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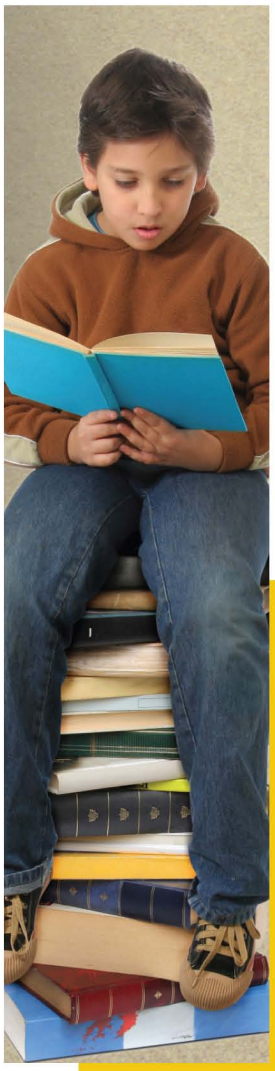
DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B
STRUCTURAL AND COHESION POLICIES



Agriculture and Rural Development

Culture and Education

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IMPLEMENTING THE UNESCO CONVENTION OF 2005 IN THE EUROPEAN UNION

STUDY

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

CULTURE AND EDUCATION

Implementing the UNESCO Convention of 2005 in the European Union

STUDY

This document was requested by the European Parliament's Committee on Culture and Education.

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[1] See section "Research Team" at www.diversitystudy.eu

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Abstract

This study provides a summary of the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. Focusing on fields in which the EU is expected to provide leadership or coordination, it is intended to provide ideas and long-term guidance on implementing the Convention. For that purpose, it analyses the obligations set out by this treaty. It assesses various practices in implementing the UNESCO Convention from a legal and practical viewpoint, and identifies challenges and measures to help achieve the objectives of this instrument.

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Drawing: Elena Sofia

Grassroots interpretation, creation and implementation

John Lennon sang "Imagine there's no countries / It isn't hard to do / Nothing to kill or die for / And no religion too / Imagine all the people / Living life in peace..."

Now imagine that diversity is more realistic and feasible than "no countries" and "no religion".

Imagine grassroots communities whose members gather together to read and discuss the text of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. They will first try to understand its meaning - "grassroots interpretation". They might replace words such as "culture" and "cultural" with "religion" and "religious", or "politics" and "political" with "nation" and "national". Adopting these revisions they might elaborate a new agreement on the diversity of religious, political and national expressions. Accordingly, they would further develop the protection and promotion of the diversity of cultural expressions towards a new Convention on human diversity - "grassroots creation". Finally, they would implement what they created, discussed and interpreted - "grassroots implementation."

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LIST OF ABBREVIATIONS

ACP	Africa, the Caribbean and Pacific Region
AVMS	Audiovisual Media Services (directive)
CARIFORUM	Caribbean Forum
CT	Cultural Treatment Principle
DG	Directorate-General
EAC	Education and Culture
ECJ	European Court of Justice
EDF	European Development Fund
EFAH	European Forum for Arts and Heritage
ETF	European Training Foundation
EU	European Union
FRA	Fundamental Rights Agency
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
INFSOC	Information Society
IPR	Intellectual Property Rights
MFC	Most Favoured Culture
MFN	Most Favoured Nation
NT	National Treatment Principle
OMC	Open Method of Coordination
PCC	Protocol on Cultural Cooperation
R2P	Responsibility to Protect
RELEX	DG External Relations
SWOT	Strengths, Weaknesses, Opportunities, and Threats

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TFI	Tribunal of First Instance
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

EXECUTIVE SUMMARY

Coal and steel call for culture

Does culture matter for Europe? - Jean Monnet, one of the architects of the European integration, stated that if he had to start his work all over again he would start with culture: "*Si c'était à recommencer, je commencerais par la culture.*"[2]

This Study provides a summary of the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. It focuses on fields in which the European Union is expected to provide leadership or coordination. It shall give assistance and long-term guidance to the European Union on implementing the UNESCO Convention. For this purpose, it carries out a detailed analysis of the obligations set out by this treaty. It assesses various practices in implementing the UNESCO Convention from a legal and practical viewpoint, and identifies challenges and measures to help achieve the objectives of this instrument.

The implementation of the UNESCO Convention requires new action by the European Union, the Member States and civil society. Overcoming fragmentation and striving for coherence must be the leitmotivs in this undertaking. If public and private actors are ambitious, the tasks are complex and the stakes are high. However, if they take a minimalist approach, they will fail to meet the challenges. This latter approach presents a worst-case scenario that would clear the way for the diktat of trade concerns at the expense of human rights, fundamental freedoms, and access to the wealth of diversity of cultural expressions. Moreover, a middle path between ambition and minimalism will only cement the *status quo*: the diversity of cultural expressions will be a luxury for a few rich and democratic welfare states, remaining out of reach for the rest of the world.

The UNESCO Convention provides a new instrument with the potential to render the European integration substantially wealthier, more profound and sustainable. In the European Union's external relations, genuine protection and promotion of the diversity of cultural expressions can contribute to improving "world integration" in order to secure peace and social welfare as existential complements to mere economic globalisation. Sixty years after the Schuman declaration, coal and steel now call for culture more than ever in Europe and around the world.

Overview of the Study

Our Study is divided into five Parts. In our survey of implementation practices of the UNESCO Convention summarised in Part One, we examined traditional and innovative approaches to how cultural diversity can be preserved and promoted in all types of countries irrespective of their level of development. The survey encompasses: (1) developed countries with strong cultural industries such as EU Member States and Canada; (2) economically emerging countries with organised cultural industries such as China or Brazil; and, (3) developing and least developed countries with very little economic means to protect and promote the diversity of cultural expressions such as Senegal.

[2] Jean Monnet quoted in Denis de Rougemont tel qu'en lui-même, in Cadmos 33/1986, p. 22.

The UNESCO Convention is drafted in a programmatic way. As a consequence, the Parties to the Convention have a wide margin of manoeuvre in implementing this instrument. Taking this reality as a starting point, we develop and discuss new ideas aimed at improving the quality of this treaty via its implementation process (Part Two).

The surveys and desk-based research inform our evaluation of how the EU has applied the Convention in foreign relations and its internal policies (Parts Three and Four). We assess whether the UNESCO Convention had an impact on more recent policy, and provide scenarios of its repercussions in the foreseeable future in order to submit recommendations for further action (Part Five).

Part One: Survey based on questionnaires and interviews

Part One provides a summary of the information and opinions that we gathered through questionnaires and interviews from various private and public stakeholders within and outside the European Union. We provide a short analysis of these data, which grant insight into the current state of implementation and inform expected further action.

The first questionnaire allowed us to gather legal data; the second questionnaire analysed implementation practices from the perspective of representatives of civil society; and, the third questionnaire examined implementation from the angle of regional organisations. Additionally, we conducted oral interviews with representatives of several regional and international organisations.

The completed questionnaires are publicly available via the website dedicated to the Study, www.diversitystudy.eu

Part Two: New ideas for the implementation of the UNESCO Convention:

Part Two explores a selection of new ideas to implement the UNESCO Convention, which apply to the EU's external relations and internal policies.

First, article 8 of the UNESCO Convention provides that "a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding;" and, that "Parties may take all appropriate measures to protect and preserve cultural expressions" in such situations. This provision, in combination with article 17, can be construed as addressing so-called "cultural genocide" as the most extreme negation of the diversity of cultural expressions. The initial drafts of the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 contained provisions addressing attacks on certain cultural expressions with the purpose of destroying national, ethnical, racial or religious groups as such. We propose to further examine this interpretation from the perspective of possible new approaches based on the UNESCO Convention for the early prevention of genocide and mass-atrocities. In particular, we shall recommend further exploration of the relationship between the diversity of cultural, religious, political and national expressions. We shall outline a proposal for new tools for the EU's external relations with countries plagued by humanitarian issues and violations of minorities' rights and human rights.

We submit that this proposal should be discussed in the framework of the Transatlantic Legislators' Dialogue (TLD), which aims to strengthen and enhance the level of political discourse between European and American legislators. Early prevention of genocide and mass atrocities is a very important policy concern shared by lawmakers from both sides of the Atlantic. This topic will allow European Parliamentarians to reveal the full value of the

UNESCO Convention to their colleagues in the United States. In the best case scenario, such a dialogue could provoke in the United States and other like minded countries a welcome change of attitude toward this instrument, i.e., from rejection to adherence.

Second, policies aimed at protecting and promoting cultural diversity require adequate resources. In this context, we shall analyse the role of intellectual property rights and competition law in contributing to levelling the playing field between providers of cultural expressions from the North and the South. For the purpose of improving access to cultural expressions from diversified origins, we shall introduce the principles of "Cultural Treatment" and "Most Favoured Culture". We examine the issues related to the international intellectual property system vis-à-vis the protection and promotion of the diversity of cultural expressions and offer proposals for redress. In this context, we also highlight the positive contributions from existing competition law and a new legal framework based on cultural non-discrimination principles. These legal regimes can provide improved balance between the various legitimate interests at stake. Policy makers could adopt similar approaches within the EU in order to meet the requirements of articles 6 and 7 of the UNESCO Convention and promote better circulation of cultural goods and services among the Member States. This discussion calls for the elaboration of new legal avenues to implement the principles of equitable access, openness and balance, pursuant to articles 2.7 and 2.8, whilst complying with universally recognised human rights instruments as required by article 5.

Developing and least developed economies have been pressing developed countries to collaborate on patent adjustments at the WTO in order to protect and promote public health. We submit that cultural stakeholders should require similar initiatives for copyright and related intellectual property rights in order to protect and promote the diversity of cultural expressions. EU taxpayers pay for damage to the diversity of cultural expressions. This includes the adverse effects of oligopolies that abuse their market power by arguably practicing cultural discrimination through their policies.

Third, civil society must play an instrumental role in the implementation of the UNESCO Convention in order to ensure the effectiveness of this instrument. We shall focus our attention on the way this role can materialise. Ideally, non-governmental organisations (NGOs) representing civil society with respect to implementation of the Convention should undertake political action with the same determination and effectiveness as activist groups that voiced environmental non-trade concerns in the WTO. These players were able to substantially influence the elaboration and implementation of international trade laws and policies promoting non-trade concerns related to the protection of the environment and sustainable development. Similar actors must emerge in the near future to further develop and implement laws and policies aimed at protecting and promoting cultural diversity on the national, regional and international stages. In order to achieve these objectives, independence from public and private power is crucial. In authoritarian regimes, NGOs must be protected from the diktat of the state. In democratic regimes, NGOs must contend with the economic strength of corporate interests that have a dominant position in the market. In both cases, we assess legal and policy mechanisms to enable representatives of civil society to articulate and advocate the public interest whilst preserving their independence. At the same time, NGOs must be transparent and accountable in terms of their membership structure, representativeness, internal decision making processes, governance, and funding.

The participatory system of the Århus Convention of 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters can serve as a model for the implementation of article 11 of the UNESCO Convention at the EU level.

These three issues deserve particular attention for policy makers and representatives of civil society who seek to take action in the implementation process of the UNESCO Convention, with the ambition to overcome its weaknesses and exploit its opportunities.

Stakeholders' Dialogue

Our analysis of each of these three topics is informed by the fact-finding work, addressed in Part One of our study, and by desk-based research. We submitted this analysis to high-level discussants from academia who offered a critical assessment in order to stimulate a broader debate among stakeholders. We recorded these discussants' contributions on video and posted them on www.diversitystudy.eu under the section "Stakeholders' Dialogue". Each of these contributions provides a starting point for an on-line debate on the respective topics via a blog. We expect that stakeholders will read our study, listen to the discussants' comments, and then express and exchange their own opinions on our blog.

Part Three: The implementation of the UNESCO Convention in the EU's external relations

Part Three covers the EU's external relations. It addresses the implementation of the UNESCO Convention in relation to human rights policies and international trade at the multilateral, regional and bilateral levels.

This Part explores the role of the EU in recent litigation at the (WTO) on the GATS and TRIPS Agreements between the United States and China. We observe that the EU supported the United States against China in these dispute settlement procedures concerning cultural industries. Both procedures were driven by the oligopoly of Hollywood film majors and related interests. In one of these trials China invoked the UNESCO Convention in its defence. To our knowledge European cultural stakeholders were not consulted prior to the European Commission's decision to support the American position. Following a discussion of these cases, we conclude that the European Commission should establish procedures that ensure timely information and adequate participation by civil society in decision making processes regarding disputes at the WTO that involve matters falling under the scope of the UNESCO Convention. Such an informed participation shall contribute to a more effective implementation of the UNESCO Convention.

We further question the absence of formal discussions of the UNESCO Convention within the WTO thus far. We analyse this situation and propose strategies for the EU to start a dialogue between the UNESCO and the WTO on the protection and promotion of the diversity of cultural expression in relation to international trade regulation.

We also critically examine cultural cooperation mechanisms and explore the relationship between cultural diversity concerns and regional and bilateral trade agreements. The first concrete implementation of the UNESCO Convention in EU external relations, within the framework of the European Agenda for Culture, was the negotiation of two Protocols on Cultural Cooperation. In 2008, the European Commission concluded a first protocol with CARIFORUM; and, in 2009, she negotiated a second protocol with South Korea. On one hand these protocols are early indicators of how the guidelines and objectives in the Agenda for Culture can be fulfilled. On the other hand, these negotiations reveal several issues that need further analysis, especially considering that different aspects of the European Commission's approach met fierce criticism.

We submit that the EU, the Member States, and like minded countries should conclude a plurilateral framework of reference agreement when the EU enters into regional or bilateral trade agreements. This pluilateral agreement would contain the essential contents on cultural cooperation applicable to all third countries. Such an instrument could, for example, condition TRIPS Plus standards on copyright protection to the implementation of corresponding competition law safeguards. The EU could then complete this basic arrangement with specific contents applicable on a case by case basis within a clearly defined scope.

International public funding mechanisms are crucial for cultural production in countries in the Global South. On the basis of a case study on the Film Fund for the African, Caribbean and Pacific Group of States (ACP), we take lessons for future development cooperation in the framework of the UNESCO Convention.

Part Four: The implementation of the UNESCO Convention in EU's internal policies

Part Four assesses the situation of France and South Korea in terms of market shares for films as emblematic of a core issue affecting the markets of most cultural industries today. In all EU Member States, and in most countries of the world, a high concentration of marketing power conditions the audience to demand mainstream forms and contents that are for the most part culturally homogeneous. The average person has little choice but to consume the cultural expressions and underlying ideology, which market dominating players are able to impose via heavy advertisement. The more marketing power providers of cultural expressions possess, the higher their market penetration. The Hollywood oligopoly's marketing power on one side, and the EU Member States' funding via selective state aid on the other, largely "duopolizes" Europe's various cultural sectors today. The rights of artists and the audiences who refuse either of these powers must be safeguarded. Responsible policy makers should elaborate new rules for a level playing field for creators of cultural expressions currently excluded from the prevailing system. We consider the States' selective aid mechanism, its "expertocracy," and its inflating business of various intermediaries as a threat to this freedom in Europe. We identify a remedy to this risk in the intellectual property system combined with competition law and cultural non-discrimination principles, as outlined in Part Two.

We further outline strategies for institutional design aimed at implementing the UNESCO Convention in the European Union. We recommend stocktaking of existing competences and potential synergies based on new collaborations between established institutions. In addition, we suggest considering the Intergovernmental Panel on Climate Change (IPCC) as a source of inspiration for the creation of a new facility to produce and exchange knowledge on measures and policies aimed at protecting and promoting the diversity of cultural expressions. Finally, we propose to further explore the question on the impact of the UNESCO Convention on policies aimed at protecting and promoting linguistic diversity.

Part Five: Conclusions and recommendations

Part Five states conclusions and recommendations to materialise the significant potential of the UNESCO Convention within Europe and on the global stage. We stress, in particular, the role of civil society as a driving force for the implementation of this treaty.

Long version of the Study, stakeholders' dialogue and documentation

There are two versions of this Study: a shorter version of 80 pages translated into several languages, and a longer English version that contains a more detailed analysis of the topics in the form of working papers. Both versions, as well as the responses to our survey, can be downloaded from a website that is dedicated to this Study, and that contains further relevant documentation, www.diversitystudy.eu. This website also provides a section where stakeholders can comment on the Study and exchange their opinions.

The text of the UNESCO Convention, its operational guidelines and other useful information can be consulted at www.unesco.org/culture/en/diversity/convention

Key features of the Convention: the principle of sovereignty and its limitations

The mechanism underlying the UNESCO Convention can be labelled as a "limited free pass" empowering its parties to adopt and implement laws and policies aimed at protecting and promoting the diversity of cultural expressions in their territories (articles 5 and 6). The UNESCO Convention sets forth the principle of sovereignty in article 2.2. Under this provision States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures to achieve the objectives of the Convention. This right is subject to the respect for human rights and fundamental freedoms, pursuant to article 2.1. This provision recalls that "cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed". The principles of equitable access, openness and balance, pursuant to articles 2.7 and 2.8, further restrict the powers of the Parties in matters of cultural policies.

The principle of sovereignty is highly problematic when it applies to authoritarian regimes. In most cases, such regimes tend to use and abuse the power vested in sovereignty, and ignore its limitations requiring compliance with human rights and fundamental freedoms. The European Union faces the challenge to address this reality when promoting the objectives of the UNESCO Convention in her external relations.

One can argue that the principle of international solidarity and cooperation, as articulated in article 2.4, prescribes that States overcome a narrow and introverted understanding of the concept of sovereignty. International solidarity and cooperation should be aimed at enabling countries, especially developing and least developed economies, to create and strengthen their means of cultural expressions and cultural industries that are either nascent or established. This must occur at the local, national and international levels. In our opinion, the same interpretation should also apply to the principles of equitable access, and openness and balance (articles 2.7 and 2.8). These principles stress that "equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding". The Convention acknowledges that States should seek to appropriately promote openness to other cultures of the world, when they adopt measures to support the diversity of cultural expressions. Consequently, it is not in the interest of the European Union to reduce international solidarity and cooperation to forms of mere charity.

The protection and promotion of a sustainable diversity of cultural expressions in the so-called "Global South," to the benefit of the whole world, requires the elaboration and implementation of new legal mechanisms aimed at levelling the playing field. Policy instruments based on direct payments present the risk of empowering donors to influence cultural contents, and of rendering recipients vulnerable to dependence and clientelism. This particularly applies to so-called "selective state aid" funding schemes, which we address in more detail in Part Four below.

Effective legal safeguards with a long-term vision are necessary to ensure that genuine diversity of cultural expressions benefits more than a small number of wealthy and democratic states that are indifferent to, or patronise, the rest of the world.

Articles 205 to 207 of the TFEU, in combination with article 21, require that the Union's action on the international stage is guided by the principles that have inspired its own creation (i.e., development and enlargement); and, by those principles which it seeks to advance in the world, such as: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. As a consequence, the EU's common commercial policy and emerging economic constitution also should contribute to a fairer world order for the cultural sector.[3]

Overview on the strengths, weaknesses, opportunities and threats

The results presented in this Study are based on a variety of tools: data collection, interviews, case studies and desk based research. They offer the opportunity to consider the potential of the implementation of the UNESCO Convention. To this effect, we used a SWOT analysis (Strengths - Weaknesses - Opportunities – Threats) of the UNESCO Convention and its implementation in the European Union as a strategy tool. The following is a summary of this analysis:

Strengths

The UNESCO Convention provides considerable space for civil society's participation. In certain jurisdictions, representatives of civil society were instrumental in shaping the contents of the Convention during the elaboration and negotiation phases. The adopted treaty presents the same potential to empower civil society to act as a driving force for its implementation (article 11).

As a consequence, the implementation of the UNESCO Convention requires a strong commitment by civil society to motivate and legitimate action by public stakeholders.

Weaknesses

The principle of sovereignty underlying the Convention, in combination with vague provisions and a very weak dispute settlement system, do not measure up to the challenges facing a large majority of States, particularly those in developing and least developed economies and authoritarian regimes.

[3] See on the emerging European economic constitution Christian Joerges, La Constitution européenne en processus et en procès, Revue Internationale de Droit Économique 2006, p. 245 to 284: http://www.cairn.info/revue-internationale-de-droit-economique-2006-3-page-245.htm

Therefore, public and private stakeholders must articulate and enforce at the international level clear and precise limits to the principle of sovereignty based on human rights and fundamental freedoms and the principles of equitable access, openness and balance.

Opportunities

The Convention contains parlance that is inspirational and invites public and private stakeholders to be creative in legal and policy terms. Together with developments in the field of environmental law, and pressured by trade regulation, stimulating dynamics between idealism and realism can transpire from such creativity. This will be highly beneficial for the implementation of this treaty. Furthermore, this Convention can become a building block for an international legal instrument to protect and promote "human diversity" as a tool for early prevention of genocide and mass atrocities. This tool can be used in EU's external relations.

In the EU's internal relations, the Convention has the potential to reinforce more sustainable integration efforts. This instrument can substantially contribute to strengthening cohesion. It can provide a good governance tool for the maximisation of the wealth, and settlement of tensions, resulting from the diversity of cultural, political, ethnical, religious and national expressions in Europe and around the world.

Therefore, stakeholders must give special attention to the effective implementation of articles 7 and 8 of the UNESCO Convention, which address access to the diversity of cultural expressions and its most radical negation. Success in this undertaking can earn the Convention the rank of a major international treaty.

Threats

The Parties to the Convention need to be aware of the negative effects of the current international system of intellectual property rights on the diversity of cultural expressions, particularly in markets that are dominated by big corporations exercising collective power as oligopolies.

If the parties neglect to adequately use relevant competition law, and fail to redress systematic cultural discrimination perpetrated by corporate power, the current imbalance of exchanges of cultural goods and services will not be improved. In this case, the access obligations in article 7 will remain purely programmatic.

Pursuant to article 6, parties must elaborate and implement legal checks and balances to avoid measures granting decision-making powers to the state that are beyond judicial reach and violate freedom of expression. We consider selective state aid mechanisms as a risk for covert censorship and inhibiting cultural entrepreneurship.

Failure in implementing the Convention in a way that takes full advantage of its potential for good governance can have negative spill-over effects on sustainable European integration efforts, especially in times of economic and political crisis.

Without active participation of civil society and policy makers who drive the further implementation of the Convention, this instrument is at risk of becoming a mere "langue de bois" discourse for rich and democratic welfare states; and, eventually becoming a "dead letter" for all parties.

Therefore, promoters of the cultural diversity cause must oppose a narrow interpretation of the scope of the UNESCO Convention. They must mobilise private and public actors within the cultural sector and beyond in order to contribute to an effective implementation of this instrument. Last, but not least, they must use best efforts to further develop the law and policies thus far created on the national and regional levels.

Three generations of law and policy discourses on cultural diversity

We observe three generations of discourses on policies and rules of law that are relevant to the scope of the UNESCO Convention. Pursuant to article 3, this instrument "shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions." This scope must be construed in combination with articles 1 and 2, which define the objectives and guiding principles of this treaty.

Historically, the first generation of discourse was based on a predominantly ethnocentric understanding that focused on the protection and promotion of the concept of "cultural identity". With the spectacular reinforcement of the multilateral trading system in the last decade of the 20th century, cultural stakeholders in various jurisdictions became aware of their need to join forces in order to meet new challenges. The agreements of the World Trade Organisation (WTO) entered into force in 1995. During the negotiations that led to these treaties, the cultural stakeholders failed to impose a "cultural exception." This exception would have carved out cultural regulation from the scope of the regulation on the progressive liberalisation of trade in goods and services, and on trade related aspects of intellectual property rights (GATT, GATS and TRIPS).

The success in terms of predictability and enforceability of WTO law essentially resulted in a radical change of the dispute settlement mechanism that applied to the General Agreement on Tariffs and Trade (GATT) from 1948 to 1994. This new reality arguably contributed to a shift of strategy among cultural stakeholders, ushering in a second generation of discourses revolving around the concept of "cultural diversity". Cultural stakeholders reacted to the imminent threat by elaborating new law. This process started with soft law in the form of a declaration on cultural diversity adopted in 2000 under the auspices of the Council of Europe. This was followed by a similar declaration at the UNESCO in 2001, and by more binding law through the Convention of 2005. Although a variety of discourses on cultural diversity started much earlier, new multilateral trade regulation gave them the momentum to be translated into increasingly well-articulated norms of law.

At present, we perceive an emerging third generation of legal and policy related ideas and initiatives. This impending era presents the opportunity to welcome new allies for the cultural cause who are concerned about the protection of human rights, fundamental freedoms, minorities' rights, and the prevention of genocide and mass atrocities. The Convention as it stands today aims to put forward contributions that materialise human rights and fundamental freedoms, both as a result of the diversity of cultural expressions and as a limitation to the principle of sovereignty.

Implementation as "pursuit of policy developments"

The European Commission considers that "the implementation of the UNESCO Convention within the EU is not a strict legislative activity as such but rather the pursuit of policy developments, both in internal and external policies, which might take the form of legislative action in specific instances." (EU Commission's reply to question 4 of the Regional Organisations Survey, available at www.diversitystudy.eu). This understanding presents the opportunity for new creative thinking in political and legal terms beyond a

mere static and formalistic approach. The UNESCO Convention has the great potential to mobilise and stimulate law and policy makers in search of innovative solutions to address their constituencies' core societal concerns pertaining to questions of identity and diversity. The Convention covers these questions from the cultural angle. However, the considerable value of this instrument resides in its potential to offer inspiration and guidance for a future legal framework that can manage the sources of tensions, such as religious, political and national expressions that flow from the diversity of other forms of expressions within countries and regions.

In the European Agenda for Culture, the European Commission calls for "mainstreaming culture in all relevant policies" on the basis of the Treaty's cultural clause (point 4.4): "With regard to the external dimension, particular attention is paid to multi-intercultural and inter-religious dialogue, promoting understanding between the EU and international partners and reaching out increasingly to a broader audience in partner countries. In this context, education and particularly human rights education play a significant role."

The relationships between Tibet and China, or Israel and Palestine, exemplify the urgency to further examine such an avenue in depth. The protection and promotion of the diversity of cultural expressions, in compliance with human rights and fundamental freedoms, deliver a road map to the elaboration of novel international law aimed at protecting and promoting human diversity and the early prevention of genocide and mass atrocities. However, before dreaming of new buildings, the existing house must be reinforced in its foundations.

The European Commission recognises that a new strategic framework for culture in the EU's external relations is emerging, following the adoption of the European Agenda for Culture. In this framework, culture is perceived as a strategic factor of political, social and economic development, and not exclusively in terms of isolated cultural events or showcasing (EU Commission's reply to question 4.1 of the Regional Organisations Survey). The Copenhagen criteria on the dialogue between the European Union, the Western Balkan, and Turkey illustrate how this new approach can be applied to concrete tasks. The Commission also clearly articulates the expectation that the UNESCO Convention will shape "a new role for culture and cultural diversity in global governance, being recognised as the cultural pillar at global level, thus mirroring the achievements made by environmental issues and treaties in the area of climate change and biodiversity." (European Commission's reply to question 11.2 of the Regional Organisations Survey)

We share this vision and outline various options in this Study that can contribute to transforming these aspirations into a reality in domestic and cross border relations. Over recent decades, dynamic developments in environmental law have resulted in the creation of various instruments on the national, regional and international levels, such as the 1992 Biodiversity Convention. These legal developments, combined with more recent challenges to non-trade concerns such as public health resulting from WTO law, eventually caused the genesis of a new discourse on cultural diversity. From a law and policy perspective, the main threat to this discourse is an eventual regression into an introverted understanding of cultural identity. Considering this worst-case scenario, serious advocates of cultural diversity should not miss the unique opportunities that a creative interpretation of the UNESCO Convention promises to deliver.

GENERAL INFORMATION

Specification of the Tender

This study is the result of the European Parliament's expressed wish to be informed about the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, in particular in fields where the European Union would be expected to provide leadership or coordination.

Scope of the Study

Stakeholders and geographical scope

In compliance with the specifications of the tender, this Study covers the relevant questions related to the implementation of the UNESCO Convention primarily from the perspective of the European Union and the Member States. Since this implementation process requires civil society's participation, we addressed the involvement of non-state actors without limiting our focus to the situation in Europe.

In areas applicable to the EU's external relations, we consider the situation of the so-called "Global South" and more specifically those regions and countries with which the EU maintains concrete development cooperation and trade and cultural relationships.

Since the UNESCO Convention is an international treaty, this Study addresses domestic practices, challenges and expectations in several countries and regions outside of Europe.

Chronological scope

For the purpose of the empirical research in this Study, "national law" implementing the UNESCO Convention includes national legislation, regulations, administrative practise and case law promulgated both before or after the entry into force of the UNESCO Convention in the countries surveyed. We use 1 January 2010 as a reference date in our questionnaires.

Scope of policies and measures

This Study refers to the scope of application defined in Article 3 the UNESCO Convention: "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions." We construed this scope of application in conformity with the rules of interpretation of the Vienna Convention on the Law of Treaties.

1. FACT-FINDING ANALYSIS ON THE IMPLEMENTATION OF THE UNESCO CONVENTION

1.1. Introduction

The fact-finding operation allowed us to gather valuable, substantive data from stakeholders across diverse geographical areas. The resource constraints of this Study prevented an exhaustive analysis of the implementation practices of the UNESCO Convention. Therefore, the results of our fact-finding operations are utilised as illustrations to inform and compliment the Study's analysis. In the future, more comprehensive empirical studies are required to produce conclusive data regarding implementation practices across multiple dimensions.

The process of gathering data with regard to the implementation of the UNESCO Convention was conducted via three sets of questionnaires.[4] The first questionnaire collected legal data from UNESCO National Commissions of EU Member States and law firms of non-EU countries. The second questionnaire explored implementation practices from the perspective of representatives of civil society, in particular National Coalitions for Cultural Diversity. The third questionnaire investigated the situation from the angle of regional organisations.[5] To supplement our primary fact-finding operations described above, we distributed a set of questionnaires to two additional groupings of civil society organisations: 1) in countries that have ratified the 2005 UNESCO Convention, but were not included in the first data set; and, 2) in countries that have not yet signed and/or ratified the Convention. The table below outlines the entities we contacted in our primary fact-finding operations, their response rates, and the respondents to the questionnaires.

	Participating Countries (Respondents)		No response / declined participation	Response rate
Civil Society	Canada, Croatia, Denmark, France, Germany, Italy, Senegal, Spain, Switzerland, UK	10	Bulgaria, Brazil, China, Ireland, Hungary, Portugal, Tunisia	59%
Regional Organisations	Assoc. of Caribbean States, Commonwealth Foundation, European Commission,[6] IOF	4	ASEAN, AU, COE, League of Arab States, OAS	44%
National UNESCO Commissions	Bulgaria, Denmark, France, Germany, Hungary, Ireland, Spain	7	Croatia, Egypt, Portugal, Spain, UK, Tunisia	54%
Law firms and consultancy firms	Azerbaijan, Brazil, Canada, China, Senegal, Switzerland,	6		(100%)

[4] The fact-finding operations covered the following national jurisdictions: Azerbaijan, Brazil, Bulgaria, Canada, China, Croatia, Denmark, Egypt, France, Germany, Hungary, Ireland, Italy, Portugal, Senegal, Spain, Switzerland, Tunisia, and the United Kingdom. This choice was made on the basis of geographical, political, and cultural criteria. All of the completed questionnaires and other data components of the study are publicly available via the study's website, www.diversitystudy.eu.

[5] The following regional organisations were invited to participate in the survey: African Union, Association of Caribbean States, Association of Southeast Asian States, Commonwealth Foundation, Council of Europe, European Commission, International Organisation of the Francophonie, League of Arab States, and Organization of American States.

1.2. Implementation practices in a selection of jurisdictions

1.2.1. Legal Questionnaires

The respondents identified the fundamental role of civil society in protecting and promoting the diversity of cultural expressions; however, there is a lack of specific mechanisms in place to support civil society in regulating implementation practices. Regarding institutional coordination, there are two prevailing viewpoints. First, among several respondents there was a perception of reasonable consistency in measures established for ensuring fluidity in communication among governmental institutions and agencies coordinating action in regard to cultural policies. Second, however, some respondents identified inadequate institutional measures at the state level, specifically for dialogue between trade and cultural agencies. Major obstacles to implementation were commonly associated with inadequate resources and funding. China, in particular, highlighted concerns regarding harmonising tensions between national cultural protection and social and economic development. Several respondents shared displeasure regarding insufficient support for developing countries.

Activities of States to promote their objectives on the international and regional levels were positively assessed. Identified best practices include: cross-border cultural cooperation agreements; state subsidies for projects involving diversity of cultural expressions; programmes addressed to a variety of multi-cultural audiences; promotion of mobility of art/museum collections; and, active participation in international and/or regional projects (e.g. European Year of Intercultural Dialogue).

1.2.2. Regional Organisation Questionnaires

Respondents identified the EU as the sole entity who ratified and implemented the UNESCO Convention in its internal and external relations. Other organisations did not have competence in the sphere of cultural policy; or, due to their status as a non-governmental organisation, are not authorised to promote legally binding instruments amongst their members. Two major problems identified were: a failure of international coordination and promotion of the Convention; and, the erroneous perception that the Convention poses a threat to cultures in smaller and/or developing countries. The best practices identified relate to EU activity in the sphere of cultural diversity, such as structured mechanisms of inter-ministerial consultations at States Parties' internal level, and structured dialogue with civil society.

1.2.3. Civil Society Questionnaires

Civil society organisations were generally critical of their country's promotion of the objectives of the UNESCO Convention. However, the activity of France and Germany in the cultural diversity field was highly valued as public authorities in these States explicitly encourage and support dialogue with civil society. Problems identified covered the following issues: inefficiency of domestic public administration in terms of coordination and governance; institutional and financial obstacles; lack of concrete goals and strategies developed at the political level; inaction of the Intergovernmental Committee (IGC) in formulating the operational and legal guidelines; and, insufficient financial contributions to the International Fund for Cultural Diversity. In addition, some respondents argue for the reinforcement of the position of the IGC and extension of competences of civil society organisations on the international level. Regarding EU external relations, it is argued that the practice of including Protocols on Cultural Cooperation (PCC) in trade negotiations

[6] The European Commission responded on behalf of the European Community.

challenges the objectives of the UNESCO Convention. The best practices include: integration of the Convention's principles in overseas development programmes; promotion of the values of multicultural society on national, regional and local levels; international cultural exchange programmes; and, state policies to develop various cultural sectors.

1.3 Expectations from the stakeholders

1.3.1 Legal Questionnaires

The respondents commonly shared the expectation that the effective implementation of the Convention would lead to a global system of governance in the sphere of cultural expressions, based on multi-sectoral cooperation. The worst prognoses included: inaction on behalf of policy makers; failure of international and sectoral cooperation; and, financial obstacles arising from the global financial crisis and insufficient contributions to the International Fund. The respondents also expressed concern that the Convention will merely remain a declarative international instrument.

Prominent factors of a 'best-case scenario' include: sufficient, meaningful support for developing countries; widespread ratification in diverse geographical areas; and, increased international funding. China positively anticipated the ability to use the Convention as a justification for restricting importation of 'harmful cultural goods and services;' and, providing safeguards for cultural security whilst strengthening cultural sovereignty.

1.3.2 Regional Questionnaires

There was a striking divergence in the assessment from the participating regional organisations, particularly between the European Commission and the Commonwealth Foundation. Accordingly, the Commission identified the strengths of the Convention as follows: setting forth clear objectives; coherence in scope; and, definitional clarity regarding the diversity of cultural expressions vis-à-vis cultural goods and services. The Commonwealth Foundation stated that the Convention is not sufficiently articulated as a development instrument and maintains limited understanding among stakeholders. Both entities viewed the Convention in positive terms as an important instrument elevating culture in international policymaking processes. However, the Commonwealth Foundation voiced concern that the Convention is not adequately connected with relevant social movements, and may inadvertently manifest as a repressive instrument that promotes majority cultures at the expense of national cultural diversity.

1.3.3 Civil Society Questionnaires

The 'best-case scenarios' with regard to civil society's expectations were consistently related to the involvement of civil society in national integration issues and bolstering its influence in national policymaking in cultural fields. There was also a shared perception among respondents that the Convention can provide a framework for increased cooperation among EU Member States' respective national cultural industries, and strengthen extant cultural institutions (national and international). Respondents stated that these developments may likely have the positive effect of increased diversity of cultural expressions in production, distribution and access of cultural products.

The worst prognoses relate primarily to three scenarios: inaction on behalf of policy makers; lack of incorporation of the Convention's provisions in national cultural policies; and, the exclusion of civil society from negotiation of policies with respect to implementation practices of the Convention.

The strengths of the Convention are generally perceived as follows: provides a legal basis for the protection of cultural identities; serves as an impetus for an emerging normative framework for proactive cultural policies; and, forging new avenues for cultural exchanges between the developed and developing world vis-à-vis the cultural impact of trade policies.

Respondents identified significant weaknesses as follows: lack of consequences for non-implementation of the Convention; and, due to the lack of obligations in the Convention for implementation, civil society remaining at the mercy of politicians with short-sighted political time horizons. This latter point is exacerbated by inadequate space in policymaking processes for civil society's input.

1.4 Notable trends

Respondents provided little detail as to procedural measures for civil society's participation, although many emphasised its fundamental role. Moreover, inadequate coordination at the national level was reported as a significant problem. Insufficient resources due to minimal contributions to the International Fund coupled with the recent global economic crisis were common concerns. Other findings of the study relate to important differences between developed and developing countries vis-à-vis perception of the Convention. Accordingly, developed countries, in particular the EU members, raised arguments in favour of global governance and cultural policy-making at an international level. Conversely, developing countries and non-European regional organisations were concerned that the Convention may be used as a repressive tool promoting majority cultures at the expense of national cultural diversity. Common good practices were reported as follows: public state aid for programmes involving cultural diversity, international cultural cooperation and/or exchange agreements; mobility of artists and collections; and structured dialogue with civil society.

2. NEW IDEAS FOR THE IMPLEMENTATION OF THE UNESCO CONVENTION

2.1. Early prevention of genocide and mass atrocities

2.1.1. Biological, cultural and human diversity

In Eichmann in Jerusalem, A Report on the Banality of Evil, Hannah Arendt qualifies genocide as "an attack upon human diversity as such, that is, upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning." The UN General Assembly's Resolution 96 (I) of 1946 states that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."

With the end of the Cold War, the UN Genocide Convention of 1948 found effective enforcement regarding its provisions dealing with the punishment of the "crime of crimes". However, this instrument of international criminal law contains almost no rules on prevention, not to mention "early" prevention. In December 2008, Madeleine Albright and William Cohen delivered the Genocide Prevention Task Force's report "Preventing Genocide" to the US Administration.[7] This document analyses past failures and makes recommendations for the prevention of mass atrocities and acts aimed at annihilating human groups as such. To our knowledge this report has not yet had significant repercussions in Europe. The government of Hungary announced in June 2009 its intention to establish a Centre for the International Prevention of Genocide and Mass Atrocities in Budapest.[8] By launching this initiative the Government of Hungary seeks to contribute to the international promotion of human rights and fundamental freedoms, emphasising the prevention of genocide and mass atrocities with a view to spread a culture of prevention. However, except for this recent initiative still in its infancy, early prevention does not appear to be a priority in Europe.

The Albright/Cohen report mainly discusses the United States' contributions to the prevention of genocide and mass atrocities. Furthermore, it does not address early prevention in much detail. In this respect, the greatest challenge is finding solutions that protect civil society from being used as an instrument to perpetrate such crimes. An inventory of the existing relevant legal framework, which ranges from traditional protection of minorities via international criminal law to the newest developments of the "responsibility to protect" ("R2P"), reveals that early prevention lacks corresponding legal instrumentation.[9] Indeed, existing law is incomplete and fragmented. States and civil society need foremost a convincing set of incentives to protect and promote the diversity of human groups. We submit that human diversity requires a new "contrat social" with compelling incentives that immunise civil society from mobilisation by perpetrators of mass

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[7] See, Report of the Genocide Prevention Task Force chaired by Madeleine K. Albright and William S. Cohen, "Preventing Genocide: A Blueprint for U.S. Policymakers" at: www.usip.org/genocide_taskforce/index.html For a critical analysis of this report by various genocide scholars, See, Genocide Studies and Prevention, Volume 4, Number 2, Summer 2009. In Canada, in the context of the project "La volonté d'intervenir" co-chaired by Roméo Dallaire and Frank Chalk, the Institut montréalais d'études sur le génocide et les droits de la personne published the report, Leadership et action pour la prévention des atrocités de masse, in 2009: www.operationspaix.net/IMG/pdf/DALLAIRE_Romeo_Mobiliser_la_volonte_d_intervenir_2009-09-22_.pdf

[8] See Istvan Lakatos / Enzo Maria Le Fevr, Feasibility study for the establishment of the Budapest Centre for the International Prevention of Genocide and Mass Atrocities, June 2009, at: www.mfa.gov.hu/kum/en/bal/foreign_policy/protection_human_rights/bp_nepirtas_megelozesi_kozpont/

[9] See UN Secretary-General, Report on Implementing the responsibility to protect, 12 January 2009 (A/63/677), at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf?OpenElement

atrocities. For this purpose, the protection and promotion of the diversity of cultural expressions can play an instrumental role in exploring new legal avenues to secure human diversity through its cultural, religious, political and national expressions.

The prevention of mass atrocities, genocide in particular, is essentially about protecting "human diversity" according to the term used by Hannah Arendt. Human groups are both "living beings" and "cultural beings" whose existences rely on biological and cultural welfare.

Since 1992, there is a convention on biological diversity; and, since 2005, a convention on the diversity of cultural expressions. These two treaties arguably reflect a paradigm shift from idealising uniformity and supremacy to valuing diversity and equality as existential conditions for the evolution of life and culture on this planet. One can argue that these conventions need completion by a third international legal instrument that specifically addresses the protection and promotion of "human diversity".

The first article of the Universal Declaration on Cultural Diversity adopted by the UNESCO on 2 November 2001 considers "as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature." The UNESCO Convention of 2005 sets forth that "the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples."

2.1.2. Cultural genocide as the most extreme negation of cultural diversity

The Polish lawyer Raphael Lemkin, who coined the term "genocide" and who was instrumental in the adoption and implementation of the genocide treaty, advocated for the inclusion of acts against cultural expressions aimed at wiping out a human group as a genocidal technique: "It takes centuries and sometimes thousands of years to create a (…) culture, but genocide can destroy a culture instantly, like fire can destroy a building in an hour."[10]

The first two drafts of the Genocide Convention contained provisions on cultural genocide. However, they did not find their way into the final version of this instrument. The opponents to inclusion of "cultural genocide" into the treaty of 1948 argued that it would dilute the gravity of the crime of genocide and could favour separatist movements seeking national disintegration.[11]

[10] The importance of the Convention, p. 1, reel 2, Lemkin Papers, New York Public Library. In Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposal for Redress, Washington 1944, p. 84, listed "cultural genocide" as a technique of genocide.

[11] See William A. Schabas, Genocide in International Law, The Crimes of Crime, Cambridge 2009, p. 207-221, for a summary of the negotiating history.

"Cultural genocide" according to the 1948 draft by the UN Ad Hoc Committee:

Article III

['Cultural' genocide]

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

We observe that these draft provisions refer to protected human groups' cultural expressions as defined in article 4.3 of the 2005 UNESCO Convention as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content."

In 2009, the Swiss Parliament voted on the question of "cultural genocide" upon a motion by Josiane Aubert, one of its Members.[12] This lawmaker requested new legislation to reinforce, by way of criminal law, the protection of cultural expressions against destructive acts aimed at wiping out a human group as such. The new legislation seeks to strengthen the legal meaning of culture in relation to the protection of human groups that, at least symbolically, appear to lag behind the significance of *nature* as protected by environmental law. This legislation would constitute an important step towards a new international convention on human diversity, as a "civil law" complement to existing criminal law on genocide and mass atrocities. The protection and promotion of human diversity, as the most effective way to prevent genocide and mass atrocities, relies on the protection and promotion of biological and cultural diversity. The Swiss Parliament rejected the proposal in September 2009. However, this first attempt calls for further efforts to raise awareness for, and make use of, the full potential of culture to preserve life. The European Parliament can take up this challenge in its efforts to promote dialogue and collaboration with other countries and regional organisations, with the aim of securing peace, human security and sustainable development.

Arguably, the UNESCO Convention has the potential to reinforce more sustainable integration efforts on the regional level. This instrument can substantially contribute to strengthening internal cohesion at the national level, particularly related to the management of migration flows. It can provide a good governance tool for the maximisation of the wealth, and settlement of tensions, resulting from the diversity of cultural, political, religious and national expressions. It can also provide new practical guidance to policy makers in implementing more sustainable inter-cultural dialogue from the legal perspective.[13]

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[12] See Conseil National, Motion Aubert Josiane. Prévention des génocides. Combattre les génocides culturels (08.3789), in BO 2009 N 1351, at: www.parlament.ch/ab/frameset/d/n/4811/306271/d_n_4811_306271_306485.htm

[13] Compare Council of Europe, White Paper on Intercultural Dialogue - "Living Together As Equals in Dignity", Strasbourg 2008, at: www.coe.int/t/dg4/intercultural/Source/White%20Paper_final_revised_en.pdf See also Patricia Wiater, Intercultural Dialogue in the Framework of European Rights Protection, Strasbourg 2010.

This avenue can also broaden the constituency of cultural diversity proponents beyond the traditional stakeholders of the cultural sector, by including new public and private players engaged in human rights and minorities' rights advocacy. In turn, this novel approach can elevate the meaning of diversity of cultural expressions. In the best-case scenario, it will also attract support from civil society and States that have thus far refused to adhere to the UNESCO Convention, such as the United States and Israel. In this manner, a legally open-minded interpretation of articles 8 and 17 of the Convention may become a very meaningful tool for the EU's external relations.

We submit that this proposal should be discussed within the framework of the Transatlantic Legislators' Dialogue (TLD), which aims to strengthen and enhance the level of political discourse between European and American legislators. The TLD constitutes the formal response of the European Parliament and the US Congress to the commitment in the New Transatlantic Agenda (NTA) of 1995 to enhanced parliamentary ties between the EU and the US.[14] Early prevention of genocide and mass atrocities is a very important policy concern shared by lawmakers from both sides of the Atlantic. This topic will allow European Parliamentarians to reveal the full value of the UNESCO Convention to their colleagues in the US.

2.1.3. Hypotheses on cultural genocide under desirable international law

Can the prevention of cultural genocide under desirable law strengthen the prevention of physical and biological genocide as addressed by existing law? Systematic attacks on cultural expressions can contribute to removing inhibition in perpetrators to physically and biologically destroying the targeted victims. For example, the Nazi regime started to burn books in public places and eventually killed people in concentration camps. This pattern of behaviour provides a solid argument against the critique that cultural genocide would dilute the significance of the crime of physical and biological genocide.[15]

If one accepts that the prevention of cultural genocide can contribute to the prevention of physical and biological destruction of human groups, one should consider whether the protection and promotion of cultural diversity could contribute to reinforcing the prevention of cultural genocide. The link is obvious: cultural genocide is the most extreme negation of cultural diversity.

[14] In practical terms, the TLD includes the bi-annual meetings of the EP and the US Congress delegations and a series of teleconferences organised on specific topics of mutual concern, with a view to fostering an ongoing and uninterrupted dialogue. The EP and the US Congress have established a Steering Committee to coordinate TLD activities. The Steering Committees also maintain contact with the members of the Senior Level Group (SLG), which is comprised of high-ranking officials from the Commission, the EU Presidency and the US Administration. See: www.europarl.europa.eu/intcoop/tld/default_en.htm

[15] While negotiating the Genocide Convention, Canada, France, the US and the United Kingdom held that this crime was not on par with physical genocide and should be dealt with separately; and, that too wide a definition of genocide would render the Convention meaningless. Combining the objective of prevention with a

New hypotheses for early prevention of genocide and mass atrocities

We submit the three hypotheses as follows to stimulate the discussion on the elaboration of new means of early prevention of genocide and mass atrocities in international law:

1) A country that cares about biological and cultural diversity will tend to protect and promote the diversity of human groups. Accordingly, civil society members will tend to be less vulnerable to calls from leaders who seek to mobilise masses of people as an instrument for the perpetration of genocide and mass atrocities.

2) Acts of "cultural genocide" as defined in the draft Genocide Convention of 1948 constitute a technique to remove inhibition to physically or biologically destroy the members of the targeted group.

3) The prevention of physical and biological genocide can be more effective by reinforcing the protection and promotion of cultural diversity in international law in order to prevent cultural genocide.

The examination of these hypotheses should deliver new legal arguments in favour of including cultural genocide into positive international law.

These hypotheses raise the following question: To what extent is the principle of sovereignty appropriate to reach the objectives at stake? An answer to this question requires further research with a special focus on the provisions for human rights, fundamental freedoms, and the principles of equitable access, openness and balance contained in the UNESCO Convention.

Article 7 provides novel, articulate support to cultural rights of minorities. Article 8 of the 2005 UNESCO Convention arguably offers new guidance for codification aimed at preventing cultural genocide under desirable international law.

2.1.4. Protecting and promoting the diversity of cultural, religious, political and national expressions

Many cultural expressions protected under the 2005 UNESCO Convention also qualify as religious expressions. Furthermore, religious expressions are often intertwined with political and nationalistic expressions.[16] We submit that early genocide prevention should be based on the protection and promotion of the diversity of cultural expressions. With this objective in mind, we propose that the 2005 UNESCO Convention, which is partially inspired by the 1992 Biodiversity Convention, should be translated and transposed into a new international agreement on the diversity of religious, political and national expressions. For this purpose, members of civil society in each country could interpret and discuss the existing instrument on cultural diversity. Thereafter, on the basis of their understanding of the treaty they could develop a new treaty on religious, political and national diversity, which could serve as a further building block for the protection and promotion of human diversity.

strict application of the requirement of a special intent ("destruction of protected groups as such") should rebut the argument of dilution.

[16] The minaret provides an example of such an expression, see Christophe Germann, La diversité humaine à l'appel du minaret, in Le Courrier, 8 December 2009: www.lecourrier.ch/index.php?name=NewsPaper&file=article&sid=444414

Such a bottom-up, grassroots initiative could contribute to an early prevention of genocide and mass atrocities, particularly those forms that originate from an ideology professing supremacy of certain cultural, religious, political and national expressions over others. Supremacist thinking rejects equality and propagates uniformity and segregation against diversity and "métissage".

At the beginning of this Study we quoted a few lines from the song "Imagine". We submit that the promotion of "human diversity", understood as "diversity of cultural, religious, political and national expressions," constitutes a more realistic and feasible vision than John Lennon's proposal to: "imagine there's no countries" / "no religion too" / "all the people living life in peace". Our blueprint for a grassroots implementation of the UNESCO Convention would grant ownership of this treaty to the members of local communities. We suggest that such a process could result in cost-efficient, effective and sustainable achievement of the objectives of the UNESCO Convention wherever it is be applied. The European Parliament could launch and sponsor such a neighbourhood initiative in the European Union. It would require dissemination of the text of the Convention to encourage people to read, discuss, understand and further develop it.

The perception and interpretation of man-made identities and differences rely on "cultural expressions" as defined in the 2005 UNESCO Convention on cultural diversity. In other words, all differences, except for biological and physical ones such as the colour of the skin, are based on "cultural expressions" according to the definition contained in the UNESCO Convention. However, these "cultural expressions" are also relevant as a discourse to integrate or exclude human groups based on nature-made identities and differences. From this angle, the UNESCO Convention can contribute to apprehending the complex reality of differentiating human groups for the purpose of elaborating new rules of conduct. This would bridge differences while keeping human diversity as a source of cultural and natural wealth, and a most precious resource for humanity.

2.2. Cultural diversity, intellectual property and competition law

2.2.1. Trade-related Aspects of Intellectual Property Rights (TRIPS)

We submit that article 7 is a fundamental norm of the UNESCO Convention that should guide the elaboration of governance tools for the functioning of modern democratic societies. This applies to both external relations and internal policies. Accordingly, this provision deserves greatest attention from law and policy makers when implementing this instrument in their respective jurisdictions.

Many artists, law and policy makers, civil society activists and scholars who are concerned about the protection and promotion of cultural expressions turn a blind eye to the international intellectual property system. They only see the benefits of this system for the cultural sector while ignoring its negative aspects. There is a widespread taboo in the cultural sector against critical analysis and discussion of aspects of the system that are inconsistent with the purposes and objectives of the UNESCO Convention. This is particularly evident in issues relating to the "shall endeavour" obligations set forth by article 7.

Most provisions of WTO law that affect national and regional cultural policies are precise and enforceable.[17] Public actors in the political and policy fields often focus on GATT and GATS rules addressing progressive liberalisation in the field of trade in goods and services.

[17] For the texts of the WTO agreements see www.wto.org

This focus is evident in political claims from many non-governmental stakeholders, and in policy statements by a majority of public actors. In contrast, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not seem to attract the critical attention it deserves from advocates of cultural diversity. In comparison, there is broad consideration that excessive patent protection is potentially detrimental to public health policies in developing and least developed countries. However, in the area of cultural industries, the prevailing dogma remains that stronger copyright and trademark protection is better for culture and cultural diversity in general, and for the diversity of cultural expressions in particular.

The TRIPS agreement harmonises to a large extent national intellectual property law among the WTO Members. As a noteworthy side effect, it reinforces oligopolies that dominate the market of cultural goods and services without providing commensurate checks and balances. This is due to the lack of effective competition law in many jurisdictions. In other words, the TRIPS agreement imposes relatively high standards of intellectual property protection on the basis of the principles of National Treatment (NT) and Most Favoured Nation treatment (MFN); and, it imposes these standards without any multilateral competition law to counterbalance excessive owners' rights.[18] Since the costs of implementing intellectual property are already high for economically weak countries, these economies generally cannot afford the significant costs of competition law as well. In this context, we recall that one main issue for the diversity of cultural expressions is arguably caused by the oligopolistic market structure that characterises the sectors of film, music and books, and spills over to other cultural expressions.

2.2.2. Cultural diversity and intellectual property rights

States seem to have a better understanding of the relationship between intellectual property and biological diversity than between intellectual property and cultural diversity. Nevertheless, they declared that both forms of diversity are equally important (article 1 of the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001). Article 16.5 of the Convention on biological diversity of 5 June 1992 provides as follows: the parties shall cooperate in relation to patents and other intellectual property rights in order to ensure "that such rights are supportive of and do not run counter to its objectives" while complying with national and international laws. In comparison, the preamble of the 2005 UNESCO Convention merely acknowledges the importance of intellectual property rights in sustaining those involved in cultural creativity.

WTO member States gained valuable experience in the process of finding a balance between TRIPS based patent protection and health concerns, particularly around access to essential drugs for poorer populations in developing countries. The WTO Member States' efforts to address these issues led to the decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health; and, to an amendment to the TRIPS Agreement based on subsequent decision of 6 December 2005, which is still in the process of being accepted.[19]

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[18] For an introduction to the NT and MFN principles see World Trade Organization, Understanding the WTO, Geneva 2008, p. 12 and 13, at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf

[19] The decision of 2003 is a so-called "waiver" that allows countries to bypass a WTO rule under certain circumstances. In this case, it waived the countries' obligations under Article 31(f) of the TRIPS Agreement that provides that production under compulsory licensing must be predominantly for the domestic market. This effectively limited the ability of countries that cannot make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented. See documents and regular updates on TRIPS, patents, and pharmaceuticals and public health at:

Arguably, a lesson learned from the process on TRIPS and public health is to critically explore the impact of intellectual property protection on the diversity of cultural expressions. This is especially advisable in order to account for the interests of economically weaker countries.

From the angle of the public interest, the main reason for applying NT and MFN principles to intellectual property law is to facilitate the cross border transfer and dissemination of technology, knowledge and trade-related culture. This is also the reason for reinforcing substantive and procedural harmonisation of intellectual property protection. From the perspective of developing countries, one may argue that inappropriately high standards of protection of intellectual property rights can hinder this goal. It is difficult for these countries to assess precisely the costs and benefits of implementing intellectual property according to TRIPS in the medium and long-term. This economic assessment is even more difficult if one considers the bilateral pressures on developing and least developed countries, which face an increase of intellectual property protection standards (so-called "TRIPS Plus standards). Indeed, by imposing TRIPS Plus standards the bilateral approach can substantially reduce the flexibilities granted under TRIPS and further disturb the equilibrium between the various interests at stake. The British government established the Commission on Intellectual Property Rights with the mandate to investigate how intellectual property rights might work better for developing countries. The Commission summarised its findings on copyright protection as follows:

> "There are examples of developing countries which have benefited from copyright protection. The Indian software and film industry are good examples. But other examples are hard to identify. Many developing countries have had copyright protection for a long time but it has not proved sufficient to stimulate the growth of copyright-protected industries. Because most developing countries, particularly smaller ones, are overwhelmingly importers of copyrighted materials and the main beneficiaries are therefore foreign rights holders, the operation of the copyright system as a whole may impose more costs than benefits for them (…)"[20]

High levels of intellectual property protection substantially reinforce positions that are already dominant on the market.

Developing and least developed economies have been pressing developed countries to further negotiate WTO amendments of the initial TRIPS rules on patents in areas that negatively affect public health. We submit that the same initiative must be taken in the field of copyright in areas where it negatively impacts the diversity of cultural expressions. Under the current situation, EU taxpayers are required to finance state aid as an expensive remedy for the damages to the diversity of cultural expressions. These damages are a result of market dominating players' arguably anti-competitive and culturally discriminative practices.

www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm#declaration

[20] Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002, Executive Summary, p. 20: www.iprcommission.org

2.2.3. Causal link between marketing investments and market shares

"The cost of pushing pills"

The example of the pharmaceutical industry illustrates the shortcomings of disproportionate standards of patent protection. This example is instructive for the debate in the field of copyright protection for cultural industries. From the perspective of welfare for society, the main rationale of intellectual property law is to provide an incentive for innovation and creation by granting a competitive advantage in the form of exclusive rights.

The pharmaceutical industries' main argument for advocating high standards of patent protection is that these standards are necessary to secure investments for research and development, and therefore are in the public interest. However, using data from two market research companies, Marc-André Gagnon and Joel Lexchin found that drug companies in the United States spent USD 57.5 billion on promotional activities in 2004, compared with USD 31.5 billion on research and development.[21] In other words, these pharmaceutical manufacturers invested almost twice as much in marketing and promoting medications than in research and development. These figures are obviously relevant in the context of the debate on a balanced level of patent protection for medicine.

Indeed, in the debate over an appropriate level of copyright protection for cultural expressions, one should critically analyse the ratio between costs of creation and production on one side and the costs of marketing on the other. One of the main rationales underlying the grant of intellectual property rights is that they provide incentives for creative achievements. Accordingly, authors and investors advocate high standards of copyright protection. Too much protection, however, is detrimental to the interest of authors who are not backed by strong distributors. It is equally detrimental to the interests of the users and society at large since it forestalls access to the benefits of cultural diversity.[22]

The cost of pushing films, books and music

In all EU Member States, and in most countries outside Europe, film distribution is largely dominated by the oligopoly of Hollywood majors and their affiliates.[23] In this context, "film distribution" means the facility to invest in competitive marketing (stars and advertising), and to bring motion pictures to theatres with the appropriate number of copies (prints), in order to ensure maximum simultaneous exposure to the audience.

The huge investments that these corporations make in the marketing of the films they produce and distribute generate market dominance. This dominance prevents films from cultural origins without competitive marketing investments from having access to audiences. Given this reality, one may question the efficiency and effectiveness of many public funding schemes in which rich states intervene in the market through subsidies to promote local cultural identities and cultural diversity. One can invest huge sums to make a motion picture; however, without competitive promotion from investments in advertisement there is little chance of accessing the public. This business reality arguably leads to a considerable waste of taxpayers' money. The same logic applies to the music and

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[21] The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States, The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States. PLoS Med 5(1), 2008: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050001

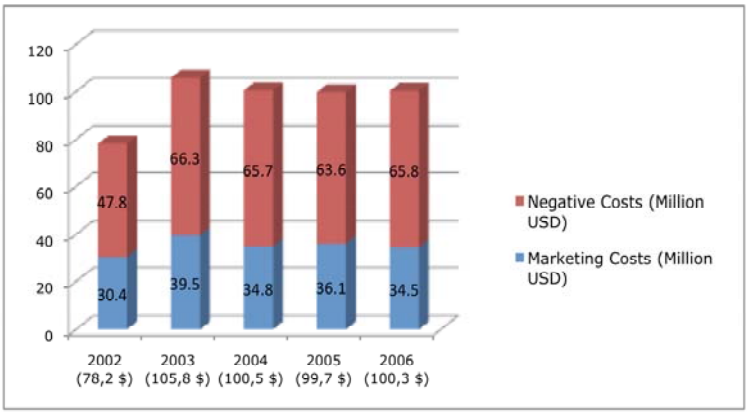
[22] Since "copyright" and "droit d'auteur" do not differ substantially regarding the economic rights, we use here the term "copyright" as a synonym of "droit d'auteur".

[23] See information on membership and market statistics of the Hollywood majors' oligopoly at www.mpaa.org

book industries. From this perspective, state aid in the form of direct payments is hardly the most cost efficient and effective measure to comply with article 7 of the UNESCO Convention.

In order to manage the high entrepreneurial risk related to the production and distribution of cultural goods and services, the film, book and music industries rely on substantial marketing means and the financial ability to offset flops with "blockbusters" (film), "bestsellers" (books) and "hits" (music). The US film industry best illustrates these realities.[24]

According to the statistical data provided by the Hollywood oligopoly's trade organisation, the Motion Picture Association of America, the majors invested in 2006 an average of USD 65.8 million per film in so-called "negative costs" (which includes production costs, studio overhead and capitalised interest), and USD 34.5 millions in marketing costs (which includes "prints" and "advertisement"). Each year, these multinational corporations release over 160 films with an average cost structure as follows (MPAA member company average theatrical costs):



In contrast to the presentation of costs in the figure above, it makes more sense from an economic perspective to account for the costs of "stars" as marketing expenses; and, accordingly subtract them from the productions costs. If the average salary for stars (around USD 20 million) is accounted for under marketing expenses, each film produced and distributed yearly by the Hollywood studios costs approximately USD 40 million to make (production or "negative" costs) and USD 60 million to sell (marketing or advertisement costs).[25] Advertising, including investments in stars, is the main tool to lure the audience into theatres, and to cause consumption in the subsequent commercial exploitation cascade that ranges from DVD sales to television broadcast. The same logic applies to the music and book industries.[26]

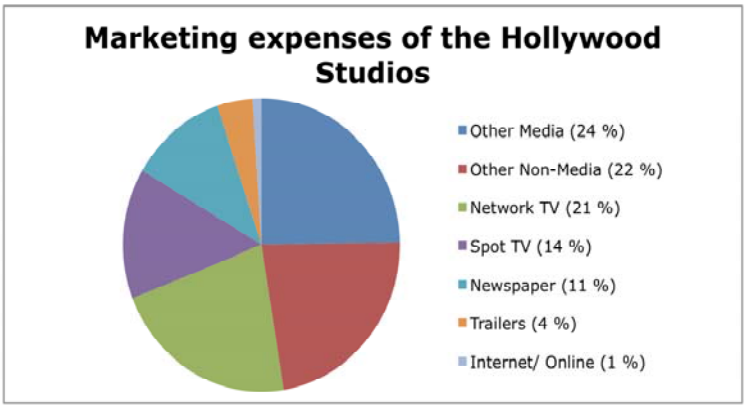
According to the available statistical data, a small percentage of competitively advertised films are very successful at the box office, whereas the others either just recoup their costs

[24] Compare the findings in the Swiss "Blockbuster" case with further references, Commission de la concurrence (éd.), Droit et politique de la concurrence DPC 2000/4, Pratique administrative, Secrétariat de la Commission de la concurrence, Enquête préalable, p. 571ff., at: www.weko.admin.ch/dokumentation/00157/index.html?lang=fr#sprungmarke1_66

[25] The MPAA no longer publishes updated statistics on marketing expenses on its website. However, one can make the reasonable assumption that these expenses hardly decreased since 2006.

[26] On average, the Hollywood studios spend approximately twice as much on production and marketing costs as their subsidiaries and affiliates, which produce "niche" films, including artistically more ambitious works made by the so-called "studio classics" and "speciality" divisions. The Hollywood Majors' subsidiaries and affiliates include studio 'classics' and specialty divisions such as Fox, Searchlight, Miramax, New Line, Sony Pictures Classics.

or incur losses. If a producer who is independent from the Hollywood studios' oligopoly wants to be competitive on the market, she must invest comparable sums for marketing. This high risk investment, however, would not be reasonable if the producer and the distributor could not, in the case of a flop, compensate losses with successful box office returns generated by other films in their catalogue. In other words, in order to compete on a level playing field a provider of cultural goods and services needs to have access to an "essential facility" encompassing competitive marketing means, and an accounting scheme for mixed calculations that permits compensating losses with profits on a sustainable level. The Hollywood studios spend their marketing money as follows:



The corresponding figures of the Hollywood studios' affiliates and subsidiaries look similar.[27] These figures illustrate the spill-over effects of motion pictures on other media, and eventually other cultural contents including newspapers, magazines, television and radio. Marketing expenditures bring visibility for a particular film in other cultural expressions; and, those cultural expressions not only gain revenues, they can use the exposure to increase their own visibility. This dynamic can impose largely uniform aesthetics and messages to the consumers and citizens, and can destroy alternative cultural expressions.[28]

2.2.4. Cultural diversity and competition law

The rules of the WTO and of many regional and bilateral trade agreements do not cover distortions of international trade and competition caused by private corporations dominating the market. This limited coverage of trade regulations is very relevant for cultural industries because, while these rules challenge trade distorting state intervention, they leave unsanctioned the often equally or even more harmful abuses of a dominant market position held individually or collectively by private corporations. The issue is not so much the insufficiencies of the world trading system, but rather the lack of awareness of States to address distortion of competition and trade via national anti-trust legislation. Moreover, this lack of awareness also extends to the relationship between cultural diversity policies, competition law and intellectual property rights.

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[27] Other media includes: cable tv, radio, magazines and billboards. Other non-media includes: production/creative services, exhibitor services, promotion and publicity, and market research. All data adjusted to exclude MGM. Source: www.mpaa.org (consulted in 2007; documents on file with the authors).

[28] For example, in Switzerland publicly subsidized newspapers regularly publish lengthy film reviews in their cultural section on Hollywood blockbusters. This widespread editorial practice arguably qualifies as covert advertisement at the expenses of tax payers and content providers from other cultural origins. It is induced by Hollywood majors' marketing power and results in state aid for newspapers having a cannibalising effect on subsidies for films. See Sandra Vinciguerra, "Hollywood pratique une discrimination culturelle à l'échelle planétaire", in: Le Courrier, Geneva, 13 October 2003, at: http://www.germann-avocats.com/docs/Le_courrier_13_10_05_full_page.pdf

Under the current multilateral trading system, States remain essentially sovereign with respect to the elaboration and implementation of competition law. Measures of cultural policy based on subsidies are in most cases out of reach for developing and least developed countries for obvious economic reasons; that is, at least insofar as such state aid is capable of reaching a critical mass to influence market shares. The long version of this Study contains a detailed analysis of possible ways to implement competition law for the purpose of reaching the objectives of the UNESCO Convention. In particular, it examines the so-called "essential facilities" doctrine and proposes to define relevant markets on the basis of marketing investments in order to meet the specific characteristics of cultural industries.

2.2.5. Marketing rule and proposals for redress

"Cultural Treatment" and "Most Favoured Culture"

Given the economic specificity of cultural industries, one can argue that States and private players with a dominant market position can restrict the free movement of cultural goods and services. In other words, such private players, notably the oligopoly of the Hollywood majors, control cross-border trade of cultural goods and services. For the time being, these corporations arguably keep the gate closed for the cultural goods and services from a diversity of cultural origins. This problem requires measures in keeping with article 7 of the UNESCO Convention. A combination of competition and intellectual property law could provide a remedy against this situation. Intellectual property protection is the *nerf de la guerre* of cultural industries. This protection relies on state activities and resources such as the elaboration and implementation of national and regional legislation and policies on copyright, neighbouring rights, trade marks, and trade names, among others. The protection of these intellectual property rights is the Achilles heel of private cultural players that abuse their dominant market position and practice systematic cultural discrimination. The economically weakest State can strike this heel in order to force such players to contribute to the promotion of cultural diversity on its territory. If a State is eager to promote cultural diversity on its territory, it should make the receipt of public support in form of intellectual property rights protection by private corporations a contingency for contributing to the State's cultural policy goals.

We propose a new deal as follows: States should protect the intellectual property of a rights holder who has a dominant market position, only if the rights holder contributes commercially to preserving and promoting the diversity of cultural expressions in that State's territory; on the other hand, if such a rights holder systematically discriminates on the basis of the cultural origin of films, music or books - that is, if it violates the principles of "Cultural Treatment" or "Most Favoured Culture" outlined below - the state should be entitled to refuse intellectual property protection to the rights holder's works.[29] We suggest that States should be entitled to suspend the application of the National Treatment principle to trade-related intellectual property rights of foreign rights holders if they have a business practice that is detrimental to the diversity of cultural expressions.

[29] This refusal can be politically justified by analogy to the cross retaliation applied in the banana arbitration procedure between Ecuador and the European Community. In this arbitration case, the WTO Dispute Settlement Body authorised Ecuador to suspend national treatment in the field of intellectual property protection for right holders from the EC as a sanction against the EC's violation of the Most Favoured Nation clauses concerning the distribution of Ecuadorian bananas into the EC (GATT and GATS violation were "cross retaliated" by a suspension of protection granted under TRIPS). In other words, this ruling legalised in Ecuador the copying of films, music and books of European rights holders without their consent and without remuneration for a determined period of time; see EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to arbitration under Article 22.6 of the DSU, Decision by the Arbitrators, 24 March 2000, WT/DS27/ARB/ECU; see also Fritz Breuss / Stefan Griller / Eric Vranes (eds.), The Banana Dispute - An Economic and Legal Analysis, Vienna / New York 2003.

In order to structure this new approach, we propose a distinction in reference to the various cultural stakeholders mentioned in article 7 of the UNESCO Convention between:

- **"Factors of creation and production of cultural goods and services"** (artists, creative technicians and producers);

- **"Factors of commercial distribution and exhibition (marketing) of cultural goods and services"** (distributors and others who invest in marketing and exhibition);

- **"Factors of consumption of cultural goods and services"** (audiences and other media that use the original cultural goods and services in other formats and markets).[30]

In the film, music and book markets, the first and last category of factors are affected by the distribution "bottleneck", which in turn affects the activities of the second category - where distribution and exhibition (marketing) commercially and culturally filter mass cultural goods and services.[31]

A new balance should be implemented between the factors of creation and production, distribution, and consumption of cultural goods and services; and, it should be based on new principles of law prohibiting "cultural discrimination". These "meta-rules", which we label "Cultural Treatment" (CT) and "Most Favoured Culture" (MFC) principles, would mirror the WTO principles of National Treatment (NT) and Most Favoured Nation (MFN).

To illustrate this proposal, we have adapted GATS articles II and XVII as follows:

Article I

Most Favoured Culture Treatment

With respect to any measure covered by this Agreement, each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord immediately and unconditionally to cultural goods and services and to the factors of cultural creation and production of another cultural origin treatment no less favourable than that it accords to like cultural goods and services and their suppliers of any other cultural origin.

Article II

Cultural Treatment

Each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord to cultural goods and services and to factors of cultural creation and production of any other cultural origin, in respect of all measures affecting the distribution and exhibition (marketing) of cultural goods and services, treatment no less favourable than that it accords to its own like cultural goods and services and like factors of cultural creation and production.

[30] "Factors" means here labour and capital in the context of creation, production, distribution and exhibition, whereas it means intermediary or end consumers in the context of consumption. "Distribution and exhibition (marketing)" includes all forms of supply and communication to the public.

[31] Compare Fiona Macmillan, Copyright and corporate power, in Ruth Towse (ed.), Copyright in the Cultural Industries, Cheltenham 2002, p. 99 – 118.

Article III

Maintenance of a culturally discriminatory measure

The public, private or mixed-economy factors of distribution and exhibition (marketing) of cultural goods and services having a dominant market position may maintain a measure inconsistent with articles I and II provided that such a measure is effectively demanded by the factors of consumption.

This tentative formulation of the principles of Cultural Treatment and Most Favoured Culture requires more comprehensive elaboration. Private and mixed-economy factors will be bound under these principles by the States that grant them the protection of their intellectual property rights. In other words, the States that adhere to these principles will no longer protect the intellectual property rights of private and mixed-economy actors engaged in commercial activities on their respective territories; that is, so long as these factors do not comply with these principles.

Arguably, our proposals to implement article 7 of the UNESCO Convention would be consistent with the Preamble and articles 7, 8 and 40 of the TRIPS Agreement, in combination with article 20 of the UNESCO Convention. These proposals rely on national competition laws appropriately constructed to address cultural diversity concerns. Ultimately, UNESCO and WTO members would negotiate a stronger standing for cultural diversity law, developed and articulated by non-state courts vis-à-vis the multilateral trading system. UNESCO, WIPO, and other relevant organisations would be invited to contribute to this process with the aim to elaborate rules on preferential, special and differential treatment in order to promote cultural diversity in the Global South.

Testing CT and MFC before non-state courts

The parties to the GATT, and since 1995 the members of the WTO, have developed the National Treatment and Most Favoured Nation principles over the course of half a century. The full meaning of these rules still needs further exploration. This relatively long period of time illustrates the complexity of non-discrimination principles as applied to trade. Presumably, it will require additional time to fully develop the cultural non-discrimination principles of Cultural Treatment and Most Favoured Culture.

This policy objective could flourish from grassroots initiatives and find its way to the international level. Representatives of civil society could establish non-state tribunals where creators, producers and consumers of cultural goods and services can sue private and public players having a dominant market position, and who are suspected of cultural discrimination. In these trials, the court can establish the relevant facts from stakeholders' claims, and apply the principles of Cultural Treatment and Most Favoured Culture to these facts. The procedural rules can be developed using the rules in the WTO Dispute Settlement Understanding as inspiration. If a non-state court concludes that a corporation or a State practices cultural discrimination that affects the jurisdiction where the court is located, such a court can order the entity to change its behaviour in an appropriate way.

Concretely, the result is that the convicted players are required to open their marketing and distribution facilities to contents from a greater variety of cultural origins. If these players refuse to follow the non-state court ruling, the court could order a sanction where the intellectual property of the infringer is no longer protected in the jurisdiction of the court for a given period of time. This sanction should be commensurate with the damage incurred to local diversity of cultural expressions, and have a "name and shame" effect. This trial and error process based on litigation would generate non-binding, but authoritative case law. Guided by article 7 of the UNESCO Convention, this jurisprudence could be transformed progressively into State law by a codification as constitutional and legal norms on the national level. Once this codification process is achieved, the moot courts could become regular instruments of law, rendering their rulings and sanctions enforceable.

There are several noteworthy examples of representative of civil society collectively taking initiative in different contexts in order to settle disputes, or highlight lack of accountability for grievances or abuses. These models contain important features that are easily transferable for use in other situations. That is, at a baseline they represent important examples of civil society taking the initiative to mobilise public awareness, promote constructive dialogue, and give a voice to public opinion. For example, prior to the end of the Vietnam War, Bertrand Russell founded the International War Crimes Tribunal with its first meeting in 1966. It was established to address the atrocities committed by the US against the Vietnamese people over the course of the war; and, accordingly provided an accounting of these abuses, which otherwise would have remained unrecorded. As Jean-Paul Sartre acknowledged in the Inaugural Statement, the tribunal was not an institution in the manner of being endowed with power from the state or established by any such mandate from a government authority; rather, the tribunal's 'legality comes [precisely from] both its absolute powerlessness and its universality.' In this respect the tribunal was intended to be a 'Court of the People'.[32]

2.3. Civil society's role for the implementation of the Convention

2.3.1. Legal framework of civil society participation in the European Union

The Lisbon Treaty requires that EU institutions ensure civil society's participation. Article 11 of the TEU states, "the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action". In addition, article 11 states that "the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society".[33] According to this provision, the European Commission shall carry out broad consultations with the parties concerned in order to ensure that the Union's actions are coherent and transparent (para. 3). Cultural stakeholders may also invite the European Commission, within the framework of its powers, to submit appropriate proposals on matters where EU citizens consider that such a legal act of the Union is required for the purpose of implementing the Treaties (so-called "European Citizens' Initiative" under para. 4).

The procedural aspects of civil society's consultation are outlined in the European Commission's Communication on general principles and minimum standards for consultation of interested parties (2003).[34] On the basis of this Communication, social partners are involved in many consultation procedures and various committees, albeit without detailed, codified rules.[35]

In the field of intercultural dialogue, the EFAH (European Forum for Arts and Heritage) and ECF (European Cultural Foundation) established a Platform for Intercultural Europe (formally labelled "Rainbow Platform") in 2006 that brings together organisations from the cultural sector and other relevant areas. This forum comprises over three hundred civil society organisations and individual members engaged in intercultural action throughout Europe.

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[32] See documentation "Prevent the Crime of Silence Reports from the sessions of the International War Crimes Tribunal founded by Bertrand Russell" at http://911review.org/Wget/www.homeusers.prestel.co.uk/littleton/v1tribun.htm

[33] See also Art. 15 TFEU referring to the requirements of transparency as a means to promote good governance and participation of civil society.

[34] See documentation at http://ec.europa.eu/civil_society/accueil_en.htm

[35] The right of access to documents of the institutions is granted by the Nice Charter. Regulation 1049/2001 of 30 May 2001 based on Art. 255 TEC regulates a right of access to the European Parliament, the Council and the Commission documents for all Union citizens and for all natural or legal person residing, or having a registered office, in a Member State.

According to the European Commission's response to our survey, civil society's participation in the implementation of the UNESCO Convention shall take place through the civil society platforms established by the European Agenda for Culture in a Globalising World.[36] Each of these platforms convenes approximately forty civil society organisations and addresses questions such as access to culture. These platforms complement the Platform for Intercultural Europe.

The EU made laudable efforts to implement article 11 of the UNESCO Convention. However, the consultation procedures via platforms deserve improvements since they remain "sectoral," and in some cases fail to adequately address cross cutting issues. Furthermore, it remains unclear how and to what extent these platforms actually influence cultural policy-making. Eventually, participation requires better access to relevant information.

We observe, for example, that the EU supported the US against China in two recent litigations at the WTO concerning cultural industries. We are not aware of an appropriate consultation of European cultural stakeholders prior to the European Commission's decision to support the American position. We will outline new approaches to address these shortcomings in Part Three below.

2.3.2. Ensuring civil society participation on a level playing field

In article 11 of the UNESCO Convention, the Parties "acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention". To secure the participation of civil society, the implementation of article 11 must proceed alongside implementation of article 9 on information sharing and transparency, and article 10 on education and public awareness.

While the Convention does not define "civil society," the UNESCO Operational Guidelines state that "civil society means non-governmental organisations, non-profit organisations, professionals in the culture sector and associated sectors, groups that support the work of artists and cultural communities".[37] The Guidelines' definition seems to include natural and legal persons on an individual basis or as groups. Therefore, participation according to article 11 involves a variety of stakeholders including non-profit organisations and like groups, as well as trade organisations (lobbies) that often represent divergent interests. In our questionnaire to a selection of representatives of civil society we tried to assess the respondents' independence from state and corporate power (see Section "Civil Society Survey" at www.diversitystudy.eu).

In our surveys and desk based research, we identified various actors who can influence the implementation of the UNESCO Convention. Public players include the relevant agencies within international and regional organisations as well as government agencies on the national level. Particular national bodies include the administrative units within the ministries of culture, education trade and foreign affairs. Many national parliaments have culture and education committees. These committee members may be instrumental in raising awareness of the objectives of the Convention among their peers, and to keep its implementation on ongoing legislative agendas. Subnational collectivities at the municipal

[36] Communication from the Commission of 10 May 2007 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda for Culture in a Globalizing World [COM(2007) 242 final].

[37] At the international level, few requirements are indicated for civil society organizations or groups that could be admitted to attend the sessions of the organs of the Convention (see Annex I of the Guidelines). This requirements are: a) interests and activities in one or more fields covered by the Convention; b) legal status in compliance with the established rules of the jurisdiction in the country of registration; c) representativity of their respective field of activity, or of the respective social or professional groups.

and regional levels (e.g. the Germann Länder) often play an essential part in elaborating and implementing cultural policies in conformity with the principle of subsidiarity. Radio and television broadcasters, and other undertakings involved in cultural and educational activities regulated and/or subsidised by the state, will normally act in line with these public players regarding policies that ensure their economic existence and independence. They interact with private corporations, non-governmental organisations and individual creators, performers, producers and distributors of cultural expressions. In between, there are hybrid organisations and mixed activities, such as the national UNESCO Commissions or private entities performing public services. We observe that certain trade organisations ("lobbies" or pressure groups) and non-governmental organisations (NGOs), such as the National Coalitions for Cultural Diversity advocating non-trade concerns, are very active in influencing policy makers. Although cultural diversity is a crosscutting topic, there is no political party in Europe yet that presents a programme specifically focusing on this matter.

Civil society's consultation for policy-making purposes requires transparency regarding the linkages between civil society organisations and public and private interests. Transparency is crucial in order to obtain a clear picture of the interests at stake and the strengths to articulate and voice these interests. In this context, a main challenge for the participation of various civil society interests on a level playing field resides in the organisational capabilities of civil society. Organisational capacities vary significantly from country to country, and from one entity to the other within countries.

We share the opinion that civil society's involvement must go beyond a mere member or observer status generally reserved for its representatives, and take the form of a constructive dialogue and meaningful interaction.[38] Accordingly, non-institutional participatory mechanisms of dialogue with civil society need to be complemented by formal participatory methods of interaction.

EXAMPLE OF GOOD PRACTICE

Proposals for the implementation of the UNESCO Convention on the Diversity of Cultural Expressions in Switzerland

Pursuant to the UNESCO Operational Guidelines, civil society plays an essential role in the implementation of the Convention since "it brings citizens', associations' and enterprises' concerns to public authorities, monitors policies and programmes implementation, plays a watchdog role, serves as value-guardian and innovator, as well as contributes to the achievement of greater transparency and accountability in governance". This implies that the Parties implement a legal framework ensuring transparency and timely access to relevant information. Ideally, they should adopt a proactive approach aimed at including civil society, by appropriate means, in cultural policy-making and so encourage civil society to bring new ideas and approaches to the formulation of cultural policies. Following the example of our survey via questionnaires and interviews in support of this Study, the Parties should also involve civil society in the collection of data that is necessary for an informed and participatory policy making process.

[38] Véronique Gouvremont, The Convention on the Diversity of Cultural Expressions: Implementation and Follow up—The Challenge of Concerted Action by Civil Society, at www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/article-societe-civile-eng.pdf

In Switzerland, the National Coalition for Cultural Diversity and the Swiss UNESCO Commission published in October 2009 the report "La diversité culturelle – plus qu'un slogan" (Cultural diversity – More than a slogan"), which contains proposals for the implementation of the UNESCO Convention.[39] These recommendations are based on stocktaking and analyses of the current situation of cultural diversity in Switzerland, which resulted from the work of eight experts' groups addressing the areas of international cooperation, theatre and dance, cinema, education, music, literature, visual arts and conservation of cultural heritage, and media. This stakeholders' report is a highly valuable tool for the implementation of the UNESCO Convention in Switzerland.

2.3.3. The Århus Convention as a source of inspiration for civil society participation to implement the UNESCO Convention

The participatory system of the 1998 Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters can provide guidance for the implementation of article 11 of the UNESCO Convention at the EU level.[40] The overall objective of the Århus Convention is to increase the democratic foundation and legitimacy of public policies on environmental protection.[41] In order to contribute to the protection of the right of individuals to live in a healthy environment, the Parties must guarantee the rights of access to information, of public participation in decision-making, and of access to justice in environmental matters. The provisions of the Convention set forth a detailed participatory system based on these procedural rights.

The participatory system of the Århus Convention could inspire the implementation of the relevant provisions of the UNESCO Convention. On the EU level, there is a set of directives and regulations implementing the Århus Convention. Of these regulations, the most important is EC Regulation No. 1367/2006 on the application of the provisions of the Århus Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies ("Århus Regulation").[42]

For the participatory system to truly strengthen democracy it should include civil society at large.[43] Although the Århus Convention contains a certain parlance on the necessity for public authorities to deploy pro-active measures to assist the public, it is somewhat laconic on this crucial aspect of the participatory system.[44]

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[39] See report and related documentation at www.diversiteculturelle.ch/visio.php?en,0,0,

[40] This treaty drafted under the auspices of the United Nations Economic Commission for Europe (UNECE) was signed by 35 member states of the UNECE and by the European Community at the 4th "Environment for Europe" Ministerial Conference in Århus (Denmark) on 25 June 1998. Currently, the Convention has 44 Contracting Parties, including the European Community. Cf. Council Decision (EC) No. 2005/370 of 17 February 2005, on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, *O.J.E.U.*, L 124/1, 17 May 2005.

[41] For example, paragraph 21 of the Preamble of the Convention.

[42] For further information on European law implementing the Århus Convention see: http://ec.europa.eu/environment/aarhus/

[43] See Christine Larssen, Les modalités et le déroulement des procédures d'enquête publique en matière d'environnement et d'urbanisme. La participation du public au processus de décision en matière d'environnement et d'urbanisme. Actes du colloque organisé le 27 mai 2004 par le Centre d'étude du droit de l'environnement (CEDRE) des Facultés universitaires Saint-Louis, B. Jadot (dir.), Bruylant, Bruxelles, 2005, esp. n°s 3 and 19.

[44] See para. 8, 12 and 14 of the Preamble; Art. 3, paras. 2 and 3, Art. 5, para. 2 and Art. 9, para. 5 of the Århus Convention.

The Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums ("Almaty Guidelines") clarify the Århus Convention.[45] They are cautious of not excluding the public at large from their participatory system by stating that:

- "Care should be taken to make or keep the processes open, in principle, to the public at large" (para. 14); and,
- "[W]here members of the public have differentiated capacity, resources, socio-cultural circumstances or economic or political influence, special measures should be taken to ensure a balanced and equitable process. Processes and mechanisms for international access should be designed to promote transparency, minimise inequality, avoid the exercise of undue economic or political influence, and facilitate the participation of those constituencies that are most directly affected and might not have the means for participation without encouragement and support" (para.15). [46]

In the process of implementing article 11 of the UNESCO Convention, policy makers should consider the representativeness, accountability and transparency of participating NGOs gathered in the framework of the Århus Convention. Furthermore, they should extend, legally and factually, the participatory measures implementing article 11 of the UNESCO Convention to the public at large.[47]

Pursuant to the UNESCO 2009 World Report, "[d]emocratic governance presupposes forms of government and modes of decision-making that take account of the multicultural composition of contemporary societies and their wide variety of beliefs, projects and lifestyles.[48] In promoting a more inclusive form of governance, the management of cultural diversity can turn a societal challenge into a democratic strength" (p. 221). These concerns are particularly relevant in regard to civil society's participation in the implementation of the UNESCO Convention, particularly in relation to individuals and groups listed under article 7.

2.3.4. Collection, dissemination and exchange of information on laws and good practices

The Århus Clearinghouse for Environmental Democracy aims to support the effective implementation of the Århus Convention through the collection, dissemination and exchange of information on laws and good practices relevant to the rights granted by the participatory system. The national focal points to the Convention provide information to the Clearinghouse. In turn, the Clearinghouse offers information to a wide range of users, including the Parties and other States, intergovernmental organisations, NGOs, researchers and the general public.[49] EU policy makers should assess whether and to what extent the

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[45] Almaty Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums, annexed to Decision II/4, adopted at the second meeting of the Parties to the Århus Convention, held in Almaty (Kazakhstan), on 25-27 May 2005 (ECE/MP.PP/2005/2/Add.5, 20 June 2005). The Guidelines were developed on the basis of Art. 3, para. 7 of the Århus Convention.

[46] See also paras. 17 and 18 of the Guidelines.

[47] Compare para. 14 and 15 of the Almaty Guidelines

[48] Investing in Cultural Diversity and Intercultural Dialogue, UNESCO, Paris 2009.

[49] For further information on the Clearinghouse Mechanism, see http://aarhusclearinghouse.unece.org/index.cfm Compare also the Recommendations on the more effective use of electronic information tools to provide public access to environmental information, annexed to Decision II/3, adopted at the second meeting of the Parties to the Århus Convention, held in Almaty (Kazakhstan), on 25-27 May 2005 (ECE/MP.PP/2005/2/Add.4, 8 June 2005), paras. 2, 5, 6 and 18. The Task Force on Electronic Tools, responsible for the Århus Clearinghouse Mechanism, conducts various activities in order to identify needs and challenges, and suggest solutions in implementing the Recommendations cited above, see www.unece.org/env/pp/electronictools.htm

Århus Clearinghouse could serve as a model for implementing article 9 of the UNESCO Convention on information sharing and transparency.

Responses to the civil society questionnaire in our survey indicate that participation of civil society in policy making and implementation remains quite low in many jurisdictions within and outside of Europe. Many jurisdictions do not have structured processes ensuring civil society's participation in the implementation of the Convention. In some instances, civil society representatives stated that they have simply been ignored at national policy making levels.[50] The "Århus Clearinghouse Mechanism" can serve as guidance in order to elaborate procedural rules insuring effective participation at the Member State and EU level.

2.3.5. Elaborating new rules on the participation of civil society to implement the UNESCO Convention

Desirable new regulation should outline adequate methods and rules aimed at actively involving civil society in the decision making process on cultural policies. In particular, it should appropriately consider the situation of new entrants, minorities and those cultural stakeholders who are reluctant to cooperate with the state. Obviously, genuine diversity of cultural expressions cannot materialise when only the loud and powerful are heard.

The better the knowledge of the UNESCO Convention among actors, the more likely that they will refer to the instrument and to the diversity of cultural expressions in their discourses and initiatives. Therefore, desirable regulation on participation should carefully address the collection and dissemination of information on the UNESCO Convention. The establishment of databases allowing the dissemination of relevant information should complement this approach. For this purpose, the Århus Clearinghouse Mechanism provides a useful model. Exchange of information between private stakeholders as well as these private stakeholders' access to information in possession of state entities is crucial for civil society participation.

The desirable new regulation should provide formal procedures in form of a "structured" dialogue between private and public stakeholders in the decision making process pertaining to measures and policies affecting the diversity of cultural expressions. This codified participation would complement and support more informal and flexible mechanisms such as those that take place within the Open Method of Coordination (OMC). While civil society participation is often implemented via consultations, it should also include preparatory phases and public debates. Public debates would play a significant role in the political discourse on the implementation of the UNESCO Convention.[51]

[50] See replies to the questionnaire from Italy under the Section "Civil Societies Survey" at www.diversitystudy.eu

[51] In Italy, the Autorità Garante per la Partecipazione in Tuscany provides an interesting model for such an approach.For information on Tuscany's Autorità Garante per la Partecipazione, see www.consiglio.regione.toscana.it/partecipazione/default.aspx

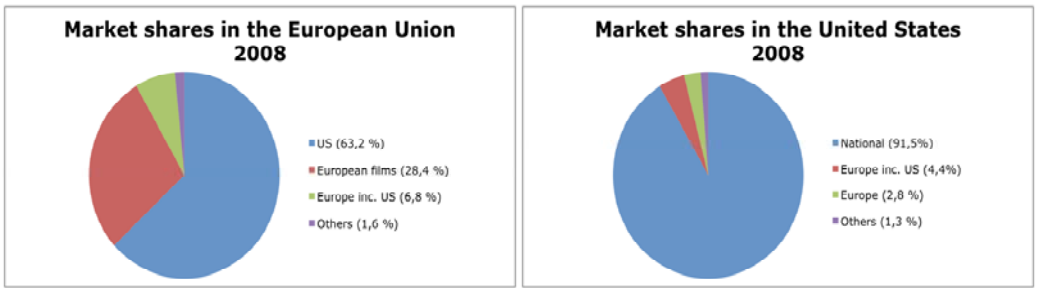
3. THE UNESCO CONVENTION IN THE EU'S EXTERNAL RELATIONS

3.1. Towards a change of paradigm from the marketing rule to equitable access to cultural expressions

In the 2010 Green Paper "Unlocking the potential of cultural and creative industries", the European Commission asks which tools should be foreseen or reinforced at the level of the European Union in order to promote cooperation, exchanges and trade between the European cultural and creative industries and third countries.[52] In this context, the Commission recalls that the EU's perspective on international cultural exchanges and trade is framed by the UNESCO Convention. Under this Convention, the EU is committed to fostering more balanced cultural exchanges, and to strengthening international cooperation and solidarity in the spirit of partnerships. The EU fosters these exchanges with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions. These objectives are in keeping with some of the guiding principles of the Convention, particularly the principles of equitable access, openness and balance, pursuant to articles 2.7 and 2.8.

In the Section on intellectual property and competition in Part Two of this Study, we outlined new ideas for EU Member States, as well as small and medium-sized enterprises, to overcome the market domination of big enterprises that abuse their marketing strength and impose uniform cultural expressions on the public. In the introductory section of Part Four below, we will critically assess the power of States to control the contents of cultural expressions via selective state aid schemes. We will argue that cultural stakeholders should find a new balance between the "duopoly" of private and public powers in the EU, which are currently dominating the markets of cultural industries at the expense of providers of cultural expressions from the Global South, local new entrants and otherwise marginalised artists.

If we take the film sector as an example and market shares as an indicator of the diversity of cultural expressions in the European Union, we observe that the public consumed a very small percentage of films from non-European origins in 2008:[53]



In comparison, domestic films in the US reached a market share of 91.5 percent, whereas films from Europe and the rest of the world attracted only 2.8 percent and 1.3 percent, respectively, of all American moviegoers (4.4 percent for films produced in Europe with

[52] COM(2010) 183, point 4.3.
[53] All figures quoted from the European Audiovisual Observatory, Focus 2009, World Film Market Trends, at: www.obs.coe.int/online_publication/reports/focus2009.pdf.en

incoming investment from the US).[54] In light of these figures, one can argue that the European taxpayers finance the remnants of diversity of cultural expressions in the US film sector. In the US, the game is largely left to an oligopoly of private players. Arguably, the situation in terms of diversity of the supply of cultural goods and services is poor. We label this situation as "cultural quasi uniformity".[55]

In the European Union, most of the market shares go to Hollywood whereas cultural policies preserve only less than a third of the shares for European films on average. Obviously, this situation is far from satisfactory in light of the principles of equitable access, openness and balance. This situation raises very serious concerns regarding freedom of expression and fundamental freedoms. In the absence of comparable statistics for books and music, we can only suspect that a similar situation applies for all types of cultural expressions that heavily rely on copyright and related rights. Trade related intellectual property protection without adequate safeguards in competition law induces predatory marketing. This type of marketing conditions the consumers to read, watch, and listen to largely uniform cultural expressions. Only rich countries can partially escape this rule by spending their tax-payers' money to protect and promote local cultural expressions. We therefore advocate a radical change of paradigm at the multilateral level of the WTO and the regional and bilateral levels in the European Union's cultural cooperation efforts. This issue is not only about trade and markets. It reaches the core values of the UNESCO Convention as articulated in article 5.

In this Part Three, we first address the implementation of the UNESCO Convention in the framework of the EU's human rights policies. We then address the absence of discussions of this treaty on the multilateral level at the WTO. We further examine this point in light of recent WTO litigations where the EU blindly endorsed the US position in matters that were relevant to the UNESCO Convention. Subsequently, we analyse the situation at the regional and bilateral levels where the EU is testing new approaches based on the Protocols on Cultural Cooperation. Finally, we draw lessons from the EU's experience in promoting local film production in the South via the African, Caribbean and Pacific (ACP) cooperation fund. We conclude that, at least for the time being, this initiative is a drop of water on a hot stone.

We are aware that the EU's external relations and internal policies are intrinsically interrelated since articles 5, 6 and 7 of the UNESCO Convention complement each other. Therefore, Parts Two through Four should not be read in isolation, but as a selection of topics that are all equally relevant to the essence of the UNESCO Convention. In addition, in an Annex to the Long Version of this Study, we further elaborate on preferential treatment pursuant to article 16. We envisage building blocks for a new architecture based on an enhanced intellectual property system, which will provide a synthesis of cultural policies, equitable access, human rights and fundamental freedoms.

Our Study deliberately omits a detailed examination of the impact of new digital technologies on the diversity of cultural expressions. We consider that the digital promise remains conditional upon new normative solutions to the marketing issue, which is a focus of our research.

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[54] All figures quoted from the European Audiovisual Observatory, Focus 2009, World Film Market Trends, at: www.obs.coe.int/online_publication/reports/focus2009.pdf.en (figures from previous years are quoted from Focus in the respective editions).

[55] Canada's market shares pattern looks similar to the one in the United States. The Hollywood film majors consider this country as a "domestic" market for distribution purposes.

3.2. The implementation of the UNESCO Convention in the framework of human rights policies

The UNESCO Convention recalls "the importance of cultural diversity for the full realization of human rights," and that "cultural diversity can be protected and promoted only if human rights and fundamental freedom (…) are guaranteed." Fundamental freedoms include the freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions. The Convention also states that cultural diversity flourishes "within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures". Therefore, promoting human rights policies in the framework of the EU's external relations contributes to implementation of the UNESCO Convention.

In dealings with countries that have ratified the UNESCO Convention, Human Rights Dialogue is an effective instrument to:

- Assess and condemn cultural expressions that infringe on human rights.
- Ensure that cultural diversity is not used to justify discriminatory practices.
- Protect cultural expressions at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding (articles 8 and 17).

In March 2009, the European Council adopted Guidelines on Human Rights.[56] Although they are not legally binding, the Guidelines serve as a pragmatic instrument of the EU Human Rights Policy. At present, however, the Guidelines do not make any reference to cultural diversity or the UNESCO Convention. Therefore, for the purpose of implementing the Convention these Guidelines should be amended to:

- Highlight the protection and promotion of the diversity of cultural expressions as a means to protect human rights and fundamental freedoms;
- Underscore the implementation of the UNESCO Convention as a priority in the framework of the EU's human rights policy.
- Encourage the ratification of and compliance with the Convention by third countries.
- Address the protection of cultural expressions at risk of extinction;
- Require adequate action by the EU against violation of the UNESCO Convention.

Since 1995, the European Community has sought to insert a human rights clause in all agreements with developing countries. In the event of serious and persistent breaches of human rights, these clauses enable a party to the agreement to take restrictive measures against the offending party in proportion to the gravity of the breach. Existing human rights clauses should be interpreted as encompassing the protection and promotion of cultural rights and cultural diversity, even in the absence of express reference thereof. However, future clauses should expressly require compliance with the provisions of the UNESCO Convention.

[56] See references to the Human Rights Guidelines at http://www.consilium.europa.eu/showPage.aspx?id=1681&lang=EN

3.3. The UNESCO Convention and the WTO: promoting dialogue on the legal relationship

3.3.1. Discussing the UNESCO Convention at the WTO

In contrast to the UNESCO and UNCTAD, the WTO Secretariat refused to reply to the questionnaire we sent to international organisations. It explained that it is not in a position to unilaterally pronounce the interpretation or implementation of articles 20 and 21 of the Convention since this matter has not been raised by WTO Members. Accordingly, the WTO does not have recorded views of Member governments in regard to these issues.[57]

We question whether avoidance of discussions on the UNESCO Convention at the WTO is a good strategy to implement this instrument. The EU should take leadership and address the implications of articles 20 and 21 of the UNESCO Convention at the WTO, following the example of formal discussions on other non-trade concerns such as public health and the protection of the environment.

Article 20 governs the relationship between the Convention and other treaties with a certain ambiguity. It provides that Convention parties must "foster mutual supportiveness between the Convention and the other treaties to which they are parties" (Art. 20.1; see for details para. 2.4 of this Study); and, at the same time, states that nothing in the Convention is to be "interpreted as modifying rights and obligations of the Parties under any other treaties".[58]

Of the 153 Members of the WTO, 96 are parties to the Convention (hence, the vast majority of the 110 Convention parties are also WTO Members). Discussing the UNESCO Convention under the auspices of the WTO would be one way for WTO Members who are also parties to the Convention (such as the EU) to implement articles 20 and 21 of the Convention, while simultaneously providing a forum to analyse the meaning and significance of those provisions.

To date, discussion of the UNESCO Convention within the WTO has been minimal. During the drafting of the UNESCO Convention, the Director-General of UNESCO requested to the WTO Secretariat that WTO Members share their views on the draft text at an informal session on 11 November 2004 with UNESCO's Director of the Division of Cultural Policies and Intercultural Dialogue[59]. The provisions of the draft Convention regarding the relationship with other treaties were the subject of considerable discussion and interest at that session[60]. Occasional references to the UNESCO Convention have been made in

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[57] See letter of 2 March 2010 under the Section "International Organizations Survey" at www.diversitystudy.eu

[58] Art 20.20. Article 21 goes beyond treaties to require parties 'promote the objectives and principle of this Convention in other international forums', including by consulting each, 'bearing in mind these objectives and principles'

[59] UNESCO, Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 23-27; UNESCO General Conference, Preliminary Report by the Director-General 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 and Promotion of the Diversity of Cultural Contents and Artistic Expressions, 33 C/23 (4 August 2005) [17]. See also UNESCO, Preliminary Draft Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions: Preliminary Report of the Director-General, CLT/CPD/2004/CONF.201/1 (July 2004) [13]; WTO General Council, Minutes of Meeting Held on 20 October 2004, WT/GC/M/88 (11 November 2004) [64]–[85]; WTO General Council, Annual Report 2004, WT/GC/86 (12 January 2005) 20.

[60] CLT/CPD/2004/CONF.607/1, partie IV, 25-26.

documentation circulated at the WTO by the WTO Secretariat, observers, and Members[61]. Other less formal and typically less transparent discussions of the relevance of the UNESCO Convention to the WTO (and to services trade in particular) appear to have been held in the form of events such as: WTO negotiations to improve the GATS from April 2004; a seminar at the WTO on trade and culture arranged by certain WTO Members (30 September 2004); and, a discussion among WTO Members (25 August 2005).[62]

One difficulty in holding discussions of the UNESCO Convention at the WTO is striking a balance between transparency and participation of interested groups outside the WTO, and the willingness of WTO Members to engage in open and frank debate. Non-governmental organisations and community groups typically do not have standing to listen to or be involved in WTO meetings. UNESCO also lacks observer status in any WTO body. Although inclusion of these non-WTO entities might enrich the discussion and increase awareness of policy objectives beyond trade, restricting attendance to WTO Members probably increases the chances of reaching agreement on narrow common ground. Moreover, considering the substantial number of parties and non-parties to the Convention amongst the WTO Membership, interests from all aspects of the debate are likely well represented. This is reinforced by inter-departmental discussions and public consultations that can be expected at a domestic level. Separate meetings inviting non-WTO entities including UNESCO could also be arranged.

The following issues would be useful inclusions in future meetings: the obligations under articles 20 and 21 of the UNESCO Convention of a WTO Member who is also a Convention party, in the context of WTO negotiations and WTO disputes; the extent of inconsistencies between the UNESCO Convention and WTO rules; the measures that WTO Members have adopted to implement the Convention, and the consistency of those measures.

3.3.2. Legal Impact of WTO Discussions

Conducting discussions in the WTO regarding the UNESCO Convention would certainly contribute to the Convention's objectives of 'foster[ing] mutual supportiveness' with other treaties and promoting its principles, as required by articles 20.1 and 21. Making concrete progress towards a better reconciliation of trade and culture is a difficult task. This is equally true for the prospect of agreeing to an understanding of the role and meaning of articles 20 and 21. The following factors further complicate these efforts:

- The large number of WTO Members and the fact that around one-third of them are not parties to the Convention.
- The traditional WTO rule of decision-making by consensus rather than voting.
- The continued delays and challenges in concluding the Doha Round negotiations.
- Continuing concerns arising from the Global Financial Crisis among many WTO Members, which may increase suspicion about protectionist measures (in the case of Members who would prefer not to allow special recognition of culture in the WTO); and, decreased willingness to liberalise trade in culture-related sectors (in the case of Members who are convinced that culture requires special protection).

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[61] See, eg, WTO Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting Held in the Centre William Rappard on 14-15 June 2005, IP/C/M/48 (15 September 2005), [92] (Peru); WTO Ministerial Conference, Organisation Internationale de la Francophonie (OIF): Statement Circulated by HE Mr Abdou Diouf, Secretary General (As an Observer), WT/MIN(05)/ST/57 (15 December 2005), 2; WTO Council for Trade in Services, Audiovisual Services: Background Note by the Secretariat, S/C/W/310 (12 January 2010), [71]. See also Appellate Body Report, China – Publications and Audiovisual Products, n. 538; Appellate Body Report, China – Publications and Audiovisual Products, [25].

[62] See WT/GC/M/88, [64]; International Network for Cultural Diversity, Newsletter n. 5(11) (November 2004).

- Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organisation, which provides that the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the WTO agreements.
- The factual and conceptual difficulties in distinguishing between genuine cultural policy measures and purely protectionist measures designed to assist local industry.
- The long history of controversy concerning the need for an exception from WTO rules with respect to 'cultural products' (such as audiovisual products and publications), culture or cultural diversity. This controversy has played out in the context of the Uruguay Round negotiations, more recently in services trade negotiations, and within disputes between WTO Members.
- The complexity of the underlying legal questions regarding: how to resolve conflicts between treaties, either in general or in the specific context of the WTO; the role of non-WTO international law in interpreting the WTO agreements (particularly treaties to which not all WTO Members are a party)[63]; and the applicability in a non-interpretative manner of non-WTO international law in WTO disputes.

3.3.3. Recommendations for UNESCO

The WTO's increasing engagement with non-trade policy areas such as public health and the environment, and particularly its relationship with other intergovernmental organisations such as WIPO and the WHO, demonstrate the range of ways in which UNESCO could enhance its role in the WTO, such as by:

- Applying to become an observer on a permanent or ad hoc basis in relevant WTO bodies such as the Council for Trade in Services, and encouraging participation of the WTO Secretariat as observers in relevant UNESCO meetings.
- Exploring opportunities for collaboration with the WTO in public activities such as organising seminars, and researching and writing publications.
- Arranging informal discussions between the WTO and UNESCO Secretariats.
- Preparing reports on specific areas of interaction between trade and culture.

3.3.4. Recommendations for the EU

As a WTO Member and Convention party who is committed to the promotion of both trade liberalisation and cultural diversity, the EU is advised to:

- Continue to highlight cultural implications and interests in domestic, regional and multilateral fora engaged in developing decisions, policies or laws, with the goal of encouraging respect for UNESCO Convention objectives in a manner consistent with WTO rules and taking account of the views of cultural interest groups.
- Assist other WTO Members, particularly developing and least-developed countries, in identifying and developing cultural industries of potential value, and in understanding the complex relationship between cultural diversity and international trade.
- Promote discussion of the UNESCO Convention in the WTO as a short-term measure, with a view to optimising conditions for reaching more ambitious agreements on the relationship between trade and culture when conditions improve in the medium term (for example, once Members have successfully concluded the Doha Round and fully recovered from the financial crisis).

[63] See, eg, Panel Report, EC - Biotech, [7.67]-[7.72].

3.4. Two recent WTO dispute settlement procedures involving cultural industries

3.4.1. Political context of the implementation of the UNESCO in the case of China

China ratified the UNESCO Convention at the end of December 2006. Culture Minister Sun Jiazheng stated that ratification would allow China to protect its cultures and promote the development of a cultural industry, and so reverse an imbalance in cultural trade.[64] In March 2008, the Dalai Lama alerted the world community to the fact that "the language, customs and traditions of Tibet, which reflect the true nature and identity of the Tibetan people are gradually fading away."[65] At a subsequent press conference, he denounced these actions stating that a kind of cultural genocide was taking place.[66] After China's ratification of the UNESCO Convention the US initiated at the WTO two dispute settlement procedures against China, based on the GATS and TRIPS agreements regarding cultural industries. Lobbyists from the Motion Picture Association of America, which represent the oligopoly of the Hollywood film majors, successfully pressured the US administration to take this action. In both procedures the EU formally supported the US without substantive debate in the cultural sector of Europe, even though China invoked the UNESCO Convention in the GATS case. Both the *China-Publications and AV Products* case and *China-IPRs* case were settled by the WTO Dispute Settlement Body ("DSB") and involved the protection and promotion of non-trade concerns. Both cases refer to cultural diversity.

3.4.2. The China-Publications and AV Products Case

The Panel considered a complaint by the US concerning a series of Chinese measures regulating activities relating to the importation and distribution of the following products: reading materials, audiovisual home entertainment products, sound recordings, and film for theatrical release. The United States claimed that some of the Chinese measures violated trading rights commitments undertaken by China.[67] Additionally, the United States argued that such measures restrict the right of private enterprises and individuals to import relevant products into China by limiting trading rights to Chinese state-owned enterprises. Furthermore, the United States claimed that some of the measures were inconsistent with provisions in GATS and GATT 1994.[68] The Panel found that the challenged measures were inconsistent with these instruments. The Appellate Body upheld this decision[69].

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64 People's Daily Online, China ratifies UNESCO convention on protecting cultural diversity, 29 December 2006.

65 Statement of His Holiness the Dalai Lama on the 49th Anniversary of the Tibetan National Uprising Day, 10 March 2008.

66 European Union-China diplomatic relations reached a historical low point after the visit of the Dalai Lama to the European Parliament at the end of 2008. Additionally, China cancelled the EU-China Summit that was to be held in Lyon in December 2008, thereby postponing the signing of cultural agreements such as the French-Chinese co-production agreement.

67 Protocol on the Accession of the People's Republic of China to the World Trade Organization and the Report of the Working Party on the Accession of China to the WTO

68 Article XVI and/or Article XVII of GATS and Article III:4 of GATT 1994. See the WTO Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, 12 August 2009, para. 3.1 and WTO Appellate Body Report, WT/DS363/AB/R, 21 December 2009, at para. 2 et seq. Full text available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm, http://www.worldtradelaw.net/reports/wtopanels/wtopanels.asp and http://www.worldtradelaw.net/reports/wtoab/abreports.asp.

69 For details on some excluded "measures", see WTO Appellate Body Report, WT/DS363/AB/R, at paras. 5 and 10.WTO Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, at paras. 8.1-8.2 and WTO Appellate Body Report, WT/DS363/AB/R, at para. 414 et seq.

China's defence: cultural diversity and public morals

In its defence, China submitted that cultural goods and services share a unique nature. They do not merely satisfy a commercial need, but are "vectors of identity, values and meaning" playing an essential role in the evolution and definition of aspects such as societal features, values, ways of living together, ethics and behaviours.[70] China established a link between cultural goods and the protection of public morals, arguing that cultural goods have a major impact on societal and individual morals as emphasised in the UNESCO Convention. Therefore, China argued that the state has a vital interest in imposing a high level of protection of public morals through an appropriate content review mechanism that prohibits any cultural goods with content that could have a negative impact on public morals.[71] In this manner, China defended its regulations as necessary to protect public morals, and thus fully justified under Article XX(a) of the GATT and its chapeau.[72]

The Panel's decision

While the Panel adopted an 'open' interpretation of 'public morals' as culturally and socially oriented, it concluded that China's regulations were not 'necessary' to protect public morals within the meaning of Article XX(a).[73] Accordingly, the Panel reached its decision on grounds of technical compliance with GATT regarding the necessity of China's regulations; thereby not reaching the substantive question of whether the relevant measures satisfy the requirements of the chapeau of Article XX. On appeal, China requested the Appellate Body to be 'mindful' of the 'specific nature of cultural goods', but the Appellate Body upheld the Panel's conclusion[74].

3.4.3. The China-IPRs Case

In the *China-IPRs* case, the United States alleged several inconsistencies with TRIPS related to copyright protection. China defended its denial of copyright protection as a right under applicable law to impose regulations related to censorship and public order.[75] Although the Panel found certain inconsistencies between China's laws and its obligations under TRIPS, it held that the United States failed to prove noncompliance of some of the measures with WTO norms.[76]

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[70] Article 8 of the UNESCO Declaration and Article 1(g) of the UNESCO Convention. See WTO Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, at paras. 4.89, 4.276 and 7.751.

[71] This 'negative' content could include violence, pornography, and any content that China deems as posing a threat to Chinese culture and traditional values.

[72] To address the meaning of the concept of "public morals" as it appears in Article XX(a), the Panel adopted the same interpretation of the expression as it is used in Article XIV of the GATS and given in *US – Gambling*, that is anThis Ibid., at paras. 4.109 et seq., 4.276 et seq., 7.714 and 7.753. The "chapeau" is the introductory paragraph of Article XX. It contains general requirements that must be satisfied by a measure in order to comply with it.

[73] WTO Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, at para. 7.759.

[74] Except for what concerns the State plan requirement in Article 42 of the Publication Regulation, see WTO Appellate Body Report, WT/DS363/AB/R, 21 December 2009, at paras. 25, and 414 et seq. particularly at para. 415.(b).(iii).

[75] China's denial of copyright protection was based on Article 17 of the Berne Convention for the Protection of Literary and Artistic Works (hereafter the Berne Convention) which sets forth that its provisions "cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right".

[76] WTO Panel Report, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, 26 January 2009, at para. 7.120 full text available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

The *China-IPRs* case illustrates the relevance and limits of the adoption of IPR-related measures to protect non-economic interests. Arguably, these measures fall under the sovereign rights of a State provided for in the UNESCO Convention to maintain, adopt and implement policies and measures appropriate for the protection and promotion of the diversity of cultural expressions in its territory. Indeed, denying copyright protection is not only about tolerating piracy, but can be considered as a measure for protecting and promoting the diversity of cultural expressions. The excessive penetration of foreign cultural goods and activities hamper the flourishing and expression of cultural diversity. If domestic cultural industries cannot compete with foreign competitors there is a risk that domestic cultures, traditional knowledge, and languages cannot find the needed space to emerge, and ultimately will succumb to the dominant culture.[77]

3.4.4. The European Union as a Third Party

In both WTO cases, the EU supported the United States' complaint without offering legal or political statements in support of cultural diversity. [78] In the *China publications and AV products* case the EU reaffirmed its positions regarding services, though without reference to the UNESCO Convention or Declaration.[79] Indeed, the EU's position is coherent with the position the Commission expressed in the Communication of 2006 concerning the EU-China partnership. The Commission opposed barriers to market access and discrimination of foreign cultural goods, instead favouring trade relationships and defending the right of free access to culture. A positive statement from the EU would have reinforced the effectiveness of its position on services, especially considering the United States' lack of a solution within the multilateral context of WTO. In order to implement its digital agenda, the United States has turned to bilateral agreements. These agreements require States to establish a definitive list of restrictions, rather than enabling them to gradually make liberalising commitments.

In the *China-IPRs* case, the EU missed an opportunity to refer to the Berne Convention in order to deny copyrights. A statement from the EU concerning the prospects of limiting copyrights in order to protect non-trade concerns would have maintained coherence with the EU position regarding the UNESCO Convention[80].

3.4.5. Forecast on Further Developments in the WTO System

Arguably, the Panel and Appellate Body allowed trade concerns to prevail over "cultural issues", which escape definitional clarity and are often politicised. It is unlikely that these bodies will deviate from precedent established within a time-tested dispute settlement system, and deliberate in favour of the UNESCO Convention, which is a much weaker legal regime. The following characteristics are inherent weakness of this instrument:

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[77] For the similarities with other industries (i.e. pharmaceutical) and for oligopolies see paras. 2.11 and 2.14.4. of this Study.

[78] First Submissions of the USA, 13 May 2008 and 30 January 2008. For the whole briefs and further documents on the panels proceedings, see the section Pending US briefs filed in WTO dispute settlement proceedings at http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/measures-affecting-pr and http://www.ustr.gov/webfm_send/319.

[79] Third Party Written Submission by the European Communities, 4 July 2008, at 16 et seq., available at http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140292.pdf.

[80] Third Party Written Submission by the European Communities, 26 March 2008, at 8, available at http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140289.pdf.

- Aspirational language in key provisions of the Convention.
- Subordinate relationship to other treaties. [81]
- Dispute settlement procedures are co-operative and not legally constraining. [82]
- Intellectual property rights are not addressed by the Convention.

Nevertheless, some measures can be put forward to foster greater harmonisation between trade and culture in the WTO system, and a better implementation of the UNESCO Convention.

3.4.6. Conclusion

Both cases discussed above concern "cultural industries" whose markets are particularly affected by distortions shaped at the international level via horizontal and vertical concentrations and oligopolies.[83] In neither case did the EU offer statements in support of cultural diversity. Such statements would have furthered the implementation of the UNESCO Convention, and strengthened its role in the interpretation of existing international agreements and negotiations regarding their future development.

Both cases also reveal some of the inherent weakness of the UNESCO Convention, specifically regarding its weak cooperative procedures in comparison with the WTO's robust dispute settlement system. This weakness makes it particularly difficult for the Convention to counter an emerging trend within the WTO DSB of an unwillingness to allow "cultural issues" to prevail over trade issues.

In the TRIPS case, neither Europe nor China seemed to be aware of the implications of intellectual property protection of the diversity of cultural expressions. In the GATS case, in which China quoted the UNESCO Convention, Europe supported the position of the United States as well. It is not clear whether human rights concerns in compliance with the UNESCO Convention, or mere economic interests against the text and spirit of this instrument, were decisive for this backing. In any case, the EU must expect that China will do the same in the future, if the United States files a claim against China in a matter related to cultural industries, and to the disadvantage of the cultural sector in Europe.

China invoked the UNESCO Convention to justify censorship of cultural goods and services. The European Union failed to react in a coherent manner that is consistent with the UNESCO Convention. In both cases, by omitting consultation with civil society the European Commission arguably missed the opportunity for a serious debate on the interpretation of the UNESCO Convention, which imposes limits on the principle of sovereignty in order to respect human rights and fundamental freedoms. In the TRIPS case, the European Commission further missed the opportunity to critically discuss the necessity of balanced intellectual property protection in the absence of substantive rules on competition law in the multilateral trading system (see our discussion in Part Two above). If cultural diversity shall matter in the future, private and public stakeholders in the EU must take appropriate action. Blind support of any fight against piracy in favour of reinforcing intellectual property protection, as recommended in the European Parliament's study of 2009 "The Potential for Cultural Exchanges between the European Union and Third Countries: The Case of China", will hardly contribute to meeting the objectives of the UNESCO Convention.

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[81] Article 20.2 provides that the Convention shall not be "interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties"

[82] Procedures such as negotiation, mediation, and conciliation.

[83] E.g., with regard to the audiovisual sector and the oligopoly of the US majors.

China and Europe share a common objective of protecting and promoting their local film industries against the oligopoly of the Hollywood majors. This concern arguably contributes to the diversity of cultural expressions. Europe and the United States, in turn, share a common aim of protecting human rights and fundamental freedoms, including the diversity of religious and political expressions (see also Part Two and Section 3.2 above on the implementation of the UNESCO Convention in the framework of human rights policies). Structured dialogue with representatives of civil society can assist the European Commission in adopting a more nuanced and more clearly articulated approach in future dispute settlement procedures at the WTO.

Harmonising cultural diversity and international trade concerns within the WTO and UNESCO

We assess two main scenarios to bridge differences between culture and trade concerns on the international level.

The first scenario consists of reintroducing the concept of cultural exception, and thus carving out cultural policies from the multilateral trading system. We consider this scenario not only unrealistic, but also potentially detrimental to the cause of cultural diversity. Over time such a scenario would remove healthy pressure on wealthy and democratic states to address the situation of developing economies and authoritarian regimes. In turn, these privileged jurisdictions would loose the benefits resulting from the cultural expressions of the Global South and artists oppressed by dictatorships.

The second scenario consists of taking full advantage of the positive contribution of WTO law to the second and third generations of discourses on cultural diversity. Without the Marrakech agreements of 1995, we doubt that a majority of cultural stakeholders in the Global North would have adhered a decade later to the principles of equitable access, openness and balance in the UNESCO Convention, as a binding instrument.

There is no cultural diversity without trade, unless trade is unfair. The UNESCO Convention limits the principle of sovereignty as a "free pass" for state regulation on cultural policies and measures, by requiring respect of human rights and fundamental freedoms, equitable access, openness and balance. In contrast, the WTO agreements removed state sovereignty for many trade concerns without balancing this removal with commensurate international competition law. The WTO agreements thus provide a "free pass" for corporate power dominating cultural industries. Most States in the world are, for the time being, unable or unwilling to duly restrain such corporate power via their national or regional competition law.

The UNESCO Convention is legally toothless in terms of dispute settlement. Therefore, it has little bargaining value vis-à-vis the dynamics of GATT, GATS, TRIPS and other relevant multilateral trade agreements. This explains the absence of cultural diversity as a non-trade concern from discussions and litigation in the WTO, as we analysed in the previous sections. A contribution to overcoming these shortcomings would consist of elaborating and negotiating a plurilateral culture and trade agreement based on the UNESCO Convention and desirable international competition law. Such an instrument would include minimum standards for cooperation and development in matters of cultural diversity and international trade. It would initially complement, but eventually replace, the EU's current bilateral piecemeal approach via Protocols on Cultural Cooperation, as analysed in the following sections. As a framework of reference agreement, it would provide legal safeguards against selling-off cultural diversity by trade.[84] Last but not least, it would actively promote "fair trade" as articulated by the principles of equitable access, openness and balance.

[84] In an emblematic case that pre-dates the entry into force of the GATS, the airline company "Swissair" asked the Swiss government to negotiate additional landing licences for their flights to Atlanta in view of the Olympic Games. The US administration replied that the competent authorities would be willing to grant such additional landing permissions in exchange for a removal of the Swiss quota system restricting distribution of Hollywood films in Switzerland. The Swiss government, driven by Swissair, concluded this bilateral deal without informing and consulting the local film sector. It replaced the quota system by subsidies in form of direct payments based on selective aid granting procedures. Today, "Swissair" does no longer exist since the company went

3.5. EU external trade policy and Protocols on Cultural Cooperation

With the development of the UNESCO Convention, the European Union and its Member States are set to reinforce a new cultural pillar of global governance and sustainable development by means of strengthened international cooperation.[85] On 20 November 2008 the European Council issued its Conclusions on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States. The Council calls upon the Member States and the European Commission to: strengthen the role of culture within the framework of external relations; promote the 2005 UNESCO Convention, cooperation with third countries and international organisations, and intercultural dialogue; and, to draw up a European strategy for incorporating culture consistently and systematically in the external relations of the Union, with due regard for complementarity between the Union's activities and those of the Member States.[86] The EU has proven itself as a driving force behind the successful conclusion of the 2005 UNESCO Convention. Therefore, to continue its leadership in the implementation of the Convention, the Commission has undertaken swift action to develop a new approach to the treatment of cultural activities and industries in its bilateral and regional agreements.[87]

3.5.1. Protocols on Cultural Cooperation

The negotiation of Protocols on Cultural Cooperation (PCC) has been important in this context, in parallel with free trade negotiations the EU engages in with third countries. The PPCs aim to promote the principles of the Convention and implement its provisions.[88] The first such protocol has been appended to the Economic Partnership Agreement with CARIFORUM, which was signed in October 2008.[89] It represents the first initiative by the EU to implement the Convention in its external relations, particularly with regard to article 16.[90] The Protocol targets preferential treatment for cultural goods, services and practitioners of developing countries, albeit outside the trade liberalisation provisions of the general trade agreement to which it is attached. Thereafter, in October 2009, another Protocol with Korea has been concluded in parallel with the EU-Korea Free Trade Agreement.

While the development and contents of both protocols have been met with several criticisms from European professional organisations and a number of EU Member States, this new practice provides an interesting test case on how the EU exercises leadership and coordination in the concrete implementation of provisions in the Convention. Moreover, the negotiation of both protocols and plans to continue the new approach in the future have led to a debate among relevant stakeholders regarding how EU external policies should account

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bankrupt due to several factors. If we compare the current market shares for local films in Switzerland and South Korea that kept her quota system, we observe that quotas arguably work substantially better than selective state aid for the purpose of achieving diversity of cultural expressions in this sector. For a more detailed discussion of the Swissair-deal, read Ivan Bernier, La bataille de la diversité culturelle, in Tiré à part SSA, Lausanne 2004, at: www.ssa.ch/_library/de/documents/publications/tireapart/no3_0704.pdf (German version) or www.ssa.ch/_library/documents/publications/tireapart/no3_0704.pdf (French version).

85 European Commission, Commission communication on a European Agenda for Culture in a Globalising World, COM(2007)242 final, 2007a, pp. 2-3, 7.

86 Council of the European Union, Council Conclusions on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States, 2905th EDUCATION, YOUTH AND CULTURE Council meeting, 20 November 2008, Brussels, pp. 3-4.

87 European Commission. Commission Staff Working Document on the External Dimension of Audiovisual Policy (SEC(2009) 1033 final), Brussels, 2009a, pp. 15, 17.

88 Notably articles 16 (Preferential treatment for developing countries), article 12 (Promotion of international cooperation), article 20 (Relationship to treaties) and article 21 (International consultation and coordination).

89 For a detailed description of the EU-CARIFORUM Protocol on Cultural Cooperation, see Bourcieu, E. In: Expert Reports on Preferential Treatment for Developing Countries.

90 Bourcieu, E. Op. Cit., 2008, p. 12.

for the dual nature of cultural expressions. In effect, a new strategy for dealing with culture in external policy and in bilateral, regional and multilateral trade relations is beginning to unfold. In developing PCCs, the European Commission puts forward the following goals and strategy: [91]

- Implementation of the UNESCO Convention.
- Ratification by third parties: building an alliance behind the Convention.[92]
- Facilitation of exchanges on a case-by-case basis using a modular approach.[93]
- Approach towards developing countries must reflect the asymmetrical relations between the negotiating partners.
- Approach towards developed countries must realise a broader and more balanced cultural and audiovisual exchange with international partners with already developed cultural industries.
- Provisions with regard to the audiovisual sector should only be dealt with in the framework of a PCC.

3.5.2. Criticisms towards the protocols and responses

The development of these new instruments has been met with several criticisms concerning the division of competences, the protocols' relation to the UNESCO Convention, the absence of analysis toward provisions on co-production, and the fundamental model on which the new strategy is based. Although both the PCC with CARIFORUM and with Korea have been approved, the build-up to the final texts during the negotiating process revealed several sceptical positions among some Member States, European professional organisations, and coalitions for cultural diversity.[94] The criticisms can be clustered around the following issues: subordination of culture to trade interests and the related division of competences within the EU; the relationship of the protocols to the UNESCO Convention, and the development of a new international instrument to counterbalance trends in the WTO; the critical co-production provisions in the Protocol with Korea; and, the fundamental model on which future protocols are based. [95]

Which model for new protocols?

The development of the Protocols has spurred further debate with regard to the dual character of cultural diversity, effective implementation of the UNESCO Convention, the development of safeguard mechanisms, and the outline of a new strategy for future cultural cooperation in a bilateral, regional and multilateral context. In this regard, a final aspect that comes to the fore in discussions of the new practice is the model the Commission sets out to negotiate a cultural protocol with a trading partner. The Commission was criticised for minimally adapting the CARIFORUM model when entering

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[91] European Commission, Argumentaire on the Title on Cultural Cooperation in future EU trade agreements, 2007b; European Commission, Follow-up Argumentaire On the Cultural Cooperation. Protocol in future EU trade agreements, 2008; European Commission, *Op. Cit.*, 2009a. See also, Bourcieu, Op. Cit., 2008, p. 12.

[92] See, e.g., Pacal Lamy's call in 2003 for the Commission of Culture of the European Parliament, Lamy, P., Les négociations sur les services culturels à l'OMC. Speech, Commission de la Culture du Parlement européen, 19 May 2003, Brussels.

[93] Differentiate between developed and developing countries due to enormous variation between the level of development of the cultural and audiovisual sectors of different trading partners vis-à-vis the EU.

[94] Critics also argue that in reality it is not cooperation and exchange, but one-way traffic from Korea to the EU that results from the co-production provision in the PCC. (Interview with Ms. Cécile Despringre, Executive Director of SAA (Society of Audiovisual Authors). *See* Part IV of this Study for additional discussion of this interview.

[95] These criticisms are discussed in greater detail in the long version of the Study available online at www.diversitystudy.eu

negotiations for a PCC with Korea.[96] However, EU Member States have accepted the finalised PCC with Korea, which is equipped with additional safeguard mechanisms.[97] Nevertheless, scepticism remains as critics anticipate the multiplication of protocols in parallel with upcoming bilateral trade negotiations. Representatives of Member States and the professional sector are concerned that upcoming protocols will not address their concerns. Consequently, the European Commission needs to communicate her approach very clearly. There is indication that relevant DG's are in the process of developing a general framework and strategy for the negotiation of future PCC agreements. The question remains whether a proliferation of bilateral cultural cooperation agreements or protocols would lead to increasing fragmentation and asymmetries among trading partners. Therefore, in place of a so-called spaghetti bowl of bilateral agreements, a plurilateral approach could be considered. This approach is well suited to address the diversity of cultural expressions in a trade context that is comprised of an increasing number of international partners.

3.5.3. SWOT analysis regarding the Protocols on Cultural Cooperation

Strengths

Although the UNESCO Convention's implementation phase is only beginning to unfold, its impact on the EU's external policies related to trade has been characterised by swift action. In this process, the EU has confirmed its leadership and engagement with implementing the Convention in accordance with the objectives of the European Agenda for Culture.[98] The example that has been set with the negotiation of PCCs also resonates in the non-EU context, which includes international organisations that deal with matters related to cultural diversity.

The UNESCO Convention has also provided a new framework, which in turn has generated new and innovative approaches for dealing with culture in the EU's external trade policy. A start has been made with the concrete implementation of articles in the Convention, especially those articles the European Commission considers to be of a more binding nature (e.g., articles, 12, 16, 20, 21 of the Convention).[99]

This indicates the beginning of the development of a European strategy for incorporating culture consistently and systematically in the external relations of the Union. The strengthened role of the European Parliament in the follow-up to the common commercial policy offers new possibilities for monitoring and fine-tuning processes related to trade and culture. In any case, debates that have unfolded during the negotiations of PCC's have been beneficial to improve its contents, and provide internal safeguard mechanisms to balance the dual nature of cultural diversity.[100]

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[96] France, Op. Cit., 2009, p. 4; Response of the French Coalition for Cultural Diversity to the Civil Society Questionnaire, p. 8.
[97] Such as criteria related to qualification as a European work.
[98] Particularly Articles 12, 16 and 20 of the Convention.
[99] In the response of UNESCO to the International Organizations and EU Survey, it is indicated that to date, the Intergovernmental Committee has yet to draft guidelines for articles 20 and 21.
[100] See, e.g., debates within the Trade Policy Committee in the context of the Trade Civil Society Dialogue.

Weaknesses

There is limited prior study of the impact of PCCs to generate the diversity of cultural expressions in the EU.[101] There is a general sense that a 'leap into the dark' is taken with respect to PCC's. However, in negotiations of the PCC with Korea corrective safeguards and adjustment mechanisms have been developed.

Another weakness is the lack of transparency and faltering communication to stakeholders regarding proceedings in trade and economic negotiations with third parties. This can incite anxiety and confusion among stakeholders, creating suboptimal conditions for constructive debate; and, causing fragmentation in policy developments for implementation of the Convention in external relations. Implementation is an obligation for all EU parties, and its effectiveness depends on broad based support within the EU. Therefore, Member States' silence regarding negotiations of PCCs may be an indication of diminished interest in the process of implementing the Convention. In this respect, structural dialogue among stakeholders must be improved between EU institutions, Member States, and civil society, as well as relevant ministries at the Member State level (e.g. between trade and cultural ministries).[102]

Opportunities

The mainstreaming of culture in related EU policies and instruments offers prospects to clearly articulate within the EU, and to international partners, that culture is a key pillar in the EU integration process and in global governance. In addition, the new practice of negotiating PCC's or other cultural cooperation frameworks provides a tool to urge third parties to ratify and implement the UNESCO Convention. In this context, the alliance in favour of making the UNESCO Convention the global pillar for cultural policies can be broadened. This new approach explicitly communicates to international partners that there are alternatives in dealing with the dual nature of the diversity of cultural expressions, in contrast to US bilateral liberalisation strategies for the audiovisual and cultural sector.

Additionally, the negotiations of PCC's have allowed for reflection and development of new safeguarding mechanisms in the spirit of the UNESCO Convention. Moreover, these experiences have generated new ideas to differentiate between third parties with whom the EU will hold negotiations. Additionally, it has provided opportunities to strengthen the relationship between different policies and frameworks that are related to the cultural diversity issue.[103]

Threats

Among the variety and number of stakeholders within the EU, the strained relationship between cultural and trade objectives remains pervasive and clutters the relationship between EU institutions, Member States, and the professional sector. This in turn diminishes the capacity of the EU to speak with one voice in international negotiations regarding cultural diversity issues. Accordingly, different views on the scope of the Convention have led to considerable differences in expectations and approaches. This can lead to confusion and friction among the stakeholders within the EU, and weaken an otherwise unified position shared by the EU and its Member States.

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[101] Particularly in regard to co-production provisions of PCCs
[102] E.g., trade and cultural ministries.
[103] E.g., the relationship between a PCC and the implementation of the AVMS Directive.

Transparency and adequate communication to relevant stakeholders on the development and implementation of a new strategy for cultural diversity in external relations is essential. Such communication with stakeholders must be guaranteed in order to achieve success and broad based support in the case of future negotiations and agreements.

Negotiating protocols on cultural cooperation is one way to implement the UNESCO Convention in EU external relations. While it has generated a certain momentum, it essentially only targets a small number of international partners. An additional approach to implementation is necessary to include more parties such as developing countries. We recall that the EU should not implement the UNESCO Convention on the basis of short-term particular interests, or in an introverted manner.

3.6. Culture and development policies: a case study on the ACP Film Fund

3.6.1. Introduction

This section of the study focuses on the EU-Africa, Caribbean and Pacific region (ACP) cooperation in the realm of culture, and provides a case study of the ACP film fund. It analyses ACP film funding to draw lessons from its strengths and weaknesses so that a "best practice" can be applied to other international cultural funding mechanisms. This section also questions whether the Convention has contributed to a change in measures taken with respect to the inclusion of cultural issues in EU development policies in this domain.

In the realm of EU-ACP development policies, culture has been an area of intervention since the mid 1980s. ACP film funding has been one of the longstanding hallmarks of cultural cooperation within EU development policy. As an example of cultural policy instituted by the EU that predates the Convention, it has important comparative analytical value. Therefore, an analysis of the ACP film programme can be useful in order to propose optimisation measures for the implementation of the Convention. Such an analysis is relevant for implementing the following articles: article 18 of the Convention, which calls for the establishment of an International Fund for Cultural Diversity; article 16, which stipulates preferential treatment for developing countries; and, more broadly, article 14 regarding the subject of cooperation for development.

3.6.2. The context of ACP film funding

ACP film funding was established within the context of the EU economic cooperation agreements with ACP countries (79 States), and is financed through the European Development Fund (EDF).[104] The availability of funding for ACP filmmaking began modestly in 1986. Support was increased during the 7th EDF, and by 1995 the funding available for ACP films gave the EU the status of top-funder. Since its inception the ACP film-funding programme has existed in a rollercoaster mode - being suspended, evaluated, improved and renewed on various occasions.

[104] http://ec.europa.eu/development/how/source-funding/edf_en.cfm

The Cotonou Partnership Agreement (June 2000/2005), which is in force for twenty years, created a strong mandate to support culture through article 27, and thereby renewed the ACP film support programme.[105] The Cotonou Agreement establishes a comprehensive framework for cultural cooperation that ranges from mainstreaming culture in development activities to promoting intercultural dialogue and preserving cultural heritage. The framework also supports cultural industries and improves access to European markets for ACP cultural goods and services.

At the intra-ACP level the two most important programmes are: 1) the cinema and audiovisual support programme, which co-finances the production and diffusion of audiovisual works from ACP countries and the training of audiovisual professionals (ACP Films); and, 2) the creative industries support programme, which provides support to cultural actors.[106] The programmes focus on five pilot countries that have been identified to maximise economic and job potential (4 million €).[107] The ACP Cultures programme supports projects in the following fields: contemporary visual arts; performing arts and music, including the organisation of art events; technical training; professional seminars and networking; and, artists' residences. [108]

3.6.3. ACP Films (2008-2009 call)

Objectives

The overall objective of the ACP film fund is to contribute to the development and structuring of audiovisual, cinema and television industries in ACP States in order to optimise their capacity to create and distribute their own images and products. Additionally, the fund seeks to enhance the promotion of ACP cultural diversity, cultural identity, and inter-cultural dialogue. On one hand, assistance aims at stimulating production capacity in cinema and audiovisual industries in ACP States; and, on the other, to enhance the circulation of audiovisual works primarily within ACP States, but also in EU Member States and internationally.

Structure and Funding

Three types of support in the form of grants are available: 1) assistance for film production by ACP producers (cinema: feature-length fiction, documentary and animation) (television: TV films, fiction, animated and documentary series, one-off documentaries) (3.8 million €); 2) assistance for distribution, development and promotion of ACP films and creation of networks for ACP audiovisual professionals (1.7 million €); and, 3) assistance for training to enhance professionalism in the ACP audiovisual sector (1 million €). The total funding for the programme amounted to 6.5 million €. The different categories reflect the attempt to address production, distribution, promotion and training. All of these pillars must be developed simultaneously. The funding subsidies in the area of production are substantial, reaching 400,000 € per project. While this is a very positive aspect of the ACP Films funding mechanism, expectations of what 6 million € can accomplish must remain realistic, given the challenges in the ACP region.

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[105] Reference to Art 27 of the Contonou agreement

[106] These programmes total more than one third of EC's financial support to culture in ACP countries within the 9th EDF (2000-2007). The cinema and adiovisual support programme provides 6.5 million € in funding; and, the creative industries support programme provides 6.3 million € in funding. See, www.acpfilms.eu.

[107] www.acpcultures.eu

[108] Providing 2.3 million € in funding.

Administration

The administrative process encountered in the ACP film fund programme continues to be overwhelming and insufficiently adapted to the film/cultural industry. The onerous application procedure is inappropriate and does not contribute to the professionalism or growth of the film and cultural sector. Administrative processes must be based on the realities of the industries and sectors in which they are situated (i.e., film and culture).

Decision-making procedures

There are a multitude of decision-making procedures possible in selective project funding schemes. In the case of ACP film funding and ACP cultures, both programmes run on calls for proposals. This funding functions on a selective process and is not an automatic funding scheme.[109] In the case of the ACP Films 2008-2009 call, the evaluation grids used to assess projects were not sufficiently adapted to projects in the film industry. This was especially evident in the area of production support.[110]

3.6.4. International funding mechanisms for culture

International public funding through subsidies in the domain of culture is critical for cultural vitality in any society. For countries in the South, it is vital to create possibilities through public funding sources. This can be seen as a responsibility and obligation of wealthier countries.[111] Funding for any kind of cultural production should be provided with a view to address the internal aspects and overall context of the sector. In terms of the latter, cultural funding mechanisms for production, distribution, and promotion are optimised when they are coherent with the sector as a whole.[112]

3.6.5. Establishing local regional funds

Another critical aspect in the development of sustainable, cultural livelihood and diversity is to enable locally established funding mechanisms, such as those operating at a regional level. Along with international funding sources, such as ACP film funding or a new funding mechanism such as the International Fund for Cultural Diversity, it is extremely important to enable local empowerment through locally driven sources of public funding regardless of amount. In this optic, there are models of international and regional funds involving a large number of Member States that work quite successfully.[113] Budgets are constituted through contributions from each member country, and funding is redistributed through selective

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[109] In simplified terms, automatic funding is often allocated to a new project based on receipts generated from a previous project of the producer or director.

[110] For example, if one compares the ACP film fund evaluation grid with the evaluation guide used by the EU Media programme (single project - development) significant differences are evident. A main concern in the evaluation procedure of the Media grid is with the quality of the project from various perspectives, and that the questions are designed in a manner that is relevant for film projects. This needs to be improved in the evaluation process under ACP Films. These observations are based on the author's personal experience as an "assessor" of projects for the ACP film fund during the call in the 9th EDF.

[111] Articles 14, 16 and 18 of the Convention lay the groundwork in this domain.

[112] E.g., accounting for extant national and regional cultural policies; a legal context for the profession; and relevant professional associations.)

[113] For example, Ibermedia is another international, regional film fund with 18 members: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Ecuador, Spain, Guatemala, Mexico, Panama, Peru, Portugal, Puerto Rico, Dominican Republic, Uruguay and Venezuela. The National Film Institutions of each country are members. Each state allocates a proportional amount to the Ibermedia budget. In addition, the Spanish Ministry of Foreign Affairs (Cooperation and Development) also contributes to the fund, in particular, by providing the administrative personnel, offices, etc. based in Madrid, for running the fund. Such schemes mean that dependence on international sources is mitigated and it creates a positive internal effect. The overall budget of Ibermedia is in the area of 3-4 million €, which may be considered modest, but it is a successful model of empowerment. The member states also assist each other mutually in developing their film sector, for example, by sharing experience and knowledge in policy making and creating national film laws.

processes.[114] New financing mechanisms for culture might consider contributing to regionally functioning funding mechanisms similar to the Ibermedia model. For example, the input from an international fund (e.g., EU or the Convention Fund) could play a role similar to the Spanish government's input in the case of Ibermedia. Additionally, each country from the determined region would allocate proportional amounts for the fund's budget. The Eurimages model, which is run as a partial agreement of the Council of Europe, is also a model to be considered.

3.6.6. Conclusions

ACP film funding is a longstanding pillar of cultural cooperation in the EU-ACP development context. Using the example of ACP cooperation in the film and audiovisual sector, the signing of the Convention does not appear to provide impetus or contribute to improvements in this cooperation. Nevertheless, the activities of EU-ACP support to filmmaking, and the cultural sector in general, are directly in line with the aims of the Convention. However, thus far there does not appear to be specific dialogue linking these similar aims. This should be a EU objective in the process of implementing the Convention. ACP film funding is a valuable international funding mechanism. Through an assessment of its strengths and weaknesses, it provides lessons that should be accounted for when constituting other international cultural funding mechanisms.

[114] In most existing cases of funding in a North-South direction, financing is allocated through a selective basis. One should also consider the possibility of establishing automatic funding schemes which work in parallel with selective schemes.

SWOT Analysis

Strengths	**Weaknesses**
- ACP film funding has been the cornerstone of EU cultural policy within its development mandate. The existence of the programme predates the signing of the Convention and is evidence of a long standing commitment by the EU to integrate culture into its development policies. - The fund is a crucial support system for the film making sector in ACP countries - Investing in the development of the film and audiovisual sector in developing countries is a clear EU priority, given both the cultural benefits and economic potential of the sector.	- The ACP film fund lacks financial resources - The administration is overwhelming and the application process is not sufficiently adapted to the realities of film sector -The decision-making procedure is insufficiently adapted to the sector - The irregularity of the calls disrupts the professionalisation process and diminishes the potential local impact. - The fund lacks visibility in the European film industry
Opportunities	**Threats**
- Improve the ACP Film fund – benefit from experience - Use an improved model of the ACP film fund to adapt other international cultural funding mechanisms - Consider additional and complementary cultural funding mechanisms (i.e., regional funds which have cultural and economic objectives; more automatic funding mechanisms; matching funds; different budget structures) - Encourage Ibermedia and Eurimages type models in other regions - Use the impetus of the Convention to increase the visibility of the ACP film and audiovisual sector in Europe and globally - Use the Convention as a tool to accompany programmes which exist, such as the ACP film fund	- Funding should focus on quality projects and not impose a thematic "development dimension" (i.e., gender equality, literacy, modernity/tradition conflicts, environment, etc.). Supporting cultural projects in developing countries is, in itself, supporting development. - One size fits all model of funding is not applicable within or across the cultural sectors - Unrealistic expectations – public funding mechanisms are not miracle machines. They function best when they are coherent with the larger context

4. THE UNESCO CONVENTION IN THE EU'S INTERNAL POLICIES

4.1. Issues of selective state aid

4.1.1. Obstacles to the free movement of cultural goods and services in the internal market

The European Commission's Green Paper on Cultural and Creative Industries recalls that a diverse range of entrepreneurs, and the free movement of their services, is a pre-requisite for a culturally diverse offer to consumers. This is possible only if fair access to the market is guaranteed. Creating and maintaining a level playing field that ensures the absence of unjustified barriers to entry will require combined efforts in different policy fields, especially competition policy. The European Commission acknowledges that, even in sectors where major international companies play a leading role, small and micro-enterprises play a crucial role in creativity and innovation: "They are typically the risk takers and early adopters and play decisive roles when it comes to scouting for new talents, developing new trends and designing new aesthetics." The Commission asks in this context how to create more spaces and better support for experimentation, innovation and entrepreneurship in the cultural and creative industries. Furthermore, which tools should be foreseen or reinforced at EU level to promote cooperation, exchanges and trade between the EU cultural and creative industries and third countries?[115]

"*On agit sur la réalité en agissant sur sa représentation.*" - "*You act on reality by acting on its representation.*"[116] In all EU Member States, and in most countries of the world, a high concentration of marketing power conditions the audience to demand mainstream forms and contents that are for the most part culturally homogeneous. The average public has little choice but to consume the sights and sounds, smiles and cries, writings and music, stories and underlying ideology that market dominating players ably impose on them via heavy advertisement. In the film sector, for example, exhibitors around the world will rent films from distributors that are likely to fill their theatres. Considering the unpredictability of success when making their programmes, exhibitors will rely on available data of marketing investments performed by the distributors. Ultimately, the audience will see the films that these exhibitors are willing to show in their theatres; thus, audiences miss the opportunity to see other films. The same supply driven business pattern applies to the cascade of commercial exploitation of audiovisual content, ranging from television to DVD releases. The more marketing power content providers possess, the higher their market

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115 European Commission, Green Paper, Unlocking the potential of cultural and creative industries, COM(2010) 183, points 2, 3 and 4.3.

116 Michel Foucault, Les mots et les choses, Une archéologie des sciences humaines, Paris 1966, p. 93. The European Commission articulated in a communication of 1999 the values underlying the objectives aimed at protecting and promoting cultural diversity in the audiovisual sector as follows: "The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. This is not simply because they influence to a large degree which facts about and which images of the world we encounter, but also because they provide concepts and categories – political, social, ethnic, geographical, psychological and so on – which we use to render these facts and images intelligible. They therefore help to determine not only what we see of the world but also how we see it. The audiovisual industry is therefore not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry par excellence. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities. This is true above all with regard to children." In: Principles and guidelines for the Community's audiovisual policy in the digital age, COM(1999) 657 final.

penetration. The same logic arguably applies to books, music and other cultural goods and services.

The Hollywood oligopoly's marketing power and the EU Member States' control via selective aid produce a combined effect that largely "duopolizes" Europe's various cultural sectors. The rights of artists and of the audiences who refuse these powers must be safeguarded. Responsible policy makers should attempt to assess which gifted artists are silenced under the current "duopoly" and take appropriate action. They should elaborate new rules for a level playing field for creators of cultural expressions who are currently excluded from the prevailing system. We consider the States' selective aid mechanism, its "expertocracy," and its inflating business of intermediaries as a threat to this freedom in Europe. We perceive a remedy to this risk in the intellectual property system combined with competition law and cultural non-discrimination principles, as outlined in Part Two.

4.1.2. Market share as cultural diversity indicators: comparing France and South Korea

Market shares can serve as an indicator of the strength of domestic culture and the diversity of cultural expressions. If we take the film industry as an example, we find four main types of market shares:

1) Market shares resulting from an absence of state intervention, because the local film industry dominates the domestic market (e.g., United States or India);
2) Market shares resulting from an absence of state intervention, because a foreign film industry dominates the domestic market and the state cannot afford consequential cultural policies (most developing and least developed countries);
3) Market shares resulting from a state intervention mainly based on quotas (e.g., South Korea);
4) Market shares resulting from a state intervention mainly based on subsidies and supported by quotas (e.g., the European Union).

Market shares commonly reflect the audience's demand. However, the film industry is heavily supply driven and the demand mainly conditioned by advertisement, since films are typically "prototype" goods and services. The same applies to the music and book sectors. We observe that there are no statistical data on marketing investments in the various territories that would explicate the linkage between market shares and the cultural origins of the films. We submit that policy makers should implement statistical devices to provide such information to the benefit of consumers.

In all EU Member States, most independent artists as well as small and medium-sized entrepreneurs providing cultural goods and services are caught between a rock and a hard place – *entre le marteau et l'enclume* - between the private power of strong oligopolies and the public power resulting from state aid.

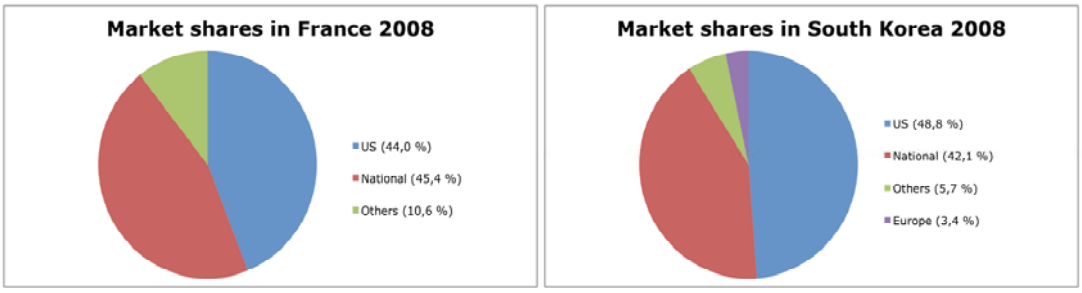
On the national level, France is at the top of public aid via an efficient, sector specific tax system (so-called "taxe parafiscale"). France levies a percentage of the revenues generated by the whole audiovisual sector, and distributes it mostly to local film producers. A small part of this aid is granted to film projects from transitional economies and developing countries via the Fonds Sud development programme. Other parts are spent on foreign films made according to international co-production agreements with France. In recent years, France increasingly replaced centralised automatic funding modalities with decentralised selective aid.

In 2008, the French taxes levied from 44 percent of the market share obtained by Hollywood films in the Hexagon were redistributed among French producers, in order to preserve local film production. In turn, this production achieved approximately 45.4 percent of the share in their own national market. During that year films from third countries, mainly European ones, obtained 10.6 percent of the market share.

If the state protects local cultural expressions by quantitative restrictions to trade (i.e., quotas or equivalent measures), it reduces the supply of cultural goods and services from foreign origins, and as a consequence the overall diversity of cultural offerings.

In comparison to France, the screening time quotas in South Korea for theatrical release in 2008 led to a market share of 42.1 percent for local content (45.2 percent in 2002); 48.8 percent for content from the oligopoly of the Hollywood majors (48.9 percent in 2002); and, 9.1 percent for content from third cultural origins (0.8 percent in 2002), including 3.4 percent from Europe.

We note that the market share structure in France and South Korea are almost identical: most of the shares are divided between local films and films from the Hollywood oligopoly, whereas only a relatively small percentage goes to films from third cultural origins. We label this situation as "cultural quasi duality".[117]



Source: Focus 2009

4.1.3. Independent creators of cultural goods and services are between a rock and a hard place

The European Commission defends the principle of reciprocity as a contribution to cooperation, balanced exchanges, better circulation of audiovisual works, and access to markets that are difficult to penetrate.[118] This opinion was challenged by certain European stakeholders in the context of co-production arrangements for the film sector contained in Protocols on Cultural Cooperation, which we discussed in Part Three above. The interest groups argued that the positive features of co-production arrangements would primarily benefit the other party. Accordingly, they advocated limitations to cooperation and exchange. Among other arguments, these stakeholders contended in the specific case of South Korea that the market was already "saturated" with national and Hollywood films. They argued that in reality co-production provisions would not result in cooperation and exchange, but rather one-way traffic from South Korea to the EU.[119]

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117 A recent bilateral free trade agreement between the United States and South Korea explains the change in the structure of market shares between 2002 and 2008.

118 European Commission, Op. Cit., 2009b, p. 2.

119 Interview with Cécile Despringre, Executive Director of SAA (Society of Audiovisual Authors).

We question these stakeholders' claim in terms of its consistency with article 7 of the UNESCO Convention. Rather than "one-way-traffic," we submit that almost "no traffic" characterises the prevailing situation in most cases. Moreover, it is technically not an issue of "market saturation," but of a "market barrier" that arguably results from cultural discrimination. We critically assess that films from third countries are caught between a rock and a hard place in France and South Korea in a strikingly similar way - that is, between the Hollywood majors' marketing hammer, on one side, and South Korean quota regulation and the French state aid regulation, on the other. The situation of third countries in this context is emblematic of a core issue affecting the market of most cultural industries today. This status quo is also detrimental to the free circulation of European films within the European Union. In the EU and Member States, these types of duopolies hinder the public from accessing films from local authors who are on unfriendly terms with the national selective aid regimes. They also hinder access to films from authors of other Member States, and the rest of the world, who are not supported by the Hollywood oligopoly.

Policy makers could easily amend quota regulation, as applied in South Korea, in a manner that would provide a better market access to works from third cultural origins. In contrast, state intervention based on selective aid schemes constitutes a substantially more complex problem that mere amendments of applicable rules can hardly solve. Therefore, we submit that selective aid granting procedures should be reduced to a minimum. Existing and novel forms of automatic aid should replace this patronising form of state aid. At the same time, States must reinforce the artists' and public's protection against abuses of private power dominating the market of cultural industries. This can be achieved by means of intellectual property and competition law, as well as new cultural non-discrimination principles as discussed in Part Two above.

The states' contribution should focus on creating an environment that enables the public to access cultural expressions from a great variety of cultural origins, as required by article 7 of the UNESCO Convention. Artists should decide what to create and communicate, rather than state appointed experts. The public should ultimately decide what it wants to see, read, hear, feel and think, and not upper management of entertainment giants.

"Marketing Tax" for fairer market access

As argued in Part Two above, copyright and related intellectual property rights protect, on average, 40 percent of creative activities and 60 percent of marketing. Disproportionately high standards of intellectual property protection are incentives to disburse excessive expenditures in advertisement for cultural goods and services. They are the primary means for market domination and, therefore, detrimental to the creation, production and dissemination of films, books and music that do not enjoy comparable investments in attracting the public's attention. In this regard, excessive copyright, trademark and trade name protection generally contribute to marginalising and excluding films, books and music that are culturally different from the economically dominant ones. Accordingly, policy makers must structure and compose the complex legal dynamics between intellectual property and competition in novel modes to implement access pursuant to article 7 of the UNESCO Convention.

For Europe, we suggest that Member States introduce a progressive marketing tax on "blockbusters", "hits" and "bestsellers".[120] Such a measure, pursuant to article 6, would complement a new balance in intellectual property protection and help level the playing field between providers of cultural goods and services from diversified origins. The members of the Hollywood oligopoly presumably invest over Euro 10 billion per year in advertisement. The proceeds from such a tax could initially amount to 2 billion Euro per year. This tax revenue could be redistributed to advertisement efforts for cultural expressions of providers who are independent of market dominating corporations in the EU. This revenue could also serve to feed the International Fund for Cultural Diversity that was established by the UNESCO Convention.

4.1.4. Shortcomings of selective state aid procedures

There are two primary mechanisms of awarding state aid in the form of direct payments for cultural goods and services: "Automatic" and "selective" procedures. Procedures are "selective" if they are based on the opinion of experts with mandates from public funding schemes to evaluate, in their personal capacity, artistic projects or completed works. Selective aid procedures refer to criteria such as quality, originality and cultural value. These criteria are essentially subjective, and thus allow for broad discretion in their interpretation. In contrast, state aid granting procedures are "automatic" if they are based on conditions established by the applicable rules that do not include experts' discretion.[121]

In 2008, a study was conducted for the European Commission on the economic and cultural impact of territorialisation clauses of state aid schemes for films and audiovisual productions. This study tackled the complex and controversial issue of local spending obligations attached to state aid. This 2008 survey demonstrated that most of the subsidies in the EU are distributed to beneficiaries on the basis of so-called "selective state aid" schemes.[122]

When subsidies are selectively granted on the basis of state-appointed expert opinions, the creators' freedom of expression and the public's freedom of opinion are at risk, especially in the absence of effective legal safeguards. In practice, selective state aid provides a quasi-unrestricted discretionary power to governments. It relies on procedural rules that are insufficiently subjected to the principles of transparency, accountability and predictability. Decisions founded on such experts' opinions normally cannot be challenged in courts. The experts' decisions and funding recommendations are hardly suitable for judicial review, except on purely formal grounds: *De gustibus non est disputandum.*[123] Criteria of quality, originality and cultural value are intrinsically unsuitable for substantive judicial review. Courts cannot question the taste of the governments' experts. Thus, these selective aid-granting decisions constitute a legal "no man's land". This situation enables States to preserve a powerful, hidden decision-making power that allows them to reject projects for "implicit" or "tacit" reasons under the guise of stated reasons, thus providing a broad margin of assessment.

If States abuse their power, either in authoritarian regimes or even in liberal States, they can censor content as well as tolerate and facilitate forms of clientelism and corruption. When experts are incompetent or dependent, this means of distributing subsidies can

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120 For an overview on the existing tax treatment in the audiovisual sector, see Hasan Bermek, The Impact of EC Law on the Taxation of the European Audiovisual Industry, IRIS plus, Legal Observations of the European Audiovisual Observatory, Issue 2007-12.

121 E.g., when a funding scheme grants a flat amount for each cinema ticket sold to the producer of a film that is eligible for such state aid.

122 See study and legal database on funding schemes in 25 Member States at: www.germann-avocats.com/documentation/index.htm

123 "In matters of taste there is no dispute" or "there's no arguing taste" or "there's no accounting for taste"

destroy the creativity, originality and autonomy of artists. Furthermore, even when experts are competent and independent, this system does not stimulate the competitive and innovative spirit of cultural entrepreneurs; rather, it induces conformism vis-à-vis the experts' personal tastes. The experts' diktat can be detrimental to the quality of the cultural industries affected by such practices when their choices exclude talent from the market. Without appropriate legal safeguards, selective aid can harm the applicants' creative and competitive animus by driving innovative talent and entrepreneurship out of the market. As a consequence, the "expertocracy" currently prevailing in the European cultural sector can oblige the audience to consume mediocre, uniform or censored cultural goods and services. From this perspective, selective aid can have a negative impact on the diversity of cultural expressions. Therefore, policy makers should therefore protect cultural industries, not only from market economies that suffer from oligopolistic private power, but also from the power of States to correct market failures that damage cultural diversity.

4.1.5. Separation between culture and state to empower artists and the public

The financial involvement of EU Member States in cultural industries should comply with the principle of an effective separation of state and culture. This principle is analogous to the separation of church and state, as inspired by the rationale underlying the French principle of secularism ("principe de laïcité"). A mere formal separation between state and culture will not be sufficient.[124] Only genuine separation between state and culture on formal and informal levels can promote freedom of opinion and expression in conformity with article 2.1 of the UNESCO Convention. In a manner that should be justiciable, such a separation of power would protect artists from States' and their experts' potential covert control. In this regard it protects the artists as the core contributors of contemporary cultural expressions.[125] Consequently, it also protects the public in its freedom of choice.

On one hand, we adopt a critical approach in this Study towards the intellectual property system. We recommend this approach in markets dominated by private oligopolies, in order to meet the objectives of the UNESCO Convention. On the other hand, we acknowledge that intellectual property rights can grant cultural actors a crucial independence from States, their bureaucracies and experts. This is equally applicable to liberal and authoritarian regimes, as well as wealthy and developing economies. In this Study, we do not advocate for the complete abolition of intellectual property protection as a means for local providers of cultural goods and services to escape from the prevailing duopoly.[126] Instead of this radical solution, we recommend that stakeholders should work towards achieving a new equilibrium based on better interaction between competition law and intellectual property rights, combined with human rights protections, such as the freedom of expression. Additionally, cultural non-discrimination principles would provide necessary guidance to implement the Parties' obligations to grant access to cultural expressions from diversified origins, as outlined in article 7 of the UNESCO Convention.

The ultimate goal of this undertaking is to propose new solutions for a framework that provides a level playing field for all suppliers of cultural goods and services. Such a level playing field is the basis of freedom of choice for consumers of cultural goods and services.

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[124] By analogy, see the Irish Commission to Inquire on Child Abuse on the importance of a strict separation between the church and the state at: www.childabusecommission.ie/

[125] See Christophe Germann, The "Rougemarine Dilemma": how much Trust does a State Deserve when it Subsidises Cultural Goods and Services?, European University Institute, EUI MWP 2008/22: http://cadmus.eui.eu/dspace/handle/1814/9027

Since these goods and services have a cultural specificity that distinguishes them from all other goods and services, freedom of choice is crucial for the well functioning of democracies founded on freedom of opinion and expression.[127] Pursuant to the latter provision, everyone has the right to freedom of expression. This right includes freedom to hold opinions, and to receive and impart information and ideas, without interference from public authorities.

One must be aware that the beneficiaries of the status quo are very powerful. They include Hollywood entertainment majors that control the film, music and book markets and their local clientele, as well as established recipients of selective state aid. Those excluded from support under the status quo encompass European artists who reject the states' "expertocracy" and artists from the Global South. The status quo also affects Member States with respect to the freedom of movement and market access of its cultural goods and services in other Member States. This latter category of actors represents a major constituency, which the European Parliament should account for in order to promote genuine diversity of cultural expressions.

For this purpose, the challenge for the European Union is to ensure that the intellectual property system is implemented in a manner that fulfils the rationale of this system. That is, the intellectual property system should serve as a source of revenue for artists to preserve their independence vis-à-vis illegitimate state control. At the same time, the European Union should ensure that copyright, trademarks and related intellectual property rights do not serve as a tool for big corporations to cannibalise small and medium-sized cultural entrepreneurs.

4.1.6. Enforcing the access to diversified cultural goods and services as freedom of expression

The dispute settlement system of the UNESCO Convention is legally very weak and only accessible to Sates Parties of this instrument. At first sight it does not appear that members of civil society have access to a judicial remedy. However, it is worthwhile to further explore ways to overcome this substantial shortcoming of the UNESCO Convention. This is especially relevant for jurisdictions that are parties to the European Convention on Human Rights (ECHR), or that have national constitutions allowing for so-called "horizontal application" or "Drittwirkung" of human rights and fundamental freedoms.[128]

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[126] Some scholars take this position. See, e.g., Joost Smiers and and Marieke van Schijndel, Imagine there is no copyright and no cultural conglomerates too... Better for artists, diversity and the economy, Institute of Network Cultures, Amsterdam 2009: www.networkcultures.org/_uploads/tod/TOD4_nocopyright.pdf

[127] As protected by article 10 of the European Convention on Human Rights and article 11 of the Charter of Fundamental Rights of the EU.

[128] Basic texts and case law on the ECHR at: www.echr.coe.int/echr/ Outside of Europe, Section 8 of the Bill of Rights of South Africa is an example that sets forth horizontal application, see: www.constitutionalcourt.org.za/text/rights/bill.html and Van der Walt, J, Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism, Law, Social Justice & Global Development Journal (LGD) 2003, at: www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/walt/ This author argues that the "horizontal application" under South African constitutional law has a specific meaning: "We invoke the term 'horizontal application' whenever fundamental rights find application in disputes between private legal subjects, that is, when fundamental rights are said to bind private individuals and not only the state as the classical theory concerning the application of fundamental rights suggests. This is the standard understanding of horizontal application, an understanding that is certainly not insignificant for my argument. The conflation of economic and political power often takes place today because of the impact of huge business concerns on national politics. In other words, neo-feudal or neo-colonialist power is most often wielded today by private legal subjects. However, the understanding of horizontal application in terms of the application of fundamental rights on private legal subjects is not always accurate. The South African legal system may in fact well be the only legal system in which horizontal application can be understood in this way, given the specific articulation of the application clause in section 8(2) of the Constitution of South Africa of 1996. It can

Representatives of civil society could provoke case law in these jurisdictions addressing the obligation to grant access to cultural expressions from diversified origins. For this purpose, they could argue that the provisions on freedom of expression, such as article 10 of the ECHR or the equivalent in national constitutions, require the state to enforce access under article 7 of the UNESCO Convention. In such trials, they could challenge excessive levels of intellectual property protection and selective state aid that manage to escape sound judicial scrutiny. They could argue that copyright and trademark protection for marketing investments drive "diverse cultural expressions from within their territory as well as from other countries of the world" out of the public's reach in violation of article 7.1 (b) of the UNESCO Convention. They could further argue that in the absence of substantive review by courts, one cannot exclude the risk that cultural policies based on selective state aid may serve as a tool for covert censorship practiced by experts with government mandates. Indeed, such a risk is incompatible with an "environment which encourages individuals and social groups (…) to create, produce, disseminate, distribute and have access to their own cultural expressions", pursuant to article 7.1 (a) of the UNESCO Convention. In the first situation, private parties that dominate the market violate the freedom of expression. In the second situation, the state potentially violates this same freedom.

"An Inconvenient Truth"

"An Inconvenient Truth", a film by Davis Guggenheim, illustrates this point. This film covers former US Vice President Al Gore's efforts to halt the progress of global warming. In 2007, this film won an Oscar for the best documentary. Let us imagine a scenario where the producer, director and main performer are not Americans, but Chinese. They would apply for selective state aid in Beijing based on a written outline of their project. The authorities' experts would issue a negative opinion: the "screenplay" proposes a treatment of the topic that is not sufficiently visual since it essentially relies on a power point show. Based on these experts' opinion, the authorities would refuse state aid to the production of this work by stating that it lacks artistic value. The production company could not challenge this decision in court, essentially because "de gustibus non est disputandum."

In this example, we could never know whether the selective state aid funding scheme's statement of reasons referring to a lack of artistic quality actually hide politically motivated censorship. We submit that the same scenario could apply in any liberal democracy, including all EU Member States. If a film-maker applies for state aid in Switzerland in order to fund a project that is critical of the bank secrecy law, in the same vein as "An Inconvenient Truth", one cannot reasonably exclude a similar outcome. In fact, selective state aid requires the applicants to blindly trust the state's power of decision. It therefore grants quasi-unrestricted power to States, both in authoritarian regimes and liberal democracies, to circumvent the rules protecting freedom of expression. Hence, we advocate applying the "precautionary principle" inspired from environmental and public health whenever selective state aid is granted: one cannot exclude censorship under the cover of taste.

nevertheless be argued that the South African judiciary has yet to come to terms with the articulation of horizontal application in section 8(2)."

At the same time, States that do not insure protection against prohibitive levels of advertisement protections induced by copyright, trade mark and related forms of intellectual property law will tolerate and even promote "market censorship".[129] We doubt that "An Inconvenient Truth", if it was made outside of America today, would have enjoyed the same marketing facility to access such a broad audience. Market domination induced by excessive intellectual property protection fails to deliver a competitive level-playing field between cultural expressions of comparable potential audience appeal. This situation requires appropriate state action in jurisdictions that consider cultural activities, goods and services to be exclusively economic matters.

4.1.7. Interplay between the EU's external relations and internal policies

State aid for the creation and communication of cultural goods and services fails to work for economically weak countries that lack the resources to publicly assist their cultural sector, and for authoritarian regimes that oppress freedom of expression in their territory. Does this fact challenge the practice of rich and democratic jurisdictions, in particular the EU and her Member States, to grant such aid? The European public shall enjoy sustainable diversity of cultural expressions through access to films, music and books, pursuant to articles 5 through 7 of the UNESCO Convention. However, without a radical change in the Global North's current mainstream cultural policies, the development cooperation and the international fund (articles 14 through 18) will remain a weak and potentially wasteful palliative.[130]

We submit that the combination of potential covert "state censorship" and overt "market censorship" infringes article 7 of the UNESCO Convention, as well as article 10 of the European Convention on Human Rights and like provisions in national constitutions. Based on the doctrine of "horizontal application", a state genuinely respectful of the diversity of cultural expressions must guarantee a third way in its jurisdiction. Therefore, a new legal framework is needed that guarantees a clear separation between state power and trade related culture, on one hand, and corporate power and trade related culture, on the other. This will require a new balance in the areas of intellectual property and competition law, which must be specifically designed for cultural activities, goods and services. The cultural non-discrimination principles of "Cultural Treatment" and "Most Favoured Culture" discussed above in Part Two can provide a solid foundation for this desirable equilibrium.

Both selective state aid and intellectual property provide immense power to States and corporations. In the worst-case scenario, the abuse of this power facilitates censorship, propaganda, consumerism and cultural uniformity. Hence, this power must be constrained by strict democratic control. Private and public stakeholders should mobilise and elaborate new checks and balances that ensure a separation between state and culture as well as independence of culture from corporate power.

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[129] There is little systematic research on the relationship between freedom of expression and intellectual property protection. Compare from the perspective of intellectual property interest groups the legal database by the International Association for the Protection of Intellectual Property on "Conflicts between trademark protection and freedom of expression" 2005 at: www.aippi.org/?sel=questions&sub=listingcommittees&viewQ=188#188 In the context of cultural goods and services, trademark protection plays an important role for marketing; for example the star system fulfils a similar function as trademarks to sell films, music and books from the economic perspective.

[130] Senegal qualifies as a "least developed country" according to the United Nations classification at www.unohrlls.org/en/ldc/related/62/ For violations of freedom of expression in Tunisia, see for instance Tunisia: Internet Censorship - A Rearguard Battle in: Observatory of Freedom of Press, Publishing and Creation (OLPEC), 2009, at: www.olpec-marsed.org/fr/media/files/Rapport_OLPEC_censure_Internet_09En.pdf and www.olpec-marsed.org/fr/Content-pid-5.html The NGO OLPEC is member of the the International Freedom of Expression Exchange (www.ifex.org). Freedom of expression is essential to denounce the violation of core human rights such as the prohibition of torture as the recent US history demonstrates.

We identify a need in the European Union to elaborate new legal safeguards against the prevailing intellectual property rights and selective state aid regulation, when they hinder access to cultural expressions as protected and promoted by article 7. Without desirable checks and balances, the EU and the Member States' sovereign right to formulate and implement cultural policies to achieve the purposes of the UNESCO Convention will remain inconsistent with the principles of equitable access, openness and balance (article 2.7 and 2.8), as well as "universally recognised human rights instruments" (article 5.1).[131]

The EU and her Member States must adopt a model character and, fully adhere to the fundamental principle of the UNESCO Convention articulated in article 2.1: "Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed."

4.2. Institutional design for the implementation of the UNESCO Convention

4.2.1. Taking stock of existing facilities

The implementation of the UNESCO Convention requires organisational measures. There are various institutions in the European Union dealing with matters that are relevant for this task. As a first step, the EU and the Member States should coordinate stocktaking of existing competences and facilities and evaluate potential synergies. The European Institute on Gender Equality could serve as a model for a new agency to coordinate the implementation of the UNESCO Convention. The potential of institutional synergies should be assessed at the European Training Foundation (ETF) and the Fundamental Rights Agency (FRA). These two agencies, whose functioning we outline below, are primarily involved in tasks relevant for the EU's external relations. However, since the EU and her Member States can benefit from the experience of foreign regions and countries for the implementation of the Convention, these agencies could contribute to enhancing a true dialogue among stakeholders within and outside Europe.

Another source of inspiration for institutional design is the Intergovernmental Panel on Climate Change (IPCC). This panel can serve as a reference for the elaboration of a facility to produce and exchange knowledge on measures and policies aimed at protecting and promoting the diversity of cultural expressions. The IPCC assesses the state of knowledge on the various aspects of climate change, including scientific, environmental, and socioeconomic impacts and response strategies. The IPCC does not undertake independent research, but compiles all key research published in the world and produces a consensus. The IPC provides governments with scientific, technical, and socioeconomic information relevant to evaluating risks, and developing a response to global climate change. It regularly publishes reports drafted and reviewed by experts from different countries. Governments, international organisations, and non-governmental organisations nominate these experts. The IPCC is recognised as an authoritative scientific and technical voice on climate change, and its assessments have had a profound influence on the negotiators of the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.[132]

[131] More extensive human rights obligations under European law also apply in this context.
[132] Mark Maslin, Global Warrming, A Very Short Introduction, Oxford 2009, p. 23 – 40.

A similar body could set up working groups with specific tasks, such as further research on the following topics:

- Indicators to measure the diversity of cultural expressions;
- Impact of the diversity of cultural goods and services on cultural expressions that are not trade related;
- Determination of cultural expressions that are not compliant with human rights;
- Role of intellectual property and competition rules to implement a better access to diversified cultural expressions pursuant to art. 7;
- Contribution of the UNESCO Convention to protect and promote linguistic diversity (see box below).

The experts' reports could serve as support for the elaboration of operational guidelines that would adapt and further develop the UNESCO Operational Guidelines at the European level. The European Parliament's Committee on Culture and Education could establish a structured dialogue on such regional guidelines with its counterparts in the MS national and municipal parliaments, in line with the principle of subsidiarity. The considerable shortcoming of the UNESCO Operational Guidelines that the Parties adopted thus far is that they essentially paraphrase the respective provisions of the UNESCO Convention. Regional operational guidelines elaborated and concluded at the EU level could provide a clearer, more concrete and binding interpretation of the rights and obligations at stake. Eventually, they could serve as a basis for the elaboration of regional guidelines in other parts of the world and reinforce the current UNESCO operational guidelines.

Pursuant to a more ambitious vision, each Member State's government could appoint a national from another Member State as a "Visiting Cultural Diversity Minister". This new position would contribute to reinforcing exchanges between MS' on cultural diversity policies, thereby making these policies more open and dynamic. These ministers would essentially contribute to the implementation of the UNESCO Convention and of article 167 on the MS level. They could meet on a regular basis in an EU visiting cultural diversity ministers' conference and inform the civil society, their national executive and legislative branches, the European Parliament, and the Commission on the progress of actions aimed at protecting and promoting the diversity of cultural expressions in Europe. MS could also envisage the position of a cultural diversity ombudsman and a cultural diversity advocate as an institutional complement to desirable non-state tribunals run by civil society representatives (see Part Two above).

4.2.2. Development of existing EU agencies

Aside from the Parliament and the Council, the Commission carries out an important political role as demonstrated by the 2007 Communication.[133] The mission of the Directorate General in the Commission (DG EAC) is to reinforce and promote lifelong learning, linguistic and cultural diversity, mobility, and the engagement of European citizens. An inter-services group (GIS) on culture, which gathers all Directorate General within the Commission for which culture has a direct or indirect relevance, has been set up and meets regularly since 2007.[134]

[133] Education and culture are dealt with by the same Directorate General in the Commission (DG EAC).
[134] It succeeded to the inter-services group on cultural diversity set up internally for the preparation, conduct and conclusion of the negotiations on the UNESCO Convention.

In its Communication "European agencies – the way forward" of March 2008, the Commission called upon the Parliament and the Council to provide fresh momentum to the development of a clear and coherent vision of EU agencies' role in European governance. Current discussions on the inter-institutional dialogue regarding the future governance of the EU Agencies should involve an evaluation of existing Agencies, and reflections on their possible role in implementing the UNESCO Convention.[135] For example, relevant EU Agencies should be involved in planning future implementation of the UNESCO Convention, or the implementation of existing legislative acts in order to achieve the goals of the Convention. The European Parliament should make more use of the specialized agencies in view of mainstreaming the principles of the Convention, which would render more effective implementation of the Convention. Indeed, calls for new institutional bodies for further implementation do not exclude the involvement of existing agencies. Agencies with relevant technical or scientific expertise could assist the Commission and the Member States as they implement the Convention.[136] For the purpose of this Study, we suggest to involve first and foremost two agencies: the ETF and the FRA.

4.2.3. The role of the ETF in the implementation of the UNESCO Convention

The European Training Foundation (ETF)[137] is one of the EU agencies involved in the field of external relations, and may prove particularly relevant for the implementation of the UNESCO Convention in EU external relations. [138] Accordingly, it provides useful guidance for the role of EU institutions in the implementation of the UNESCO Convention in EU internal policies.

The ETF agency was established by Council Regulation No. 1360 in 1990, recast as No. 1339 in 2008. In the context of the EU's external relations policy, the ETF helps developing countries harness the potential of their human capital through the reform of education, training and labour market systems.[139] Thus, the ETF can contribute to:

- Enhancing public sector strategic and management capacities in cultural public sector institutions through professional sharing of best practices (implementation of article 12(b) of the UNESCO Convention).
- Implementing article 12(c) of the UNESCO Convention. Particularly, the ETF could carry out projects and activities, in EU partner countries, that encourage non-profit organisations and public and private institutions to foster the promotion of cultural diversity. In addition, the ETF can help developing countries to promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services; and, to stimulate both the creative and entrepreneurial spirit in their activities.

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135 http://www.efsa.europa.eu/en/euagencies/doc/euabrochure.pdf.

136 However, it must be considered that the system of European agencies contains a number of problematic aspects that have been discussed by scholars. These issues concern the legitimacy and accountability (political, judicial, financial, administrative and public accountability) of the agency's actions, and the significant diversity between the different agencies in how they relate to decentralisation, subsidiarity and proportionality.

137 See http://www.etf.europa.eu/web.nsf?Open.

138 By sharing expertise in vocational education and training across regions and cultures, the ETF could furnish advice and project cycle support to various Directorates General of the Commission (namely DG Education and Culture, DG External Relations, Enlargement, Employment, Enterprise and the Europe Aid Cooperation Office) in order to promote the implementation of the UNESCO Convention.

139 The ETF is devoted to assisting third countries in the field of human capital development. In particular, it has the following functions: (a) to provide information, policy analyses and advice on human capital development issues in the partner countries; (b) to promote knowledge and analysis of skills needs in national and local labour markets. The ETF's activities are structured around a series of projects that take place in the partner countries. These projects are devoted to facilitate the reform of vocational education and training and employment systems See http://www.etf.europa.eu/Web.nsf/pages/Projects_EN?OpenDocument.

The ETF could also play a relevant role in implementing article 10 of the UNESCO Convention through educational programmes in partner countries. In particular the ETF could support:[140]

- Projects targeting the promotion of cultural diversity (also within educational programmes).
- Projects aimed at nurturing and supporting artists and others involved in the creation of cultural expressions, such as vocational training for cultural operators in these countries.[141]
- Professional seminars devoted to foster the dialogue between national institutions and stakeholders and the exchange of their information and creation of networks.
- Projects on social inclusion and rights of minorities in the region[142] in order to address cultural diversity and in view of implementing article 10 of the UNESCO Convention. [143]
- Identify proper follow-up actions to set out educational programmes for promoting and understanding the importance of cultural diversity, in view of the implementation of article 10 of the UNESCO Convention.[144]

4.2.4. The role of the FRA in the implementation of the UNESCO Convention

The Fundamental Rights Agency (FRA) was established in 2007 by Council Regulation (EC) No 168/2007 of 15 February 2007 (based on Art. 308 EC).[145] The FRA aims to provide EU institutions and Member States, when implementing Community law, with assistance and expertise relating to fundamental rights (article 2 Reg. 168/07/EC). The FRA supports these entities when they adopt measures or formulate courses of action within their respective spheres of competence, in order to ensure that they fully respect fundamental rights.[146]

The scope of the FRAs action refers to a broad notion of "fundamental rights". Since the founding Regulation clearly refers to the Nice Charter, which protects cultural diversity, it is arguable that the protection of cultural diversity is fully within the scope of action of the FRA. The FRA could play a relevant role in implementing the UNESCO Convention as follows: encouraging dialogue among cultures; fostering interculturality in order to develop cultural interaction in the spirit of building bridges among peoples; and, promoting respect for the diversity of cultural expressions and raising awareness of its value. [147]

Before a new ad hoc body is established, the FRA could contribute to the implementation of article 9 and 10 of the UNESCO Convention as follows:

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140 That is, to encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions,

141 This would be highly appropriate since in many countries the lack of qualifications and vocational training for the majority of the artists, operators and cultural mediators (associations, collective organisations), entertainers, supporting personnel and technicians is registered. For example, this is the situation of ACP countries (see at http://www.culture-dev.eu/colloque/Culture-Dev.eu-theme1-en.pdf).

142 ETF presently has such a program in the Balkans. http://www.etf.europa.eu/web.nsf/pages/Project_Social_Inclusion_EN?opendocument.

143 http://www.etf.europa.eu/Web.nsf/pages/Projects_EN?OpenDocument. These projects could also be used to ensure the participation of local communities in the implementation of the Convention as envisaged by article 11 of the UNESCO Convention

144 In December 2009, a Regional Meeting "Policies and Practices for the Preparation of Teachers for Inclusive Education in Contexts of Social and Cultural Diversity: Research and Actions" was organized by ETF. The purpose of the meeting was to raise awareness and to promote mutual understanding among key stakeholders from the Western Balkans and Turkey of existing policies and practices for the preparation of teachers for inclusive education by means of discussing the findings of a recent ETF study. This event and the ETF study linked to this can offer a sample of similar events

145 http://www.fra.europa.eu/fraWebsite/home/home_en.htm. On the long path leading to the creation of an EU agency dealing with human rights, see *inter alia* E. HOWARD, *The European Agency for Fundamental Rights*, in *European Human Rights Law Review*, 4/2006, 445 ss.

146 Its powers are primarily information-based; it is not a powerful decision-making body.

147 See Art. 1 (c),(d) and (e) of the UNESCO Convention.

- Collect, analyse and disseminate objective, reliable and comparable information on the protection of cultural diversity;
- Carry out and encourage scientific research and surveys on the implementation of the Convention;
- Raise public awareness of cultural diversity;
- Promote dialogue with civil society.

Additionally, the FRA could include specific research projects on cultural diversity and intercultural dialogue whilst linking such projects to non-discrimination and minorities issues.[148] The FRA could also play a relevant role in implementing article 10[149] via public awareness programmes that promote greater understanding of the Convention.[150]

[148] It is also advisable to launch a survey focusing on cultural rights with the purpose of fostering intercultural dialogue, using EU-MIDIS as an example. In 2008 the FRA launched EU-MIDIS (European Union Minorities and Discrimination Survey), the first and largest EU-wide survey of its kind to collect comparable data on selected immigrant and minority groups' experiences of discrimination in access to goods and services, including experiences of criminal victimisation.

[149] Encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions

[150] This can be achieved by mentioning the UNESCO Convention in the Annual Work Programme. In addition, the European Parliament can request the FRA to carry out specific tasks relating to the Convention.
Initiatives such as the "S'cool Agenda 2010", "Vienna Film Festival" and "Diversity Day" can be a source of inspiration for new similar initiatives targeting cultural diversity and intercultural dialogue. http://www.diversityday.eu/.

Linguistic Diversity and the UNESCO Convention: language as a cultural expression

The UNESCO Convention clearly identifies 'language' as a primary feature of the cultural identity of an individual or a community.[151] The Convention also mentions 'linguistic diversity' in the Preamble recalling that 'linguistic diversity is a fundamental element of cultural diversity'.[152] Arguably, language can be considered as a cultural expression contemplated by the UNESCO Convention.[153] However, additional research is needed to explore how the UNESCO Convention can reinforce the protection and promotion of linguistic diversity. Current EU accession criteria regarding minority languages provides a useful example of how the UNESCO Convention could have an important role in reinforcing linguistic diversity in EU policies.[154]

The protection of minority languages and linguistic diversity is an important criterion for accession to the EU. Indeed, measures to protect minorities and their languages are considered as a 'structural' or 'political principle' for accession. One criterion for accession of Central and Eastern European states is the existence of legal framework for the protection of national or linguistic minorities. [155] As the protection of minorities was particularly important in the 2007 EU expansion, linguistic diversity will feature prominently in expansion towards the Balkans. The Council Decision of 23 January 2006 notes Turkey's progress regarding minority protection, but lists numerous improvements that are required prior to accession.[156] These requirements include the following: to guarantee cultural diversity and promote respect for and protection of minorities in accordance with the Framework Agreement; to guarantee the property rights of minorities; and, to guarantee the presence of languages other than Turkish on TV and radio, as well as the adoption of measures to support the teaching of those languages.[157] In this context, the criteria for accession with respect to minority languages and linguistic diversity seem to conform to the aims of article 7 of the UNESCO Convention. [158]

4.3. The European Parliament's contribution to the diversity of cultural expressions

Pursuant to article 167 of the TFEU (ex article 151 TEC), cultural diversity is a cross cutting concern of the European Union. The UNESCO Convention affects a wide range of policy fields such as: education and culture, language, external relations, trade and development, competition and intellectual property protection, immigration (mobility of artists), human rights, and fundamental freedoms. Our analysis covers EU external relations and the internal situation in the areas relevant for the implementation of the Convention. The implementation of the Convention at the EU level can only proceed in fields within the EU's

151 Article 6 (2)(b) states 'measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services'.'

152 Article 5 of the UNESCO Declaration of 2001 states 'all persons have … the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue.' Also, article 6 of the Declaration was dedicated to linguistic diversity in the context of education: 'Encouraging linguistic diversity – while respecting the mother tongue – at all levels of education."

153 See e.g., article (6)(2)(b) where language is identified as a component of cultural activities, goods and services.

154 Articles 7 and 8 of the UNESCO Convention refer to the rights of minorities to have their own cultural expressions.

155 The joint report known as the 'composite papers' summarizes the steps requested of all countries that join in May 2004. This report tracks these countries' progress and gives recommendations in regard to the expression of linguistic rights.

156 See the Council decision 'The principles, Priorities and conditions contained in the accession partnership with Turkey' 23 January 2006.

157 Urrutia & Lagabaster, 2008, P; 12-13

competences, as defined by TFEU. In our analysis, we consider the fields where the EU has competences to act (i.e., exclusive, shared and supporting competences) with respect to the EU's external relations and internal policies.

The UNESCO Convention forms part of the legal order of the European Union, and is binding upon the institutions of the EU and on Member States. The Lisbon Treaty widened the scope of application of the "co-decision procedure" that is now called "ordinary legislative procedure". As a consequence, the European Parliament enjoys increased capacity to influence and participate in the preparation, adoption, implementation and control of binding legislative acts and policy-making. This procedure provides a framework for a deliberative dialogue on the content of legislation between the European Parliament, the Council and the Commission. The full legislative and budgetary parity established by the Lisbon Treaty, together with the postponement of the qualified majority reform in the Council until 2014-2017, further reinforces the European Parliament's role in the EU decision-making process.

Article 167(5) of the TFEU expressly refers to the "ordinary legislative procedure" in order to contribute to the achievement of its objectives as "cultural clause", stating that "the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States".

Under the "ordinary legislative procedure" (previously "codecision") the Parliament votes by majority while the Council votes by qualified majority. This procedure is applied for the adoption of a vast majority of EU laws. Accordingly, the European Parliament can deal with many core issues in the implementation of the UNESCO Convention in compliance with the division of competences. The TFEU grants the European Parliament considerable powers vis-à-vis the Council of Ministers and the European Commission. The Commission retained its power to take legislative initiative while the Parliament and the Council exercise legislative and budgetary functions jointly (see article 14 of the TEU).

For the purpose of implementing the UNESCO Convention, coordination between the Parliament and the Council can prove very important in order to achieve the desired effectiveness of the UNESCO Convention. The Parliament can rely on cooperation and transparency by developing and implementing common programmes, requesting the Council's participation in its meetings, and requiring the exchange of relevant documents and information.

In view of the large scope of application of the UNESCO Convention, the European Parliament has a wide margin of manoeuvre when implementing this instrument in coordination with the other EU institutions that are competent in this matter.

[158] 'parties shall endeavour to create in their territory an environment which encourages individuals and groups […] to have access to their own cultural expressions, paying due attention to […] various social groups, including persons belonging to minorities and indigenous peoples'.

Open Method of Coordination and implementation of the UNESCO Convention

The "Open Method of Coordination" (OMC) provides an appropriate mechanism for cooperation between the Member States in the field of culture. It is a non-binding, intergovernmental framework for policy exchange and concerted action suitable for a field such as this, where competence remains at the Member-State level. This method consists of stipulating common objectives, regularly reporting on progress, and exchanging best practices and relevant data in order to foster mutual learning. The OMC is also utilised in other domains such as employment, social protection, education, and youth. In such contexts, the OMC has helped strengthen Member States' policy making, as regular participation in a European process raises the profile of these policies at the national level and creates an additional stimulus to adopt them. It also enables Member-States to learn from one another; and, it allows the actors in these policy fields to have a voice at the European level, which they would otherwise not have (point 4.2 of the Agenda).

According to the European Agenda for Culture, the European Commission is committed to pursuing a structured dialogue with the cultural sector. In this document, the Commission highlights the complexity of this task with respect to the following components: exchanging views and best practices; providing inputs into the policy-making process; and, follow-up and evaluation, particularly in regard to the identification of representative interlocutors. The Commission recognises the special characteristics of this sector such as its notable heterogeneity (e.g., professional organisations, cultural institutions with different degrees of independence, non-governmental organisations, European and non EU networks, foundations, etc.). However, the Commission highlights the lack of communication in the past between the cultural industries and other cultural actors, and the ensuing challenges with regard to greater structuring of the sector. The Commission acknowledges that this situation has diminished the voice of this sector at the European level. Therefore, the Commission encourages this sector to maintain its legitimacy and organise itself in a manner that permits the identification of representative interlocutors (point 4.1 of the Agenda).

The Open Method of Coordination (OMC) has considerable potential for the implementation of the Convention, as this method of policy coordination has proven its usefulness in fields where the European Union lacks hard legal competence and in which coordinated action is nevertheless warranted. Such enhanced coordination is required by mixed agreements such as the UNESCO Convention.

In the field of cultural policies, as outlined in the 2007 Agenda, the OMC is used in four experts' working groups comprised of Member States, and organised around five priority areas that correspond with the main objectives of the Agenda for Culture.[159] The reporting procedures provide that each expert working group shall submit periodic reports and policy recommendations to the EU; and, the Commission shall likewise provide substantive guidance to the working groups. This interaction between the EU and Member States via the expert working groups is important. It may help raise the profile of cultural issues at the domestic level, leading to improvements in domestic policies in areas that would normally fall outside the reach of community law or where the Member States would not welcome community direction. [160] However, there is need for improved coordination between civil society and the Cultural Forums and platforms.

Presently, there is insufficient opportunity for cultural organisations to feed the cultural OMC's. Indeed, for a coordination process to be effective with respect to participation and transparency, adequate time must be given for consultation; and, relevant information and reports need to be readily accessible to civil society groups.[161] At present, there is some interaction between the OMC experts groups and the platforms, such as: the Platforms report on their work by giving presentations in OMC expert groups on a regular basis; and, there are organised meetings between the chair of an expert group and the chair of a platform. Nevertheless, a structural interaction process is necessary and should be implemented in the future.[162]

159 1) Expert group on mobility of artists and other cultural professionals; 2) Expert group on cultural and creative industries; 3) Expert group on synergies between education and culture; 4) Expert group on mobility of collections.

160 Craufurd Smith, 2007:3

161 Craufurd Smith, 2007:4

162 Interview with Alison Crabb, Deputy Head of Unit Cultural Policy and Intercultural Dialogue, 02/03/2010

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

5.1.1. The UNESCO Convention from "flou artistique" to a road map for good governance

At the present stage, the UNESCO Convention is not sufficiently operational from a purely legal perspective. That is, at least not in a manner that is comparable to the effect the WTO agreements have had over the last fifteen years in generating a great deal of case law and peer reviewed country assessments clarifying trade rules.[163] A respondent to a WTO dispute who does not comply with a report must endure incisive trade sanctions. The deterrent effect of this mechanism is considerable, and provides a strong incentive for Members of the WTO to respect its agreements. The UNESCO Convention does not provide any comparable strength - a stark reality that impacts the current process of implementation of the UNESCO Convention.

The core issue for the further implementation of the UNESCO Convention on the diversity of cultural expressions resides in its current lack of "justiciability". WTO law imposes effective dispute settlement procedures and an arsenal of constraining trade sanctions to ensure compliance with its obligations. In contrast, the UNESCO Convention does not require any meaningful discipline from the States to protect and promote cultural diversity beyond vague "shall endeavour" obligations, which the parties can construe and implement in practice as mere discretionary rights to act. The core issue with the UNESCO instrument is the lack of "lock-in mechanisms" that would effectively commit the countries to protect and promote the diversity of cultural expressions. Article 5.1 provides that the Parties "reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention." This means that no party can realistically oblige another to exercise its rights and comply with its "shall endeavour" obligations to protect and promote cultural diversity on its territory, if such other State is not willing to do so for one reason or another. Therefore, this agreement is in practice hardly subject to enforcement.

Most of the substantive terms and concepts of the UNESCO Convention are subject to interpretation, notably the definition of "cultural diversity," in relation to the "diversity of cultural expressions," and the meaning of "cultural expressions". In the absence of jurisprudence, we expect that these terms and concepts will remain vague and unclear. Indeed, since this treaty lacks an effective dispute settlement mechanism that could generate case law interpreting the Convention, its contents remain ambiguous, legally inoperable, and therefore practically non-binding. The reporting obligations (article 9 let. A), and the operational guidelines (article 22 para. 4 let. c and 23 para. 6 let. B) may resolve some of these shortcomings. However, they will remain as ineffective palliatives so long as the reporting does not trigger stringent peer review, and the guidelines are phrased in a diplomatic style.

[163] Under the old GATT, panel reports (judgements) needed the unanimous approval by all parties, including the loosing one, in order to be enforced. Accordingly, the number of adopted reports remained small. Since 1995, such reports need the unanimity of the parties, including the approval by the winning one, in order to avoid adoption and enforcement. As a consequence of this new regime and of the considerable extension of the coverage of multilateral trade law, case law increased substantially in terms of quantity and quality.

In our Study, we outlined strategies for civil society to overcome the legal shortcomings of the UNESCO Convention. These strategies include the use of non-state tribunals to test the novel cultural non-discrimination principles of "Cultural Treatment" and "Most Favoured Culture," as well as regular state courts that are competent to hear cases on human rights, intellectual property and competition.

There are major challenges that stakeholders must face when contributing to the implementation of the Convention; particularly with respect to its scope of application, which is far from clear and leaves room for diverging interpretations.

5.1.2. The Scope of the UNESCO Convention is open, but certainly not narrow

We have not found consensus among stakeholders and commentators on the interpretation of the scope of the Convention. The UNESCO commentary of 2007 (CLT/CEI/DCE/2007/PI/32), p. 4, proposes a narrow scope: "The Convention on the Protection and Promotion of the Diversity of Cultural Expressions does not cover all the aspects of cultural diversity addressed in the UNESCO Universal Declaration on Cultural Diversity. It deals with specific thematic fields of the Declaration, such as those set out in Articles 8 to 11 (...)." Several other commentators share this opinion. We disagree with this narrow construction on the basis of an interpretation that is consistent with the Vienna Convention on the Law of Treaties. We argue that this narrow constrution derives in part from the conflation of the terms "cultural expressions" and "cultural activities, goods and services". The Convention defines these terms separately without indication that they share the same meaning (articles 4.3 and 4.4).

As a general rule of interpretation, article 31 para. 1 of the Vienna Convention provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context, and in light of its object and purpose. Only one of nine objectives listed in article 1 of the UNESCO Convention mentions "cultural activities, goods and services". Four objectives refer to "cultural expressions", while four other objectives refer to other terms for which this instruments does not provide a legal definition (i.e., "culture", "cultural exchanges" and "cultural interaction"). Pursuant to article 31 para. 2 of the Vienna Convention, for the purpose of the interpretation of a treaty the context shall comprise the text of the treaty including its preamble and annexe. As a supplementary means of interpretation, article 32 sets forth that the preparatory work of the treaty and the circumstances of its conclusion can serve to confirm the meaning derived from the interpretation, pursuant to article 31. Article 18 of the UNESCO Convention, which is of central interest to many parties, establishes an "International Fund for Cultural Diversity". The preamble of the UNESCO Convention refers eight times to "cultural expressions" and seven times to "cultural diversity," whereas it only once mentions "cultural activities, goods and services".

The interpretation of a broader scope of the Convention appears to reflect findings from the negotiation history of the Convention, and stakeholders' perception as reported in our surveys. Therefore, in this Study, we reject the interpretation of a narrow scope as advocated by the authors of the 2007 UNESCO Commentary and among certain scholars. Instead, we adopt the interpretation of a broader scope while leaving open the discussion regarding its parameters, which case law can eventually clarify.

We believe that this approach supports the European Commission's view that the implementation of the UNESCO Convention within the EU is not a strict legislative activity as such, but rather the pursuit of policy developments. The UNESCO Convention can serve

as a good governance tool to promote human rights and fundamental freedoms, particularly through intercultural dialogue. Such dialogue needs an instrument that protects and promotes the diversity of cultural expressions beyond cultural goods and services. A narrow scope of the Convention presents the risk that this treaty will be reduced to a loudspeaker for sterile cultural monologues of rich democracies.

5.1.3. Civil society as driving force for the implementation of the UNESCO Convention

In reference to a quote by Georges Clemenceau, we recall that culture is a matter too important to leave to policy makers alone. Indeed, civil society is called to play a major role in the implementation of the UNESCO Convention, in order to enable this instrument to materialise its full potential.

In this context, we must duly account for the public and private players' varying economic power and influence. Poorly funded NGOs face wealthy lobbies that are able to purchase support for their initiatives. Small and medium-sized enterprises are in competition with large multinational corporations. Indeed, there are markedly diverging interests at play in the elaboration and enforcement of laws and policies affecting culture and trade. On the international level, these interests operate in countries that represent great diversity in terms of political regimes, social traditions and economic welfare. These countries range from liberal to authoritarian states, relatively progressive to more conservative societies, and from developed to developing and least developed economies. There is also a wide variety of life-styles within these countries, particularly in the considerable differences between urban and rural ways of life. The context is therefore very complex, and the identification of the various constraints and interests at stake accordingly difficult. Indeed, the diversity of cultural expressions has complex and subtle ramifications.

In her replies to questions 8 and 17 of our survey, the Commonwealth Foundation states that "[m]any Commonwealth Member States, particularly its smaller, developing states, have limited capacity for engagement with the Convention, as reflected in low levels of ratification and implementation. International co-ordination is poor and processes in Paris often seem to be dominated by voices of larger countries. There would seem to be a need for active development of government capacity and the active promotion of voices that can speak on behalf of smaller countries." Accordingly, this regional organisation evaluates the degree of the cultural stakeholders' interest in her jurisdiction in contributing to the implementation of the UNESCO Convention, and concludes that it is thus far "not satisfactory".[164]

We understand that the objectives of the UNESCO Convention cannot be appropriately met if public actors only hear the voices of well organised, loud and powerful players among the cultural stakeholders. This is particularly relevant for the implementation of article 11 regarding the participation of civil society. Furthermore, article 7 requires "due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples." In order to fully comply with this provision, responsible policy makers must involve civil society in the process of implementing the Convention without silencing those individuals and groups who are currently marginalised or excluded from the system.

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[164] See section "Regional Organisations Survey" at www.diversitystudy.eu We observe that the Organisation Internationale de la Francophonie and certain other relevant regional organizations did not reply to our questionnaire despite an invitation to do so followed by several reminders.

We are well aware that policy makers who question the status quo will face fierce pressure both from corporate power and from well established beneficiaries of the current selective state aid regimes. Good governance, however, requires that public interest prevail over private interest in cases of conflict. Policy makers should not simply equate dominant private interests with the public interest, without critical assessment and due consideration of the situation of the weaker parties. If the policy makers only listen to the politically loudest and economically strongest actors, they will fail in materialising those features of the Convention that we consider the most valuable.

5.2. Recommendations

In summary, we recommend taking the following actions as a "maximum" programme for policy makers to implement the UNESCO Convention (certain recommendations are substantiated in the long version of this Study):

AREAS OF LAW AND POLICY ACTION	CONTRIBUTION BY THE EUROPEAN UNION	CONTRIBUTION BY THE MEMBER STATES
Promotion of dialogue among cultures (Article 1 let. c), human rights and freedom of communication (Article 2.1), and early prevention of genocide and mass atrocities (Articles 8 and 17).	Elaborating the transposition of the Convention into new conventions on the protection and promotion of the diversity of religious, political, and national expressions on experts', law and policy makers' levels. Establishing an observatory on public and private practices of censorship, and on cultural expressions that violate human rights and fundamental freedoms. Transatlantic Legislators' Dialogue between the European Union and United States. Contributing to new operational guidelines on human rights, fundamental freedoms and cultural diversity at the UNESCO and on the EU level. Including a reference to the UNESCO Convention in human rights clauses. Using the Human Rights Dialogue:	Elaborating the transposition of the Convention into new conventions on the protection and promotion of the diversity of religious, political and national expressions at the grassroots level

	1) To promote the ratification of the Convention 2) To promote the implementation of the Convention 3) To monitor the implementation of the Convention within the framework of human rights. 4) To strengthen, in particular, protection and promotion of freedom of expression, information and communication as a complementary strategy of the implementation of the Convention. 5) To support and encourage the work of relevant national and international NGOs or coalitions for cultural diversity	
Measures, rights and obligations on the domestic level (Articles 5 and 6)	Further developing the Open Method of Coordination for the cultural sector. Creating a permanent technical body for cultural diversity (on the model of the European Institute on Gender Equality or the Intergovernmental Panel on Climate Change IPCC) to support the EU institutions and Member States in the formulation, conduct, and development of cultural policies in compliance with the Convention.	Introducing the position of so-called "Visiting Cultural Diversity Ministers" on the level of MS. Each MS' government would have such a minister from another MS in its cabinet. They shall meet on a regular basis in an EU visiting cultural diversity ministers' conference and inform civil society, their national governments and parliaments, the European Parliament and the European Commission on the progress of the actions aimed at protecting and promoting the diversity of cultural expression in Europe.
Rights of access to diverse cultural expressions for all social groups and from all cultural origins, and recognition of artists' contributions, in particular intellectual property rights, competition law, tax legislation and "free culture" principles (Article 7)	No export of higher intellectual property standards of protection ("TRIPS +") without export of appropriate competition law in regional and bilateral agreements. Defining the relevant market for cultural activities, goods and services on the basis of marketing investments.	Introducing a progressive marketing tax on "blockbusters", "hits" and "bestsellers". Defining the relevant market for cultural activities, goods and services on the basis of marketing investments.

	Using the "essential facilities" doctrine in the area of cultural industries by referring to a definition of the relevant market based on marketing power. Provoking ECJ and ECHR judgements on the Convention. Provoking judgements in non-state courts on the Convention. Requiring a pooling of intellectual property assets financed by state aid to serve as collaterals for private investments.	Using the "essential facilities" doctrine in the area of cultural industries by referring to a definition of the relevant market based on marketing power. Provoking ECJ and ECHR judgements on the Convention. Provoking judgements in non-state courts on the Convention.
Information sharing, transparency, accountability and reporting (Articles 9, 19)	Structured dialogue between civil society, law and policy makers.	Monitoring of implementation of the Convention and its compliance as effective as that for trade rules (WTO peer review mechanism) and anti-bribery treaties
Education and public awareness (Article 10).	Discussing and interpreting the Convention on experts', law and policy makers' levels. Creating chairs for social science studies on human diversity and the diversity of cultural, religious, political and national expressions.	Discussing and interpreting the Convention at the grassroots level.
Involvement of civil society (Article 11).	Elaborating and implementing structured stakeholders' dialogue. Adopting a new legislative act (regulation) implementing Article 11 and inspired by the Aarhus convention. Using "virtual platforms" through specific websites to foster participation of European civil society. Protecting the interests of weak players in the cultural sector, in particular new entrants, against strong private and public actors	Creating the positions of national "Cultural diversity ombuds(wo)man" and "Cultural diversity advocate". Transposing the Arhus Convention into the cultural sector. Encouraging the establishment of non-state tribunals to hear cases on cultural discrimination in order to develop case law that further develops the rules of the Convention and the principles of "Cultural Treatment" and "Most Favoured Culture".

	including cultural bureaucracies via a more balanced intellectual property system and "automatic" state aid.	Protecting the interests of weak players in the cultural sector, in particular new entrants, against strong private and public actors including cultural bureaucracies via a more balanced intellectual property system and "automatic" state aid.
Sustainable development, international solidarity and cooperation (Articles 12 to 16, 18).	Preferential treatment, special and differential treatment as a "new deal" to materialise balanced exchanges of cultural goods and services against implementation of intellectual property law. Negotiating a framework agreement for cultural cooperation with MS containing minimum standards applicable to all bilateral trade agreements. Including cultural cooperation protocols to trade and partnership agreements with countries that have ratified the Convention. Establishing conditionality ex ante (clauses that condition the conclusion, or the entry into force, of new agreements to the previous ratification of the UNESCO Convention by the Partner country). Establishing conditionality ex post ("suspension clauses"-clauses that make the UNESCO Convention observance an "essential element" and a condition of trade terms and development aid).	Balancing intellectual property and competition law.

Relation to other treaties (Articles 20 and 21).	Elaborating and testing cultural non-discrimination principles of "Cultural Treatment" and "Most Favoured Culture" against trade related non-discrimination principles to bring "cultural liberalisation" and "free culture" on a level playing field with "trade liberalisation" and "free trade" laws and policies. Elaborating a framework agreement to overcome fragmentation and achieving more coherence regarding the interface between cultural diversity, human rights and fundamental rights.	
Promotion of ratification and involvement in administrating the Convention (Articles 22 to 24).	Transatlantic Legislators' Dialogue between the European Union and United States.	Legislators' dialogue between Member States and non-EU States.
Further development of law (implementing legislation and judicial and administrative case law; Article 25 and Annex).	Encouraging the establishment of non-state tribunals on the European level to hear cases on cultural discrimination in order to develop case law that further develops the rules of the Convention and the principles of "Cultural Treatment" and "Most Favoured Culture".	Encouraging the establishment of non-state tribunals on the national level to hear cases on cultural discrimination in order to develop case law that further develops the rules of the Convention and the principles of "Cultural Treatment" and "Most Favoured Culture".

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