Building Development through Culture

A critical analysis of the EU's inclusion of culture as a vector of development in external relations

Mery Ciacci

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 14 November 2014

European University Institute
Department of Law

Building Development through Culture

A critical analysis of the EU's inclusion of culture as a vector of development in external relations

Mery Ciacci

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Prof. Marise Cremona, European University Institute (Supervisor)
Prof. Bruno de Witte, European University Institute
Prof. Massimiliano Montini, University of Siena
Mr Xavier Troussard, European Commission

L'INFINITO

Sempre caro mi fu quest'ermo colle,
E questa siepe, che da tanta parte
Dell'ultimo orizzonte il guardo esclude.
Ma sedendo e mirando, interminati
Spazi di là da quella, e sovrumani
Silenzi, e profondissima quiete
Io nel pensier mi fingo; ove per poco
Il cor non si spaura. E come il vento
Odo stormir tra queste piante, io quello
Infinito silenzio a questa voce
Vo comparando: e mi sovvien l'eterno,
E le morte stagioni, e la presente
E viva, e il suon di lei. Così tra questa
Immensità s'annega il pensier mio:
E il naufragar m'è dolce in questo mare.

Giacomo Leopardi, *Canti*, XII

To all those who love knowledge,
and study for the pleasure of knowing

To my family

Abstract

This thesis explores the relationship between culture and development as reflected in the current international debate on human and sustainable development through the lens of the EU's external policy practice. For long time culture has been kept aside from the international debate around development, yet, during the last twenty years, culture become considered a relevant vehicle to promote human sustainable development and nowadays many voices at local and global stages argue for recognizing culture as the fourth pillar of sustainable development and call for a greater integration of culture into developmental policies. Although culture as a driver and enabler of sustainable development is rather peacefully accepted, mainstreaming culture within developmental policies is a considerably challenging task. This often implies confronting contradictions and tensions, arising, in particular, when culture interacts with trade and other aspects of today's global economy. The debate around the need to promote culture as a vehicle for development highlights the need to intensify cultural flows at the global level. On the other hand, the unbalanced access to global trade and the unfair relationship between developed and developing countries raise issues concerning the protection and promotion of less economically important cultures. A balance between the interest to foster cultural exchanges and to protect cultural diversity needs to be found. The European Union, as a major international actor on the international scene, is taking part to the global debate about mainstreaming culture in developmental policies. In particular, the Union's external initiatives concerning the role of culture in contributing to sustainable development has gained strength since the EU's ratification of the *UNESCO Convention for the Protection and Promotion of the diversity of cultural expressions* (2008). This thesis develops around the following questions: is the EU – as a global actor – carrying out a coherent policy when mainstreaming culture as a vector of development in its external action? If not, how can the Union improve the mainstreaming of culture as a vector of development in order to pursue a more coherent approach? The analysis carried out in this research tries to answer this main question by analysing the EU's action in three specific cases dealing with the interaction of culture with development, namely the free circulation of cultural goods and services, the mobility of artists and cultural professionals, and the protection of traditional knowledge related to the use of genetic resources. The thesis demonstrates that, although the inner institutional and constitutional features of the EU often hamper the achievement of an overall coherent EU policy, the Union is certainly contributing to the shaping of a global governance for "culture and development". The thesis also argues that the overall action of the Union could gain added value from a better use of the principle of integration and, more broadly, the principles of sustainable development.

Acknowledgements

Writing a doctoral thesis is a journey, a long and sometimes lonely journey during which one frequently loses track of the final destination. With that said, "*sometimes it's the journey that teaches you a lot about your destination*".[1] My doctoral journey has indeed taught me a lot and on reflection I can say with confidence that it has proven to be an invaluable expedition in terms of both personal and intellectual growth. Of course, it would have not been so interesting, rich and fulfilling without the contributions of all those who have supported me, and those I met along the way.

First of all, I am greatly indebted to my supervisor, Prof. Marise Cremona, for her rigorous guidance and constant support, which have been so very precious to me in the preceding years. I feel extremely lucky to have had her as a supervisor, not only in terms of her immensely fruitful advice aimed at improving the quality of my work, but also for her patience in helping me to find a balance in juggling my many personal research interests. I am grateful to her for her unfaltering support and encouragement even when my work did not seem to make any progress and the final destination seemed totally unclear.

At the EUI, I am very thankful to Prof. Francesco Francioni and Prof. Bruno de Witte for their suggestions and advice, especially in the initial part of the doctoral programme. I additionally wish to thank Prof. Patrizia Vigni (University of Siena) and Prof. Karen Engle (University of Texas) for having introduced me to the world of academic research and supported me when I first manifested the will to start a PhD programme. I warmly thank Prof. Massimiliano Montini for giving me the opportunity during the final years of my PhD to work at the University of Siena, enabling me to discover both the pleasure of teaching and of working in his research team. I thank him for having shared ideas and thoughts on both research and life, for the professional opportunities he presented to me and for his invaluable friendship. Special thanks also go to my colleagues, Francesca Volpe, Alessandra Barreca and Alessandra Solazzo for their comforting support in moments of panic and for their continued encouragement.

I wish to extend my gratitude to Mr Xavier Troussard and Mrs Valérie Panis from the European Commission (DG EAC) for their availability to discuss issues related to my thesis, and for providing me with relevant information. Thanks also to all the other professionals and specialists of the UNESCO, WIPO and UNDP (Regional Centre of Bratislava) who, on various occasions, granted me the opportunity to interview them and exchange views and information.

Many friends and colleagues of the EUI contributed in making this journey a real and worthy experience of life and have helped to create everlasting, beautiful memories. In particular, from the bottom of my heart, I wish to thank Manu, Vale Valissima, Anthony, François Xavier (ou bien Fratello Sole, merci!) Alice (Pata Aly), Keiva, Camille, Berenika, Chiarina, and Julia for the pleasant time spent together, sharing thoughts and emotions while travelling the path characterised by many ups and

[1] Drake.

downs. My warmest thanks to my “sisters and brother of housing” Janine, Sara, Christelle and Mathias, who have been much more than flatmates and will remain “my little Florence family”! And, of course, thanks to the friends of forever, in particular Marzia, Melissa and Lia, and Francesco and Luca for being my second welcoming house in Florence, and a milestone in my life. Thanks to my “soul sister” Francesca, with whom I discussed the initial ideas of this thesis walking along the Tevere river, passing by the Seine and ending up on the Arno riverside. And thanks also the new friends made along the way, and in particular Arianna, Dodo, and Kuba of the WIPO summer school in Dubrovnik: I will forever recall our time in Dubrovnik as among the best experiences of my life, an amazing combination of fun and work. My gratitude additionally goes to my colleagues from the Italian Ministry of Environment, Land and Sea, for their patience and sensitivity with me during the final part of this process.

Finally, thanks to my family, not simply for their support in all my projects, but for the person I am today: to my father, for having passed on to me his love for knowledge, nature and culture; to my mother, for being a model of strength and determination; to my brother, for being the most critical mirror of myself and a better version of me. Without these elements, I could not have completed this endeavour.
Last, but by no means least, thanks to Davide, who entered my life when I was approaching the end of this journey, but who suddenly filled all my efforts with meaning and love.

Table of Contents

INTRODUCTION

1. BACKGROUND: CULTURE, DEVELOPMENT AND THE INTERNATIONAL DEBATE

In a continuously changing world, where the predominant models of development are constantly challenged by the limits of nature and global threats like famine, poverty and wars, culture is being increasingly recognised as a potential vector for a different developmental paradigm, likely to ensure fairness and equity and to boost more economically, environmentally, socially and culturally sustainable lifestyles. Indeed, since the beginning of civilization, culture has played an important role in shaping and influencing the social development of societies. Nevertheless, it is only in the last twenty years that the recognition of culture as a positive element for development is gaining its place on the global scene. For a long time, culture has been kept aside from the international debate around development. If we look at the framework of international meetings, conventions and declarations dealing with developmental issues, from the 1972 Stockholm Declaration to the 2002 Johannesburg Summit, they barely mention culture or cultural concerns. On the one hand, at the roots of such a gap there is probably the negative perception of the relationship between culture and development; that has been largely predominant among major economists and policy thinkers. According to this view, culture is understood as a set of old beliefs and prejudices, which remain immutable throughout time and are the primary causes of underdevelopment and inequalities.[1] On the other hand, the notion of sustainable development under international law has evolved through a sectoral approach, leading to a fragmented set of treaties mainly focusing on environmental protection and addressing the relationship between environment and the economy The Rio+5 Summit in 1997 enriched the definition of sustainable development with the social component, giving form to the well-known three pillar structure of development: economy, environment and social development. If a place for culture had to be found within the sustainable development model, it could only be on the social pillar, since culture is often associated with the elements of the social sphere.

[1] L E Harrison and S P Huntington, (eds), *Culture matters: How values shape human progress*, (New York: Basic Books, 2000).

In the last two decades something has changed. The strengthened focus on the human dimension of development and the centrality of human rights for improving the condition of human beings has paved the way for a greater acknowledgement of culture as a vector of development. Within the new broader paradigm known as sustainable human development, development is mostly seen as the enhancement of human freedoms in a broader sense. The enjoyment of cultural freedoms is, then, essential both to ensure and to assess development.[2] Further, the contribution of culture to development is not only seen in terms of human cultural rights: through the lenses of a holistic approach, its multiple interaction with the economic, environmental and social pillar of development has been more and more acknowledged. Indeed, through the creative and cultural industries, culture promotes economic growth and offers opportunities for employment; traditional knowledge, which is part of the intangible cultural heritage of local rural communities or traditional handicraft, often constitutes environmentally friendly practices for the management of lands and natural resources and strengthens the linkages with the territory; artistic and creative forms of expression – including cultural goods and live performances – spread values that can foster social cohesion and contribute to enhance respect of diversities and fundamental rights.

Within this new trend, several voices among States, scholars and stakeholders were raised to claim that culture should be recognised as the fourth pillar of the sustainable development paradigm. Such a formal recognition has not yet happened, as the most recent declaration "The Future We Want", issued at the end of the UN Conference on Sustainable Development / Rio+20 Summit held in June 2012, shows by renewing the global "commitment to sustainable development and to ensuring the promotion of an *economically*, *socially* and *environmentally* sustainable future for our planet and for present and future generations" (emphasis added).[3] Nevertheless, several efforts to include cultural concerns into developmental policies have been made. If the three pillars definition of sustainable development has not yet changed, the growing awareness towards the positive effects of culture on development has slowly started to be integrated into international agreements dealing with environmental and developmental issues, such as the Convention on Biological

[2] A Sen, *Culture and Development*, (World Bank Tokyo meeting, 13 Dec 2001), electronic version available at http://www.scribd.com/doc/6699222/Culture-Development-by-Amartya-Sen.
[3] A/CONF.216/L.1, Point 1.

Diversity. *Ad hoc* initiatives have also been undertaken, such as the UN Resolution on Culture and Development adopted in 2011,[4] or the creation of specific network for civil society and stakeholders like the Agenda 21 for Culture.[5] Certainly, among these initiatives, the most relevant are those carried out by UNESCO, the UN organisation devoted to science, culture, and education. Under the aegis of the UN Decade for Culture and Development, in 2001 the UNESCO Declaration on Cultural Diversity was adopted, which, for the first time, clearly established a direct connection between culture and sustainable development. This first attempt to create a legal framework for the integration of culture into developmental policies and strategies was followed by the adoption, in 2005, of the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions. The 2005 UNESCO Convention is the first legally binding instrument that consecrates the link between culture and sustainable development in terms of principles and compulsory obligations. Although it addresses in a more direct sense the relationship between culture and the economic pillar of sustainable development, the 2005 UNESCO Convention requires all Parties to further integrate culture in all developmental policies at the international, regional, national and local level. In the international framework of global commitments, culture no longer seems to be the forgotten dimension of development.

In spite of all these valuable efforts, the transposition of the concept 'culture for development' into legal terms and concrete actions is not an easy task. When implementing the obligations under the UNESCO Convention a chain of challenges and inner contradictions is unveiled. First of all, the 2005 UNESCO Convention recognises the need to foster cultural exchanges in order to promote economic growth, social and cultural values and contribute to all aspects of human wellbeing. This means opening national and regional markets to cultural goods and services, granting conditions for developing countries in order to ensure them a fair and equitable access to such markets. It also means facilitating the temporary circulation of artists and cultural workers, especially those coming from disadvantaged contexts. This constitutes a countertrend in the global scenario, where phenomena like cultural homogenisation, loss of local cultures and increased migration flows are among the

[4] UNGA Res 65/166 "Culture and Development", (28 February 2011) UN Doc A/RES/65/166.
[5] Agenda 21 for Culture, www.agenda21culture.net.
[5] United Cities and Local Governments (UCLG), *Culture: Fourth Pillar of Sustainable Development*, Policy Statement adopted on 17th November 2010 at the World Summit of Local and Regional Leaders – 3rd World Congress of UCLG, held in Mexico (made available at: www.cities-localgovernments.org).

major concerns in today's national agendas. In addition, globalisation has contributed to exacerbate the effects of existing asymmetries in international trade and inequalities around the world, therefore becoming a threat rather than a chance for enhancing cultural exchanges. In practice, this signifies that the unbalanced access to global trade and the unfair relationship between developed and developing countries raise issues concerning the protection and promotion of less economically important cultures. Further, when intensifying cultural flows requires the facilitation of mobility of persons, like artists and cultural professionals, the contrast between the different interests at stake is even stronger. Fostering the circulation of artists and cultural workers from developing countries entails, indeed, entails the opening national borders and dealing with migration-related matters. Other issues concern certain forms of cultural expressions, such as traditional knowledge, that promote sustainable lifestyles and represent cultural identities of local communities in many developing countries. They are often also a valuable source of revenues for developed countries' actors. The accent on their economic relevance led to their being protected mainly through market-based measures, like patents under IP law, which reflects a Western approach and does not take into account the impacts on local models of development.

Considering the whole landscape, two main opposite trends emerge when implementing culture as a vector of development: on the one hand, the need to foster mobility of cultural goods, services and persons as well as to further integrate cultural aspects into trade agreements and developmental strategies; on the other hand, the necessity to limit the effects of free trade on local and national cultures in order to preserve diversity and avoid the risk of making culture a mere commodity. In other words, the integration of culture into developmental policies encroaches on inner tensions belonging to the eternal *dilemma* between free flows and protectionism.

In today's globalised world, the facilitated circulation of people, goods and services, the massive migration flows, the technological revolution of means of communication have result in increased cultural exchanges. This situation has generated uncontrolled and accelerated interactions between culture and other policies, such as trade, migration or IP law. Globalisation has demonstrated both the synergies and tensions of these interactions, like the advantages for creative industries and the risk of homogenisation of cultures, as well as the claim for cultural identity within our multiethnic societies.

The idea of preventing and mitigating cultural homogenisation without hindering cultural exchanges[6] is strictly connected to the current debate on the promotion of sustainable development. Culture has always been considered as *energy, inspiration and empowerment* for groups and individuals and profoundly contributed to their social development[7]. A balance between the interest in fostering cultural exchanges and protecting cultural diversity as well as the specificity of culture needs to be found. At different times and levels, a possible solution has been envisaged by establishing a special legal treatment for cultural goods and services under international trade law, mostly known as the cultural exception clause. However, if *cultural exceptionalism* certainly shows a certain understanding of the special nature of cultural goods and services, it does not provide an adequate solution to address and reconcile the complex set of challenges and concerns relating to the relationship between culture and development.

2. THE EU AS A GLOBAL ACTOR, CULTURE AND DEVELOPMENT

In the last few years the EU has enormous gained attention on the international scene, becoming a major international actor, capable of having a major influence on global processes as well as developmental models in third countries. Within the framework of its external action, culture has usually played a marginal role. Under Article 167(4) TFEU the Union and its Member States committed to "foster cooperation with third countries and the competent international organisations in the sphere of culture". However, no explicit connection between culture and developmental objectives is made under such a provision. Further, the Treaty of Lisbon clearly reiterates that the promotion of a sustainable economic, social and environmental development is among the priorities of the Union's external action (Article 21 TUE), but it does not make any reference to the cultural dimension of development.

Despite this lack of reference, the EU's awareness concerning the role of culture in contributing to achieve sustainable development was already nuanced in its

[6] This concept was also expressed in the UN Commission on Human Rights Resolution 2002/26 on the "Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities".
[7] Report of the World Commission on Culture and Development *Our Creative Diversity*, UNESCO publishing, Paris, 1995 at 11, available at http://unesdoc.unesco.org/images/0010/001055/105586e.pdf

conventions concerning developmental cooperation, and has sensibly grown in the last decades. The Cotonou agreement, adopted in 2000, stated that "development policy in the area of culture shall aim at integrating the cultural dimension at all levels of development policy; at recognising, preserving and promoting cultural values, heritage and identities to enable inter-cultural dialogue; at supporting the development capacity in this sector, developing cultural industries and enhancing market access opportunities for cultural goods and services" (Article 27). Most recently, the EU's ratification in 2008 of the *UNESCO Convention for the Protection and Promotion of the diversity of cultural expressions* marked a significant step for the integration of cultural aspects within the Union's external (and internal) developmental policy. Since its entry into force, the Union is committed, on the one hand, to promote cultural exchanges as a means to foster development, on the other hand, to ensure the protection of cultural diversities in a globalised world. Following the spirit of the UNESCO Convention, the 2007 *European Agenda for Culture on a Globalizing World* places culture at the heart of development and calls for respect of cultural diversity. More recently (June 2014), the European Commission published the report "Preparatory Action Culture in EU External Relations", which is the outcome of a sixteen-month inquiry that has been the centrepiece of the Preparatory Action "Culture in EU External Relations". It is quite significant that this document opens with the following statement: "*Strong awareness of the need for a strategy for culture in external relations has emerged in Europe over the last few years. The adoption in 2005 of the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, to which both the EU and its individual Member States are Parties, underscored the importance of strengthening Europe's relationships with other regions, notably in the developing world. It also underlined the need to enhance the autonomy of the cultural sector and of the cultural and creative industries everywhere*."[8]

The EU has, then, to face this new global challenge: to foster and facilitate cultural exchanges with third countries, and, at the same time, to ensure the protection of cultural diversity. If we consider that "development" itself can be considered a cultural model, the challenge seems to be doubled: integrating cultural elements

[8] "Preparatory Action Culture in EU External Relations", Report prepared for the European Commission, published in June 2014.

within trade and development policies ought not to turn into the imposition of European values and models of development in third countries.

3. SCOPE, METHODOLOGICAL REMARKS AND SHORTCOMINGS OF THE THESIS

This thesis develops around the following questions: is the EU – as a global actor – carrying out a coherent policy when mainstreaming culture as a vector of development in its external action? If not, how can the Union improve the mainstreaming of culture as a vector of development in order to pursue a more coherent approach? The analysis carried out in this research tries to answer this main question. This thesis focuses on the intrinsic tensions and ambiguities that arise when mainstreaming culture into developmental policies by analysing the integration of culture within the Union's external action. The choice to select the EU as the case study of this research is mainly based on two reasons (besides my personal interest in this very peculiar regional organisation with a strong international vocation). First, I wanted to understand in more depth what is concretely meant when we try to implement the principles and identify the content of "culture as a vector for development": in this sense, the EU offers a very interesting frame for a case study thanks to its broad and varied external relations with third countries and international organisations. Second, as the EU is among the major international actors today, taking part in almost every kind of international processes, and since it is a model of regional economic integration for a great number of third countries, the potential level of influence that the EU can exercise when implementing the idea of culture as a vector for development deserves to be explored. Third, the EU itself needed to grapple with the problems of culture and free movement, having undertaken a considerable number of commitments in terms of fostering liberalisation and protecting diversity – both by being a WTO member and having ratified the 2005 UNESCO Convention on Cultural Diversity. Further, the EU is constantly engaged in the international law-making process dealing with sustainable development issues, and it is a party to other international agreements – such as the Convention on Biological Diversity and its Protocol of Nagoya, as we will see later on – which contains relevant provisions addressing specific issues of the "culture and development" relationship.

While most of the existing literature and research focuses on the growing integration of cultural interests within the internal and external EU law and policies or on the potential expansion of EU competence in the cultural field, my research addresses directly addresses the implementation challenges stemming from the integration of culture within the EU's external action, with a special focus on developmental issues. This work looks at the EU's policy and legal initiatives in the cultural sector from a different angle: assuming that the Union is today a recognised actor that mainstreams culture in its external relations, my analysis does not question whether the Union is more or less competent to act in the cultural sector, rather it wants to explore in which terms and to what extent the Union is developing a coherent frame of action that mainstreams culture as a means of development. In order to do so, the analysis focuses on three specific issues belonging to the "culture and development" debate, in which the EU has undertaken initiatives, and that interact with other relevant EU policies: 1) fostering the mobility of cultural goods and services, which falls under the frame of the Common Commercial Policy (Chapter 3); 2) fostering mobility of artists and cultural workers, overlapping both with the CCP and migration policy (Chapter 4); 3) ensuring the protection of traditional knowledge in vulnerable contexts, falling under the frame of both the environmental and the intellectual property external actions (Chapter 5). Although these three chapters may appear to concern three single and separated issues, they are pieces of the same puzzle and offer a more comprehensive vision of the concrete problems at stake. Indeed, one of the greatest challenges of writing this thesis has been to draw a connecting line between these three chapters to ensure a coherent and comprehensive analysis for the readers. They must be read bearing in mind the multidimensional interaction of culture with the three pillars of sustainable development (which will be fully discussed in Chapter 1). Indeed, the chapter dealing with the circulation of cultural goods and services looks at synergies and tensions emerging from the interaction between culture and trade: more circulation of creative industries' products can contribute to economic growth, but also entail the risk of increased cultural homogenisation. In the chapter on mobility of artists and cultural workers, these last are taken into account in their function of promoters of social cohesion and mutual understanding: as we will see, the obstacles deriving from migration law and policy often have a negative impact on the potential social effects of culture. Finally, the chapter addressing the protection of traditional knowledge

acknowledges that certain traditional practices, in particular those belonging to Local and Indigenous Communities, are not only central to the survival of cultural diversity, but they play a core role in preserving biological diversity and environmental integrity. Today, most traditional knowledge is at risk of disappearing. This is also due to the increasingly inadequate access to such knowledge, especially those relating to the use of genetic resources, demanded by western users and regulated mostly by Intellectual Property rules. A fair and equitable access to traditional knowledge and the benefits deriving from its use is today urgently needed.

Focusing on the implementation challenges of the concept "culture for development", the analysis mainly looks at the instruments adopted by the EU in the bilateral and multilateral framework. For the bilateral level, particular attention is given to the new Economic Partnership Agreements and most recent Free Trade Agreements; for the multilateral level, the EU's position within relevant frames of negotiations, such as WTO and WIPO, is taken into account. Each of the three chapters is complemented with an in-depth analysis of the international legal and policy framework to contextualise the questions at stake and the EU's position.

The underlying thesis of this work challenges the idea that trade-based instruments can ensure an appropriate path to mainstream culture as a vector of development. It also questions the validity of the "*cultural exceptionalism"* approach, while proposing to focus on solutions that can correct the existing asymmetries and disparities between developing and developed countries. Finally, the thesis argues that to mainstream the integration of cultural elements that will lead to sustainable human development, culture cannot be considered predominately as a commodity. When looking at the interaction of culture with the economic, environmental, and social pillars, it would be important to address them through the lens of a truly integrated and systemic approach, which also contemplates the enforcement of human cultural rights. The instruments-based analysis of the EU's external action will demonstrate that the European Union's position in the bilateral and multilateral frame of negotiations is often different. In this sense, it is difficult to assert whether the EU is implementing a coherent strategy to mainstream culture as a vector of development. Nevertheless, such diversity also shows a different understanding of the issues at stake at different levels, as well as that the EU is often more willing to dare on the bilateral than the multilateral level.

In particular, concerning the free flow of cultural goods and services, it will be shown that the idea of a cultural exception clause, used within the WTO to exclude this sector from opening to further liberalisation, has been almost abandoned at the bilateral level in favour of the establishment of *ad hoc* protocols that facilitate cultural movements. The idea of a "special" frame for cultural goods and services remains, as if to confirm the recognition of their peculiar nature, but at the same time, the necessity to grant better access to developing countries to the international cultural market is addressed. However, the analysis will show that the most valuable initiatives addressing culture and development often take place under the umbrella of trade. The mismatch between the results achieved in external trade and those that have failed under other relevant frames, such as the external action concerning migration, reveals that ensuring coherence is often critical when the domains fall within the competence sphere of the Member States. Constraints on the external action of the EU derive from internal limits that characterise the EU's architecture. The bilateral trade frame often offers a chance for a broader margin of action for the EU. However, using trade as the most relevant path to promote culture for development raises doubts about what kind of approach to sustainable development the EU is promoting worldwide.

After outlining the overall scope and the methodology adopted for this thesis, it is equally important to acknowledge some shortcomings affecting this research. This work does not cover all the possible fields presenting legal and policy challenges. For instance, it does not deal with challenges resulting from the increased digitalisation of cultural contents, or the issue of bringing unlawfully exported cultural goods back to the country of origin. Nor does the thesis address in depth the controversial relationship between human rights, culture, and development. On this point, it is important to specify that Chapter 1 takes human rights into account when exploring the human development concept, namely to explain the human rights-based approach to development. Chapter 1 also briefly explores the role of human cultural rights as potential instruments to protect and promote cultural diversity, giving a hint of the underlying debate concerning the opposition between cultural relativism and the universality of human rights. Unfortunately, there was not enough room and time in this thesis to fully address this topic and the brief mention included serves the reader to have a broader vision of the whole possible paths that are being discussed to ensure an adequate integration of culture within the development discourse. This and

other subjects – such as the ones just above mentioned – might fall within those controversial and debated aspects concerning the use of culture as a factor of development. I am aware that the absence of the analysis of these issues does not allow us to reach a fully comprehensive vision of the entire culture and development debate. Unfortunately, a thesis' timeframe does not provide enough space to cover all the complex discussions surrounding the culture and development debate. Further, a research project is a constant work in progress, and along the way one realises how many other different perspectives and paths the research could take. Yet, a choice, in terms of time, space and coherence, had to be made and this choice has been based on a careful selection of the most relevant case studies both from the angle of the "culture and development relationship" and the European Union, as just explained.

4. THESIS STRUCTURE

The thesis is structured in 6 Chapters: the first two introduce the contents of the analysis and outline the major issues and questions at stake; the three central chapters explore three specific challenges concerning the implementation of culture for sustainable development; the sixth chapter draws together the outcomes of the critical analysis carried out and tries to make an overall assessment of the Union's initiative, as well as to propose possible solutions wherever appropriate.

Chapter 1 outlines the debate about culture and development, clarifies basic notions, such as "culture" and "sustainable development", and breaks down the binomial "culture for development" into concrete issues. The chapter gives an appraisal of the two major views of "culture and development": a negative vision, that sees culture as an element hindering development, and a positive one, that looks at culture as a factor enhancing development. The chapter also traces the difference between the two theoretical concepts of "cultural development" and "culture for development". Indeed, while "cultural development" can be seen as one of the outcomes of developmental strategies, "culture for development" mainly refers to the manifold ways in which culture can contribute to economic, environmental, social and cultural development. This distinction sheds light on the current debate discussing the need to ascertain culture as the fourth pillar of the sustainable development paradigm. Finally, the interaction of culture with economic, environmental, and social aspects is

analysed through legal and policy lenses, which underline what major tensions arise when mainstreaming culture within developmental policy.

Chapter 2 looks at the EU as a relevant international actor within the "culture and development" debate by assessing the existence of the EU's external competences in this area. It tries to shape, then, the notion of sustainable development and the notion of culture adopted and/or promoted by the EU, both within the Treaties and other secondary legislation or policy documents. Finally, it explores whether synergies or tensions between the EU culture and development policy, as well as other EU policies – namely trade, migration and intellectual property law – are acknowledged by the Union's institutions.

Chapter 3 deals with one aspect concerning cultural flows: the free circulation of cultural goods and services. The chapter focuses on the debate within the WTO and explores the tensions between the need to achieve further liberalisation to promote the circulation of cultural goods and services, and the opposite: exempting cultural goods and services from the implementation of free trade rules. It looks at the adoption of the UNESCO Convention on the diversity of cultural expressions as a possible tool to counterbalance the effects of WTO rules. It focuses, then, on the bilateral level, in particular the recent EPAs and FTAs. The adoption of a specific protocol on cultural cooperation constitutes an innovative action within the bilateral trade relations of the EU with third countries.

In Chapter 4 fostering cultural flows is explored through the perspective of the mobility of artists and cultural professionals. This issue touches upon the sensitive policy area of migration. The difficulties encountered by artists and cultural professionals in crossing frontiers can be compared to those faced by most economic migrants. The chapter proposes an analysis of the mobility of artists and cultural workers through the lenses of the migration and development nexus. It looks at the practical initiatives enacted by the Union under both trade and migration policies. Once more, trade instruments seem to be more efficient, while the human and cultural dimensions of the whole subject seem to be overlooked.

Chapter 5 addresses the relationship between traditional knowledge and development and the complications deriving from adopting intellectual property measures to protect traditional knowledge. Although the protection of traditional knowledge is not an important issue within the European context, at the international level this subject is today highly debated, at least as far as it concerns the protection of

traditional knowledge connected to the use of natural and genetic resources. The EU is involved in this worldwide discussion, both under the WIPO and WTO umbrella. The analysis looks at the EU position within the multilateral framework, as well as at the actions undertaken under the bilateral frame.

CHAPTER 1

CULTURE AND DEVELOPMENT: OUTLINING THE DEBATE

1) Culture and development: a theoretical framework

The first part of this chapter will provide a picture of the theoretical debate underlying the shift from a negative to a positive vision of the interplay between culture and development. Since these two approaches are strictly connected with the understanding of what "development" and "culture" mean, it will be necessary to trace the evolution of these two concepts and to clarify which basic notions are adopted for the purposes of this analysis. I will attempt to outline the distinction between the concepts of "culture and development" and "cultural development", which are often conflated. This thesis focuses on "culture and development": to make clear the distinction between the two concepts our analysis will begin by addressing the opportunities and tensions stemming from the use of culture as a vector of development. The second part of the chapter will look at the interaction between culture and development from a legal and policy perspective. The analysis will focus on three specific case studies and in turn the relevant international legal contexts will be taken into consideration.

1.1) From a negative to a positive vision of the role of culture: a theoretical framework

Until only recently the scientific, political, and academic debates around developmental issues had dedicated little attention to culture and its relationship to development. In general, development has been mainly conceived of as a matter of "numbers" or "modernism", and thus a prerogative for economists, scientists and technologists. Policy makers – in particular, economists and lawyers – and major actors engaged in debates over development have greatly overlooked the possibility to consider culture as a positive factor to boost development. When attention has been granted to the connections between culture and development, it has tended to stress the negative impact of culture for developmental process. Over the last few decades this trend has declined and a growing interest towards the "culture and development"

dynamic has arisen. Culture is no longer considered a field of study exclusively for artists, sociologists or anthropologists: today economists, politicians, and most of the actors involved in developmental thinking recognise the need for a more interdisciplinary approach to take better account of cultural factors in policies and programmes.

1.1.1) The negative vision

> "Some may find it incongruous that two economists who work for the World Bank are editing a book about culture. It reflects an increasing recognition of the centrality of cultural process to the reproduction of inequality and human ill-being among development policy makers and economists."
>
> V. Rao and M. Walton, *Culture and Public Action*, (2004)

With this provocative statement two famous economists – Rao and Walton – sum up the negative approach towards cultural interactions with development[1] that prevailed for most of the past century. As recalled above, economists and policy-makers have mainly inspected the influence of culture on development from a rather sceptical standpoint. Such a diffident approach never denied the existence of potential connections between culture and economic performances; after all, Max Weber was among the first influential scholars and economists to recognise that "culture matters".[2] Nevertheless, culture – mostly perceived as a set of inner values and attitudes traditionally guiding populations – was perceived as an element hindering the realisation of economic, political and social changes. Since the Industrial Revolution, the Western idea of "development" put economic, institutional, and social reforms at the heart of the path towards development. To put it another way: development could only be achieved through a process of "modernisation" involving

[1] V Rao and M Walton (eds), *Culture and Public Action*, (Stanford University Press, 2004).

[2] Max Weber put cultural values and ethics (typical of Protestantism) at the heart of his economic analysis. The Weberian analysis of the role of values in the emergence of capitalism is still of considerable interest for the contemporary world. For a commentary on this: D Landes, 'Culture Makes Almost All the Difference', in L E Harrison and S P Huntington, (eds), *Culture matters: How values shape human progress*, (New York: Basic Books, 2000), 2-13.

institutions, the economy and society; therefore calling for cultural changes as well. Culture, understood by economists and other social scientists as a static set of traditions and beliefs, immutable throughout time, represents the old heritage of the past that constitutes an obstacle for progress and "modernisation". To use Davis Landes' words: "culture frightens scholars".[3]

This negative approach towards the interaction between culture and development has been mainly built upon the evidence that certain traditional cultural rules induce social and gender inequalities, like the subjugation of women or the differentiation of enjoyable rights according to ethnic background, others justify the use of violent practices and body mutilations on human beings, which deny human dignity and all respect of human rights. In these cases, cultural values and beliefs certainly hamper the promotion of social, political and institutional reforms and are a threat to democracy and social justice. It is well known that in countries where the cultural context favours anti-democratic regimes or allows racial and gender discrimination, challenges like poverty, inequality, or the violations of fundamental freedoms remain unresolved. Culture can also negatively affect the maintenance of peace and security: recent centuries have witnessed the rise of intercultural and multiethnic conflicts in the name of cultural diversity. According to some, the struggle for the affirmation of ethnic, religious and cultural identity is the major cause of wars, national instability, and difficult international relations in our times.[4]

Obviously culture, and cultural issues, can impinge in different ways on developmental patterns, which may lead to negative or positive effects.[5] Yet, to assert that culture can, for the most part, be an adverse factor for developmental mechanisms is overly reductive. Indeed, such an analysis has two major shortcomings: it relies on a narrow notion of "culture" and an outdated understanding of "development".

As for the notion of "culture", this negative approach looks at culture solely in terms of values, beliefs and ethical behaviours, which remain immutable throughout time and incapable of inspiring new processes. Instead, the notion of culture is a much

[3] D Landes (n 2), 2.
[4] S P Huntington, *The clash of civilizations and the Remaking of World Order* (Free Press, 1996).
[5] For a collection of case studies on negative and positive examples: Harrison L E and Berger P L (eds), *Developing Cultures: Case Studies,* (Routledge, 2006); and L E Harrison and S P Huntington, (eds), *Culture matters, (n* 2). On the interactions between culture and development and the ambiguity of the role of culture in societies, see also: I Vitanyi, "Development and Culture: the New Concepts", 3-17 and E Laszlo "The Role of Culture in Development", 19-32, both in E Laszlo and I Vitanyi (eds.), *European Culture and World Development*, (Pergamon Press, 1985).

broader concept, including both material and immaterial components, whose capability to change and evolve according to times and place makes it a very fluid concept. The complexity of the notion of culture will be explored further in the following paragraph, yet it is important to underline here that this intrinsic complexity is reflected in a great variety of different interconnections with social, political and economic aspects of people's lives. The great economist Amartya Sen is among the most authoritative voices to acknowledge that achieving an adequate understanding of cultural interconnections is an inescapably complex endeavour, nonetheless he recognises the importance of examining these diverse interrelations by "*paying attention to their disparate nature and relevance*" in order to understand the multiple ways in which culture can be considered a means for development.[6] We may assert, then, that the branch of economic analysis investigating the influences of cultural values on behaviour, and their contribution to the process of economic and social development – also known as "behavioural studies" – is only one of the various ways through which the interrelations between culture and development can be explored.

As for the notion of "development", the tendency to see culture as a hindrance for development appears to be largely based on the traditional understanding of development as primarily involving economic growth. Social, cultural, and political issues of societies, although important, are treated separately at different stages: either as instrumental for achieving economic progress, or as externalities to take into account when implementing economic policies. According to this view, development is achieved through specific economic programmes and concrete actions such as building roads, schools, or telecommunications systems.[7] Within this traditional vision there is little room for considering culture as a vector of development, except in the form of education –building schools and helping to reform educational systems in order to fight illiteracy.

1.1.2) Moving towards a positive vision

[6] A Sen, *Culture and Development*, (World Bank Tokyo meeting, 13 Dec 2001), electronic version available at http://www.scribd.com/doc/6699222/Culture-Development-by-Amartya-Sen.
[7] D D Bradlow, 'Differing conceptions of development and the content of International Development Law' (2005) 21 *South African Journal on Human Rights* 47, 53.

In recent decades the predominant trend to see culture as hindering development has much changed: nowadays, there is a growing interest towards exploring the positive influence culture may have on developmental dynamics. This shift is connected to the considerable evolution of the concept of development that has gradually occurred (as it will be further discussed in the following paragraph 1.3). The traditional understanding of development has been strongly questioned since the 1980s, when political scientists and anthropologists started to *deconstruct* the development discourse while criticising the "aid to development" strategy put in place by Western governments and Institutions in developing countries.[8] In his major work *The Anti-Politics Machine: "Development", Depoliticization, and Bureaucratic Power in Lesotho*, the anthropologist James Ferguson challenges the concept of "development" as a universal one and argues that, like the word "civilization" in the 19th century, "development" is used as an interpretive prism to identify Southern Countries. [9] While recalling that '*different people mean different things by "development*"', Ferguson acknowledges that the "development discourse" is often defined as "problematic" but never really questioned. When it is challenged, it is mostly in the name of *real* development, as if to confirm that "development" is an unquestionable truth and a value shared by all. His social analysis of developmental projects in Lesotho demonstrates that the "*development discourse does operate within a familiar broad contemporary configuration of Western knowledge […] [a]nd it is easy to trace the lineage of many of its characteristic lines of thought – from modernization theory, for instance, or neo-classical economics*".[10] In this sense, the idea of "development" is very much outlined as a dominant cultural model that aims at perpetuating Western forms of colonisation, rather than empowering people.[11] According to Ferguson's deconstructionist analysis, "development" is a cultural model to engage with important issues like poverty, hunger, and rights-deprived

[8] The emphasis on the word "deconstruct" is to refer to the form of philosophical and literary analysis known as *deconstruction*, whose major father is the philosopher Jacques Derrida. This approach is used to assert that words and metaphysical concepts do not have just one meaning and that their meaning depends on ultimately arbitrary signifiers. In the 1980s, this method of critical analysis gained ground in diverse areas of humanities and social sciences, including law, anthropology, linguistics, and political studies. It was also used to criticise the idea of development.

[9] J Ferguson, *The Anti-Politics Machine. "Development", Depoliticization, and Bureaucratic Power in Lesotho*, (University of Minnesota Press, 1994).

[10] *Ibidem, 67.*

[11] James Ferguson audaciously asserts that governments and governmental agencies do not really wish to enable and foster the process of popular empowerment, which may lead to political and social transformation.

people in the Third World, but it is far from being the only possible answer. In the same vein, Arturo Escobar, who sees "development" as a cultural invention used as "mechanism of control" to maintain the unbalanced relationship between North and South, calls for the identification of alternatives for a post-development era.[12] While he provocatively asserts that "*to think about alternatives in the manner of sustainable development, for instance, is to remain within the same model of thought that produced development and kept it in place*",[13] Escobar stresses the importance of focusing on cultural differences as a key element for discerning alternatives to capitalism and modernity in their hegemonic form. Escobar sees in the resistance of certain minority cultural situations the possibility for "*other ways of building economies, of dealing with basic needs, of coming together into social groups*".[14]

Although highly philosophical, and perhaps somewhat unrealistic, the merit of this deconstructive critique of the development discourse is that it interprets the relationship between culture and development through a different lens. First, it makes clear that the traditional idea of "development" – mainly corresponding to the Western neo-liberal model – is itself a cultural prototype, which may or may not work when applied to different (cultural) contexts. For this reason it is necessary to take local and cultural differences into account when building developmental strategies. These cultural differences, not intended as static but as transformed and transformative forces, can contribute to shape different meanings of development able to better address local needs and give value to different social and economic opportunities.

On a less theoretical level, the quest for alternative models of development has been also raised within international institutional fora. The failure of the neo-liberalist models, the unsuccessful global fight to eradicate poverty and inequality, and the environmental emergency have shown the interconnection of the economic system with the environmental, social and cultural spheres. Since the 1992 UN Conference on Environment and Development in Rio de Janeiro, a less econometric and more holistic concept of development has started to become popular. A new definition of development was proposed in Rio: the idea of a "sustainable development", which could work in harmony with the ecosystem and enable future generations to satisfy

[12] A Escobar, *Encountering Development: the making and unmaking of the third world*, (Princeton University Press, 1995).
[13] *Ibidem*, 232.
[14] *Ibidem*, 225.

their needs.[15] In the following years, many major scholars, under the aegis of the UN Development Programme (UNDP), have forged the concept of "human sustainable development". Based on the assertion that *development requires more than economic growth alone,* the adjective *human* switches the focus to the human dimension of this process, which is concerned with aspects of human life, such as access to education, healthcare, and the enjoyment of social and cultural rights.[16]

Although culture mainly sits on the sidelines, these ways of re-thinking development open the door for the recognition of its positive contribution. Most International Organisations and NGOs dealing with developmental policies now acknowledge that culture has always played a fundamental role in human development and the evolution of societies: contributing to shape minds, behaviours, and creativity. In particular, during the 1970s and 1980s, UNESCO, the UN agency devoted to education, science and culture, promoted a series of intergovernmental Conferences on Cultural Policies, which emphasised the role of culture as an integral part of world development and invited States to engage in adopting long-term policies to foster *cultural development* in all related fields (such as education, communication, art, heritage, environment, democracy, participation of civil society, etc.).[17] The second World Conference, held in Mexico in 1982 and known as MONDIALCULT, adopted a declaration (the *Mexico City Declaration*) stressing the need to ensure *cultural pluralism* as a means of enrichment[18] and launched the UN Decade for Cultural Development, whose aim was to ascertain the cultural dimension of development and the connections between culture, development and democracy. [19] In the report *Our Creative World,* released in 1995 within the framework of the Decade by the World Commission on Culture and Development, culture is defined as *energy, inspiration, and empowerment* for individuals, groups and societies, and looks at

[15] Rio Declaration on the Environment and Development, UN Report A/CONF.151/26.
[16] S Fukuda-Parr, and AK Shiva Kumar (eds.), *Handbook of Human Development: Concepts, Measures, and Policies*, (Oxford University Press, 2009). Both the notion of "sustainable development" and "human development" will be treated further in the following paragraphs.
[17] The first of the World Conferences on Cultural Policies was held in Venice in 1970. It was followed by a cycle of regional conferences (Europe, 1972; Asia 1973; Africa, 1975; Latin America 1978), which ended up to the second World Conference in Mexico in 1982, known as MONDIALCULT. For more details on this: K Stenou (ed.), *UNESCO and the Issue of Cultural Diversity-Review and Strategy 1946-2004*, (UNESCO Division of Cultural Policies and Intercultural Dialogue, Paris, 2004).
[18] *Mexico City Declaration*, UNESCO Doc. CLT/MD/1, 1982, World Conference on Cultural Policies (MONDIACULT) in Mexico City, Mexico.
[19] Proclamation of the World Decade for Cultural Development (1988-1997), UNGA Res 41/187 (8 December 1986).

cultural diversity as an inherent element of sustainable development.[20] In 2005, UNESCO adopted the Convention on Protection and Promotion of the Diversity of Cultural Expressions, which is based on a broad concept of development and establishes a clear duty for the Parties to include culture in all developmental policies.[21] Similarly, other agencies and international organisations working in fields related to development have started to adopt a broader vision of development and to advocate for the beneficial effect of culture to achieve a more qualitative development.[22] Yet, it was only in 2011 that the UN General Assembly adopted a specific Resolution on "Culture and Development", which recognises that "*culture is an essential component of human development, represents a source of identity, innovation and creativity*" and "*is an important factor in the fight against poverty, providing for economic growth and ownership of development processes*".[23] Today, some argue that culture should be considered the fourth pillar of the sustainable development paradigm.[24] This theory will be explored further at a later stage in this chapter, yet it is worth mentioning here to show that the vision of culture as a positive vector of development has gained enormous ground.

As discussed above, this acknowledgment has not always been easily accepted. Besides the reasons described, the fact that both the notion of "culture" and "development" are rather difficult and often contested has certainly contributed. Thus, the next step of my analysis will be to clarify the notions of "culture" and "development".

[20] *Our Creative World*, Report of the World Commission on Culture and Development, CLT-96/WS-6 (1996).
[21] Art. 13 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the 33rd Session of the General Conference of UNESCO, Paris 20 Oct 2005. The 2005 UNESCO Convention will be further discussed in chapters 2 and 3.
[22] For example, similarly to *Our creative world*, the UNDP 2004 Human Development Report *Freedom in a Diverse World*, focused on culture and cultural diversity and stated that development is not only about economic wealth, but is also about the possibility for all people to have a satisfying and valuable life.
[23] UNGA Res 65/166 "Culture and Development", (28 February 2011) UN Doc A/RES/65/166.
[24] Among the others, see: J Hawkes, *The fourth pillar of sustainability: culture's essential role in public planning*, (Common Ground Publishing Pty Ltd in association with the Cultural Development Network (Vic), 2001).

1.2 The notion of culture

1.2.1) Culture as *heritage*, *creativity* and *way of life*

"The notion of culture is everywhere invoked
and virtually nowhere explained"[25]

Providing a precise and univocal definition of "culture" is no easy task and no agreements under international law contain a universal definition. This is due to the fact that "culture" is *per se* a dynamic process, which continuously changes and does not have precise boundaries. Furthermore, as "culture" is a cross-cutting subject that interacts with a wide range of different disciplines, such as law, economics, and sociology, its meaning is often drafted according to the relevant purpose of the context. There is also a great degree of ambiguity in understanding when culture refers to the means or to the end: for instance, culture is both the source of education and the product of the educational process. Because of the manifold ways in which culture manifests itself and is understood, to give a unified definition of the word "culture" would not only be difficult, but also rather inappropriate.[26]

An historical excursus dealing with the origin of the word "culture" and the evolution of the concept over time may help to advance a comprehensive understanding of the notion. Etymologically, the Latin word *cultura* derives from the agricultural context and referred to the action of cultivating the land, in order to make it fertile and grow plants.[27] The word was used metaphorically by Latin authors, such as Horace and Cicero, to refer to the development and exercise of the intellectual capabilities of human beings. Conversely, the analogous Greek word had a broader meaning and referred to both intellectual and physical exercise, as well as to education. Over the centuries, the extensive Greek notion of "culture" was dismissed and the classic notion mainly came to refer to the "highest intellectual achievements of human beings".[28] Indeed, this is the traditional understanding of culture and, in

[25] N Mezey "Law as Culture", in A Sarat and J Simon. (eds.), *Cultural Analysis, Cultural Studies and the Law: moving beyond legal realism*, (Duke University Press, 2003), 37.
[26] The concept of culture is still a widely discussed and contested topic in social and legal sciences. See: P Rossi. (ed.), *Il Concetto di cultura*, (Einaudi, 1970).
[27] Fratelli Fabbri (ed.), *Nuova Enciclopedia Universale*, Vol. V,(F.lli Fabbri, 1984), 2611.
[28] *Ibidem*, p. 2611. See also: L V Prott "Cultural Rights as Peoples Rights in International Law", in J Crawford (ed.), *The Rights of Peoples,* (Clarendon Press, 1998), 94.

modern times, it refers to *literacy and artistic productions, including fine arts, literature, music, and all those works inspired and produced by creative activities*.

This humanistic sense of culture implies at least two other declinations of the word: "culture as heritage" and "culture as creativity". The first declination indicates the entirety of historical monuments, works of art and traditional handicrafts that embed cultural values and contribute to shape the identity of nations and people, also known under International Law as the "cultural heritage of humankind".[29] The second declination – "culture as creativity" – refers to the process of artistic creation and intellectual production. Creativity usually translates as artistic performances and output, such as dancing, theatre, music, literature, etc., which are identified as cultural goods and services. Today, thanks to the introduction of new technologies in the field of arts and creativity, the category "cultural goods and services" also encompasses new products of creative industries, such as film, television, and radio broadcasting.[30]

In both cases the material element of culture is key, in other words, the focus is on the externalisation (or the objectification) of cultural manifestations. Although, it is undeniable that we cherish these cultural objects for the values, ideas and history they embed. The material side of culture is, then, strictly connected to its intangible component. Over the last century, under the influence of social sciences – in particular ethnology and anthropology – the notion of culture evolved significantly in order to reconcile the material and immaterial dimensions. During the nineteenth century, anthropologists focused their research on primitive societies and their habits, techniques of exchange and traditional customs, with the aim of reaching a unitary concept of culture. According to anthropologists, "culture" means the sum of all material and spiritual activities and products of a given society, all the beliefs, knowledge, rites, customs, laws and arts that distinguish one social group from other

[29] The concept of the "cultural heritage of mankind" first appeared in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Nowadays the notion has expanded and also encompasses natural elements (such as landscapes and seas), see the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage. Some authors have pointed out that a universal definition of "cultural heritage" is nowhere written, but each Convention (or other legal instrument) dealing with it has a definition drafted for the purpose of that instrument alone. See: V L Prott and P J O'Keefe, *Law and the Cultural Heritage,* Vol I, (Professional Book, 1984), 8. On the difficulty to define "cultural heritage" under International Law: J Blake, "On Defining the Cultural Heritage", (2000) 49 International And Comparative Law Quarterly, 61.

[30] In Western countries, debates over this broad understanding of cultural goods and services led to a distinction between "high" and "low" culture: the latter refers to popular culture as the results of modern cultural industries (pop-music, pop-stars, etc.); the first refers to "culture d'élite". See: R Stavenhagen, "Cultural Rights: a Social Science Perspective", in Institute for Art and Law (ed.) *Cultural Rights and Wrongs*, (UNESCO Publishing, 1998,), 5.

similar groups.[31] In other words, "culture" is a "total way of life". This broader understanding of culture, which relies on the social role of culture as a symbolic element of continuity for communities, contributed to re-shape the concept of "culture as heritage". [32] Indeed, it introduced the idea of "living culture" as a comprehensive notion of all those traditions, values, religions, symbols and practices that contribute to express and manifest the identity of a society. Today, cultural heritage encompasses the material dimension of culture (cultural goods and services), as well as the intangible dimension (traditional knowledge, customs, popular cultural manifestations, folk music and dances, traditional agricultural ways, languages, religion, etc.).[33]

As summarised above, culture can be identified with a great variety of ideas, depending upon the lenses through which we look at the concept (e.g.: culture as values, culture as education, culture as religion, etc.). *Heritage*, *creativity*, and *way of life* are the relevant working definitions for the purpose of this analysis.

1.2.2) *Culture*, *cultural diversity* and *identity* in a globalised world

Culture also means *identity*, a subject that is directly connected to the notion of cultural diversity. In recent years much attention has been given to the need to preserve and protect diversity for healthy and balanced societies.

The influence of the anthropologists' analysis brought about a shift from a rather elitist concept of culture to a more pluralist idea, which takes into account the individual and collective dimension of culture, as well as the subjective dimension given by feelings, behaviours and ways of thinking.[34] This broad knowledge of culture

[31] Among the rich variety of authors on this concept, see: E B Tylor, *Primitive Culture: Researches in the Development of Mithology, Philosophy, Religion, Language, Art and Custom*, (London, 1920); C Lévi-Strauss, *La pensée sauvage*, (Paris, 1962).
[32] F Francioni, "Culture, Heritage and Human Rights: An Introduction", in F Francioni and M Scheinin (eds.), *Cultural Human Rights*, (Martinus Nijhoff Publishers, 2008), 14.
[33] For a legal definition of intangible heritage, see Art. 2 of the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage, partially quoted here: "For the purposes of this Convention, 1. The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity."
[34] R O'Keefe, *"The Right to Take Part in Cultural Life under Article 15 of the ICESCR"*, (1998) 47 International and Comparative Law Quarterly, 905, 913.

raised awareness about the fact that there is not one culture but many. According to Lévi-Strauss' structuralism, this plurality of cultures is the way through which social groups and communities evolve and develop: it is a natural phenomenon deriving from the direct or indirect interactions between societies.[35] This concept implies the idea of cultural change as an endemic element of societies: culture is not static, it is a dynamic process intimately linked to the social space in which social actors interact. This interaction causes cultures to exist, adapt, change, or disappear in the course of time. To return to the theoretical debate that opened this chapter, it is this capability of continuously adapting that makes culture a potential positive factor for development: culture becomes, indeed, a source of exchange, innovation and creativity, useful to achieve social and economic improvements.

The modern "what is culture?" debate no longer aims at achieving a homogenous idea of culture, rather it recognises that culture is a complex and constantly evolving process which results in a plurality of cultures, or *cultural diversity.* Under the current landscape of international conventions, UNESCO defines cultural diversity as the "*the manifold ways in which the cultures of groups and societies find expression*" which "*is made manifest […] through […] diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used*".[36] Further, the UNESCO Declaration on Cultural Diversity, adopted in 2001, by affirming that this cultural diversity is part of the richness of our humanity, widens the range of everyone's options, and "*is as necessary for humankind as biodiversity is for nature",*[37] acknowledges the link between culture and development. It is interesting to note that UNESCO, while defining cultural diversity *as "one of the roots of development"* points out that development is *"understood not simply in terms of economic growth, but also a*

[35] Discussing about the concepts of race and civilization, Claude Lévi-Strauss writes: "[…] la vie de l'humanité […] ne se développe pas sous le régime d'une uniforme monotonie, mais à travers des mode extraordinairement diversifiés de sociétés et de civilizations; cette diversité intellectuelle, esthétique, sociologique, n'est unie par aucune relation de cause à effet à celle qui existe sur le plan biologique […] elle lui est seulement parallèle sur un autre terrain", C Lévi-Strauss, *Race et Histoire*, (Edition Gonthier, 1961).at 11.

[36] Art. 4 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, references above (n 21).

[37] Art. 1 of the UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO, Paris 2 Nov 2001.

means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence".[38]

In our globalised ever-changing world where societies become increasingly multicultural, cultural diversity is under several threats. On the one hand, globalisation and digitalisation have generated uncontrolled and accelerated interactions between culture and other sectors, such as trade and law, which are leading to a sort of global cultural homogenisation. On the other hand, the difficulty of accommodating diversity in our societies creates social tensions and hostilities. In both cases, there is an increasing claim for preserving cultural diversity as a means to protect *cultural identity*. As we will see in the course of this analysis, these tensions are at the heart of the culture and development dichotomy.

1.3) The notion of development

1.3.1) From economic growth to sustainable development

As previously stated, institutions and governments have traditionally understood development as economic growth, to be achieved through increasing production and trade activity. Great attention was given to the relationship between human beings and economic growth: poverty could be overcome through growth, and this would be the key for humanity's wellbeing.[39] In general, the Western neo-liberal developmental model assumed that if the economy grows, eventually all would benefit.[40] As we have seen above, since the 1980s this traditional understanding has been strongly attacked. Evidence that there are still well-developed and non-developed regions in the world, the negative impact of industrialisation for the environment, and the acknowledgment that economic growth does not always trigger the respect of democracy, rule of law, and fundamental freedoms, calls for alternative and more holistic models of development.

Starting again from the etymology of the word, "development" literally means a *progressive process towards improvements or change*. *Improvement* is not only a

[38] Art. 3 of the Declaration.
[39] B Hopwood, M Mellor and G O'Brien, "Sustainable Development: Mapping Different Approaches", (2005) 13 Sustainable Development, 38.
[40] D Dollar and A Kraay *Growth is Good for the Poor*, (World Bank, 2000).

matter of quantity, but also – if not mainly – a question of quality. Therefore, a progressive process towards improvements cannot only be about economic growth as quantitative results, but implies also qualitative goals.[41] Further, every progressive process does not stand alone, but depends upon the interaction of several elements that are not disconnected from the rest of the world and generate externalities likely to affect other lives (or systems).

The 1986 Declaration on the Right to Development defines development as "*a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom*".[42] In spite of this all-embracing definition, for a long time development was not considered a complex process connected to other dimensions: indeed, the interdependence of economic growth and the environment and its consequences on ecosystems, as well as with the social and cultural sphere, have been mostly ignored. In the 1970s, under the influence of the ecologist and environmentalist conservation movements, awareness was raised about the fact that growth is not unlimited and is very much dependent on natural resources – which are finite and in great demand by human beings.[43] The recognition from the scientific community that irresponsible industrialisation has negative impacts on the environment and heavily affects climate change also contributed to stir the global audience and in 1987 the World Commission on Environment and Development (WCED) was created.[44] The WCED released the document *Our Common Future*, [45] also known as the Brundtland Report, which introduced the idea of a *sustainable development*, subsequently reaffirmed at the UN Conference on Environment and

[41] H Daly, "Sustainable growth: an impossibility theorem", in H Daly and K Townsend (eds), *Valuing the Earth: Economics, Ecology Ethics*, (MIT Press,1993).
[42] Preamble of the Declaration on the Right to Development, UNGA resolution 41/128 (4 December 1986).
[43] This strong concern about environmental issues gained international attention with the 1972 United Nations Conference on the Human Environment (UNCHE), held in Stockholm, which ended with the "Stockholm Declaration on the Human Environment". The Declaration is a statement of principles, among which principle 14 recognises the *need to reconcile the conflicts between the needs of development and the need to protect and improve the environment*. See: Declaration of the United Nations Conference on Human Environment, UNGA A/CONF.151/26
[44] The WCED was a mixed international group made up by experts on environment, development, politicians and civil servants, whose mandate was to propose long-term environmental strategies for achieving sustainable development. UNGA 38/161 Res (1983).
[45] *Our Common Future*, UNGA Res 42/187.

Development in Rio de Janeiro in 1992.[46] According to the Brundtland Report, sustainable development "*meets the needs of the present without compromising the ability of future generations to meet their own needs*". This definition recognises the dependency of humans on natural resources to satisfy their needs – giving priority to the needs of the poor – and understands wellbeing in a much wider sense than merely economic. The Brundtland Report points out the interconnections of human activities with the environment and the fact that actions and impacts are not only local, but regional and global: environmental problems threaten people's health and livelihoods, hinder access to food, can cause instability and wars and compromise future generations' lives. Therefore, sustainable development should be built on the more responsible action of human beings towards the entire planet, which requires increased participation of civilians and local stakeholders and the assessment of environmental and social impacts of human activities. Business and governmental actors should also be socially responsible when taking initiatives that can have externalities on the environment, ensure equity in benefit sharing, and a fair access to resources. Based on three components – economic, environmental, and social – the model of development proposed by the Brundtland Report focuses on qualitative and responsible growth, rather than quantitative growth. This has been codified under international environmental law through new principles and obligations, such as the integration of environmental protection in development policies, the precautionary principle, the sustainable use of natural resources, conservation strategies, etc.[47] Further, the principle of equal access to benefit-sharing, "common but differentiated responsibilities" for developed and developing countries, inter-generational and intra-generational equity, and social accountability of private and public actors recall the social component of this new developmental paradigm.

Although this paradigm certainly represents a more holistic way of thinking about development, several critics have pointed out that the accent is still on growth – namely understood as economic growth.[48] Qualitative aspects seem to be reduced to the possibility of being able to achieve economic growth in the future, whereas

[46] Rio Declaration, *cit* (n 15).
[47] See the 27 principles of the Rio Declaration (n 15). For a history of the birth and evolution of sustainable development under international law: N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, (Martinus Nijhoff Publisher 2008).
[48] See, for instance, Serge Latouche, who argues that societies of growth are not sustainable and advocates for a downscaling of production and consumption: S Latouhce, *Le pari de la décroissance*, (Librairie Arthème Fayard/Pluriel, 2010). See also Arturo Escobar, above quoted (n 12).

"sustainability" – the key word of this new paradigm – should mainly mean *ecological sustainability*, referring to a "*harmonious relationship between humans and nature*, *enabling life on the planet and supporting human development"*.[49] Others argue that the social components of the sustainable paradigm are mostly instrumental to achieve economic development, and social and cultural rights mainly stay on the sidelines.[50]

From these critical perspectives, as far as the final goal is still to ensure economic growth, sustainable development does not represent a truly different model of development,[51] nor does it seem to endorse fully the etymological definition of development as a process towards improvement. Nonetheless, the emphasis on the environmental dimension of development – highlighted from the Rio declaration onwards – passed into a proliferation of soft and hard law instruments focusing on environmental protection. Although the effectiveness of international environmental law can be questioned,[52] it can be noticed that the same attention has not been granted to culture as a dimension of the sustainable paradigm. It is unsurprising, therefore, that the implementation of multilateral action plans does not systematically include the cultural dimension. Let us consider, for instance, that the Millennium Development Goals – adopted in 2000 – left out culture entirely.[53] Within the sustainable development paradigm, the cultural component is generally associated with the social pillar, which mainly refers to culture as education or more broadly with regard to human rights.

1.3.2) A rights-based approach: the human development paradigm

From the late 1980s to the early 1990s, the international debate on sustainable development turned into a reconceptualisation of a broader definition of development: the "human development" paradigm. In 1990, the United Nations Development

[49] M Montini, "Revising International Environmental Law Through the Paradigm of Ecological Sustainability" (2013) EUI Working Papers AEL 2013/05, at 5. See also: K Bosselman, *The principle of sustainability: transforming law and governance,* (Ashgate, 2008).
[50] MC Cordonier Segger and A Khalfan, *Sustainable development law: principles, practices and prospects*, (Oxford University Press, 2004), at 29.
[51] See again A Escobar on this, above (n 12), at 232. See also: H Bartoli, *Rethinking Development. Putting an end to poverty*, Ed. UNESCO, Paris, 2000, 31-60.
[52] On this: D Bodansky, *The art and craft of international environmental law* (Harvard University Press, 2010); or also M Montini, above (n 49).
[53] Millennium Declaration, UNGA Res A/RES/55/2.

Programme launched the *Human Development Report*, which, under the influence of Amartya Sen's work,[54] defined human development as the *process of enlarging people's choices*. The main difference between the idea of "development as economic growth" and "human development" is that the first one focuses exclusively on the expansion of one kind of choice (namely increasing incomes), whereas the second one encompasses the enlargement of all human choices (economic, social, cultural or political).[55] This idea moves from the understanding that the expansion of income does not necessarily contribute to enlarge all other choices, especially when the access to resources and income are not fairly and equally distributed within a society.[56] The human development theory questions the prevailing approaches to development: the accent is on the human being as a complex system of different needs and abilities and development is about empowering people to enhance their capability (rather than on the expansion of the capability of the economic system). As Amartya Sen explains, a human life may be seen as a set of interrelated "functionings", a set of beings and doings contributing to her/his personal welfare: being well-nourished, being respected, avoiding escapable disease, and participating in political decisions are among such beings or doings. "Capabilities" are the various combinations of functionings a person can undertake, when exercising his/her freedom to choose a lifestyle. Development becomes the process of providing new functionings and enlarging the capabilities of people.[57] Sen also argues that *choices* are the condition and the realm of freedom: the fulfilment of human rights plays a core role in extending people's choices and, therefore, securing human beings' freedom and development.

Among the diverse critics of sustainable development, there is also the acceptation of the legal status of sustainable development under international law, which remains highly contested. Such incertitude weakens the concept and undermines its effective implementation.[58] A human rights-based approach to

[54] A Sen, *Development as Freedom*, (Oxford University Press, 1999).
[55] M Ul Haq, *The Human Development Paradigm*, in S Fukuda-Parr and A K Shiva Kumar (eds.), *Handbook of Human Development: Concepts, Measures, and Policies*, (Oxford University Press, 2009,),17.
[56] A Sen, cit. (n 54).
[57] A Sen, *Development as capability expansion*, in S Fukuda-Parr and AK Shiva Kumar (eds.), *Handbook of Human Development: Concepts, Measures, and Policies*, (Oxford University Press, 2009), 3.
[58] On the debate over the legal status of sustainable development, see: V Lowe, "Sustainable development and unsustainable arguments", in A Boyle and D Freestone (eds), *International law and*

development may help to overcome this problem. As argued in the 2000 Human Development Report, grounding the human development paradigm on human rights has a double advantage. First, human rights grant a more specific and compulsory dimension to development by giving a legal status to the claim of individuals and communities and indicating duty and responsibility of institutions and other actors to enforce them. For instance, to assert a human right to free elementary education is to claim more than saying that it would be a good thing for everyone to have a basic education: the rights dimension entitles everybody to have access to and enjoy free elementary education, and to raise such a claim before national (and, if necessary, international) courts when not enforced. Second, embedding the human rights thinking within the human development logic can help to make human rights' contents more concrete – whose realisation is often hindered by problems related to their interpretation and enforcement.[59]

The 1986 Declaration on the Right to Development states that "*the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*."[60] Such a definition embeds the principles and contents of the human development paradigm and goes beyond the sustainable development definition of the Brundtland Report. Focusing on the human rights-based approach directs the attention to the ends that make development important, rather than to some of the means that make it possible. GDP growth or rise in personal income can be among these useful means, but they are not the ends of development.[61] The primary end of development is freedom, which can be reached through the enjoyment of economic, social, cultural, and political rights. This broader and more inclusive perspective of development re-interprets the role of markets as instrumental to other goals: economic improvements can bring economic freedom, which can lead to social and political freedom and extend human freedoms.[62]

---

sustainable development: past achievements and future challenges, (Oxford University Press, 1999); see also N Schrijver, cit. (n 47), and Cordonier Segger and Khalfan, cit. (n 50), at 45.

[59] UNDP, *Human Rights and Human Development*, Human Development Report 2000, at 21.

[60] Art. 1, Declaration on the Right to Development, UNGA resolution 41/128 (4 December 1986).

[61] A Sen, (n 54), at 3.

[62] *Ibidem*, 6.

Within the human development paradigm a greater recognition of the role of culture as a means of development can be discerned.[63] Culture is, *in primis*, taken into account in terms of cultural rights, whose fulfilment contributes to enhance freedom and to have good, equal, and balanced societies, but also the *constructive* role of culture in the genesis of values and priorities is endorsed.[64] Indeed, while acknowledging that certain traditions and values may hinder personal freedoms, Sen refuses all generalisations or universalist presumptions about cultural values, and recalls that also in the same region there may be much diversity and argues that it is now time to understand cross-cultural influences. Cultural interchange can extend our basic capability to enjoy products of other cultures and other lands, and, by doing so, strengthen the opportunity to understand one another.[65] Finally, culture contributes to enhance people's ownership of developmental processes by strengthening their participation and sense of self-determination.

Sustainability and human development have today merged: when UN agencies, institutions, and States talk about development to the global audience, they commonly refer to a "sustainable human development" model, which brings together environmental concerns and economic, social, and cultural aspects. To sum up, the adjectives "sustainable" and "human" have given development a different face and put the accent on the qualitative aspect of development, rather than quantitative. This integrated approach reflects a more holistic vision of development and asks for the integration of human rights, social, cultural, economic and environmental objectives at all policy and governance level.[66] This holistic and comprehensive understanding of development is the one adopted for the purpose of my analysis.

2) "Culture and development" or "Cultural development": what is it all about?

[63] Culture is, at the same time, a structural element of the human development paradigm and the result to be achieved through human development policies, see: C Welzel, R Inglehart and H C Klingemann. *"The Theory of Human Development: A Cross-Cultural Analysis"*, Paper for the Center for the Study of Democracy, University of California of Irvine, 2002, available at http://repositories.cdlib.org/csd/02-01.

[64] *Ib*., 233, 246.

[65] *Ib*, 242, 244.

[66] This approach is reflected in the principle of integration and interrelations of human rights and social, economic and cultural objectives (Principle 7) of the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002 (70th Conference of the International Law Association, held in New Delhi, India, 2–6 April 2002), also published in (2002) 2 *International Environmental Agreements: Politics, Law and Economics, 211-216.*

2.1) "Culture and development" vs. "Cultural development"

Does "culture and development" refer to something different to "cultural development"? When talking about "culture and development" (or "culture *for* development"), many people will immediately think about "cultural development". This mismatch is quite common and perhaps inevitable, considering that the two processes are strictly connected and interdependent. Nonetheless, they define two different concepts and pursue different outcomes and objectives.

The "culture and development" dichotomy, similarly to "culture for development", refers to the role of culture in achieving development. In these terms, culture is instrumental to the economic, social, and environmental pillars of development. Culture is taken into account as a vector for economic growth and eradicating poverty, enhancing human rights, gender equality, health and environmental concerns, but also as a broader resource to improve quality of life and intensify participation.[67] In other words, "culture and/for development" is about the relationship of culture with very pragmatic and concrete situations of human life and the way through which culture can interact, influence and contribute to the improvement of the human condition. Indeed, the final objective of "culture and development" is development and not – or at least, not only – the development of culture itself.[68]

Conversely, "cultural development" deals with the promotion of cultural growth as an aspect of development: culture is here considered as a sociological dynamic in which society grows by taking part in cultural life, education, arts and creative processes. When referring to "cultural development", the focus is on culture *per se* and the overall goal is the development of cultural involvement, intellectual and cultural capabilities.[69] Cultural development is, then, one possible outcome of developmental policies, and in particular of those policies that use mainstream culture as a lever for development.

---

[67] R Cherneva, B Danailov, R Arkova and T Petrova, "Culture and Sustainable Development", in K Epskam, H Gould, DA Jelincic (eds.), *Culture and Development vs. Cultural Development*, (Culturelink Special Issue, 2000), 125.

[68] M Claxton, *Culture and Development Revisited*, (1998) paper delivered at the UNESCO World Conference on Cultural Policies for Development, also published in K Epskam, H Gould, DA Jelincic (eds.), *Culture and Development vs. Cultural Development*, (Culturelink Special Issue, 2000), 23.

[69] K Epskam and H Gould, "Introduction: outlining the debate", in K Epskam, H Gould, DA Jelincic (eds.), (n 67), 6, 8.

"Cultural development" is mainly a matter of cultural policy addressing artists, cultural professionals and citizens, whereas the dichotomy "culture and development" needs to be implemented by governments, institutions, and developmental specialists through typical developmental channels such as trade agreements, cooperation, aid programmes, and human rights instruments. In the last case, practical aspects concerning artistic and cultural activities, the protection of cultural heritage and diversity should be taken into account within developmental frames. This distinction is not always clear to governments and policy makers, who frequently switch between the two concepts, stressing the cultural component as a goal rather than a means when integrating culture into developmental policies. On one hand, this is explained by the difficulty in describing and measuring the interactions between culture and development through wealth measures and indicators.[70] On the other hand, culture is both the means and the end of development and it is not always easy to establish if culture acts as a catalyst for development or whether it is a product of development.

In the past fifty years, international conferences addressing the interaction between culture and development have contributed to create even more confusion, often making no distinction between culture and development, cultural development, and cultural policies for development.[71] In particular, governments usually focus on the promotion of cultural policies as art promotion and art policy, forgetting the other dimension of development. To draw a clear-cut distinction between these two binomials might clarify the existing confusion, but it could also prevent us from noticing the synergies between them. Indeed, the two concepts not only coexist, but they are often closely entwined. Let us consider, for instance, the promotion of artistic events, which at first glance falls within the activities pursuing cultural development, but, in some ways, also has a social vocation and stimulates dialogue and participation within societies (therefore contributing to build a more democratic community life and addressing social problems). Cultural and artistic activities promoting "cultural development" – such as entertainment, cultural tourism, or education – do not

[70] On the need to develop a set of new and comprehensive cultural indicators see: P Schafer, "Diversity and Sustainable Development. Contemporary Concerns or Permanent Realities?", in (Special Issue 2002/2003) *Cultural diversity and Sustainable Development Culturelink Review*, 5, 16. On this issue, see also the UNESCO's initiative "Culture for Development Indicator Suite", a research project that aims to establish a set of indicators highlighting how culture contributes to development at the national level fostering economic growth, and helping individuals and communities to expand their life choices and adapt to change (http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/culture-for-development-indicators/more-information/).

[71] For some examples see para. 1.1.2 of this chapter.

explicitly focus on development, however they have indirect positive spill-over effects for it.

While from a theoretical point of view a rigid separation between "cultural development" and "culture and development" might not be necessary, from a practical perspective a distinction between the two is relevant, particularly in terms of the opportunities and tensions that may arise. Indeed, cultural development is not a controversial theme, whereas using culture as a means to achieve development (in its broader sense) may give rise to unexpected tensions, *in primis* the preservation and conservation of culture and cultural diversity. In fact, if it is true that culture can positively or negatively impinge upon development, it is also true that development can have a positive or negative impact on culture. The accelerated and ongoing process of globalisation contributes to point out the contradictions arising from the encroachment of culture by other policies.[72] In particular, this thesis focuses on the tensions that may arise from the interplay of culture with trade, migration, and intellectual property policies. After describing how culture can positively contribute to the economic, social, and environmental pillars of sustainable development, I will provide a frame depicting what tensions may arise when different interests are at stake. This analysis will be explored further through the lenses of international law in chapter 3.

2.2) "Culture and development": contributions to economic development, social inclusion and environmental sustainability

2.2.1) *Heritage* and *creativity* as a lever of economic growth

There are several declinations of the "culture for development" dichotomy: beliefs, traditions, ways of living, cultural expressions and creativity can simultaneously play different roles for societies' development. Starting from the economic dimension, it is acknowledged today that culture as *heritage* and *creativity* contributes to boost economic growth.[73] In particular, we can consider the role of

[72] As Rosemary Coombe notices, nowadays cultural preoccupations seem to be more relevant for sociologists, economists and lawyers than for anthropologists: R J Coombe.*"Legal claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference"*, (2005), 1 *Law, Culture and the Humanities*, 35.

[73] For a comprehensive discussion on how and to what extent culture contributes to economic growth, see: P E Petrakis, *Culture, Growth and Economic Policy*, (Springer-Verlag Berlin Heidelberg 2014).

cultural and creative industries[74] – such as film and music, broadcasting, fashion, design, cultural tourism – in increasing national GDP, creating employment and generating incomes. When the production of a movie begins – or the restoration of an ancient monument, the preparation of music festivals, and other similar initiatives – it is not only the cultural sector that is likely to benefit but all the economic activities, provisions of services and business around it. For instance, in the case of film production, investments dedicated to this realisation will bring opportunities for new jobs in the area where the film is set and produced. Thus it is not only the producers, distributors and creatives involved in the cultural production, but also the local economic actors around it – from people working in the hospitality sector and restaurateurs to providers of services such as cameraman, hairdressers, music technicians, etc. – that can take advantage of this situation, both in terms of increased incomes and new creation of job opportunities.

Trend studies affirm that the creative industries have been one of the most dynamic sectors of the world economy throughout the past decade.[75] Because of a lack of evidence, long-term statistical data on cultural industries and underdeveloped methods of measurement of economic analysis that could be applied to the cultural sector, until the 1960s cultural industries as an economic phenomenon have been underestimated. Between the mid-1960s and 1980s, methodological and analytical research improvements in this field produced research that demonstrated that cultural and creative industries can generate a high growth rate of Gross Domestic Product (GDP) or Gross Value Added (GVA) and employment.[76] From the point of view of

[74] UNESCO broadly defines cultural industries as the 'printing, publishing and multimedia, audio-visual, phonographic and cinematographic productions, crafts and design, architecture, visual and performance arts, sports, manufacturing of musical instruments, advertising and cultural tourism'. See: UNESCO, *Culture, Trade and Globalization: Questions and Answers* (2000). The expression 'creative industries' is synonymous with cultural industries. Hereinafter, I will use both terms to refer to the same concept. For further details on the evolution of the concept of cultural industries see: Rostam J. Neuwirth, *The Cultural Industries in International Trade Law. Insights from the NAFTA, the WTO and the EU*, (Verlag Dr. Kovač, 2006), 30.

[75] UNCTAD *Creative Economy Report 2010*, (UNCTAD/DITC/TAB/2010/3), available at http://unctad.org/en/pages/publications/Creative-Economy-Report-(Series).aspx (last access on the 12th May 2014).

[76] A history of the evolution of economic analytical approaches to cultural industries can be found in *Measuring the economic contribution of cultural industries A review and assessment of current methodological approaches 2009 Framework for Cultural Statistics Handbook No. 1* (published by UNESCO Institute for Statistics, 2012) available at http://www.uis.unesco.org. The report clarifies that "the history of economic research of culture is connected with the publication of Baumol and Bowen's paper "On Performing Arts: Anatomy of their Economic Problems" in 1965, and later in 1966, with the book entitled *Performing Arts: The Economic Dilemma*, where the authors analysed the economic position of performing arts in the United States". Such contributions gave fresh inputs into the

economists, cultural and creative industries can generate growth of the overall economy: some of their sectors (e.g. tourism, design and film production) can provide spill-over effects for the economy; they attract a high-quality workforce, business and investment, and spur creativity and innovation across other sectors of the economy.[77] This last element is particularly relevant if we consider that under the new understanding of growth and development, the main factors of economic and social growth are knowledge, creativity, originality and skills. This so called "knowledge-based economy" finds its economic support in creativity, talent and the exchange of ideas; therefore, cultural industries play a significant role as growth generators.[78] Further, in time of crises, figures show that the creative sectors are responding better than other industries: in 2008, despite the 12 per cent decline in global trade, world trade of creative goods and services continued to expand, reaching $592 billion and reflecting an annual growth rate of 14 per cent during the 2002-2008 period.[79] The UN Conference on Trade and Development recognises that "*creative economy sectors can contribute a lot to growth and prosperity, especially for developing countries seeking to diversify their economies and build resilience to future economic crisis*".[80] Cultural goods and services can, then, play a crucial role in fighting poverty, creating employment and enhancing national economies – even in developing countries. Several initiatives undertaken by several governments in the Eastern and Southern regions of the world, especially in the frame of institutional regional cooperation, seem to show that developing countries have cottoned on to the economic potential of the cultural sector. For instance, in 2006, the BIMSTEC ministerial meeting launched the Paro Initiative recognising that "*Cultural industries have the capacity to*

---

reconsideration of the role of cultural industries in economics. Major studies were developed between 1980 and 1990 on this subject (at 9).

[77] More information concerning relevant authors and research carried out by economists in this field are available in the 2009 UNESCO Handbook No 1, (*ibidem*).

[78] Unfortunately, at the time of writing, updated and comprehensive statistics concerning the contribution of the cultural and creative industries that could offer more precise data in support of this statement are still missing. The scarcity of data and comprehensive analytical frameworks measuring both the qualitative and quantitative contributions of culture to the economic sectors is a major challenge for analysts in this sector. Several ongoing initiatives are attempting to fill this gap. For instance, the UNESCO Institute of Statistics (UIS), based in Canada, is now implementing a new global survey on Cultural Employment, to be launched in July 2015 (first results are expected by 2016). Further, the UIS is currently developing a new analytical report and a new data set, which will also include the international trade of cultural goods and services, based on the 2009 UNESCO Framework for Cultural Statistics: outcomes are expected by Mid-2015. (Source: courtesy of the Head of the Cultural Statistics Unit, José Pessoa, of the UIS, interviewed *via* e-mail in June 2014).

[79] Data extrapolated from the 2010 UNCTAD Report, at 22.

[80] *Ibidem*, at XV.

contribute to poverty reduction and have proven to be a powerful instrument for social reorganisation and the vitalization of local communities, especially among the poorer groups of society, both in rural communities and in the urban slums."[81] Similarly, in 2008 the Ministers of Culture of the African Union, who had gathered together in Algiers, adopted the Nairobi Plan of Action on the Cultural and Creative Industries in Africa.[82] These initiatives aim at improving living and working conditions of local artists and creators in endogenous cultural development, as well as to support improvements of local cultural industries. In particular, the Nairobi Plan of Action, by establishing specific objectives, such as facilitating the "*safeguard, organisation, production, marketing, distribution, exhibition and preservation of African cultural and creative industries*", and making them key to African development, highlights the contribution of cultural activities, thereby enabling culture to become a significant element of future development strategies.

Finally, we should recall the economic contributions deriving from Intellectual Property Rights (IPR), namely copyright, licenses, and other related author's rights. First of all, such rights entitle creators and owners of intellectual work to exercise certain economic rights, which allow them to derive financial reward from the use of their work by others. Yet, IPRs are not exclusively beneficial for authors and creators, they are also considered an engine for the development of cultural and creative industries as they attract and foster investments, promote research development (RD) and technological advancement. As a confirmation of the acknowledgement of this contribution, between 2004 and 2012, Developmental Agendas of WIPO, the UN organisation concerning culture, cultural trade and intellectual property rights, made quite significant efforts through different proposal for actions – such as, normative and policy regulation, technology transfer, capacity building – to strengthen the value of the economic dimension of intellectual property assets.[83]

[81] BIMSTEC countries (2006). "Paro Initiative and Plan of Actions". First BISMTEC on Cultural Cooperation, Paro, Bhutan, May 2006, (source: http://www.bimstec.org/).
[82] The Nairobi Action Plan was produced at the First Session of Conference of African Union Ministers of Culture (African Union, 2005) and adopted at the Second Session of Conference of African Union Ministers of Culture in Algiers (African Union, 2008).
[83] It is also worth mentioning that in 2003 WIPO published the *Guide on Surveying the Economic Contribution of the Copyright-Based Industries,* a practical tool for measuring the economic contribution of a nation's creative and information sector: available at http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf.

2.2.2) Arts and culture as a lever of social inclusion and mutual understanding

The cultural sector generates two types of impact: non-economic and economic. This double effect comes from cultural goods and services' dual nature: indeed, cultural goods and services are both trade goods and vehicles of cultural contents, ideas and national identities.[84] Consequently, while circulating, they not only contribute to increase economies, but also have a social function. They spread knowledge, foster creativity, build social capital, and can raise awareness about key issues such as civil and political rights, gender equality, or environmental concerns. The arts and artistic creations are also valuable tools to support a community's participation in cultural life, as well as pluralism and democratic processes. Indirectly, by diffusing access to knowledge, they contribute to foster dialogue among peoples and nations and play a role in conflict prevention and post-conflict reconstruction. Overall, cultural exchanges contribute to build more balanced and peaceful societies. Several cases demonstrate that where, for instance, the commercial music industry or the handicrafts industry are prospering (and are owned by the local community), money goes directly to the grassroots and will support further development of cultural products, contributing to create community participation in building development and social cohesion.[85]

Enhancing the circulation of cultural products into and from developing countries thus seems to be a core priority in order to allow cultural industries to play a part in building sustainable development in the least developed and developing countries.[86] Circulation of cultural goods, services and artists is an essential element to foster cultural exchanges, which can deploy both economic and social benefits. Cultural exchanges have been taking place for centuries, spurring cultural contamination across the globe. It is from such contamination that many cultural products and artistic creations, highly valued today for being at the same time forms of arts and sources of important income, originated and created bridges between

[84] Art. 1 (g) and art 4 of the 2005 UNESCO Convention on Cultural Diversity, above (n 21).
[85] Several examples of these experiences in African, Caribbean, and Asian Countries are quoted in the UNESCO/UNDP *Creative Economy Report 2013 Special Edition: widening local development pathways*, available at http://www.unesco.org/culture/pdf/creative-economy-report- 2013.pdf and http://academy.ssc.undp.org/creative-economy-report-2013. For other examples, see also the Kuna Mola Handicraft Project in Panama supported by WIPO and the Inter-American Development Bank, dealing with the safeguard of traditional handicrafts through a *sui generis* IP law and the empowerment of women belonging to a discriminated ethnic group in Panama: WIPO Magazine, Issue 6/2005 (Nov-Dec), available at http://www.wipo.int/wipo_magazine/en/2005/06/.
[86] UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries - Note by the UNCTAD Secretariat,* TD/B/COM.1/EM.20/2 (30 September 2002), point II.C, at 9.

peoples and populations. To offer only a few emblematic samples, we might consider the significant influence of African music on the American continent, which gave birth to some remarkable music genres like Jazz and Blues in the US, or the combination of music and dancing such as Capoeira in Brazil. It is worth highlighting how such forms of cultural expressions, which were firstly tools to manifest the identity of certain socio-cultural contexts, have today become forms of arts and leisure that are appreciated worldwide and are capable of gaining an important space in national and international trade. We can also recall that cultural projects – such as the recovery and reconstruction of historical buildings or art works – are today a tool for building reconciliation in post-conflicts contexts.[87] When culture moves, acting as a vector of development, social and economic benefits for the whole society seem to come together.

2.2.3) Traditional knowledge as a lever of environmental sustainability

Regarding the relationship between culture and environmental sustainability, it is well known today that culture as *intangible heritage* and *ways of life* can have positive impacts on environment and biodiversity.[88] Although the development of any culture

[87] Several examples can be found among cooperation projects under the aegis of the UN (and in particular of UNESCO). The EU is also among the greatest promoters and financial supporters of this kind of initiative. The example of the Sarajevo Festival, quoted by Stefano Manservisi – former Director General for Development of the European Commission – from an interview for **the website *Culture and creativity, vectors for development* in 2009 -** clarifies the role of culture in post-conflict situations: "*Culture also plays an important role in conflict and postconflict zones, for* ***inter-cultural dialogue*** *is a key element in brining about peace and reconciliation between communities. For instance, in recent years, the Sarajevo Film Festival, which held its first edition in 1995 in a climate of smoking guns and dire inter-cultural hatred, has been working hard to bring people in the Balkans together, encouraging co-productions of young directors from the different Balkan regions and promoting, quite successfully, an atmosphere of understanding, tolerance, and exchange of ideas and experiences*". (Source: http://www.culture-dev.eu/pages/en/en_introduction_part1.html)

[88] See, for instance, the Belém Declaration, adopted by the First International Congress of Ethnobiology in Belém (Brazil), July 1988, the 1992 Convention on Biological Diversity, and the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage. Furthermore, in recent decades several studies were promoted to assess the links between culture, environment and development. Among others, see: UNESCO and UNEP, *Cultural Diversity and Biodiversity for Sustainable Development,* report from the World Summit Sustainable Development held in Johannesburg on 3rd September 2002, available at http://unesdoc.unesco.org/images/0013/001322/132262e.pdf; A Persic and G Martin (ed), *Links between biological and cultural diversity-concepts, methods and experiences, Report of an International Workshop*, (UNESCO, Paris 2008). It is also worth mentioning the Joint Programme Between UNESCO and the SCBD on the links between Biological and Cultural Diversity, launching the International Conference on Biological and Cultural Diversity, held in Montreal, Canada in 2010 to implement the provisions of the CBD and UNESCO culture related Conventions in a mutually reinforcing and coordinated manner. The Joint Programme was endorsed by UNESCO's constituencies

is highly influenced by the constant interaction between the environment and human needs, the role of cultural diversity to counteract environmental challenges, such as the erosion of biodiversity and climate change resilience has been often underestimated. States and the international community have mostly privileged technical and scientific responses to ecological issues. Yet, there is "*increasing recognition that cultural practices are intimately linked to environmental integrity"*.[89] This is particularly true in the case of traditional knowledge and practices related to natural resources management and land planning, which entail endogenous connections between culture and nature. We can think, for instance, about traditional agricultural systems or traditional handicrafts linked to the use of local raw materials that have been practised for centuries in rural European villages. Such knowledge – acquired, shared, and refined throughout time and generations – has constituted the basis of communities' local development for a long time. Traditional agriculture's interactions with nature contributed to shape the European landscape, which is today considered an important element of bio-cultural identity and diversity as well as of economic return.[90] Traditional knowledge's contribution to sustainable development is particularly relevant in developing countries, where Indigenous and local communities primarily thriving on traditional agriculture, hunting, fisheries or the managing of forests still exist. Such traditional practices often constitute environmentally-friendly management of natural resources and contribute to preserve ecological assets and biodiversity. At the same time, traditional knowledge is part of indigenous or local communities' cultural identity and societal structure: its safeguard is necessary to ensure the sustainable economic, social, and cultural survival of such communities.[91] On a global scale, protecting these local cultural practices can contribute to bring environmental benefits and influence decision-makers to adopt more harmonious measures – striking a better balance between ecosystem and human

---

and welcomed by the 10th meeting of the Parties to the CBD (CBD COP 10) held in October 2010 in Nagoya, Japan (Decision X/20).

[89] UNESCO World Report, *Investing in Cultural Diversity and Intercultural Dialogue*, (2009, UNESCO Publishing), at 203.

[90] Art. 1 of the European Landscape Convention, adopted by the Council of Europe on 20 October 2000 in Florence and entered into force on 1st March 2004, defines landscape as "living cultural and natural heritage". The ELC recognises the positive role of landscape for environmental sustainability and economics.

[91] Bates, P., Chiba M., Kube S. and Nakashima D. (Eds.), *Learning and Knowing in Indigenous Societies Today*, UNESCO, Paris 2009, pp. 128. See also the Preamble of the Convention on Biological Diversity, adopted on 5 June 1992 in Rio de Janeiro and entered into force on 29 December 1993.

needs.[92]

2.2.4) The role of artists and cultural workers in societies and their contribution to human sustainable development

When exploring synergies between culture and development, it must be recognised that artists and cultural professionals play a major role not only in contributing to the socio-cultural development of societies, but also to their economic growth.[93] Further, they contribute to raise awareness and build a civic conscience towards environmental issues.

Beginning with the economic pillar, producers of cultural goods and services, artists, and cultural operators make a significant contribution to local and global economies. As pointed out above, artistic and cultural productions and all related activities in the sector – such as technical support for film production, exhibitions, live-performances, etc. – are an important source of employment opportunities, and thus are important for a country's economic development. To continue with the social pillar, it can be observed that artists have always been the first actors in promoting cultural development by generating creative and innovative works that nourish human souls and enrich life – both through education and leisure opportunities. Artists are also the guardians and ambassadors of national traditional heritage, ancient knowledge, and local cultures: therefore, they play an important role in preserving and promoting intangible heritage. By so doing, they strengthen human cultural rights' contents, such as preserving and promoting national identities and diversities, freedom of expression, and access to and participation in cultural life. Performing artists, writers, intellectuals and cultural operators also play a core role in building mutual understanding between people: they are extraordinary actors in fostering intercultural dialogue in our globalised world by facilitating encounters with ideas and concepts that might seem unusual and create fears and prejudice. We can think, for example, of the role of "migrant writers" in exile: their works tell us about unknown countries and societies oppressed by political or religious dictatorship in order to both

[92] This, of course, would require a greater involvement of local and indigenous communities in the international processes and community's decision making concerning global and local environmental agendas.

[93] Article 7(2) of the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions expressly recognises this role and invites its parties to do the same: "*Parties shall also endeavor to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions*."

promote a better understanding of those countries and to denounce the violations of fundamental rights. Finally, artists sometimes use their works and performances to advocate global causes, like raising awareness for environmental concerns. Several artists are involved in projects dealing with the rescuing and reintroduction of ancient local traditions, with the aim of improving ecological standards and, at the same time, creating opportunities for locals to restore elements of traditional identities.

2.3) "Culture and development": threats and challenges in an increasingly globalised world

Although, as shown above, there are manifold ways through which culture can contribute to development, it should not be assumed that everything is rosy in the garden. On the contrary, mainstreaming culture as a vector of development is no easy task and it entails several threats and challenges. As stated above, in this thesis I will focus on three challenging cases dealing with the interplay between culture and other policies related to development, namely 'trade', 'migration' and 'intellectual property rights'. More precisely, I will look at the threats and challenges stemming from the demand for fostering the circulation of cultural goods and services, artists and cultural workers, and the protection of traditional knowledge related to Genetic Resources. The choice of these three specific cases, rather than the return of illegally exported cultural works, access to education, or other issues, is mainly based on the following reasoning.[94] Since the adoption of the 2005 UNESCO Convention on Cultural Diversity (introduced earlier – this will be explored further in Chapter 3), the accent on the economic returns of the cultural and creative industries has been stressed. This accentuation advocates the enhancement of the circulation of cultural goods and services, which also entails greater circulation of cultural workers and artists. Yet, fostering cultural exchanges in our globalising world is a double challenge: first, international trade rules marginalise developing countries' cultural industries, which

[94] Naturally I am aware that these three specific cases do not cover the entire range of possibilities in which culture can interact with development. Nonetheless, in my opinion they are particularly interesting because of the endogenous legal and policy issues they entail. At the same time, they offer a fascinating playground to analyse the action of the Union in its external relations. Other topics, such as cultural tourism related issues, access to education, or the return of illegally exported cultural goods, are also strongly intertwined with the "culture and development" discourse. Unfortunately, there is not enough room here to deal with all these issues and the selection for this thesis has been made for the practical reasons discussed.

already suffer from their fragmented structure and weak technological innovation;[95] second, enhancing and facilitating the mobility of artists and cultural workers is a subject that becomes highly controversial when it involves artists from developing countries or vulnerable contexts because of its connection with migration issues.

Further, the focus on the economic dimension of culture risks diverting attention away from social and environmental benefits, leading to an increased *commodification* of culture. This mainly brings mainstream culture into development strategies through trade-based tools. In the case of the protection of traditional knowledge, especially that related to the use of genetic resources, this turns into the increased implementation of intellectual property rights in local and indigenous contexts in developing countries, where such property rights clash against very diverse existing social and economic structures and hinder their development as well as the protection of local identities.

The line connecting these three specific cases is the predominance of the trade-approach in mainstreaming culture as a vector of development. I will now frame the issues at stake in these three cases, while I will describe the international law framework within which such challenges take place in chapter 3.

2.3.1) Circulation of cultural goods and services in our globalising world

In today's globalising world, thanks to the liberalisation of markets, the circulation of cultural goods and services, artists and cultural professionals has increased enormously. Advanced technology and globalisation also improved conditions for access to means of communication, by spreading knowledge and information. On the one hand, this is beneficial for global economic, social, and cultural development. On the other hand, globalisation and the increased liberalisation of markets has multiplied threats and challenges for the cultural sector and underlined discrepancies and differences among rich and poor countries. First of all, the unequal distribution of resources and means of development makes participation in the globalisation process very different for developed and developing countries. Wealthy and developed countries are major actors in this process and can take advantages of this situation, whereas developing and low-income countries have a very limited access to the world market and the processes underpinning current global policies.

[95] 2010 UNCTAD Report, at 41.

Such imbalances determine, to some extent, the cultural superiority of developed countries over poor countries.[96] The dominance of Hollywood productions in most of the world's film markets is one example of this Western predominance. As a consequence, we assist in a "westernization" of most countries in terms of culture, the homogenisation of artistic creativity according to the market's standards[97] and loss of cultural models and identities.

From a very liberalist perspective, the loss of cultural diversity should not be perceived as a problem if the rejection of a particular cultural model is the result of free and informed choice. Rather, it should be considered as the consequence of a selective process that determines a natural evolution from one cultural model to another. Yet, free choice in today's world barely exists: the economic and technological superiority of rich countries highly influences and determines the cultural shifts that occur in less developed countries. Developing countries simply cannot compete on the international market in terms of the production and circulation of cultural goods and services. Moreover, they are not in the position to stop the introduction of foreign (cultural or otherwise) goods and services to their internal markets: doing so, in a way, would have negative impacts on their attempts to achieve economic development and would hinder their relationships with developed countries (which are often also donors). From a legal perspective, it should be acknowledged that current international trade rules and the lack of global governance for cultural goods and services are conducive to the affirmation of the cultural superiority of Western countries, while contributing to influence local habits and cultural preferences in developing countries. Unfortunately, these conditions do not favour mutual cultural influences or fair exchange of knowledge that could lead to positive effects, such as economic returns, better-informed societies, and increased reciprocal understanding. In the light of these considerations, the liberalist approach to the loss of cultural diversity is rather hard to support.

---

[96] N Obuljen, *From Our Creative Diversity to the Convention on Cultural Diversity: Introduction to the debate*, in *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions: making it work*, (Institute for International Relations, 2006), at 19, 20.

[97] For example, the fact that almost 80% of the recorded music is distributed by only fours giant companies – Sony Music Entertainment (USA), Universal Music Group (France), Warner Music Group (USA) and EMI (UK) – is highly influencing the genre and the quality of the music listened to by people all over the world. In this situation, there is very little room for non-commercial music creations, experimentation and traditional songs, which, in a more optimistic view, are destined to a niche market.

Further, cultural homogenisation is not only a concern for developing countries, but also for some developed countries that fear the predominance of the US cultural model in the world. The widespread use of English as the main language of global communication, advanced higher technologies and massive investments in the US audiovisual industry are the main factors limiting the worldwide distribution of audio-visual products in other languages and determining the dominant presence of American productions on the global market.[98] So far, the priority of global trade has been to reach the highest level of profit, without paying much attention to the potential consequences of this profit-oriented approach to culture. If the situation remains unchanged, bigger and stronger companies will quickly replace many local cultural industries, with the subsequent loss of several cultural specificities and further cultural homogenisation.

2.3.2) Mobility of artists and cultural workers in a globalising world

Freedom of mobility seems to be an essential condition for the work of artists and cultural professionals, as well as for allowing them to accomplish the socio-cultural tasks mentioned above. From a broader perspective, the mobility of workers and professionals is nowadays perceived as a crucial factor to promote innovation, and creativity and to increase employment opportunities. It should be noted here that freedom of mobility of workers has been at the heart of the European Union since its formation and that the Community Lisbon Programme listed the removal of obstacles to physical, labour, and academic mobility among the number of key actions for growth and employment.[99] For the arts and culture sector, mobility plays an even more crucial role: considering that culture and artistic productions are continuously evolving, freedom of movement is important for nourishing artistic inspiration and the cross-fertilisation of ideas.[100] Transnational movement contributes to provide artists with a deeper understanding of reality, fresh inspiration, and new artistic languages.

[98] At the end of the 1990s, some 80% of films distributed in Europe had been made in the US (data available at: http://lumiere.obs.coe.int/web/sources/analyse.html).
[99] 'Common Actions for Growth and Employment: the Community Lisbon Programme', Communication from the Commission to the Council and the European Parliament, COM (2005) 330 final, 4.
[100] M Blakemore, R Polacek, J Staines: *Information systems to support the mobility of artists and other professionals in the culture field: a feasibility study. Final Report,* (March 2009), Study commissioned by the DG Education and Culture of the European Commission, 1.

Artists affirm that such mobility is often necessary for the process of creative production and allows them to operate as 'sensors' of peoples, times and societies.[101]

When asking whether artists and cultural operators are fully able to enjoy their personal freedom of movement, we find out that they often encounter different kinds of obstacles when crossing transnational borders. Major hindrances to their mobility are of regulative and administrative nature, like the recognition of qualifications, diverse and atypical social security regulations,[102] or different uses of intellectual property rights under national law. Other problems derive from the lack of funds and financial assistance for cultural programmes supporting and promoting cultural exchanges, like labour or study exchange grants. However, the biggest obstacle is presented by visa and work permits regulations, which are interconnected with national migration law and policy.[103] A considerable number of surveys and field studies show that concerts and festival organisers, cultural agents and organisations, as well as performing artists (musicians, singers, actors, etc.) increasingly face problems with visa applications, such as non-transparent, time consuming and costly application procedures.[104] These practical problems are often the outcomes of restrictive national migration policies. In addition, given that artists performing during a tour may need to move (with their troupe) back and forth between many countries, they often request multiple entrance permits. Because of a lack of administrative harmonisation, as well as scarce bureaucratic coordination, multiple entry visas often fail (especially at the country of transit's borders), obliging the whole group of performers to re-enter their country of origin. By consequence, a great number of live performances, shows, festivals – and even academic lectures – are cancelled, often resulting in a loss of money for both the performers and the organisers of the host country, and a missed opportunity to enrich the cultural offer.

The overall question of mobility is strictly connected to migration policy and regulation. Once again, freedom of movement is more difficult for artists and cultural

[101] J Neisse (ed), *Made in Méditerranée. Les défies des échanges artistiques en Méditerranée*, Fonds Roberto Cimetta, (2008), available at http://www.cimettafund.org/documents/FR/FRC-F-.pdf.

[102] As mentioned, artists and cultural professionals are often atypical workers. In particular, artists easily switch from self-employed status to that of employed, whereas cultural professionals are usually employed with temporary contracts. This cause problems in order to individualise the social or economic treatment to be applied, and stops them from moving.

[103] O Reitov and H Hjorth, *Visas / the discordant note. A White Paper on visa issues, Europe & artists' mobility*, 2008, published by Freemuse, ELMF and ECA, also available at http://ec.europa.eu/culture/documents/visa_white_paper.pdf.

[104] As an example of such studies see O Reitov and H Hjorth (*ibidem*) and J Neisse (ed), *Made in Méditerranée. Les défies des échanges artistiques en Méditerranée* (n 101).

workers from the developing and least-developed countries – as well as from certain critical areas such as the Middle-East and Mediterranean areas. Indeed, artists and cultural professionals from disadvantaged contexts are often assimilated to all other migrant workers from developing or least-developed countries: host countries, relying on biased assumptions, deem that arts and culture are just a special channel to grant people coming from third countries a preferential treatment to cross national borders. Once they have entered the country, they are alleged to stay longer and reside in the country illegally, thus contributing to increase irregular immigration.[105] Because of such prejudices, artists and cultural professionals from developing countries experience discriminatory treatment when applying for visas and entry permits, compared to their more famous colleagues from other privileged contexts.

Besides this discrimination, it should be recalled that the existing disparity of economic, social, and cultural conditions between the North and the South already heavily affects the possibility for artists and professionals from the South to travel for work purposes. Most of them can only move thanks to bilateral agreements and cultural cooperation programmes.[106]Frequently, the nature of these exchanges shows the inequality between the Southern and Northern positions: as the North provides funds and tools enabling artists and cultural workers to move from the South, the latter does not have enough power in order to decide contents, rules and conditions of the agreements. Still, the objectives of these exchanges are perceived differently: whereas the Northern countries emphasise the solidarity aim, the Southern countries see them as a possibility for a preferential corridor toward developed countries, which might contribute to improve their working conditions (but not meaning that they will stay illegally in the receiving country).[107] These different expectations lead Northern countries to raise barriers in order to stop the free movement of Southern artists and cultural workers, which could allegedly turn into an uncontrolled flow of migrants. By consequence, artists and cultural workers have to deal with national migration rules and increasingly restrictive policy. In the last decade, most States (including EU Member States) have adopted rigid immigration policy and introduced more stringent control on visa applications, in order to counteract irregular immigration and

[105] In the report *Visas/The discordant note,* a respondent reflecting on the behaviour of embassy's officers, says that "Visa application procedures have huge human costs. Artists are subject to pointless queuing, often in disgraceful conditions and subject to disrespectful treatment by embassy staff", *supra* (n 103) at 12.
[106] J Neisse, *supra* (n 101), at 24.
[107] *Ibidem,* at 24.

international terrorism. An example of this is the UK Home Office's decision, adopted in 2008, to introduce a new points-based system and visa restrictions for non-EU artists and academics wishing to come to the UK for talks, exhibitions, concerts or residencies. According to these new rules, all non-EU visitors must now apply for a visa in person, and supply biometric data, electronic fingerprint scans and a digital photograph. New controls over visitors' day-to-day activity have also been previewed: visitors must show that they have at least £800 pounds of personal savings, which have been held for at least three months prior to the date of their application; the host organisation must keep copies of the visitor's passport and their UK Biometric Card, and a history of their contact details; and if the visitor does not turn up to their studio or place of work, or their whereabouts is unknown, the organisation is legally obliged to inform the UK Border Agency.[108] Like the UK, several other States have adopted similarly restrictive measures that, although not directly addressing artists and cultural workers, are likely to create obstacles to their entrance.[109] It is quite clear that these kinds of restrictions hamper the realisation of equal opportunities for the artists of developing countries to gain their place on the global stage.

2.3.3) Protecting Traditional Knowledge related to genetic resources in a globalising world

When exploring the dynamics between culture and development, one of the most fascinating and controversial relationships stems from the interaction between certain manifestations of intangible cultural heritage, such as traditional knowledge, and intellectual property law. In the last few decades, the debate on the social, environmental, and economic returns from the use of certain forms of traditional knowledge has focused on the need to protect such forms of intangible cultural heritage both from the risk of disappearing and from the risk of misappropriation. In particular, the protection of indigenous and traditional local knowledge related to the use of genetic resources is a major challenge. It is increasingly recognising the

[108] Source and info available at: www.bia.homeoffice.gov.uk and www.guardian.co.uk/theobserver/2009/feb/22/9.

[109] For example: Ireland, Austria, Italy, the US and Canada. In spite of the well-known support that France has always given to artists coming from third countries, especially from Africa, they also face several problems regarding French policies on visa and work permits.

enormous benefits to national economies that can derive from traditional knowledge connected to the use of genetic resources, like plants, seeds, etc. Biotechnological agriculture, pharmaceutical experimentation, and the chemical and food industries largely thrive on the use of such biogenetic resources and access to related traditional knowledge. Once again, developing countries – in particular those that are also custodians of a rich and wild biodiversity like several African or Latin American countries – are a valuable source of income for these industries, mainly based in Western countries or financed by Western corporations. For these companies access to traditional knowledge connected to the use of genetic resources is a necessary step in order to acquire that knowledge, which will be the basis for further experimentation and innovation in the laboratory. Once finalised, the outcomes of such research will turn into new productions to be commercialised – such as GMO products, medicines, cosmetics, etc. – with great economic benefits to Western companies and societies, but little (or no) benefits for local and indigenous communities in developing countries. Developing countries' governments are usually very keen on providing access to local traditional knowledge for the economic benefits that can derive from such disclosure, even when it may entail access to intangible cultural heritage of indigenous and local communities. This situation opens the door to a chain of serious consequences threatening the survival of indigenous and local communities. At the base of this chain are two major causes originating in the implementation of current international Intellectual Property (IP) law: first, the possibility granted under international law to patent biogenetic resources; secondly the inadequacy of IP law to adequately protect TK holders – in particular from serious risks of misappropriation or biopiracy – and ensure a fair distribution of benefits.

It appears crucial to ensure adequate protection to indigenous knowledge for those local and indigenous communities, which primarily thrive on traditional agriculture, fisheries, cattle raising and other essential activities like traditional medicine. While preserving TK in Western societies is mainly a matter of folklore, in such contexts it is essential for ensuring both the community's development and the survival of their cultural identity. So far, most of the debate around this focuses on finding solutions within the frame of Intellectual Property (IP) law. Yet, several scholars and experts are discussing the inadequacy of the solutions offered by current intellectual property law and question the compatibility of the IP law regime with the

respect and full realisation of fundamental rights.[110] Further, intellectual property rights (IPRs) – as currently applied, and implemented worldwide – may hinder the possibility to achieve the development of developing and least-developed countries. More precisely, the legal and economic implications of current IP law can be an obstacle for local and indigenous communities seeking to maintain their own traditional model of development and can heavily influence the economic and social models of developing countries' societies. As Margaret Chon highlights, the debate around IP law and development reveals a divide: not only a divide between developed and developing countries according to their material well-being, but also a divide in understanding development as growth and development as freedom.[111] Within a model of development mainly based on economic growth, IPRs are often supposed to play a crucial role as an engine of growth and innovation in a country as well as a conduit for foreign investment and technology transfer. Many suggest IP protection as an essential driver or even pre-condition of economic growth and development. Nevertheless, economic studies have produced ambivalent results about these connections, and this is also due to the difficulty to separate out the impact of IP on the socio-cultural sphere from other intertwined factors relating to an economy. Today, it is recognised that similar levels of IP protection do not necessarily lead to the same socio-economic impact: on the contrary, they can result in different socio-economic impacts depending on the stage of development and cultural contexts of countries.[112]

In Chapter 3 I will further explore the complex relationship between TK, IPR and development through the narrative of biotechnological agriculture. For now, it is sufficient to point out that globalisation and the predominance of market economy are threatening the existence of such traditional knowledge in the most vulnerable countries and the safeguarding of such pieces of intangible heritage is a key issue not only to preserve cultural and biological diversity, but also the existence of indigenous and local communities.

---

[110] See: Sub-Commission on Human Rights, 'Intellectual property and human rights', Resolution 2000/7 and resolution 2001/21; High Commissioner for Human Rights, 'The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights', UN Doc. E/CN.4/Sub.2/2001/13. See also for a broader view on this topic: Wong, T. 'Intellectual Property through the lens of human development', in Wong, T. & Dutfield, G. *Intellectual Property and Human Development. Current Trends and Future Scenarios,* 2001, Cambridge University Press.

[111] M Chon, *Intellectual Property and the Development Divide*, 27 Cardozo L. Rev., 2005-2006, 2823.

[112] See the examples and data quoted in the UNDP Human Development Report 2001, *Making new technologies work for human development,* Oxford University Press (for UNDP).

3) Mainstreaming culture as a vector of development: major tensions and issues to tackle

3.1) The protection of cultural diversity as a global concern

Although very different in nature and content, the three challenging situations just presented seem to share one major issue: the protection and promotion of cultural diversity. In the case of the circulation of cultural goods, services and artists, the protection of cultural diversity emerges as an issue from the encounter of two different interests: on the one hand the need to foster cultural exchanges, and on the other the need to stop cultural homogenisation. Under the current conditions of neo-liberalism, international trade rules do not seem appropriate to strike the right balance between fostering the circulation of cultural goods and services and preventing the loss of cultural diversity.[113] Preventing and mitigating cultural homogenisation in the context of globalisation is nowadays a legal claim advocated both at the national and international level.[114] Thus, one of the major challenges is the identification of a more appropriate system of rules and policy that could conciliate the need to promote the movement of cultural goods and services to contribute to development and the need to preserve cultural diversity. In other words, the challenge is to find the threshold between more liberalisation of trade in culture and protectionist measures. When it comes to the freedom of movement of artists and cultural workers, striking a balance between the different interests at stake – notably to foster cultural mobility to preserve cultural diversity's potential and the migration and security issues – is even more challenging. In the case of the relationship between TK and IPRs, threats to the protection of cultural diversity stem from the encroachment of two different models and understandings of development: the predominant neo-liberal one, of which IPRs can be considered an expression, and local and indigenous models of development in certain vulnerable contexts, which are very much related to the safeguarding of local cultural identities. This interaction also raises issues concerning the self-determination of peoples to choose and decide their own model of development, as well as to

[113] The international legal framework will be analysed in chapter 3.
[114] R J Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 1 Law, Culture and the Humanities (2005), 35-52, at 36. See also the Preamble of the UN Res 2005/20 on the "Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities", (14 Apr 2005), UN Doc E/CN.4/2005/L.10/Add.10.

preserve their cultural integrity.

Cultural diversity, like biological diversity, is considered a public good: cultural products, intangible heritage, and creativity accomplish a public function that needs to be conserved and promoted for the common good.[115] Just like biological diversity, whose preservation is considered essential for the wellness of the global ecosystem, cultural diversity is seen as the common heritage of humanity and necessary for humankind's richness.[116] Therefore, preserving cultural diversity it is in the interest of humankind. As Francesco Francioni differentiates them, biological and cultural diversity present different features: the first being more permanent and less mutable, varying throughout millennia according to the law of evolution (and increased human impacts); the second being more adaptable and constantly changing throughout generations. Yet, the fact that culture is continuously changing and adapting should not be considered a reason not to grant legal recognition of cultural diversity as a value *per se*.[117] To the contrary, it is this ability to adapt and express diverse cultural contents and identities that creates fruitful exchanges and makes human life rich.[118] It is this ability and the potential of preserving cultural diversity that must be protected in the interest of current and future generations.

3.2) Towards the commodification of culture?

Mainstreaming culture in developmental strategies also entails the risk of commodifying values and heritage. Roughly speaking, commodification refers to the attribution of economic value to all kinds of goods and services, in order to put them on the marketplace.[119] As known, for a long time developmental thinking has prioritised poverty as an issue, therefore the "culture and development" discourse is

[115] Many argue that cultural products should also be considered public goods: I Serageldin, 'Cultural Heritage as Public Good: Economic Analysis Applied to Historic Cities' in I Kaul, I Grunberg, and M Stern (eds), Global Public Goods: International Cooperation in the 21st Century (1999), 240, 241, 244. In the same book, see also the chapter "Defining Global Public Goods", 2.5.

[116] Art. 1, 2001 UNESCO Declaration on Cultural Diversity (n 37); see also the Preamble of the 2005 UNESCO Convention on the Protection and Promotion of Cultural Diversity.

[117] F Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*; 25 Michigan Journal of International Law, (2003-2004), 1209-1228, at 1221.

[118] Ecology and biology show that specialisation, in specific sectors, can help to improve performance but weakens the overall strength and resistance of the system, whereas diversity increases this resistance and facilitates adaptation. The same reasoning can be applied to culture and cultural diversity: cultural diversity can contribute highly to enrich our lives and provide new solutions to face and adapt to the new millennium challenges.

[119] A Appadurai "Commodity and the politics of value*"* in A Appadurai (ed.), *The Social Life of Things: Commodities in Cultural Perspective*, (1988).

highly tied to the same critical agendas.[120] Yet, culture and cultural activities can enrich human lives in many ways that cannot be quantitatively measured. The focus on the economic returns that can derive from culture, as governments and developmental thinkers have tended to do, mainly sees culture as instrumentally useful to economic growth and overlooks the value of culture as itself and as constitutive of a more qualitative development. This is a further challenge of the "culture and development" interplay: to go beyond the instrumental vision and assign to culture a constructive and creative role that can contribute to reconcile the purely economic opportunities with values, including non-use values.

4) Culture and development: possible paths (for a difficult love)

4.1 Calling for Culture as the Forth Pillar of development (or towards a broader implementation of the principle of integration)

Globalisation is stressing endogenous tensions of the interplay between culture and development. Beyond the specificities of each single case, the emergence of possible clashes is favoured by the fact that, globally speaking, there is not a consistent and comprehensive set of principles and rules creating a global cultural governance. So far, legally binding and soft law instruments addressing cultural issues adopted within international and regional frameworks do not always refer to each other and are not applied according to a systemic interpretation. This results in a fragmentation of international cultural law, which undermines its effectiveness.[121] Further, synergies among culture-related legal and policy tools and other international instruments regulating relevant areas for the culture and development binomial – such as trade or migration – are not adequately envisaged. Therefore, efforts and achievements made within the frame of a specific cultural convention or programme are often dispersed or weakened by the counteraction of other instruments.[122] Better coordination and more awareness of the need for a systemic implementation and

[120] Y R Isar, "Cultural Policies for Development: Tilting Against Windmills?", in K Epskam, H Gould, D A Jelincic (eds.), (n 67), 15, 16.
[121] On risks and challenges posed by the fragmentation of International Law, see the Report of the Study Group of the International Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law*, A/CN.4/L.682 (13 April 2006)
[122] This happened, for instance, in the case of the 2005 UNESCO Convention interacting with WTO regimes or with national migration regimes; or in the case of the Convention on Biological Diversity and the TRIPS Agreement. These examples will be presented in chapter 3.

interpretation of international law is needed in order to protect and promote cultural diversity within development strategies.

It is upon this need to include culture in developmental strategies through a more systematic and integrated approach,[123] that the emergent discussion to re-formulate the sustainable development paradigm in four pillars, where culture would be the fourth cross-cutting pillar, seems to be based. In recent years, both at the local and global stage, several voices have called for an official recognition of culture as the Fourth Pillar of sustainable development. Jon Hawkes was among the first thinkers to have written about this, gaining the attention of the international audience.[124] Starting from acknowledging the difficulty to define culture and the different usage of this word, Hawkes affirms that government and local administrations often have an overly reductive understanding of this term and do not see the practical applications and implications of culture in everyday life. Therefore, they have largely ignored the potential of culture in the attempt to re-configure development. Hawkes recognises that the failure of the market-economy model of development is pushing the world to look for alternative models and asserts that culture can be an invaluable tool to re-shape winning developmental strategies.[125] Adopting a definition of culture that includes culture as values, tangible and intangible heritage, and creativity, Hawkes demonstrates through several examples how culture is essential for achieving sustainability and wellbeing. He shows that a sustainable society depends upon a sustainable culture, which embraces sustainability as a core value and promotes participation, engagement, and active citizenship. He acknowledges that creativity brings innovation and progress; and that arts and heritage contribute to create a sense of belonging and maintain society's vitality. For all these reasons, Hawkes argues that culture should be an integral part of public planning and the developmental paradigm on three dimensions should include a fourth one, namely the cultural pillar.[126] Culture must be granted a separate and

[123] Among others, Amartya Sen is a supporter of this integrated and systemic approach, see: A. Sen, *Culture and Development*, (n 6).
[124] J Hawkes, *The fourth pillar of sustainability: culture's essential role in public planning*, (Common Ground Publishing Pty Ltd in association with the Cultural Development Network (Victoria), 2001).
[125] Introduction, *Ibidem*, at 1.
[126] To be more precise, Hawkes defines the fourth pillar as 'cultural vitality', which encompasses wellbeing, creativity, diversity and innovation. It is interesting to notice that Jon Hawkes also renames the other three pillars, in order to stress on some specific components of their contents: the social pillar is called 'social equity' (stressing on justice, engagement, and cohesion), the environmental one is

distinct place within the development paradigm, in order to gain its place among governments and administrations' decisions and plans. This position is also shared by others, and, in particular, is strongly supported by civil society, local associations, and NGOs – *in primis* Agenda 21 for Culture, which is currently promoting a global campaign for culture to be included in the post-2015 Sustainable Development Goals.[127]

Some may argue that there is no need to add a new pillar for culture, since cultural concerns are encompassed within the social pillar (e.g., through the enforcement of cultural and social rights). Yet, the social pillar only takes into account certain aspects of the interaction of culture with development, whereas it fails to consider the cultural environment and cultural factors as elements influencing and contributing to development. Supporters of the Four Pillars structure would answer that including culture within the social component of the three pillars structure of sustainable development is not fully appropriate to advocate the central role of culture in developmental policies. Further, the three pillars formula does not reflect the complexity of current societies, in "*which culture ultimately shapes what we mean by development*."[128] Instead, the four pillars approach allows us to address the relationship between culture and sustainable development from a dual perspective: first, it looks at the development of the cultural sector itself (i.e. heritage, cultural industries, creativity, cultural tourism) as an independent component of development; second, it establishes that culture has its rightful place (similarly to the environment) at all levels and in all public policies (particularly those related to the economy, education, science, environment, social cohesion, communication and international cooperation).[129]

Without dwelling too much on the desirability of re-formulating the sustainable development paradigm into four pillars, it must be recognised that doing so would

---

renamed 'environmental responsibility' (to say that it should aim at ecological sustainability and balance), the economic one is named 'economic viability'. *Ibidem*, at 25.

[127] Agenda 21 for Culture, together with other NGOs and cultural organisations, is supporting the campaign. See the manifesto "The future we want includes culture: Declaration On The Inclusion Of Culture In The Sustainable Development Goals" at http://www.culture2015goal.net/. See also: www.agenda21culture.net; K. Nurse, 'Culture as the Fourth Pillar of Sustainable Development', prepared for Commonwealth Secretariat, (London, June 2006); I Ruigrok, *The missing dimensions of the Millennium Development Goals: culture and local governments*, "Culture, local governments and Millennium Development Goals", Agenda 21 for Culture-United cities and local government, (2009).

[128] United Cities and Local Governments (UCLG), *Culture: Fourth Pillar of Sustainable Development*, Policy Statement adopted on 17th November 2010 at the World Summit of Local and Regional Leaders – 3rd World Congress of UCLG, held in Mexico (made available at: www.cities-localgovernments.org).

[129] *Ibidem*.

help draw attention towards cultural concerns at the global level and could contribute to designing a global cultural governance. In legal terms, this approach seems to rely on (and call for) a stronger and systemic application of the principle of integration. The principle of integration came to the fore in the 1970s, with the emergence of environmental awareness, calling for the integration of environmental concerns into development policy.[130] It was codified under these terms in the 1992 Rio Declaration (principle 4). With the widening of the notion of sustainable development, the principle of integration was further extended to social and human rights' concerns. Principle 7 of the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development defines it as the "*principle of integration and interrelations, in particular in relation to human rights and social, economic and environmental objectives*" and states that *"the principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the needs of current and future generations of humankind. All levels of governance – global, regional, national, sub-national and local – and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development."* [131] Thus, the principle of integration calls for a better integration of the three dimensions of sustainable development and requires States to make all efforts in resolving *"conflicts between competing economic, financial, social and environmental considerations"*.

The principle of integration is probably among the most important principles of sustainable development. As Duncan French points out, sustainable development can only be truly achieved when the principle of integration is "*properly and fully implemented*".[132] The official recognition and formalisation of culture as the fourth pillar of sustainable development would open the door for both vertical and horizontal integration of cultural concerns in developmental policies. A correct and full implantation of the principle of integration would, then, require States and local

[130] Principle 13 of the Stockholm Declaration (n 43). For a history of the evolution of the principle of integration: P Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles", in Graham and Trotman (eds), *Sustainable Development and International Law*, (International Environmental Law and Policy Series, Martinus Nijhof, 1995), at 61.
[131] ILA Resolution 3/2002, above (n 66).
[132] D French, "Sustainable Development", in M Fitzmaurice, D M Ong and P Merkouris (eds), *Research Handbook on International Environmental Law*, (Edward Elgar Publishing Limited, 2010), at 59.

governments to identify the synergies or virtuous circles mainstreaming culture within the international, regional, national and local action and at all policy levels.

Some initiatives, under different arenas, seem to be moving in this direction. In the previous part of this chapter, I recalled the 2011 UN Resolution on "Culture and Development", which expressly acknowledges culture an essential component of human development and a significant source to fight poverty, provide for economic growth and ownership of development processes.[133] Stakeholders and NGOs are lobbying for the integration of culture as a formal goal within the post-2015 millennium agenda.[134] Such a possibility is also contemplated within the UN Resolution "Keeping the promise: united to achieve the Millennium Development Goals".[135] In 2013, stakeholders, NGOs, and other members of the civil society gathered together under the UNESCO aegis on the occasion of an international congress on culture and development, adopted "The Hangzhou Declaration: placing culture at the heart of sustainable development policies" and committed to integrate culture within all development policies and programmes.[136]

In spite of these valuable efforts, the codification of culture as the fourth pillar of sustainable development seems a long way off. Major global and regional strategies rarely quote culture within their action plans.[137] The outcome of the RIO+20 Summit in 2012, the most recent global event discussing achievements and new strategies for sustainable development, makes little reference to culture and cultural diversity within the document "The Future We Want".[138] The document reiterates the idea of a tri-dimensional development, in which economy (although

[133] 2011 UNGA Resolution on "Culture and Development" (n 23).
[134] See Agenda 21 for Culture's initiative, above (n 127).
[135] UNGA Res "Keeping the promise: united to achieve the Millennium Development Goals", adopted by the UN General Assembly on 19 Oct 2010, A/RES/65/1.
[136] "The Hangzhou Declaration Placing Culture at the Heart of Sustainable Development Policies", adopted in Hangzhou, People's Republic of China, on 17 May 2013 on the occasion of the International Congress "Culture: Key to Sustainable Development" (15-17 May 2013), CLT-2013/WS/14,(source: http://www.unesco.org/new/en/culture/themes/culture-and-development/hangzhou-congress/).
[137] For example, at the regional level, the Mediterranean Strategy on Sustainable Development (MSSD) adopted in 2005 within the framework of the Convention for the Protection of the Mediterranean Sea Against Pollution (the Barcelona Convention, adopted on 16 February 1976) does not take culture into account. Yet, its ongoing revision seems to be making some improvements towards the integration of cultural concerns (at least at the consultation stage, see UNEP/MAP "Review of the Mediterranean Strategy for Sustainable Development. Consultation Document" (April 2014), available at the UNEP/MAP website.
[138] Points 41, 58(j), 130, 131, 134, 197 of "The Future We Want", outcome of the Rio+20 UN Conference on Sustainable Development, held in Rio de Janeiro 20-22 June 2012, A/Conf.216/L.1 (reissued for technical reasons on 22 June 2012).

"green") remains the major component. As some have highlighted, the Rio+20 Conference could have been a suitable occasion to expand the development paradigm to culture: yet, it seems that States are still wary of formalising this.[139] A reason for this reluctance may be the difficulty to establish thresholds that would help understand to what extent the cultural pillar has to be taken into account. In mainstreaming culture within development, States prefer to remain on the soft level, using soft-law instruments and language. In terms of legally binding obligations, the only compulsory commitment is established under article 13 of the 2005 UNESCO Conventions on Cultural Diversity which expressly requires the Parties "to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions".[140]Certainly, if we compare the integration of cultural concerns with the integration of environmental concerns within the development discourse, it is evident that culture has a long way to go before gaining its official place among the pillars of sustainable development. Environment has been part of the construction of the sustainable development paradigm on three pillars since the world conferences of Stockholm (1972) and Rio (1992). Until now, international law has produced a rich series of binding legal instruments aiming at ensuring the protection of environment (although their real effectiveness may be challenged and criticised) that are contributing to design a global environmental governance. Nonetheless, culture and development share several similarities: like the environment, culture is a limited resource if its capability to regenerate and reproduce (cultural diversity) is not preserved. Therefore, while a global governance for culture is still being born, it seems reasonable to apply to culture the same principles of sustainable development that are applied to the relationship between environment and development.

4.2) Applying the principles of sustainable development to preserve culture as "capital"

When culture acts as a constitutive element and instrument of development, it should be considered as a "capital": as such, culture needs to be protected, maintained

[139] On this point: V Guévremont, "Le développement durable: ce gène méconnu du droit international de la culture", (2012) 116:4 *Revue Général e de Droit International Public*, 832.
[140] Article 13 "Integration of culture in sustainable development", 2005 UNESCO Convention (n 21).

and nurtured in order not to erode and destroy it. As Throsby put it: "*just as the maintenance of natural capital is seen as essential to the achievement of economic and social objectives in a resource-using world, so also might the maintenance and accumulation of cultural capital be seen as critical to the same objectives, with the added dimension that cultural capital is also valued for its own intrinsic worth*".[141] Throsby addresses the "culture and development" debate by applying some typical principles of sustainability, such as inter-generational and intra-generational equity. He affirms that fairness in the distribution of resources and opportunities between generations is crucial for ensuring the sustainability of cultural capital, considered in terms of its links with other elements of the economic and social system.[142] Paraphrasing Throsby's analysis of the dialectic "culture and development", culture can be seen as a complex asset of values, knowledge, goods, and creativity that constitute the human capital of people to be invested in, in order to produce development. Like natural capital, cultural capital is made of renewable and non-renewable resources. Therefore, it is important to put in place developmental strategies that, when using cultural resources, ensure their durability, as well as equal and fair access to them. This is necessary in order to preserve the diversity of culture and to ensure that less rich and developed countries also enjoy the benefits deriving from culture as capital. As we will see, equal and fair access is particularly important in the case of cultural industries.

The durability of cultural resources can be ensured through the principle of conservation of tangible and intangible cultural heritage, which we find expressed in several cultural-matter conventions, in particular those adopted under UNESCO's aegis.[143] The conservation and safeguard of tangible and intangible heritage is also related to its sustainable use, which is mainly put in practice through measures of preservation (lists of sites, inventories, but also financial interventions, etc.). Yet, the

[141] D Throsby, "Sustainability and Culture: Some Theoretical Issues", (1997) 4 International Journal of Cultural Policy, 7, 16.

[142] Throsby argues that, in terms of immediate policy decisions and investment analysis, cultural capital – both tangible and intangible – should be maintained through time and this maintenance could be interpreted as an investment process committing current resources in anticipation of future benefits. *Ibidem*, 17.

[143] E.g.: the Convention on the Protection of the World Cultural and Natural Heritage (1972); the Convention on the Protection of the Underwater Cultural Heritage (2001); the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions. But also: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) and its Protocol (1954); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

sustainable use of culture is, in some aspects, different than the sustainable use of environmental resources. Indeed, cultural resources are "living" resources and need to be valued and used, not only safeguarded as immutable, in order to maintain the ability to re-generate.[144] This is particularly true in the case of traditional knowledge, which is considered an expression of "living" cultures, but also relevant in the case of cultural goods and creativity, which necessitate the continuous flowering of contents and ideas. Sustainable use is, then, connected to ensuring sustainable and responsible access to cultural goods: as Rosemary J. Coombe indicates, this "involves a complex balance between openness and discretion".[145] In other words, cultural policies should aim at ensuring a balance between the protection and preservation of cultural expressions – traditional or otherwise – and the free exchange of cultural experiences.

Among the principles of sustainable development, precaution and prevention may also be applied to culture. This means that States should take preventive action and/or adopt a precautionary approach in situations where the survival of cultural identities and cultural diversity is at risk. Two examples of a practical implementation of these principles are inscribed within the 1972 UNESCO World Heritage Convention and the 2005 UNESCO Convention on Cultural Diversity. In the first case, art. 11(4) foresees a specific section to inscribe material cultural heritage under risk within the world heritage list;[146] in the second case, art. 8 establishes that States 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.[147]

Finally, the principle of public participation and a community-based approach to decision-making processes seem to be fundamental to empower local cultural communities. If culture is something "living" and continuously evolving, local peoples, ethnic and minority groups are the best custodians and spokesmen of cultural interests and concerns. Yet, empowering peoples through a participatory approach, especially in the case of minority groups or indigenous peoples, is always a

[144] V Guévremont, (n 139), 820, 821.
[145] R J Coombe, *"Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property"* (2003) DePaul Law Review 52, 1171.
[146] Article 11, 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage is constructed on a similar approach.
[147] Article 8 "Measures to protect cultural expressions", 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions.

controversial issue within the States' practice.

4.3) Contributions from human cultural rights

Within the culture and development debate, besides the use of sustainable development principles, a contribution to the protection and promotion of cultural diversity can certainly derive from human rights, in particular cultural rights. Just as culture is instrumental to strengthen awareness and respect of fundamental freedoms and rights, human rights can be useful tools to strike a balance between culture and trade issues by rescuing the human dimension of development. This is clearly established by article 4, which celebrates cultural rights as a guarantee of cultural diversity, and article 5 of the Universal Declaration on Cultural Diversity, which recalls the role of cultural rights as enablers for cultural diversity.[148] In particular, art. 5 recognises that "the flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights." Of course, the reference to these human rights provisions should not be considered exhaustive. The whole range of cultural rights existing in the various human rights conventions should be considered instrumental to the survival and flourishing of cultural diversity. Namely, these cultural rights encompass individual rights and freedoms, such as the right to freedom of expression, the right to participate in cultural life, free access to cultural and artistic goods, the right to education, freedom of religion, and respect of cultural identities; and collective rights, such as minority groups' rights, linguistic diversity, right to freedom of association or other relevant rights, like the right to land and cultural self-determination in the case of indigenous peoples.[149]

Under the human sustainable paradigm, human rights play a central role and no development strategy can be considered successful if it does not integrate the promotion of human rights' fulfilment.[150] Yet, except for the right to education, cultural rights have not been granted the same attention within the development discourse as other civil and political human rights. Broadly speaking, cultural rights

[148] Article 4 "Human rights as guarantees of cultural diversity"; article 5 "Cultural rights as an enabling environment for cultural diversity", 2001 UNESCO Universal Declaration (n 37).
[149] On the special relationship between land rights, cultural heritage and the right to development in indigenous peoples' contexts see: K Engle*, The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, (Duke University Press, 2010), 142.
[150] See above par. 1.3.2.

have not been equally developed as the other human rights' categories.[151] As some have pointed out, the underdevelopment of cultural rights is probably a consequence of the difficulty to define culture universally: indeed, the different meanings of culture can diversely shape the content of cultural rights.[152] This consideration is the basis of cultural relativism, a theory challenging the universal character of human rights by highlighting that not all human beings share the same values.[153] According to relativist thinking, all values are conventional and people accept certain values depending on the context in which they were born, on the political, cultural, economic, and religious influences surrounding them, as well as on their genetic inheritance and experiences[154]. Thus, there would be no universally accepted values that justify the universality and indivisibility of human rights. The relativism argument has been used by most Eastern and Arab States o argue that the rights contained in the international legal instruments are a product of a Western European and American culture, and that they do not match the concept and contents of human rights as shaped in their own countries.[155] As a consequence, the effort to integrate human rights (together with principles of democracy and rule of law) is often perceived as an attempt to export and impose the Western model of development and society. From a relativistic perspective, there would be an inherent contradiction in asserting that the promotion of human and cultural rights must be integrated within regional and international development cooperation programmes in order to lower the risks of cultural homogenisation and promote diversity.

From a genuine anthropological and sociological perspective, the cultural relativism argument may be supported in as far as it moves from the assumption that all cultures have the same dignity even if they do not all share the same values or cherish the same principles. In any case, the equality of all cultures is generally

[151] Y Donders, "Do cultural diversity and human rights make a good match?", in *UNESCO 2010* (Blackwell Publishing Ltd , 2010), 15.
[152] Y Donders, *ibidem*, 15, 16; D McGoldrick "Culture, Cultures, and Cultural Rights", in M A Baderin and R McCorquodale. (eds.), *Economic, Social and Cultural Rights in Action*, (Oxford University Press, 2007) 448; L.V Prott *supra* at (n 28), 94.
[153] Since the 1960s, the universality of human rights has been greatly discussed by human rights theorists and lawyers. Besides the critics from the communist approach to human rights and the debate arguing that social rights rely upon the recognition of different categories of groups and individuals, the theory of the universalism of human rights has mainly been challenged by cultural relativism and the pluralism of values. For more on this: M Iovane, "The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations", 14 *International Journal on Minority and Group Rights,* 2007, 231.
[154] J Kekes, *The Morality of Pluralism,* Princeton University Press, 1993, 8.
[155] This criticism is known as the debate on 'Asian Values', on this topic see, among others: A. Sen, *Development as Freedom*, (n 54);

accepted and encompassed in human rights' instruments. As Yvonne Donders has noted: "*equality and non-discrimination [are] key principles of human rights [and] also entail the recognition of diversity and the right to be different*".[156] Under human rights law, it is possible to distinguish between unequal and diverse situations, taking into account national and religious specificities, as well as historical, cultural, and religious backgrounds.[157] Universality and indivisibility of human rights do not entail the denial of different values: the universal character of human rights norms refers to the fact that they apply to everyone on the basis of human dignity, whereas the implementation of these rights can vary according to specific contexts and circumstances. From this perspective, it can be argued that integrating human rights, and in particular cultural rights, within developmental strategies is not about imposing universal human rights' contents and values, but promoting respect for human dignity, which should be equally recognised everywhere. Concerning this last observation, it must be acknowledged that the traditional practices and values typical of certain cultures which undermine respect of human dignity, such as female genital mutilation, forced marriages, and other discriminatory practices, mainly affect women. In such contexts, the discrimination and violations of physical integrity and human dignity are not considered as such by most of the people belonging to those societies, if not by the victims themselves, because of their cultural background. A rigid interpretation of the relativistic argument risks justifying and supporting the perpetration of such practices.[158] This is the point at which cultural relativism can no longer be accepted: all persons are equal and culture cannot be used as an argument to violate human dignity and other related fundamental rights.

Once the limits of cultural relativism, and the sense in which cultural rights should be considered universal, are clarified, efforts should be made by States and IOs to strengthen the respect and enforcement of cultural rights. Their role in promoting inclusive social development and cultural diversity seems to be mostly accepted by civil society. The Hangzhou Declaration, quoted above, places the guaranteeing of cultural rights, such as access to cultural goods and services, free participation in cultural life, freedom of artistic expression, among the central elements of a new

[156] Y Donders, above (n 151), 16.
[157] Para 5, Vienna Declaration and Programme of Action of the World Conference on Human Rights 1993, (1993) 32 International Legal Materials 1661.
[158] There are still societies that allow traditional practices hindering physical integrity and violating human dignity, such as genital mutilation, or that apply discriminatory treatment to women, minorities, or other groups on the basis of the local culture or the culture of the majority.

development governance that would include culture. The Declaration asks States to adopt "a rights-based approach to culture and respect for cultural and linguistic diversity […] within national and regional policies and legal frameworks, including consideration for minorities, gender balance, and youth and specific indigenous peoples' concerns." The enforcement and the respect of cultural rights are perceived as beneficial for democracy, freedom of expression, gender equality, reducing discrimination, and other positive values that contribute to the overall wellbeing and development of societies.

5) Concluding remarks

The scope of this chapter was to present a comprehensive frame of the theoretical debate underlying the integration of culture within development policy. I have tried to show how the perception of the relationship between culture and development has shifted from a negative to a positive approach – from an anthropological, sociological, economic, and legal perspective. This shift is mostly due to the evolution of both the notions of culture and development. Within this new and broader understanding of these terms, culture in its manifold declinations can act as a lever for a more inclusive and sustainable model of development. Yet, in spite of the growing international, regional, and local recognition of the benefits that culture can bring to development, international texts still do not include culture within the development paradigm. A considerable step forward has been taken with the adoption of the 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, which expressly requires its Parties to integrate culture in all developmental policies (article 13). Nonetheless, the integration of culture within development strategies seems to be quite a challenge. Indeed, culture's interaction with different policies entails the overlapping of diverse and contrasting interests, which call for a careful assessment and balance. Further, the accent on the linkages between culture and economics can lead culture to be treated as a mere commodity. These controversial issues have been analysed within the frame of three concrete cases, namely: the circulation of cultural goods and services, the mobility of artists and cultural workers, and the protection of traditional knowledge in vulnerable contexts. In these cases, two opposite interests are at stake: on the one hand, the need to foster circulation of cultural goods, services and artists and guaranteeing access to

cultural knowledge, on the other hand the need to preserve cultural diversity and local identities. In other words, the challenge seems to be between more mobility and openness *versus* more protectionism and conservationism. How can a balance between these different interests be reached?

If we compare the integration of environmental and cultural concerns within development policies, we can notice that mainstreaming culture as a vector of development shares several commonalities with the protection of the environment. Just like environment, culture is a capital that needs to be preserved and protected through sustainable use. An adapted use of the principles of sustainability to culture can help find a path towards a better management of cultural resources. Yet, it must be acknowledged that the integration of cultural concerns in all policies and at all levels is not systemic and is still rather weak. Therefore, several voices at different stages call for a re-shaping of the sustainable development paradigm in a way that would include culture as the fourth pillar of sustainable development. Such recognition would facilitate the systemic implementation of the principle of integration, which is considered a cornerstone principle for a governance of sustainability. In the next chapter I will focus on the European Union's approach to culture and development, in order to see what role culture has played within the external relations of the EU.

CHAPTER 2

THE EU, CULTURE, AND DEVELOPMENT IN EXTERNAL RELATIONS

" La dimension culturelle est une composante essentielle de la construction européenne et une condition de sa réussite […]. La culture européenne, c'est la diversité - une diversité qui constitue notre richesse et qui doit être préservée."[1]

1) The European Union as a global actor: an introduction

The role of the European Union as an increasingly influent actor on the global scene is nowadays well established and acknowledged. Born as an organisation of six European States for strengthening regional economic integration, the Union's project already embedded more ambitious vocations. While the EU's integration process grew, adding a rich range of internal competence areas to attain the goal of internal market integration, in parallel the external action of the EU has expanded and proliferated. The EU is currently part of innumerable multilateral agreements and conventions, not only covering trade-related topics, but also new challenges, such as climate change, environmental protection, human rights, social issues and many more. The EU is also increasingly engaging in bilateral economic and trade related relations, strategic partnerships, development cooperation initiatives and is constantly developing its Common Foreign and Security Policy (CFSP). Since the entry into force of the Treaty of Lisbon adopted in 2009, the Union has even provided itself with a High Representative for Foreign Affairs and Security Policy, assisted by a European External Action Service (EEAS), who should represent the Union in foreign affairs.[2]

[1] Extrapolated from the speech by José Manuel Barroso, President of the European Commission, concluding the meeting of the Member States' Ministers of Culture in Paris "Rencontres pour l'Europe de la Culture", held in Paris on the 2nd and 3rd of May 2005. Source: http://www.culture.gouv.fr/culture/actualites/index-rec11.html.

[2] Articles 18 and 27 of the Consolidated version of Treaty on the European Union, OJ 2010/C 83/01 (from now on, simply Treaty on the European Union or TEU). For a clearer understanding of the complex system of the EU representation in world relations, see: Chapter 2 International Representation of the EU, in *The Law of EU External Relations Cases, Materials, and Commentary on the EU as an International Legal Actor*, (Oxford University Press, 2013).

The relationships with its neighbouring countries became a well-established policy, the European Neighbourhood Policy (ENP), and the EU is even engaging in managing migration issues. Being a recognised international actor with legal personality,[3] the European Union is a member of several International Organisations and is contributing to the practice and evolution of international relations and law.[4]

As a consequence of such expansion, the EU could not avoid the debate around culture and development and is increasingly engaging in initiatives aiming at discussing and integrating the role of culture in development policies. Although it did not have a central role in the founding treaties, culture is certainly a core element of the EU construction. As far as it concerns the external dimension of the EU action, culture has always played a role – albeit one often limited to cultural cooperation. Since the EU ratified the UNESCO Convention on Cultural Diversity in 2006, its commitment to integrate culture in all developmental strategies and at all levels became an international binding obligation. Considering that "*the more the EU matures, the more it acts as a global power, the more fundamental issues concerning its position in international law will be raised*",[5] it is not absurd to explore in what terms and to what extent the EU contributes to the international "culture and development" discussion.

1.1) The EU as a *sui generis* actor of international law with global ambitions

The new Article 3(5) of the Treaty on the European Union, as now consolidated under the Treaty of Lisbon, recites as follows: "*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"*. Article 3(5) grounds the basis for a very rich and aspiring external agenda of the Union. According to this wording, the Union's external action should pursue not only its interests and spread the values embedded in the Lisbon Treaty, but

[3] Article 47, Treaty on the European Union.
[4] F Hoffmeister, "The Contribution of EU Practice to International Law", in M Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008), 37.
[5] J Klabbers, "The EU and International Law" (From IVR Encyclopedie, electronic source).

should also aim at contributing to achieve global goals and interests, such as peace, sustainable development, poverty eradication and enhance the respect for human rights, rule of law and principles of democracy. These goals, and other challenging tasks such as the promotion of an international system based on stronger multilateral cooperation and good global governance, are repeated under Article 21(2) TEU, dealing with the general provisions on the Union's external action.[6] It may be noted that Article 3(5) and Article 21(2) TEU have the semblance of a political agenda of national ministers for foreign affairs.

Although the founding treaties focused on reaching regional market integration, the EU vocation to become a more ambitious world actor was already hinted at in the Schuman declaration. It is in Schuman's sentences such as "*[t]he world peace cannot be safeguarded without the making of creative efforts*", "*the contribution which an organized and living Europe can bring to civilization is indispensable*", "*this production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements*", and "[…] *Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent*"[7] that the European vocation to contribute to the world's order and peace can be foreseen. Grounding its basis on very concrete issues and goals, such as ensuring peace by fostering economic growth and creating an area of free trade, the European project also embedded a political dimension since its establishment in the

[6] Article 21(2) TEU: "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters; and
(h) promote an international system based on stronger multilateral cooperation and good global governance."

[7] The Schuman Declaration, presented by the French foreign minister Robert Schuman on 9 May 1950, proposed the creation of a European Coal and Steel Community (full text available at www.europa.eu/abouteu/basic-information).

aftermath of the Second World War.[8] The ultimate goal seems to be the European contribution to world peace, security, and development.[9] The international ambitions of the European project were inscribed within the Treaty establishing the European Economic Community[10] – firstly through the creation of a common external convention assigning an external dimension to the internal goal of creating a European market (also known as the single or internal market) and secondly by attributing to the European Community (EC) external powers in specific sectors, such as trade policy (art. 131 TEC), development cooperation (art. 177), economic, financial and technical aid to developing countries (art. 181), and environment (art. 174(4)). As we will see later in this chapter, the European Community was also attributed a certain degree of external competence in the field of culture (art. 151(3)). Further, the EC was given the power to negotiate and conclude international agreements (art. 300, art. 310 and art. 133(3)). In 1992, the Treaty of Maastricht created the European Union[11] and provided this new treaty's creature with a set of objectives, among which arose the will to represent itself as a unity and identity on the international scene (ex art. 2 TEU). *Inter alia*, this goal also had to be pursued through the means of a Common Foreign and Security Policy, established under Title V TEU and which formed the second pillar of the previous three-pillar structure of the EU. Considering that the third pillar, known as the Justice and Home Affairs (JAI) under Title VI, involved cross-borders police and judicial cooperation in criminal matters, the TEU had further expanded the EU's external fields of action.[12] It is interesting to notice here that both the second and third pillars were conceptualised and structured in a way that recalls more traditional inter-governmental cooperation practice, whereas the relationship between the Community and its Member States following under the first pillar were defined in terms of "concession of power" from national authorities to a supranational one. Considering this peculiarity alone, the EU can be identified as an atypical kind of international organisation.

---

[8] G Tesauro, *Diritto dell'Unione Europea*, VII ed., (CEDAM, 2012), 10.

[9] The focus on the African continent can be attributed to the historical relationship between France and its former colonies.

[10] Treaty founding the European Economic Community (EEC), signed in Rome on 25 March 1957, entered into force on 1 January 1958. From now ECT or Treaty on the European Community. The consolidated version under the Lisbon Treaty is called the Treaty on the Functioning of the European Union (TFEU).

[11] Treaty founding the European Union, signed in Maastricht on 7 February 1992, entered into force on 1 November 1993.

[12] Among the novelties brought by the Treaty of Lisbon is the abolishment of the three pillars structure. The JAI has been renamed as Police and Judicial Co-operation in Criminal Matters.

The Maastricht Treaty stressed the importance for the European Union to speak with *one voice*, in order to achieve more credibility as an actor on the global stage. This priority was also enshrined in the objective to ensure overall consistency in the external action of the EU (art. 3 TEU) and to preserve and maintain the integrity of the *acquis communautaire* (art. 2 TEU). Preserving the integrity of Community law has also been among the priorities of the European Court of Justice. It is known that the ECJ has played a significant and exceptional role in contributing to the constitutional development of the European construction. Since the historical early decisions *Van Gend en Loos* and *Costa v. Enel,* the Court stated that the EC Treaty had created a new and distinct legal order: by so doing, the Court affirmed both the supranational nature of EC law on its Member States' constitutional orders and its distinctiveness from other international organisations.[13] In several following cases, the ECJ reiterated the distinctiveness of the European legal order: among others, we can recall the *Commission v. Ireland* decision (also known as the *MOX Plant* case),[14] in which the Court ruled that an international agreement cannot jeopardiSe the system of competences nor the unity of the legal order established by the Treaties;[15] and the more recent *Kadi* case, in which the Court's statement about the autonomy of the EU legal order raised a lot of criticism due to the delicate issues involved.[16]

Through its judicial interpretations, the European Court of Justice further expanded the external competence of the EU. According to the principal of conferral, a cornerstone constitutional principle ruling the functioning of the EU legal order, the European Union can act only in those areas expressly attributed to its competence by the Treaty.[17] Yet, in the ERTA case, another keystone decision concerning the power of the Community to conclude an international agreement on transports (namely the

[13] On this last point, see the view of B de Witte, "The European Union as an international legal experiment", in G De Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism,* (Cambridge University Press, 2012), at 38.
[14] Commission v. Ireland, C-459/03, para 123.
[15] For a critical comment on aspects related to international law fragmentation that the MOX Plant decision raises, see, among the others: Lavranos, "Concurrence of Jurisdiction between the ECJ and other International Tribunals", (2005) 14 European Environmental Law Review, 213.
[16] *Kadi and Al Barakaat v. Council*, Joined Cases C-402/05 P and C-415/05 P. For a broader view on the discussion around this decision: G de Búrca, "The European Court of Justice and the International Legal Order After Kadi", (2010) 51:1 *Harvard International Law Journal*, 1; also: J Kokott and C Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?", (2012), 23:4 *European Journal of International Law*, 1015.
[17] Article 5 TEU (ex art. 5 ECT). For a comprehensive analysis of the constitutional principles of the EU external action: G de Baere, *Constitutional Principles of EU External Relations*, (Oxford University Press, 2008).

European Road Transport Agreement (ERTA), the Court ruled that a Community power to conclude an international agreement may arise not only from "[…] *an express conferment by the Treaty, […] but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community Institutions*". [18] For the first time, the Court recognised implied external competences of the EC: an interpretation that greatly contributed to expand the treaty-making competence of the Community whenever internal EU law implementation is at stake. Indeed, by upholding that the conclusion of such an international agreement by one or even all of the Member States would affect or alter internal legislation,[19] the Court stated that *"[e]ach time the community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form they may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope."*[20] The so-called *ERTA rule* recognises, then, the existence of implied exclusive external competences when prior internal legislation has already been adopted and Member States are pre-empted from engaging in negotiations of subject-matter conventions which may interfere with the existing internal asset. The Union becomes the only subject entitled to undertake international obligations[21] whenever the conclusion of an international agreement is necessary in order to achieve Treaty objectives that cannot be attained by the adoption of autonomous rules.[22] Further, by stating that *"with regard to the implementation of the provisions of the treaty, the system of internal community measures may not be separated from that of external relations",*[23] the Court highlighted the intrinsic parallels between the internal and the external dimensions of EU law.

Since the establishment of the Coal and Steel Community in 1952,[24] the European process of integration has witnessed a tremendous evolution. The Treaty establishing the European Community and the following constitutional and

[18] *Commission of the European Communities v. Council of the European Communities*, Case 22/70 *ERTA*, para 16.
[19] *ERTA* case, para 22.
[20] *ERTA* case, para 17.
[21] *ERTA* case, para 18.
[22] See also: Opinion 2/92 (*Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment*), para 32.
[23] *ERTA* case, para 19.
[24] Treaty founding the European Community of Coal and Steel, signed in Paris 18 April 1951 by France, Germany, Italy, Belgium, Luxembourg, the Netherlands, and entered into force in 1952.

institutional modifications that have been taking place since the Treaty of Maastricht until the Treaty of Lisbon, created a very special creature under international law. The Treaty of Lisbon, which codifies under the TEU, the TEC and the Nice Charter under one single legislative tool, merged the European Community and the European Union into one entity (the European Union or the Union),[25] formally certifies its legal personality,[26] and further extended the fields of external competence of the EU.[27] Because of the unprecedented and peculiar mix of supranational and inter-governmental features which rule its construction and functioning (briefly outlined above),[28] the Union is often defined as a *sui generis* organisation among the actors on the international landscape. Differently from other existing international and regional organisations, the EU has expanded its substantive mandate and institutional initiative to unequalled levels. The unusual mixture of *supranationalism* and *intergovernmentalism*, the attribution of explicit and implied competence to the EU, the constitutional relationship between Member States and the Union similar to a federal order, (but in which, at the same time, the Member State remains as international legal subjects acting alongside the EU) and the constitutive role played by the European Court of Justice makes the EU a very exceptional experiment of Member States' cooperation and international organisation's development. Considering that the Union is acting in an increasingly globalising world, where different areas and issues are interconnecting and interrelating, the increased external power of the Union also raises challenges concerning its legitimacy to act and the boundaries between the Union and Member States' competences.

1.2) The role(s) of the EU in the world

The discussion around the nature of the EU under international law and the related constitutional issues is extremely interesting, although there is not enough room in the frame of this thesis to go through the extensive literature and different scholarly opinions on this subject. Besides the fascinating institutional and constitutional challenges that have attracted the attention of important scholars and researchers, from a more political perspective it can be affirmed that the EU has

[25] Article 1 TEU.
[26] Art. 47 TEU. The former version did not embed a specific provision on the legal personality of the European Union.
[27] E.g.: Article 214 TFEU concerning humanitarian aid.
[28] For an interesting view and analysis of the exceptional nature of the EU under international law: B de Witte, "The European Union as an international legal experiment", above (n 13).

become a very influential political actor that the rest of the world is watching. This brief excursion on the evolution of the external competences of the Union has aimed at clarifying under which terms the EU is defined as a *sui generis* legal actor. Yet, what is most important for the purposes of this thesis is to assess the weight gained by the EU on the international stage. Its constant process of evolution has made it a growing actor, both on multilateral, bilateral and interregional frameworks. Indeed, the EU is party to a wide range of multilateral agreements and is increasingly engaging in inter-regional trade relations[29] and strategic bilateral partnerships. What, then, are the consequences of this increased visibility and presence of the Union in world relations? The abundance of academic literature on EU external relations and the EU's "*actorness"* reveal an undeniable interest in this topic.[30] Here, I will try to briefly present the major roles that the Union plays on the international stage.

First of all, it may be highlighted that through its growing net of multilateral, bilateral and regional relations, the Union is creating a great number of expectations among third parties engaging in contractual relations with the EU, as well as among a broader global audience.[31] Such expectations are also fed by Article 21(1), which states that "*the Union's action on the international scene shall be guided by the principles that have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: 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*". The accent on EU values, as stressed by Article 3 TEU, suggest that the EU has given itself the status of a *community of values*: values which led to European progress and development and that should be globally promoted by the EU in order to contribute to global prosperity. Certainly this strengthened accent on values under the Lisbon Treaty raises not only expectations, but also criticism. Looking at it from a cultural relativist perspective as

[29] S Santander, "The European Partnership with Mercosur: a Relationship Based on Strategic and Neo-liberal Principles, The EU as a Global Player", in F Soderbaum and L Van Langehnove, *The EU as a Global Player The politics of Interregionalism,* 37.
[30] To quote only a few: M Cremona ad B de Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals,* (Hart Publishing, 2008); M Teló and F Ponjaert (eds), *The EU's Foreign Policy What Kind of Power and Diplomatic Action?*, (Ashgate 2013); P J Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Er*a (Springer, 2012); P J Kuijper, J Wouters, F Hoffmeisters, G De Baere and T Ramopoulos, *The Law of External Relations Cases Materials, and Commentary on the EU as an International Legal Actor,* (Oxford University Press, 2013).
[31] G Grevi, "The EU Strategic Partnerships: Process and Purposes", in M Teló and F Ponjaert (eds), above (n 30).

presented in the first chapter of this thesis, one may question "which and whose values" the EU is alleged to export? The wording of both Articles 21 and 3 TEU seem to be referring uniquely to European values, but what exactly are these European values? Leaving aside neo-liberalist values, Article 21 focuses on universally accepted principles such as democracy, the indivisibility of human rights, equality and so forth. Perhaps the more relevant question is: how is the Union supposed to spread these values and achieve its ambitious goals in a way that would comply with the expectations raised? The second part of Article 21(1) seems to be suggesting that this should be achieved by enhancing bilateral and multilateral relations and building partnerships with third countries and international organisations sharing similar principles. This entails that the Union has to integrate the promotion of these values in the framework of bilateral and multilateral agreements with the rest of the World, and to strengthen its participation in appropriate global multilateral fora, such as the UN. This export of values, although it may be perceived as a superimposition of the EU model of democracy, can also be seen as a positive element. Indeed, as Marise Cremona suggests, when the EU acts as a promoter of values such as democracy, the rule of law, and fundamental freedoms, it moves as a force for stabilisation worldwide.[32]

Besides seeing the EU as a "stabiliser", Cremona identifies four further roles undertaken by the Union as a global actor, namely: the Union as a model of regional integration, as a player on the global market, as a rule generator, and as an attractor for neighbours.[33] As for the Union as an inspiring model of integration, the results achieved in terms of development, wealth, and peace in Europe over the past 60 years present the European model for regional integration as a successful one. Despite the unceasing Euro-crisis and the increased wave of Euro-scepticism (also confirmed in the results of the European elections held in May 2014), the workable institutional structure and degree of regional market integration created by the Union can still be considered a model for regional integration by the rest of the world. Indeed, no other regional integration arrangement in the world (e.g.: MERCOSUR, ASEAN, NAFTA) has achieved equal or comparable results. Further, Cremona argues that the EU can be seen as a laboratory for testing deeper forms of integration in fields other than trade,

[32] M Cremona, "The Union as a global actor: roles, models and identity", (2004), 41 *Common Market Law Review*, 558.
[33] M Cremona, *ibidem*, 553.

such as immigration policy, monetary policy, security and defence policy. It is undeniable, however, that the Union's overall architecture today is in need of a process of revision and rethinking, in order to overcome the current crisis.[34] This should not be so surprising: as De Witte points out, the Union is a legal experiment[35] and, as such, improvements and changes are embedded in its nature.

Further, the EU is acting as a player on the global market, and is therefore contributing to promote more liberalisation. Certainly, as an importer, the EU is protecting its own internal market and reinforcing its position on the global market through the adoption of various measures, such as anti-dumping measures or other protectionist-oriented strategies. Nonetheless, the EU is a member of the WTO, and therefore committed to achieving further liberalisation worldwide, and it is increasingly concluding strategic partnerships and bilateral trade agreements on the basis of reciprocity. This element also confirms the importance of access to the EU market.[36]

A fourth role of the Union would be to act as a normative power. Through its varied typology of agreements – association, cooperation, and partnership agreements – the Union export parts of its regulatory norms to third parties. This happens when the opening of the internal market is conditioned upon the adoption of certain legal standards – for instance, environmental standards or intellectual property protection. Further, being a member of several international organisations, like the WTO, or having a recognised special status under other fora that allows the EU to take part in international organisation, the Union is contributing to creating multilateral rules and global governance.[37]

Finally, another role that can be attributed to the EU as a global actor is that of exercising a magnetic effect on its neighbours, who increasingly apply for membership, and of playing an active role as a neighbour. The Union, indeed, is using

[34] A Gamble, "The EU and the Evolving Shift of Power in Global Governance", in M Teló and F Ponjaert (eds), *The EU's Foreign Policy What Kind of Power and Diplomatic Action?*, (Ashgate 2013), at 16.
[35] B de Witte, above (n 13).
[36] M Cremona, above (n 32), 556.
[37] On this point, Cremona observes that "*the most distinctive contribution made by the EU is likely to be not so much in formulating substantive rules as in promoting "'just' processes of governance at all levels", processes which are informed by the principles of inclusiveness, transparency and participation*". *Ibidem*, at 557.

its neighbouring policy (ENP) as an "*instrument for foreign policy*" and to realise stabilisation and unification within Europe.[38]

In particular, for the purpose of this thesis, I will mainly look at the role of the EU as a model and laboratory of integration and a rule generator. It is the action of the EU as a model capable of inspiring other global actors' initiatives and to influence global governance processes concerning the relationship between culture and development that will be the subject of this analysis. The first step of this analysis will be to clarify the EU's understanding of "culture" and "development", as well as their place in the EU's external relations. Yet, before moving to the next section, it is necessary to understand the relevance of ensuring coherence and consistency to the EU external action.

1.3) The EU external action: issues of coherence and consistency

Ensuring coherence and consistency of the Union's external relations is a recurrent theme within EU treaty-law and policy documents. Indeed, already under the Maastricht Treaty, the EU was required to ensure the "consistency of its external activities as a whole".[39] Currently, under the frame of the Lisbon Treaty, Article 7 TFEU talks about ensuring consistency between the EU's policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers; while Article 7 TEU foresees that the Union's institutional framework shall aim to "*ensure the consistency, effectiveness and continuity of its policies and actions*". Article 21(3) TEU states that *"[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies*." As major actors in representing the Union in external relations, the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, are called to ensure such consistency and cooperate for this purpose (second statement of art. 21(3)). In the Commission's Communication in 2006 on Europe's place in the World, ensuring more coherence to the whole European external action emerges as a priority in order to face new and complex global challenges, as well as to strengthen the international accountability and visibility of the EU.[40] In sum, in order for the Union to be a reliable actor and

[38] M Cremona, *ibidem*, at 558.
[39] Art. 3 TEU, see discussion above in paragraph 1.2.
[40] Communication from the Commission to the European Council of June 2006, "*Europe in the World*

boost the effectiveness of its external action, ensuring coherence between its internal and external dimensions and all the EU policies is crucial.

But what do "coherence" and "consistency" mean and refer to in the framework of EU law? To answer this question, a first step is to clarify the use of these two words, which may be different in the 28 official languages of the Union. Various commentators have drawn attention to the linguistic divergence concerning the use of these terms in the different national versions of the Treaties.[41] More specifically, where the English version of the Lisbon Treaty uses "consistency", the Italian, French, and other versions use "coherence" instead. In English, the word "consistency" means conformity, uniformity, and the absence of contradictions, which can be translated into the Italian "*coerenza*" or French "*cohérence*". Conversely, the English word "coherence" covers a wider concept, by referring both to cohesion, positive connectedness, and a logical, comprehensive and consistent interaction of parts as a whole. Under EU Treaty law, interpreting the word "consistency" as merely the absence of contradiction may be reductive.[42] Taking into account that the Treaty provisions demand the assurance of *consistency* between the internal and external dimension and all EU policies as a whole, it is more reasonable to think that the term under EU Treaty law refers to a broader concept like coherence. To confirm this assumption, we can note that the Commission Communication "Europe in the World" exclusively refers to coherence, without mentioning consistency.

What, then, is the level of coherence that the Union is required to pursue? Although some distinguish up to five different degrees of coherence,[43] the most relevant distinction appears to be between horizontal and vertical coherence. Horizontal coherence refers to synergy, complementarity, and consistency between

---

— *Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*", COM (2006) 278 final.

[41] M Cremona, "Coherence and EU external environmental policy", in M Morgera (ed), *The External Environmental Policy of the European Union EU and International Law Perspectives*, (Cambridge University Press, 2014), at 33; P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law*, (Hart Publishing, 2001), at 39.

[42] C Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union", in *Developments in EU External Relations Law*, above (n 4) at 14.

[43] Hartmut Mayer identifies vertical, horizontal, inter-pillar, rhetorical, strategic, and external engagement coherence. Taking into account that the Lisbon Treaty eliminated the division into pillars of the EU constitutional structure, the inter-pillar coherence can be included under the horizontal one. See: H Mayer, "The Challenge of Coherence and Consistency in EU Foreign Policy", in M Teló and F Ponjaert (eds), *The EU's Foreign Policy What Kind of Power and Diplomatic Action?*, (Ashgate, 2013), at 105.

the entire range of EU policies and activities; vertical coherence is coherence between Union and Member States' actions. In particular, the pursuit of vertical coherence entails coordination and the respect of the principle of loyal cooperation (art. 10 TEU) between the EU institutions and Member States, whereas horizontal coherence relies on internal coordination among the EU institutions. A fully coherent external action would imply complementarity and uniformity in terms of foreign policy objectives and strategies, harmony between the internal and external initiatives, transparent and tension-free interactions between EU institutions, and EU institutions and the Member States.[44] Further, there should be a concrete correspondence between statements and actions: in other words, what the Union "says" should match what the Union "does".

In the field of "culture and development", the focus of my analysis will be on horizontal coherence. Nevertheless, considering that culture is not an exclusive competence of the Union, nor a shared one, but falls within the new Lisbon category of *competence to carry out actions to support, coordinate or supplement the actions of the Member States* (art. 6 TFEU), issues of vertical coherence cannot be completely ignored. Because of the overlapping of culture with other policy areas, such as trade, IP protection, or migration, this analysis will require a careful assessment of what EU competences are at stake. It is now important to clarify which principles and mechanism exist under EU law to ensure coherence.

1.3.1) The allocation of powers between the Union and Member States: a pre-condition for external coherence

It is clear that the success of the EU in pursuing coherence is intimately connected to preserving the integrity and primacy of the *acquis communautaire*, which can be guaranteed through the full respect of internal constitutional principles,[45] in particular the principle of conferral (art. 5 TEU) and duty of cooperation (art. 4(3) TEU). As mentioned, the principle of conferral allocates competences and powers between the EU and the Member States. Under the current Lisbon Treaty framework, we can distinguish three categories of competences as listed under art. 2 TFEU: *exclusive*, *shared*, and *supporting*. When the Treaty allocates an area within the exclusive competence of the EU, the latter is the only one

[44] H Mayer, *ibidem*, at 107.
[45] Case C-266/03 Commission v Luxembourg, para 60.

empowered to take internal and external legislative and policy initiative. Article 3 TFEU includes a full list of such areas.[46] Under Article 4(2) TFEU, the Treaty lists the areas of shared competence, in which both Member States and the Union are entitled to act.[47] This list is not exhaustive, given that, in principle, powers in all areas not listed under Article 3 TFEU are shared between the Union and Member States (art. 4(1) TFEU). Finally, the Treaty of Lisbon introduces a third sector of areas that remain in the sphere of national competences, but for which the Union is allowed to exercise complementary, supportive or supplementing actions (art. 2(5) TFEU). A list of these areas is included in Article 6 TFEU.[48] The Treaty is not clear in defining this kind of competence, which, as some commentators point out, seems to embed three different competences in one.[49] This group of competences may be re-conduced to the pre-Lisbon category of complementary competences that could be employed by the EU to reach minimum levels of harmonisation and that need to be complemented by higher national standards. Yet, some argue that these newly defined complementary competences are restricted to the adoption of incentive measures or legal measures as far as they do not lead to forms of harmonisation.[50]

The principle of subsidiarity is meant to shape the boundaries between the Union and Member State's power: in fields falling under shared competences, the Union shall intervene *only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States* (art. 5(3) TEU). Under these terms, the Union competence in shared areas appears to be a residual one. Yet, drawing the boundaries between Union and Member States competences is not always

[46] Article 3 TFEU: "The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy."

[47] Article 4(2) TFEU: "Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty."

[48] Article 6 TFEU: "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation."

[49] R Schütze "Lisbon and the Federal Order of Competences: a Prospective Analysis", (2008), 33:5 European Law Review, at 715.

[50] R Schütze, *ibidem*, at 714. This interpretation is based on the Final Report of Working Group V CONV 375/1/02 Rev 1 and the position of the Convention Presidium expressed in CONV 724/03, Annex 2, at 81.

easy. First, the Court of Justice of the European Union contributed to expand the areas of exclusive competences of the EU through its jurisprudence. As we saw in the previous paragraph, the Union is entitled to act in areas not expressly attributed to its exclusive competence any time that Member States' international initiatives are likely to affect existing common rules.[51] Further, the Court's jurisprudence holds that this principle also applies when EU secondary legislation does not yet exist, but the EU international action is necessary to adopt common rules for the attainment of a specific objective of the Treaty,[52] when secondary legislation is about to be adopted, or the EU has already taken steps that envisage its future initiative in that area.[53] Secondly, in our globalising world, where areas and issues are more and more connected and interrelating (as in the case of environment and development, or culture and trade), competences may overlap and identifying the correct legal basis to empower either the Union or the Member States, or both of them, to act on the international ground represents a real challenge. On the other hand, it is fundamental to avoid that Members States and the EU engage in legal initiatives likely to be in contrast and affect the image and effectiveness of the Union's external action, in order to pursue coherence and consistency. In sectors falling outside the exclusive competence of the Union, this becomes a crucial issue today and a careful assessment of the interests at stake is often demanded. The Court of Justice played a relevant role in shaping criteria that could be helpful to trace thresholds;[54] nonetheless this balance of powers still depends upon a case-by-case assessment. Further, the Court recognised that the Treaty's division of powers itself is not enough of a guarantee to ensure coherence, especially when the implementation of an agreement involves the shared competence and joint action of the EU and its Member States.[55]

---

[51] *ERTA* case, above (n 18).
[52] Opinion 1/76 *European Laying-up fund for inland waterway vessels*, para 4.
[53] Opinion 1/03 *Lugano Convention*, para 126. It is worth noting that in this material case, the Court was asked to express its opinion on shared competence. For a comment on this: M Klamert and N Maydell, "Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law", (2008) 13 *European Foreign Affairs Review*, at 502.
[54] The engagement of the EU in international negotiations concerning areas that do not fall under its exclusive competence is conditioned upon certain specific conditions as elaborated in the ECJ case law.
[55] Opinion 1/94 *WTO*, para 107. In this opinion, concerning the existence of an exclusive competence of the Community to conclude the WTO agreement, including GATS and the TRIPS agreement, the Court does not apply an extensive interpretation of the common commercial policy. Not recognising an exclusive competence of the Community to sign the WTO agreements, engages in a highly fragmentary repartition of competences between Member States and the Community. For further comments on this: A Mignolli, *L'azione esterna dell'Unione Europea e il principio della coerenza*, (Jovene editore, 2009), 76-88.

To conclude briefly, external coherence depends upon the functioning of internal principles and mechanisms of the EU's architecture. The good implementation of the principle of conferral is a necessary precondition to ensure coherence, but in case of shared and overlapping fields of competences it is not a sufficient tool.

1.3.1) The duty of cooperation to preserve common interests

When the Treaty's allocation of competence is not enough to preserve the unity of the whole EU legal order on the external dimension, so as to ensure coherence, the duty of cooperation may come to help. Art. 4(3) TEU states that "[*p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*." The Lisbon Treaty talks again about sincere cooperation in art. 13 TEU, when it requires the whole set of EU institutions to practice *mutual sincere cooperation*. Loyalty and mutual support are also recalled under the special provisions concerning the Common Foreign and Security Policy.[56] The principle of cooperation applies, therefore, to the relationship between the Union and its Members, as well as the interactions between the EU institutions. The statement under Article 4(3) TEU seems quite clear: Member States and the EU institutions shall take all appropriate measures in order to cooperate for the achievement of the Treaty's scopes. This plays a central role in contributing to the action of the Union as a "unity", especially when applied in conformity with the principle of primacy of EU law.[57]

The duty of cooperation has been developed as a constitutional principle fixing issues of procedural compliance in the context of mixed agreements,[58] but the

[56] Article 24(3) TEU: "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area"; Article 25(c): "The Union shall conduct CFSP by strengthening systematic cooperation between Member States in the conduct of policy."

[57] M Cremona, "Defending the Community Interest: the Duties of Cooperation and Compliance", in M Cremona ad B de Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals,* (Hart Publishing, 2008), 126.

[58] Mixed agreements are agreements on topics entailing shared competences and, therefore, negotiated jointly by the Member States and the Union. It should be noted that there is no obligation to proceed with the mixed agreement procedure every time that shared competences are involved (though, this has become a constant practice in the EU's functioning). Mixed agreements are mandatory when an

Court of Justice provided for interpretations to articulate its content and widen the scope of its application. In particular, the Court interpreted former Article 10 TEC in a way that strengthened the power of the EU in external action and limited the scope of action of the Member States. In the decision *Commission v. Luxembourg*, the Court specifies that the duty of cooperation is of general application and does not depend on whether the Community competence concerned is exclusive or not, nor on the existing right of a Member State to enter into obligations with third countries.[59] Therefore Member States have to comply with this duty even when they act in fields falling under their faculty. When a Member State has the competence to conclude an international agreement on a specific subject, but the Union has taken the first steps towards a common action on that subject, it is obliged to consult the EU institutions first, in order to reach an agreement with them before contracting any obligation.[60] Further, before engaging in unilateral initiatives, Member States shall inform and consult the EU institutions.[61] In this way, the duty of cooperation becomes a valuable instrument to limit the competence and fields of action of its Member States. In the field of mixed agreement, infringement of Article 10 can also be used as a deterrent for the Member State initiative to select an eligible dispute settlement *forum*. An example of this effect can be found in the MOX Plant case, in which Ireland was alleged to have failed to fulfil its obligation laid down in Article 10 TEC (and Article 292 TEC)[62] because it had initiated a proceeding against the UK under the dispute settlement system of the UNCLOS.[63] Ireland argued that the claims raised before the ITLOS (the Arbitral Tribunal under the UNCLOS) concerned areas falling within its competence, (notably environmental protection). Yet, the Court, mostly adhering to the opinion of the Advocate General, affirmed that the provisions of a convention also

---

agreement can be divided in two parts, with one falling under the exclusive competence of the Union, and the other falling under the competence of the Member States. Mixed agreements are an option when an international agreement affects exclusive and non-exclusive competences of the Union. Further: A Rosas, "The European Union and Mixed Agreements", in A Dashwood and C Hillion (eds), *The General Law of the EC External Relations* (Sweet & Maxwell, 2000), 203.

[59] C-266/03, para 58.

[60] *Ibidem*, also C-433/03 Commission v. Germany.

[61] MOX Plant case, above (n 14), para 179-180.

[62] Within the Lisbon version, Article 292 has become Article 344 "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

[63] United Nations Convention on the Law of the Sea, singed in Montego Bay on 10 Dec 1982. Both the EU and Ireland are party to this Convention.

ratified by the Community[64] "form an integral part of the Community legal order", therefore determining the existence of the EU competence. But, more interestingly, the Court held that initiating a proceeding before an international arbitral tribunal entails a manifest risk of violation of the system of competence set up by the Treaty and a threat for the autonomy of the EU legal order.[65] By condemning Ireland for the infringement of the duty of loyal cooperation, the Court restricts the faculty of the Member States to select a dispute settlement system of their choice, even when they are party to a mixed agreement, in order to preserve the unity and integrity of the EU legal order. Although the Irish claims against the UK could fall under the scope and competence of EU law,[66] Ireland – as a sovereign national order engaged in other international commitments – was exercising its right to submit a dispute concerning breach of a sectoral agreement to the specialised tribunal foreseen by the agreement in question. The Court seems not to have taken this into consideration at all, by considering the EU legal order almost as a self-contained regime in the international framework and placing the protection of its unity and autonomy among the common interests of the EU.[67]

Although the power of action of EU member States appears to be considerably reduced, the Court's extensive interpretation of the principle of cooperation should not merely be seen as an attempt to erode national competences. The rationale behind this is the effective protection of the common interest, which "*is not simply an expression of the collective interest of the Member States but represents an aspect of the autonomy of the [Union] system*".[68] Indeed, in exercising their concurrent power, Member States are alleged to pursue the satisfaction of their own interests in external relations at the risk of compromising the effective defence of the common interests of the Union. Member States may adopt positions which differ from those that the

[64] At the time of the *MOX Plant* decision the division between the Community and EU was still in place. Of course, the reasoning applies today to the EU.
[65] MOX plant case, para 154.
[66] AG Poiares Maduro broadly demonstrated the existence of the Community's environmental competence on the basis of secondary legislation in the environmental field. Further, he asserted that by ratifying the UNCLOS Convention, the Community had also exercised its non-exclusive competence in the field of environment (which normally falls under shared competence), and therefore issues in this field fall within the scope of Community law. See Opinion of AG Poiares Maduro, para 33.
[67] This aspect of the MOX Plant decision has been harshly criticised by international lawyers and scholars, see in particular: Lavranos, "Protecting its Exclusive Jurisdiction: the MOX Plant-Judgment of the ECJ", (2006), 5 *The Law and Practice of International Courts and Tribunals*, 479.
[68] M Cremona, (n 57) at 127.

Community intends to adopt, and would thereby distort the institutional framework.[69] The principle of cooperation, together with the primacy of EU law, aims at avoiding this risk. This interpretation of the principle of cooperation is confirmed by the Court's decision *Commission v. Sweden*, in which Sweden was found to be in breach of its duty of loyal cooperation because it had proposed, within the framework of the Stockholm Convention on persistent organic pollutants (POPs)[70] – to which the Union is also a party – to add a new group of POPs (perfluoroctane sulfonates, PFOS) to those already covered by the Convention.[71] At the moment of the Swedish proposal the EU's environmental regulatory framework did not cover PFOS and – according to Sweden – no common position on the issue had been formalised by the Council. Recalling that the environmental competence is a shared one, that Member States are *a priori* allowed to adopt higher environmental standards, and that no EU legislation or position existed at that time, it may be logical to think that Sweden could propose unilaterally to add the dangerous group of substances (PFOS) to the list. Yet, the Court, referring to the Environmental Council Conclusions of March 2005 preparing the first COP and considering it to be connected to the broader strategy of the Union within the Stockholm Convention, retained that a common position existed.[72] Therefore, according to the reasoning of the Court, by proposing to add a new substance Sweden had dissociated itself from the common strategy and compromised the unity in the international representation of the Union and its Member States", weakening their negotiating power with regard to the other parties to the Convention. The Court thus found Sweden in breach of the duty of loyal cooperation. As Marise Cremona points out *"[t]he key is the fact that the Stockholm Convention is a mixed agreement: Sweden was acting as a party, but the Union is also a party. Sweden' s act therefore had potential consequences for the Union both internally and externally in a way which would not have been the case had the Union not been bound by the Convention*".[73] The exercise of shared competence on the external level may, then, be limited (or substantially reduced) when it can affect the Union's decisions on the internal and external level. In the specific case of environment, Member State may decide to give priority to environmental policy over other considerations internally,

[69] Opinion 1/75.
[70] Stockholm Convention on persistent organic pollutants entered into force on 17 May 2004.
[71] Case C-246/07, *Commission* v. *Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010.
[72] *Ibidem*, paras 89–91. For further comments on the possibility to consider non binding acts
[73] M Cremona, C-246/07 CASE LAW, (2011) 48 *Common Market Law Review*, at 1663.

but externally – at least in this context of a mixed agreement – *the reconciliation of objectives necessary to policy coherence must be worked out by Union and Member States together*.[74] After all, adapting Dashwood's words to the post-Lisbon scenario, the objectives of the Treaty have to be attained jointly through the action of the EU and the Member States.[75]

1.4) Some *interim* remarks

The Union has become an increasingly visible and active international actor. It plays several roles and raises expectations among its partners and, more broadly, the international community. The success of the external Union performances depends upon several factors intimately connected to its internal dimension. In order for the EU to be a reliable and trustworthy actor, it is necessary to purse coherence between the internal and external dimension of the EU. This requires coordination and consistency between the different goals and objectives of all the EU policies, as well as between the EU and its Member States. The achievement of such coherence becomes a real challenge when different policy areas encroach, implying the exercise of different kinds of competence. EU constitutional principles, such as the principle of conferral and the duty of cooperation, make a crucial contribution to achieving coherence and preserving the unity of the EU as an autonomous legal order. Nonetheless, in our globalising world, this contribution may not be satisfactory enough. As we will see in the field of culture and development, different issues and areas overlap and finding the appropriate legal basis entitling the Union action to take initiative demands a careful assessment, which may lead to tensions between the Union and its Member States.

2) The European Union and culture

Is there a place for culture within the Union's external action? And can culture be considered as something falling under the common interest of the Union? As we saw, the allocation of competences is a central element in the functioning of the EU legal order. In order to understand what role the EU assigns to culture when behaving as a global actor, it is necessary to assess first whether an EU competence in the

[74] M Cremona, *ibidem*, at 1662.
[75] A Dashwood, "The Limits of European Community Powers, (1996), 21 *European Law Review*, at 113.

cultural sector exists. Secondly, a look at the relevant EU Treaties' provisions and major policy documents will help us to understand what notion of culture the EU seems to be endorsing, and whether any acknowledgements of the relationship between culture and development emerge.

2.1) Assessing the EU cultural competence under Treaty Law

2.1.1) The evolution of the cultural competence from the origins of the Community to the Maastricht Treaty

The Schuman Declaration opened with the following sentences: "*World peace cannot be safeguarded without the making of creative efforts […]. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations*." These words, and the frequent references to solidarity as a core value for a united Europe encompassed in the text of the Declaration, show that culture had, since the very beginning, a role to play in the building of Europe. Schuman called for *creative efforts*, efforts of imagination and intellect, to conceive of a new Europe, without borders and conflicts, and placed shared values, such as solidarity and the maintenance of peace, at the heart of Europe. The birth of the European project was also a *cultural project*.

Despite the relevance of culture in the original idea of the European project of integration, the founding Treaties did not establish a specific cultural competence for the Communities, nor grant any special recognition to culture. It was only in 1992, with the amendments brought by the Treaty of Maastricht, that a specific cultural competence was introduced within the EU legal order, namely Article 151 TEC. Nonetheless, even if the Community before the Maastricht Treaty did not have any conferred power on culture, it found itself dealing with cultural issues while implementing the rules concerning the realisation of the internal market. Under the original version of the Treaty on the European Community (EEC), the only provision contemplating cultural aspects was embedded in Article 30, which allowed restrictions of the free movement of goods on the grounds of their artistic, historic and archaeological value.[76] Such a provision hints at a certain awareness about the

[76] Former Article 30 ECT is now Article 36 TFEU: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of

preservation of national cultural heritage already at the initial stage of the European market integration, or at least among the drafters of the Treaty founding the European Community.[77] Yet, it also shows that cultural goods were considered trade goods like all others for which the rules on free circulation had to apply: if otherwise, it would not have been necessary to include such an explicit exclusion.[78] It could be stated that the Community, by applying the rules on free circulation to cultural goods, has acted as a promoter of cultural exchange and, therefore, contributed to enrich cultural diversity in its Member States. Yet, as in any free trade regime, risks of loss of national cultural specificities came to the fore and the protection of cultural heritage and diversity has mainly been a concern for Member States rather than a specific goal for Community level action. During the initial phases of integration, Community and Member States' interests in culture have mostly been in conflict: whereas the preservation of historical and artistic heritage has always been a central concern for most of the Member States due to the intimate relationship with their need to preserve cultural identity and sovereignty,[79] the Community demonstrated that it saw such interest towards cultural concerns as likely to jeopardise the internal market's integration process. In one of the first cases decided by the ECJ concerning the imposition of an export tax on cultural goods, the Court – although it recognised the special nature of cultural goods – rejected the idea of a general cultural exemption because it was likely to hamper the realisation of the internal free market and clearly affirmed that the free movement rules apply to works of art as objects of commercial transactions.[80] The position of the Court at that time is not surprising: it is well known that the ECJ, through its decisions and judicial interpretation, highly contributed to the increased abolishment of trade barriers in order to achieve negative integration.[81]

---

public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[77] Some scholars speak of an existing hidden cultural agenda under the EC Treaty. See: Craufurd Smith R., "Community Intervention in the Cultural Field: Continuity or Change?", in Craufurd Smith R. (ed), *Culture and European Union Law*, Oxford University Press, 2004, 28-49.

[78] E Psychogiopoulou, *The Integration of Cultural Considerations in EU law and Policies*, (Martinus Nijhoff Publishers, 2008), 19.

[79] E Steyger, *National Traditions and European Community Law: Margarine and Marriage*, (Dartmouth, 1997), 69-72.

[80] Case *Commission v. Italy (Italian Arts Treasures)*, C 7/68, ECR 423, at 428.

[81] The market integration process had to be realised through *negative* integration and *positive* integration. Negative integration refers to the gradual removal of all trade barriers, a set of mandatory bans for Member States and careful and limited list of exceptions to free trade rules; positive

With market integration as the priority, national claims to apply exemptions to the free circulation of cultural goods or to certain productions connected to national cultural traditions, like in cases concerning culinary traditions and local food, have mostly been denied by the Court.[82] In balancing commercial and cultural interests, the ECJ often gave priority to the freedom of circulation and condemned national cultural arguments as forms of hidden protectionism.

Tensions between the internal market regime and Member States' interests also arose under EC completion law. Frictions between Member States and the Commission were particularly frequent in the audiovisual media sector: most of the European countries – France *in primis* – have always had a long tradition of state intervention, regulating practices and subsidising cultural industries. State aid is often the only means to ensure the survival of small cultural industries, yet this can often be in conflict with the EC competition law and the ban on State Aid as envisaged by the former Article 87 ECT.[83] Under the frame of the common market's rules, Member States started to claim for a "cultural exception" to exempt cultural productions from the full application of EC competition rules in order to preserve their cultural identities.[84]

Over the years, the Court has not always demonstrated a lack of sensitiveness towards national cultural claims. Through an extensive interpretation of the doctrine of mandatory requirements, as elaborated in the famous *Dassonville* and *Cassis de Dijon* decisions,[85] the Court provided a frame for some protection of national measures dealing with cultural matters. More precisely, measures coping with the protection of national cultural heritage,[86] or other cultural characteristics can be

---

integration is realised through the adoption of EC policy and legal measures, such as harmonisation measures. F Tesauro, *Diritto dell'Unione Europea*, VII ed., (CEDAM, 2012), 365 and ff.

[82] The Court has often adopted a very restrictive approach on cultural issues. See, for instance, *Commission v. Germany*, C 178/84, 1987, ECR 1227; *Drei Glocken v. USL Centro-Sud*, C 407/85, 1998, ECR 4233. See, for other interrelations between culture and free trade: *Leclerc v. Au Blé Vert*, C 229/83, 1985, ECR 1. In this case, concerning national measures on book-price-fixing adopted to protect cultural diversity and creativity at the national level, the Court held that they could not fall under the exception by Art. 30 because they were not mentioned among the allowed exemptions. The Court privileged a narrow interpretation of Article 30, considered as an exception to the general rule on free circulation, whereas, the protection of creativity and diversity proved to be better pursued through other provisions, namely those concerning copyright and IP related rights.

[83] Now Article 107 TFEU.

[84] S Foa and W Santagata,*"Eccezione culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate"*, (2004), 2 Aedon, 4-7.

[85] Case 8/74, *Dassonville* [1974] ECR 837; Case 120/78, *Rewe-Zentral-AG v Bundesmonopolverwaltung für Brandwein (Cassis de Dijon)*, ECR 649.

[86] Case C-180/89, *Commission v Italy*.

justified as far as they pursue the public interest and would match with the parameters of the mandatory requirements.[87] The Court – elaborating on the "rule of reason" – started to accept trade restrictions or state aid policy justified on cultural arguments, if and when they were proportionate with the scope.[88] The ECJ, however, did not develop a homogenous and consistent doctrine on "culture and trade" issues, but proceeded on a case-by-case approach. This cautious attitude of the Court may be attributed to suspicions about the genuine intentions of the States, often alleged to use the "cultural excuse" to justify their breach of the EU/EC law and protect their domestic market. At the same time, the approach of the Court acknowledges that the Member States have diverse national values, which may justify the recourse to restrictive measures: because values and culture vary from one State to another, this diversity needs to be assessed in each case.[89]

The more the integration of the internal market is realized, the more cultural and trade interests encroach. The growing intervention of the Court of Justice on cultural matters showed that there was a need to have a legal basis to start addressing the relationship between culture and trade. On a parallel level, the Commission had also moved towards the acknowledgement that a cultural competence was necessary: culture, indeed, could be an obstacle for the internal market, but also a valuable opportunity for economic growth, in particular through cultural industries and increased circulation of cultural goods and services, as well as a *soft power* to boost the sense of belonging to Europe and foster the European integration process. We should not forget, in fact, that in the 1970s and 1980s Europe started to suffer from the first symptoms of a spreading Euro-scepticism. In 1986, the Single European Act (SEA) was adopted to give new powers to the integration process. Among the other structural changes, the SEA introduced new areas of competence under the sphere of power of the Community, such as environment, although it did not grant any express power in the cultural field to the Community.[90] A year later, the Commission released

[87] On this, see: E Psychogiopoulou, above (n 78), 140 and ff.
[88] To quote a few: *Cinéthèque v. Fédération National des Cinéma Français*, Joined Cased 60-61/84, 1985, ECR 2605; *Groener v. Minister for Education*, C 379/87, 1989, ECR 3967; *Commission v. Netherlands*, C 353/89, 1991, ECR I 4069; *Echirolles Distribution SA v. Association du Dauphiné and others*, C 9/99, 2000, ECR I 8207. For a broader view on these and other similar cases: R Craufurd Smith, *supra* at (n 77), 19-78.
[89] C 38/02, *Omega v. Bonn*, par. 31.
[90] The Single European Act (SEA) entered into force on 1 July 1987 and was adopted to revise the Treaties of Rome in order to add new inputs to European integration and to complete the internal market. It amends the rules concerning the European institutions and expands Community powers,

the Communication "*A fresh boost for culture in the European Community*", supporting the idea that an increased Community cultural power was both "*a political and economic necessity given the twins goals of completing the internal market by 1992 and progressing from a people's Europe to European Union*".[91] The document of the Commission reconnects with the initial logic of the Schuman Declaration: the text, indeed, by making reference again to *solidarity* as a central element to underpin integration and improve living conditions, asserts that a sense of belonging to a European culture is a fundamental prerequisite to realise such *solidarity*. The Commission Communication seems to be reconnecting both the political and economic dimensions of the European integration process through the basis of culture. Looking closely, the Commission goes even further by admitting that the main means to keep Europe united are through its regional and national cultural diversity.[92]

Member States looked at this growing Community cultural interest as a dangerous impingement on their national cultural policies. Fearing an attack on their power in an area that has traditionally belonged to State's sovereignty, Member States argued that the attribution of cultural competence had to be limited to supporting activities valorising cultural differences and diversity.[93] Member States have always been afraid of European cultural homogenisation under the European integration process.[94] Therefore, if a cultural competence was to be attributed to the European Union, it should only be formulated in conformity with the principle of subsidiarity and not with the aim of creating a uniform common culture. In this context, a cultural competence was introduced in 1992 with the adoption of the Treaty of Maastricht, which created the European Union and aimed at strengthening the political dimension of the European integration. Overall, the Maastricht Treaty gave more visibility to the relevance of culture within the European Union, especially as an element of the "European identity" that the Treaty aimed at building. For instance, the preamble of

---

notably in the fields of research and development, the environment, and common foreign policy. As far as it concerns the environmental competence, the SEA specifies that the Community can only intervene in environmental matters when this action can be attained better at Community level than at the level of the individual Member States (subsidiarity).

[91] European Commission, "Communication on a fresh boost for culture in the European Community", COM (1987) 603, 1.

[92] *Ibidem,* at 3.

[93] R Corbett, *The Treaty of Maastricht: From Conception to Ratification: A Comprehensive Reference Guide* (Longman Group UK, 1993), at 51; E Psychogiopoulou (n 78), at 15.

[94] I Katsirea, *Cultural Diversity and European Integration in Conflict and in Harmony*, (Ant. N. Sakkoulas Publishers, Athens, 2001), 31-49

the Treaty on the European Union emphasised the role of values in the European construction and the respect of Member States' history, culture and traditions. Under Article 6(3) TEU, it was established that the Union shall respect the national identities of its Member States.

The Treaty on the European Union introduced Article 151 in the ECT, conferring a complementary competence to the Community in the cultural area, in order to contribute to the "*flowering of the cultures of its Member States, while respecting their national and regional diversity, and at the same time bringing the common cultural heritage to the fore*". Under (then) Article 151(2) ECT the Community "*shall be aimed at encouraging cooperation between the Member States and, if necessary, supporting and supplementing their action in order to improve the knowledge and dissemination of culture, safeguard cultural heritage, and promote non-commercial cultural exchanges and literary and artistic creation, including in the audiovisual sector*". No power of harmonisation in the cultural sector was given to the Community: a clear ban in this sense was established under Article 151(5). The Council could only adopt incentive initiatives through the co-decision procedure, and recommendations, with the unanimity vote.[95] It is striking that for the adoption of recommendations, which are soft-law instruments within the European Union, unanimity was required. It is also peculiar that for the adoption of incentive measures, not only did the Parliament have to be involved, as required by the reference to the co-decision procedure (former art. 251 ECT), but the Committee of Regions also had to be consulted and decisions taken with unanimity. In the pre-Lisbon system the ordinary legislative procedure did not foresee the participation of the European Parliament: the Parliament's involvement was envisaged only in the case of the co-decision.[96] For culture, this was expressly envisaged in order to address Member States' anxiety towards the attribution of a cultural competence outside their national powers. The Parliament was perceived as a better custodian for the promotion of culture and cultural diversity than other EU institutions. Indeed, within the context of

[95] Article 151(5): "In order to contribute to the achievement of the objective referred to in this article, the Council
- acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedures referred to in Article 251;
- acting unanimously on a proposal from the Commission, shall adopt recommendations."
[96] After Lisbon, co-decision is now the ordinary legislative procedure.

the discussion surrounding the introduction of a cultural competence in the Treaty, the Parliament's position stressed that any involvement in the cultural field had "*[to make] the most of all aspects of the [European] diversity, thereby turning European culture into a culture of cultures by creating the most fertile environment possible*".[97]

The use of the words "cultures" and "diversity" in Article 151 shows the attention of the EU towards culture as a plurality of cultural identities and manifestations.[98]. Moreover, the exclusion of any power of harmonisation seems to be the expression of a will to preserve this plurality of cultures, as something strongly desired by the Member States. This is also recalled under paragraph 4, which acknowledges the cross-sectional function of culture by stating that "[*t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."* Finally, under paragraph 3, the Community was attributed a complementary power also on the external dimension, by fostering, together with the Member States, cooperation with third countries and international organisations active in the cultural sphere (in particular with the Council of Europe).

2.1.2) Cultural competence after the Lisbon Treaty reform: art. 167 TFEU

The reform carried out by the Lisbon Treaty did not change the asset of the cultural competence of the Union. Under Article 167 TFEU (current Article 151 ECT), culture remains a supportive competence, as also recalled under Article 6 TFEU, which lists culture among the sectors likely to be included in the complementary competences. Most of wording of Article 167 TFEU remains unchanged: under paragraphs 1 and 2, the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore; encouraging cooperation between the Member States and, if necessary, supporting and supplementing their activity' in order to improve the knowledge and dissemination of the culture and history of European peoples; the conservation and safeguarding of cultural heritage of European significance; non-commercial cultural

[97] Resolution of the European Parliament of 17 February 1989 on a fresh boost for Community action in the cultural sector, point E.
[98] B De Witte, "The Value of Cultural Diversity in European Union Law", in H Schneider and Van Den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, (2008), 219-220; D Ferri, *La costituzione culturale dell'Unione Europea*, (CEDAM, 2008) 31-42.

exchanges; and artistic and literary creation in various sectors, including the audiovisual sector. In terms of external powers, the Union's major power remains in the form of cultural cooperation, which has to be undertaken together with the Member States (paragraph 3). Only one major change can be found in paragraph 5: whereas the ban of adopting any measures likely to entail harmonisation in the cultural sector continues to exist (directives and regulations therefore remaining excluded from the range of legal initiatives of the Union), the Council can now adopt recommendations through the qualified majority vote procedure. With the Treaty of Lisbon, Member States overcame their antipathy for the qualified majority vote in cultural matters and reaching an agreement towards the adoption of cultural measure should become less difficult.[99]

2.1.3) The external cultural competence of the Union

Regarding the external competence of the Union in the cultural sector, cultural cooperation continues to be the external playground of the EU. The Union has, then, the power to promote and support projects concerning the protection of cultural heritage, cultural exchanges, and similar activities falling under the umbrella of cultural cooperation. The Union also has the power to conclude international agreements dealing with cultural cooperation.

But what does it mean that the external action of the Union is limited to "cultural cooperation"? The wording of Article 167(3) is not very precise in this sense and the effective external power may remain vague. Although "cultural cooperation" may appear at first glance as a restricted field of action, to understand better the boundaries of the external cultural power of the Union we should not forget that culture is a cross-cutting area that encroaches and intertwines with others. Further, other policy of the EU may deploy impacts on culture and raise issues concerning the protection of cultural diversity. The Union and its Member States seem to have a clear understanding of the cross-cutting nature of culture: indeed, Article 167(4) expressly requires the Union "*to take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the*

[99] In the past, it has proved to be very difficult to reach an agreement that could be accepted with unanimity by the Members of the Council. For this reason, the possibility to switch to the qualified majority vote was already discussed at the time of the Nice Treaty negotiations. However, the Nice Treaty did not achieve any result in this sense. Further on this: E Psychogiopoulou, (n 78), at 38.

diversity of its cultures".

Cultural cooperation may, then, be a wide field of action for the Union, given that opportunities for cultural cooperation may have a place within multilateral and bilateral agreements, and under different *fora.* Since 1992, indeed, the efforts of the European Union to integrate culture in external relations have expanded tremendously.[100] For instance, culture has been integrated within the framework of the trade and development policy: the Lomé and Cotonou agreements between the EU and the ACP envisage financial and technical assistance for actions in the cultural sphere, mainly in the area of the preservation of tangible cultural heritage, as well as the exchange of best practices, teaching, dissemination of information.[101] Provisions concerning cultural cooperation also exist under the frame of the Euro-Mediterranean partnership.[102] More recently, the increased engagement in the field of culture carried the EU to become a party to the UNESCO Convention on Cultural Diversity: the first UNESCO Convention concluded and ratified by the EU.[103]

Member States have always looked at the growing initiatives of the EU in the field of culture through critical eyes, fearing an extension of the Union competences and interferences in their national cultural policies. Therefore, they have tried to avoid this possibility through mechanisms and procedure, such as the need for unanimity voting first, or the joint participation in international agreements (mixed agreements), or by challenging the external power of the EU before the Court of Justice.

Safeguard mechanisms are envisaged in the case of culture and trade in services. Indeed, while external trade falls under the exclusive competence of the Union (art. 207 TFEU), Member States' concerns regarding cultural services and intellectual

---

[100] See: Commission Communication COM (92) 149, "*New Prospects for Community Cultural Actions*". Also: J A McMahon, "Preserving and Promoting Differences? The External Dimension of Cultural Cooperation", in R Craufurd Smith (ed.), *Culture and European Union Law*, (Oxford University Press, 2004), 327.

[101] E.g.: Article 139 of the 1989 Lomé Convention (Fourth Lomé Convention) aimed at fostering dialogue and better understanding through cultural exchanges between the ACP governments and peoples on the one side, and the Community on the other (Article 139 of the ACP-EEC Convention, signed at Lomé on 15 December 1989); following this, the Cotonou Agreement included Article 27, which became a cornerstone for a strong cultural development policy. (Partnership Agreement between the members of the African, Caribbean, and Pacific Group of States (ACP) on the one part, and the European Community and its Member States, on the other part, signed in Cotonou on 23 June 2000). Further in paragraph 4.2.1 of this chapter.

[102] E.g.: Article 46 of the Euro-Mediterranean Agreement establishing an Association between the European Communities and its Member States

[103] Contents and impacts of the 2005 UNESCO Convention will be further analysed in Chapter 3, whereas constitutional aspects of the EU ratification of the Convention and its implications for the Union will be object of analysis in chapter 4.

property matters are expressed through the retention of unanimous voting in these fields. Article 207 states that for all decisions concerning the "*negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules*". Further, "*the Council shall also act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; and in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them".* As the preservation of cultural identities and national cultural competences is a major concern for the Member States, the unanimity vote requirement for all Council decisions concerning cultural and audiovisual services should serve as a safeguard clause.[104]

In addition, paragraph 6 confirms that the exercise of the competences conferred by Article 207 in the field of the common commercial policy "*shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation*". This provision seems to be there to recall that the equilibrium between the cultural competence of the Member States and the complementary cultural competence of the Union should not be altered in the external level by the exercise of the trade competence.

The Court of Justice of the European Union never interpreted the limits of Article 167(3) and did not clarify what falls under "cultural cooperation". On their side, Member States often challenged the exercise of the cultural external competence of the EU – especially in areas requiring joint action by the Community and its partners – mainly relying on the subsidiarity nature of the EU cultural competence.[105] In *Portugal v. Council*[106], the first case in which the Court was called upon to give

[104] A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Review,* at 159; M Krajewski, 'The Reform of the Common Commercial Policy' in A Biondi and P Eeckhout (eds) *EU Law After Lisbon,* (OUP 2011), at 307. For an interesting view on this issue in the pre-Lisbon system: M Cremona, "A policy of bits and pieces? The Common Commercial Policy After Nice", in A Dashwood, *et al*, *Cambridge Yearbook of European Legal Studies* (Hart Publishing, 2001), at 74.
[105] E Psychogiopoulou, (n 78), at 109.
[106] *Portugal v. Council,* C-268/94.

judgment on the provisions referring to development cooperation, the ECJ recognised the possibility to include culture in development cooperation on the grounds of the complementary development competence established under Article 177 ECT (now replaced by Article 208 TFEU).[107] Nonetheless, the Court missed the opportunity to express itself on Article 151(3) (now 167(3) TFEU). In this case, Portugal applied for annulment of Decision 94/578/EC, concerning the conclusion of a cooperation agreement on partnership and development between the EC and India,[108] foreseeing action in the cultural domain. Under Article 15 of the agreement, in fact, the contracting parties should cooperate in the fields of information and culture in order to promote mutual understanding and foster cultural ties. Mostly, the activities contemplated were cultural information sharing, heritage preservation, media and audiovisual documentation and the organisation of cultural events. The Agreement included *inter alia* the enhancement of the protection of IP and related rights under Article 10. Portugal contested that the Council had adopted the Decision on the basis of former Article 133 and Article 181 ECT (now 207 and 211 respectively under the TFEU)[109] by qualified majority vote, arguing that Article 151 ECT is about coordinating cultural policies defined by each Member State within the sphere of its own competences, but does not confer any external cultural competence to the

[107] Article 177 ECT: "1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:
- the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,
- the smooth and gradual integration of the developing countries into the world economy,
- the campaign against poverty in the developing countries.
2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.
3. The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.
This Article has been replaced in the Lisbon Treaty by Article 208: "1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other. Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. 2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations."
[108] Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development.
[109] Article 211 "Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations."

Community. Therefore, according to Portugal's interpretation, the Community has no power to conclude agreements dealing with cultural matters.[110] Where the Court should recognise such competence to the Community on the base of Article 308 TEC, the Council would be entitled to take measures only by acting unanimously and following the co-decision procedure.[111] Moreover, addressing the fact that the Community had acted alone in concluding the agreement with India, Portugal estimated that this was a violation of the rules on shared and complementary competences and that all Member States should have participated in the conclusion of the agreement.[112]

The Court avoided interpreting Article 151(3) by asserting that the objectives of the Community development policy set out in Article 177(1) were very broad objectives and that the measures required for their pursuit might deal with a variety of specific matters, including culture. The Court held that, in order to qualify an agreement as a development cooperation agreement, this should pursue the objectives of Article 177 TEC and its content and nature must de determined as "*having regard to its essential object and not in terms of individual clauses*".[113] Therefore, the fact that it includes cultural aspects does not imply that it is not a development cooperation agreement. Instead, the cultural clause embedded in the agreement classifies culture as a sector of development cooperation.[114] That being so, the Court found that "*to require a development cooperation agreement concluded between the Community and a non-member country to be based on another provision as well as on Article [181] and, possibly, also to be concluded by the Member States whenever it touches on a specific matter would in practice amount to rendering devoid of substance the competence and procedure prescribed in Article [180]"*.[115] Therefore the Court did not deem the joint participation of the Member States and the Community as being necessary for the contested agreement.[116]

In terms of reallocation of competence, the Court stated that those cultural provisions did not impose obligations going beyond the objectives of cooperation

[110] *Supra* at 71, para. 51.
[111] Article 352(1) TFEU (former Article 308 ECT).
[112] *Portugal v. Council*, above (n 106), para 36.
[113] *Ibidem*, para 37 and 39.
[114] *Ibidem*, para 45 and 54. The Court applied the same reasoning to the clauses concerning intellectual property, still considered as accessorising with the overall scope of the Treaty by "smoothly and gradually integrating the developing countries into the world economy". See para 73-77.
[115] *Ibidem*, para 38.
[116] On mixity, see discussion above.

development, nor established the concrete ways to implement such cooperation. Therefore, they did not transfer any wider cultural competence to the Community and did not open the road to future reallocation of subjects between the EC and Member States. Nonetheless, it indirectly recognises the possibility for the European Union to act as a stand-alone actor, and not always together with the Member States, when culture is instrumental to the achievement of other objectives, such as development cooperation.

From a broader perspective, in affirming that culture can fall within the sphere of development cooperation competence, the Court indirectly opened up the external cultural power of the Community to new horizons. Still indirectly, it also ascertained the intertwining between the cultural competence and the development one. Recalling that Article 177(1), in particular, refers to sustainable economic and social development, including cultural actions in this sphere of actions can be considered as a step forward for the recognition of the value of culture for development.

2.2) The EU's understanding of "culture"

2.2.1) The notion of culture under EU law: culture as goods, creativity, values and heritage

The EU Treaties do not provide a definition of "culture", nor have the Court of Justice or the other EU institutions supplied an interpretation of such a notion. This is not surprising, given the difficulty ascertained in the first chapter of this work to provide a uniform definition of culture. The above-made analytical excursus on the evolution of the EU cultural competence and a look at the secondary legislation and cultural policy developed by the EU should be useful to single out which notion(s) of culture are relevant for the Union. In other words, how does the Union understand culture?

It has been ascertained that culture was not among the priorities inscribed in the founding Treaties, nonetheless cultural concerns came to encroach on the realisation of the internal market since its origins. The initial decisions of the Court of Justice in disputes concerning culture and the internal market rules show a trend towards a negative approach in the understanding of the relationship between culture and economics. The Member States' claims for special consideration of cultural

concerns and exemptions of cultural goods from free market rules were mostly seen by the Court as likely to hinder the realisation of the single market, and therefore as an obstacle for further European integration.[117] Initially, the Commission also sensed this threat and adopted several measures impinging on national cultural policies with the aim to ensure the full functioning and achievement of the internal market. For instance, the Sixth Value Added Tax (VAT) Directive and the following Directive 92/77/EEC on approximation of VAT's rates allowed for preferential tax treatment of certain cultural goods and services, in order to facilitate the flow of such goods and services.[118] Furthermore, despite the ban of harmonisation established by Article 151 ECT (now 167 TFEU), in the early 1990s the Commission started a series of initiatives in the field of culture, which have led to some level of harmonisation in specific cultural sectors. In particular, secondary law instruments were adopted to regulate the audiovisual sector, such as the *Television without frontiers* directive.[119] The final scope of this directive was to create a European broadcasting space, undermining national monopolies in the sector. Such regulations, of course, affected national public broadcasting policy, yet were also meant to contribute to the diffusion of knowledge, cross-cultural exchange, and creative development.[120] This last point is particularly interesting for the current analysis because it shows a certain degree of awareness towards the double nature of culture goods and services. Indeed, if culture is mainly taken into account by Treaty law as cultural goods and services,[121] their double nature consisting in embedding both economic and cultural values is not ignored. The special nature of cultural goods was also recognised by the Court in the *Italian Arts Treasures* case, and a shift towards a more sensitive approach to the protection of cultural values can be discerned on a case-by-case analysis of the Court's jurisprudence.[122]

[117] Cases above quoted, see ff. (n 80 and n 82).
[118] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes; Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC.
[119] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, (amended by Directive 97/36/EC).
[120] M De Cock Buning, "Cultural Diversity in Mass Media Regulation", in H Schneider and Van Den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, 2008, at 249.
[121] See for instance commentator on the exception under former Article 30 ECT, above (n 78).
[122] For some examples see f. (n 88). See also: D Ferri, above (n 98).

Whereas at the beginning the encroaching of culture on the economic development of the EU mainly came to the fore in terms of opposition, the Commission had sensed the potential of culture as a driver of economic growth and creativity since its 1987 Communication "on a fresh boost for culture".[123] Aware of the close interrelation between cultural industries and economic development, the Commission promoted programmes to incentivise (through financial assistance) the creative industry sector, the mobility of artists, and access to culture. A first example of this kind of initiative is the Council Decision 90/685/EEC concerning the implementation of an action programme to promote the development of the European audiovisual industry, also known as the MEDIA programme.[124] Other programmes aimed at encouraging cultural cooperation in the arts and literature.[125] Most of the EU efforts were focused on the audiovisual sector and creative industries, however initiatives dealing with the protection of more traditional forms of cultural heritage were also enacted, such as the Raphael Programme.[126] This programme aimed at raising awareness about issues concerning cultural heritage protection, collecting best practices in conservation, and sharing information. Under this frame, several projects concerning the restoration and conservation of heritage received financial support. In 2000, the Commission adopted the Culture Programme: a single programming and financing instrument for measures in the field of culture.[127] Besides collecting the different previous cultural initiatives supported by the EU under one single frame (therefore simplifying the basis for actions), the Culture Programme 2000 aimed at creating a common cultural area for the creation and dissemination of culture, supporting the mobility of artists and their work, promoting cultural dialogue and transnational cooperation projects and the European cultural heritage.[128] The Culture

[123] Above quoted, (n 91).
[124] Council Decision 90/685/EEC of 21 December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry.
[125] Namely, the Kaleidoscope programme and Ariane programme. Respectively adopted with Decision 719/96/EC of the European Parliament and of the Council of 29 March 1996 establishing a programme to support artistic and cultural activities with a European dimension (Kaleidoscope); and Decision 2085/97/EC of the European Parliament and of the Council of 6 October 1997 establishing a programme of support, including translation, in the field of books and reading (Ariane).
[126] Decision 2228/97/EC of the European Parliament and of the Council of 13 October 1997 establishing a Community action programme in the field of cultural heritage (Rapahel). The programme lasted from 1997 to 2000.
[127] Decision 508/2000/EC of the European Parliament and of the Council of 14 February 2000 establishing the Culture 2000 Programme. The programme lasted from 2000 until 2006.
[128] Article 1 of Decision 508/2000/EC.

Programme 2000 can be considered the beginning of a European cultural policy adopted on the basis of Article 167 TFEU (still Article 151 ECT at that time).

It is interesting to see that Decision 508/2000/EC defines culture as both an economic factor and a factor in social integration and citizenship, an important intrinsic value to all people in Europe, and a vehicle of socioeconomic development.[129] The Culture Programme 2000 can be considered an official recognition of the multifunctional dimensions of culture and its positive role for development within the EU. Further, Article 6 of Decision 508/2000/EC requires the Commission and the Member States to ensure the overall consistency and complementarity with relevant EU policies and actions. This seems to be reproducing the formula under current Article 167(4) TFEU. The integration of culture and cultural concerns into other EU policies is also recalled under Article 13 TFEU, which established that "in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while *respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage"* (emphasis added). In spite of the lack of a formal definition of culture, the Union seems to have developed a broad understanding of culture, which takes into account its tangible and intangible dimensions, as well as its cross-cutting and multifunctional nature.

2.2.2) Culture as a cross-cutting instrument for regional and local development

The integration of cultural elements in the framework of regional development policy and other EU policies, such as environment, shows that the Union is aware that culture is a transversal tool which may support local development, environmental benefits, strengthen social cohesion and economic wealth. The recognition of the positive interaction of culture with development, and in particular local development, can be detected in the 1999 reform of the Common Agricultural Policy, which introduced the idea that the market and the income support activities ought to be complemented by rural development initiatives. In this context, more attention was given to encouraging farmers to use agricultural practices safeguarding the cultural

[129] See point 1 and 2 of the Preamble and Article 1(e) of Decision 508/2000/EC.

and natural heritage of the countryside. Financial aid was also given to support measures for the renovation and development of rural villages, the conservation of rural heritage, tourist and craft activities, and protection of the environment in connection with landscape conservation. In 2005, the Council Regulation 1698/2005 on the financing of the CAP[130] set up the future strategy of the Community agricultural policy and enhanced the integration of cultural considerations with a view to promoting sustainable rural development. This sustainable rural model was also promoted under the Structural Funds programmes in the framework of regional development policy. A wide range of funded projects was set up, such as INTERREG III, URBAN, EQUAL and LEADER+: these programmes still mainly focused on the conservation and management of natural and rural heritage, yet they have been conceived as important tools for a local sustainable economic development. Some of them have focused on conservation and better management of tangible and intangible heritage, others on the creation of spaces for cultural enjoyment. In any case, by directing resources to projects with a cultural dimension, the Structural Funds restore less-developed and underperforming local economies and contribute to the development of the endogenous cultural potential of EU regions, transforming them into spaces where culture is more accessible. There is, then, an attempt to promote an integrated approach for a bottom-up development strategy, based on the creation of partnerships involving local subjects and taking into account indigenous traditions and the cultural elements of rural communities.

2.2.3) Cultural diversity as a European common interest

Article 167 TFEU grants constitutional recognition to the protection of cultural diversity.[131] In particular, the Union has to protect and promote European cultural diversity. What strikes the attention of the reader is that the Treaty never speaks of one single European culture; rather, cultural diversity *is* the European culture. As a regional integration organisation of 28 member states, the diversity of languages, traditions, and cultural backgrounds is overspread among the European

[130] Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).
[131] B De Witte, "Trade in Culture: International Legal Regimes and EU Constitutional Values", in The EU and the WTO Legal and Constitutional Issues at 252

countries. Cultural diversity is also present in Europe in the form of political and legal diversity: a wide range of different constitutional regimes coexists in the Union.[132] Throughout the years the concept of a European culture made of a plurality of cultures emerged as a complementary element of the EU citizenship and a central element for further improvements for the integration.[133] Cultural diversity has become the essence of the European cultural identity. This was firstly outlined in 1973 in a document on the European Identity published by the Nine Foreign Ministers on 14 December 1973, which defined the European identity as the "*diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe*".[134] This identity is what makes the originality and the dynamism of Europe, as was also highlighted by the European Parliament in its 1989 Resolution on a fresh boost for Community action in the cultural sector.[135] Today the slogan "United in Diversity" is quite notorious, and having first appeared in 2000 it has since become a symbol of the European Union.[136]

The promotion and preservation of cultural diversity is among the Union's constitutional values. Article 3(3) TEU "*shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".* The protection of cultural diversity should, therefore, be considered among the priorities of the Union – or, in other words, as being among the common interests of the Union. In a relatively recent case decided by the Court of Justice, the protection of cultural diversity gained some judicial strength. In the UTECA decision, the Court was asked to decide about the conformity of a restrictive Spanish measure affecting the broadcasting discipline of the Television without Frontiers Directive. The Spanish measure requires the television operator to allocate 5% of their operating revenues for the pre-funding of European films, and to allocate 60% of that 5% for the production of films in one of the official languages of Spain, in order to preserve

[132] The recent failure of the adoption of the project of a Constitutional Treaty for the European Union is also evidence of the strong will of the Member States to maintain this constitutional pluralism, in order to preserve their national political identities.
[133] M Ross, "Cultural Protection: a Matter of Union Citizenship or Human Rights?", in N A Neuwahl and A Rosas (eds.), *The European Union and Human Rights*, Martinus Nijhof Publishers, 1995, 247.
[134] "Declaration on European Identity", *Bulletin of the European Communities*, December 1973, N 12, (Luxembourg: Office for official publications of the European Communities), 118-122.
[135] See above (n 97).
[136] Europa.eu/about-eu/basic-information/symbols/motto/index_en.html

Spanish multilingualism. This last aspect is particularly interesting for the scope of this thesis. Indeed, although the Spanish measures are likely to reduce the mobility of workers, as well as the free movement of capital and establishment and may appear to be in conflict with the internal market rules, the Court found that the Spanish measures pursued the promotion and protection of multilingualism, which is a component of cultural diversity, and were compatible with the Treaty rules on competition.[137] Following the address of the AG Kokott, to define multilingualism as a component of cultural diversity, the Court made express reference to the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the EU in 2006.[138] In her opinion, AG Kokott recalled that, according to the UNESCO Convention "cultural diversity forms part of the common heritage of humanity" and, therefore, it needs to be protected.[139] In a way, it seems that the protection of cultural diversity could gain further strength from the entry into force of the UNESCO Convention within the EU. It also seems that the protection of cultural diversity by the EU has to be ensured to pursue a common interest that goes beyond the Union's interests, but rather as an overriding reason of general interest (also identified as the common interest of humankind).

3) The European Union and development

Development policy is one of the most significant and developed policies of the Union. The EU is today a major donor of development aid and a very prominent actor in the development process, both at the regional and global level. The Union certainly plays a relevant role as a global actor in development cooperation, and raises great expectations around the world. Article 3(5) TEU places the promotion of sustainable development as a priority goal within its external relations.

In this section I will try to frame how the international role of the Union in development cooperation has grown through the analysis of the evolution of the EU competence in development. This analysis will also be the basis to understand what notion and model of development the Union endorses and is likely to export. It will

[137] *UTECA v. Administración General del Estado*, C 222/07, para 33. See also the Opinion of AG Kokott to the case, delivered on 4 September 2008.
[138] Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/EC).
[139] See AG Kokott's Opinion to the case, para 14.

also be useful to establish whether the acknowledgement of cultural connections with development also has a place in the external development policy.

3.1) The EU competence on development

3.1.1) Origins and evolution of the Union's competence on development

Under Article 3(5) TEU, the Union is committed "in its relations with the wider world to contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

Development as a global goal, not only for the wealth and wellbeing of Europe, but also for the rest of the world was already present in the Schuman Declaration. Namely, Schuman referred to the development of the African continent, with which France – as well as the other European countries – had a close relationship. The European development policy, indeed, finds its origin in the colonial and post-colonial history of the relationship with the African countries.[140] In spite of this ambitious declaration, the founding Treaties did not expressly attribute a general competence for development to the Union. This was introduced only in 1992, with the entry into force of the Maastricht Treaty.

While an expressed competence for development cooperation was missing, Article 3 of the former Treaty on the European Community envisaged the "association with overseas countries and territories, in order to increase trade and to promote jointly economic and social development."[141] The Treaty of Rome recognised a link between trade and development to be promoted within the framework of association agreements with third countries – namely those having historical relations with Belgium, France, Italy and the Netherlands.[142] Given the association between trade and development, the first steps towards a general

[140] Further on this: L Bartels, "The Trade and Development Policy of the European Union", in M Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008), 128.
[141] Article 3(s) ECT. Previous Article 3 ECT has been replaced, in substance, by Article 7 TFEU and by Articles 13(1) and 21, paragraph 3, second subparagraph of the TEU.
[142] Former Article 182 ECT. It is interesting to note that the formula has only slightly changed under current Article 192 TFEU, which no longer mentions Italy and Belgium, but expressly includes the UK.

development policy were taken within the frame of the Common Commercial Policy (CCP), whose major goal was to boost further trade liberalisation (Article 207 TFEU, ex Article 133 ECT). Indeed, the first agreements concluded between the European Economic Community and its partners – listed under Annex IV of the ECT – dealt with free trade provisions and investments in order to further apply the internal market system to the associated partners. The countries listed under Annex IV were the former colonies of European States (grouped as the African, Caribbean, and Pacific countries (ACP)). When they gained independence in the 1960s, the agreements were revised because of the change of status of the partners. In this new political context, a five-year agreement between the EC and the newly-independent countries was signed in 1963 (the first Yaoundé Convention) and a second agreement in 1969 (Yaoundé II). Whereas most of the provisions remained the same, a political and institutional dimension was given to these kinds of associations through the creation of specific institutions (namely: an Association Council, a Parliamentary Conference, an Association Committee and a Court of Arbitration). This frame was complemented by a European Development Fund (EDF), which was established to give financial aid for building infrastructure like schools and hospitals and other investments in the overseas territories. Besides these aspects, the emphasis of these agreements was on the progressive elimination of trade barriers on the basis of reciprocity.[143] This scheme was overcome with the adoption of the first Lomé Convention (1973) and the following Conventions,[144] which endorsed the establishment of a Generalised System of Preferences (GSP) for developing countries. The GSP, together with the conclusions of trade agreements, are the major instruments through which the EU development policy has evolved under the umbrella of the CCP.

The GSP unilaterally grants preferential trade treatment to other parties. It was firstly introduced in 1971 as an answer to the claims raised by developing countries for a differentiated treatment under the GATT system, and following the UNCTAD recommendation to create a tariff preferences system for developing countries.[145] The

[143] L Bartels, above (n 140), at 137.
[144] 1980-1985 Lomé II; 1985-1990 Lomé III, 1990-2000 Lomé IV Conventions. According to the principle of non-reciprocity, under these framework Conventions the ACP countries had no obligation to offer reciprocal market access.
[145] R Schütze, "EU Development Policy: Constitutional and Legislative Foundation(s)", in (2012-2013) 15 *Cambridge Yearbook of European Legal Studies*, at 702. In the 1960s, developing countries started to criticise the application of the Most Favoured Nation (MFN) clause under the GATT, which

GSP scheme was renewed over the years and in the 1990s an additional chapter granting special incentives for sustainable development and good governance was added. This so called GSP+ conditioned additional tariff reductions to the ratification by developing countries of international conventions that are considered to further the goals of sustainability and democracy. Under the Lomé Conventions frame, the respect of human rights, principles of democracy and the rule of law also became constantly applied as conditions to grant financial and technical aid.[146]

Within the broader framework of international trade law, the GSP scheme has often been challenged before the WTO Panel because of its alleged violations of the enabling clause and the principle of reciprocity under the GATT.[147] This situation pushed the EU to revise the frame of its trade agreements with the ACP: in order to comply with its commitment under the WTO, the Cotonou Agreement was signed between the EU and the ACP group in 2000.[148] This new frame is built on three pillars: the political, development, and trade pillars. Whereas the first two will last until 2020, the third pillar expired in 2007. After this deadline, a new season of partnership agreements based on reciprocity began: the Economic Partnership Agreements (EPA). The overall scope of the Cotonou Agreement is to conclude new WTO compatible trade arrangements, but also to contribute to poverty reduction and the promotion of sustainable development in ACP countries. It is based on an integrated approach, which includes political, social, environmental, and economic

---

establishes that the most favoured treatment reserved by a State to another should be extended to all the other contracting parties (Article I:1 GATT). Developing countries argued that such a clause does not favour equality, but maintain existing inequalities. In 1968, the first United National Conference on Trade and Development (UNCTAD) took place and spoke about a New International Economic Order. This affected changes under the GATT system, which allowed preferential tariffs to be applied to developing countries, and special preferential treatment for least-developed countries (the so-called Enabling Clause). Further on this: L Bartels, above (n 140), 143-146.

[146] In 1995 human rights conditionality became an official component of the EU trade and cooperation agreements with third countries. Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216; Commission Communication on the European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond, COM (95) 567. Further on this: L Bartels, *Human Rights Conditionality in the EU's International Agreements*, (Oxford University Press, 2005).

[147] E.g.: the notorious EC-Bananas cases (the "Banana Wars"), WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/AB/R. In synthesis, the EU-ACP agreements under the Lomé frame were in breach of Article XXIV GATT and the development aim cannot justify exception to the MFN rule under Article XXIV GATT when the parties are not both developing countries. In a North-South relationship, reciprocity is required.

[148] Partnership Agreement between the members of the African, Caribbean, and Pacific Group of States (ACP) on the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

dimensions. As we will see further in this chapter, cultural aspects are also taken into account.

Throughout the years, the EC-ACP relationship model based on trade preferences, aid and institutionalised dialogue was increasingly extended to other regions, namely Eastern Europe, Asia and Latin America. The relationship with the ACP is not longer considered to be *special*[149] and the Union has gradually established a general development policy that seems to be going beyond trade. This was possible also through the introduction of a more comprehensive competence on development in 1992, which seems to rely on a wider understanding of the notion of development.

3.1.2) The development competence under the Maastricht Treaty: development beyond trade

The 1992 Treaty on the European Union introduced an entire title in the EC treaty dedicated to development cooperation and conferred an expressed development competence to the EU. Article 179 ECT allowed for the adoption of unilateral measures in the form of multiannual programmes; whereas Article 181 ECT entitled the EU to conclude international agreements in the field of development cooperation. This is considered to be the beginning of an autonomous development policy, independent from the CCP. The EU's competence on development was conceived as a shared competence. In order to avoid conflicts and implement a coherent development operational framework, the Maastricht Treaty established three principles on which the EU development policy had to be based: *complementarity* between development policies of the member states and the EU's programmes; *co-ordination* between the Member States and the EU institutions to ensure effective operational implementation; and *coherence* of all the Community policies. In 1997, the Treaty of Amsterdam added a fourth principle: *consistency* of all external activities of the European Union in the context of its external relations.[150] These principles should ensure the effectiveness of the external action of the EU as a

[149] According to commentators, the EU development policy developed on a two-track approach: a special relationship with the former colonies, while gradually establishing a broader development policy. See on this: Schütze, above (n 145). For a comment on the shift of interest from the ACP countries to other regions in the world, and in particular the neighbours of the Union, see: K E Smith, "The ACP in the European Union's network of regional relationships: still unique or just one in the crowd?", in K Arts and A K Dickson (eds), *EU development cooperation From model to symbol,* (Manchester University Press, 2004), 60-79.

[150] These four principles are often referred to as "the four Cs". M Van Reisen, *EU 'Global Player' The North-South Policy of the European Union,* (International books, 1999).

promoter of development. In particular, they should help to overcome a sectoral approach to development, mainly based on trade, by coordinating goals and strategies of sectoral policies of the EU.[151]

Under Article 177 ECT, the EU development policy shall contribute to the sustainable economic and social development of developing countries; the gradual and progressive integration of developing countries in the world economy; fighting against poverty; and fostering and consolidating principles of democracy, the rule of law, and the respect of human rights and fundamental freedoms. This ambitious agenda endorses a broader understanding of development, which goes beyond mere economic growth and embeds a social and environmental dimension. This seems to be confirmed by the reference to sustainable development, as well as by the reference in paragraph 4 of Article 177 to the EU's obligation to comply with commitments and objectives undertaken under the UN and other competent international organisations. Recalling the international framework in which the EU acts is important. It should be noted that in 1992, when the Maastricht Treaty was adopted, discussions about a broader knowledge of development, and meeting environmental and social needs, were taking place.[152] The ongoing international process towards the recognition of sustainable development seems to have influenced the notion of development embedded in the Treaty of Maastricht. Former Article 2 TEU lists the achievement of a harmonious and balanced development of economic activities among the goals, in line with the concept discussed at the Conference of Rio.

The shift from a notion of development that is based entirely on economic growth and wealth to a more holistic concept had already started in the 1980s with the acknowledgement of the impact of EU trade and development policies on other fields. In particular, the first steps were made with the adoption of environmental protection measures.[153] The Single European Act in 1987 extended the EC competence in the environmental field adding three new articles permitting the Community to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational use of natural resources.[154] The new EU engagement in environmental protection and the active participation of the

[151] M Van Reisen, *ibidem*, at 66.
[152] See Chapter 1.
[153] S Baker, "The European Union: Integration, Competition, Growth – and Sustainability", in W M Lafferty. and J Meadowcroft (eds.), *Implementing Sustainable Development. Strategies and Initiatives in High Consumption Societies*, (Oxford University Press, 2000), 307-310.
[154] Artices 130R, 130S and 130T of the EEC Treaty of the Single European Act (SEA).

EU in international environmental-focused *fora*, such as the UNCED Earth Summit (1992), the negotiation of the United Nations framework convention on climate change, and the following adoption of the Kyoto Protocol (1998), contribute to bolster an understanding of the concept of sustainable development mainly based on the accommodation of environmental protection.

As mentioned, the Treaty of Maastricht also referred to the need of ensuring the coherence and consistency of development policy in its external activities. Concerning the environmental dimension of development, a clause of integration was introduced within the ECT: Article 6 ECT established that *"[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*." That clause of integration has been reproduced under Article 11 TFEU. As for the social dimension, a similar clause of integration was not foreseen. The social pillar of the sustainable paradigm is mostly associated to the fulfilment of human rights and democracy. The EU committed to contribute towards the achievement of this goal through its development policy (art. 177 ECT).[155]

No references to cultural aspects of development policy were introduced by the Maastricht Treaty under the title "development cooperation". Culture was merely mentioned under Article 182 ECT to clarify that the association agreements with third Countries shall serve primarily "to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and *cultural* development to which they aspire" (emphasis added). In the overall context, that statement sounds more like a rhetorical justification of the EU's interest in pursuing trade association agreements with third countries – conceived in political rather than judicial terms.[156]

[155] Nonetheless the integration of human rights clauses into development policies has never been a peaceful fact. For a critical appraisal on this: B de Witte "The EU and International Legal Order: The Case of Human Rights", in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders Policy Interconnections between the EU and the Rest of the World,* (Hart Publishing, 2011).

[156] The Union's development policy with third countries, especially the ACP groups, has often been criticised for being in the interest of the Union, as far as it boosts its image in the developing world and beyond, and of the Member States, particularly France and the UK. Among the others, see: K Arts and A K Dickson, "EU development cooperation: from model to symbol?", in K Arts and A K Dickson (eds), *EU development cooperation From model to symbol,* (Manchester University Press, 2004), at 5, 14.

3.1.3) The Union's competence on development after Lisbon

Under the current post-Lisbon frame, Article 209 TFEU (replacing Article 177 ECT) recites: "*1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.*

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations."

The new formulation of Article 209 TFEU does not seem to be changing the scope or extension of the Union's development competence,[157] which remains a shared competence. It seems, nevertheless, to be stressing the need to pursue a coherent and consistent external development policy. First of all, the Union's action in the external development policy must be in harmony with the Union's principles and objectives of the external action. This can be read as an express reference to Article 21 TEU and Article 3(5) TEU. Further, the *complementarity* aspect is strengthened by the express acknowledgement that the Union's development policy and the Member States' development policies complement each other and by Article 210 that forecasts the possibility of EU/Member States' joint actions and coordination between their policies on development cooperation, in order to promote the complementarity and efficiency of their action. Coordination among the Member States and the Union should fully respect the principle of conferral and the shared nature of the EU development competence. Indeed, Article 209(1) states that the Union's power to conclude agreements in the area of development must not prejudice the Member States' competence to negotiate in international bodies and to conclude agreements. Under the Lisbon Treaty, the respect of the principle of conferral is rather strong: Article 4(4) TFEU adds that the Union shall carry out activities and conduct a

[157] A broader competence in the specific field of humanitarian aid is given to the Union by Article 214 TFEU.

common policy in the field of development without affecting Member States' exercise of their competence.[158]

In terms of scope and objectives, the development policy should be coherent with the overall principles and goals pursued by the Union. Some commentators point out that the emphasis on poverty reduction in Article 208 TFEU may confine the action of the Union to this specific goal.[159] This interpretation is supported by the fact that while poverty reduction becomes a primary objective, the achievement of sustainable development, the smooth and gradual integration of developing countries into the world economy and the respect for human rights are no longer specific objectives of the development policy but have become general goals of the Union's external action. Following this argument, in theory this may entail a different choice in terms of legal basis for Union initiatives not directly focusing on poverty reduction. However, actions aiming at poverty reduction may be broadly interpreted and fall within the development competence of the Union. *Portugal v. Council* is an example of the broad interpretation that may be given to the development competence.[160] Besides the discussion on the potentially more complicated frame for the choice of legal basis created by the Lisbon Treaty, the Treaty seems to endorse the broadest concept of sustainable development, as shaped under international law. Article 3 TEU includes sustainable development among the overall goals pursed by the Union;[161] further, several provisions in the Treaty recall environmental and social sustainability and the need to include sustainable development principles in the overall external action of the Union. Article 21(2) recalls that the Union shall *foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty* (point d); *help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development* (point f); *consolidate and support democracy, the rule of law, human rights and the principles*

[158] Schütze seems to be suggesting that this formulation may be interpreted as excluding the pre-emptive effect of Union legislation in this area (Schütze, above (n 145), at 708). In his comment on the imperfections of the new order of competences shaped by the Lisbon reform, he argues that the development competence may be conceived as a "hidden", "parallel" competence and raises the question of how a competence so shaped can be complementary with the Member States' actions. (Schütze, above (n 49)).

[159] Schütze, above (n 145). Also: K Lenarts and P Van Nuffel, *European Union Law*, (Sweet and Maxwell, 2011), at 991.

[160] Case references above cited (n 106).

[161] Article 3 points (3) and (5) TEU.

of international law (point b). The stress on coherence between the Union's policies highlighted in the Lisbon Treaty should require that the Union's actions based on the development competence – whether they focus on poverty reduction or on wider goals – take these principles and goals into account. Further, all EU policies should be coordinated and consistent so as to create a coherent frame for pursuing sustainable development both on the Union's internal and external level.

It should be noticed that while the integration of environmental concerns is expressly foreseen by the Treaty (Article 11 TFEU) and the respect of human rights, the rule of law, democracy, and other principles of sustainable development are often recalled under several provisions, culture and cultural diversity do not have the same relevance. Under Title III TFEU on development, culture in not mentioned; nor is the protection of cultural diversity listed as a goal among the general provisions on external action (Article 21 TEU).

3.2) The notion of development under EU law: any room for culture?

The EU treaties do not define the notion of sustainable development. Looking at the origins of the Union's development policy under the CCP frame, the initial understanding of development under EU Treaty law is mainly tied to economic growth. The connection between trade and development was also affirmed by the Court of Justice in the case *Commission v. Council*, in which Court estimated that the only CCP competence was a satisfactory legal basis to adopt measures aiming at fostering development because of the strong link between trade and development.[162] It is interesting to note that the Court based its interpretation of "development" on the evolutions of international law (namely, those ongoing under the UNCTAD and the GATT's frame). Indeed, the international debate over development highly influenced the shaping of the notion of development within the EU, especially as far as the integration of social and environmental components is concerned. Since the entry into force of the Maastricht Treaty, the Union shifted from a concept of development merely based on trade towards a more holistic approach.

[162] C 45/86 *Commission v Council (Generalised Tariff Preferences),* para 17, 18 e 19. In this case, the Commission challenged the Council's choice of the legal basis for the adoption of two regulations concerning trade preferences. The Council had partly based the adoption of the contested regulations on former Article 308 ECT (352 TFEU), arguing that the purpose of such regulations was not only commercial, but mainly development. Thus, in a situation of lack of power in the development area, it was necessary to supplement the residual power clause under Article 308 ECT.

The Union's new broader understanding of development is expressed in the *European Consensus on Development* (ECD), a policy statement jointly adopted by the Council, the European Parliament and the Commission in 2005 which sets out common objectives and principles for a vision of common development and a common implementation strategy.[163] The overall scope of the document is to strengthen the role of the Union as a global partner and actor in development by adopting a vision and a strategy commonly shared by the Union and its Member States. The Union's vision of development is based on the principles, fundamental values, and objectives (namely the MDGs) of sustainable development as agreed at the multilateral levels. The Union endorses the principle of ownership of development strategies by partner countries and acknowledges that developing countries have the primary responsibility for creating an enabling domestic environment for mobilising their own resources. Within this broad notion of development there is no great acknowledgement of culture and its contributions. The only mention is in relation to the EU's commitment to promote human development through its policy framework for health, education, culture, and gender equality. Cultural aspects are rather encompassed under the social chapter, and they mainly refer to the improvement of education, training, and research programmes in developing countries.

The evolution of the understanding of sustainable development still does not explicitly make reference to culture as a pillar of the EU development policy, but refers to a notion of sustainable development that includes the economic, social and environmental variables and considers cultural aspects as being part of the social sphere.[164] The EU's re-thinking on sustainable modes of governance followed the major international evolutions: whereas consensus grew around the idea that importance had to be given to economic, social and environmental matters, culture has been left outside this process and synergies remained unexplored (and

[163] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', (2006/C 46/01).

[164] See, for instance, *The Agenda for a Change*, a Commission Communication adopted to increase the impact of EU development policy in the world: the document does not include culture as a lever of development; more efforts in spreading education for human development are recommended under the social chapter. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Increasing the Impact of EU Development Policy: An Agenda For Change, COM (2011) 637 final, point 3.1. See also: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 July 2009 – Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM (2009) 400 final.

unexploited). This gap certainly derives from the absence of strong political commitments to cultural mainstreaming, as well as the lack of a procedural mechanism enabling the EU institutions to delve into the cultural impact of their actions.[165] In fact, most of the instruments set up for the assessment of economic, social and environmental impacts of EU policies and projects do not address cultural impacts. On the internal level, the EU procedure for the Environmental Impact Assessment and the Strategic Impact Assessment limit their application to physical impact on tangible cultural heritage, namely historical buildings, monuments, and works of art.[166] Impacts on the intangible heritage and other manifestations of cultural expressions are not addressed. The evaluation of potential impacts on the cultural dimension of development are not included in the unified system for ex-ante impact assessment of policy proposals introduced in 2002 to implement the EU Sustainable Strategy.[167] Similarly, on the external level, the Sustainability Impact Assessment, a policy tool for the prior assessment of the economic, social, and environmental implications of a trade negotiation, only addresses economic, social and environmental impacts.[168]

Comparing the evolution of the notions of culture and of development on the basis of the competences attributed to the EU, the following consideration arises: whereas under the cultural competence (Article 167 TFEU), the cross-cutting nature of culture is recognised and the integration of culture in development cooperation is recommended, the development competence (Article 208 TFEU and ff.) does not acknowledge such a link and does not envisage any connection with the cultural competence. Nonetheless, this sectoral approach should be overcome under the post-Lisbon frame. The accent on coherence calls for further coordination of all the EU policies and consistency among the strategies adopted. If cultural diversity is a common concern for the Union, to be protected and promoted also on the external

[165] E Psychogiopoulou, above (n 78), at 83.
[166] Directive 11/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (Article 3); Council Directive 2001/42/EC of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment.
[167] Communication from the Commission on Impact Assessment, COM(2002) 276 final; Communication from the Commission Action Plan "Simplifying and improving the regulatory environment", COM(2002) 278 final.
[168] These assessments were first developed in 1999 for the WTO-DDA negotiations. Since then they have been applied to all the EU's major multilateral, regional or bilateral trade negotiations. They are carried out during the underlying negotiation. *Handbook for Trade Sustainability Impact Assessment,* (available at: http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf).

level, culture should be granted more space within the policies implementing sustainable development. The new wording referring to the respect of the Union's rich cultural and linguistic diversity and the safeguard of Europe's cultural heritage under Article 3 TEU can be interpreted as a better acknowledgement of the potential impacts of development policies – mostly those related to fostering trade liberalisation – on culture, at least on the internal level.[169] Furthermore, in recent years something has moved towards the awareness of the positive interplay of culture with development issues, in particular since 2006 when the EU ratified the UNESCO Convention on Cultural Diversity.

4) Culture and development in the European Union's external relations

The EU Treaties do not expressly recognise the link between culture and development, at least not in the wording of Articles 167 and 208 TFEU. Nor do the policy documents on development embed an official recognition of the cultural interaction with development. In spite of this lack of official acknowledgement, culture has never been an unknown element within the frame of the EU's external action, with a view to contribute to development objectives. As envisaged by Article 167(3), the Union has integrated culture in the form of cultural cooperation since the IV Lomé Convention was enforced. Culture as values and vehicle of principles is also present in the European Neighbourhood Policy (ENP) to strengthen intercultural dialogue, and contribute to the overall objective of this policy. Under this frame, the EU recognises the role of culture as a soft power in diplomatic relations.[170]

---

[169] The introduction of Article 13 TFEU seems to be confirming this interpretation (above section 2.2.1). An anticipated application of Article 13 can be found in Article 3 of the Regulation (EC) no 1007/2009 of the European Parliament and of the Council of 16 September 2009 On Trade In Seal Products, which establishes an exception for products deriving from traditional Inuit hunting in order to preserve their lifestyle (*Article 3* Conditions for placing on the market: **"**The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence").

[170] For instance, in 2004 the *Communication from the Commission on European Neighbourhood Policy-Strategy paper* invited States to adopt measures in order to facilitate and foster the movement of people in the sectors of education, training, science and culture, in order to put in practice the *people-to-people contacts* strategy. The Commission acknowledged that "*an effective means to achieve the ENP's main objectives is to connect the peoples of the Union and its neighbours, to enhance mutual understanding of each others' cultures, history, attitudes and values, and to eliminate distorted perceptions. Thus, in addition to contacts between public bodies or businesses, the ENP will promote cultural, educational and more general societal links between the Union and its neighbourhood*" (COM(2004) 373 final). For a broader appraisal on the ENP: M Cremona "The European Neighbourhood Policy More than a Partnership?", in M Cremona (ed.), *Developments in EU External Relations Law*, (Oxford University Press, 2008), 244-299.

In this section we will see that, so far, most of the EU actions integrating culture into development cooperation have focused on cultural cooperation, aiming at promoting cultural development rather than culture as a vector of development. Yet, in the last few years, something has changed. Since the entry into force of the UNESCO Convention on Cultural Diversity in 2006 within the EU legal order, the Union has undertaken international legal obligations to promote cultural diversity and integrate cultural interests in all its policies, both at the internal and external levels. From an international perspective, this new international commitment highly contributed to give more visibility to the EU and created new expectations from other world actors and civil society. Such expectations were further nourished by the fact that the EU not only ratified the Convention, but also played a leading role for its negotiation and worldwide ratification.[171] Following this ratification, the EU endorsed a broader notion of culture and recognised it as a central element for human development. I will now briefly map the evolution of the integration of culture within the external development policy from a cultural development-centred approach to a wider one, shaped on the lines of the major ongoing "culture and development" debate on the international landscape. Then, I will introduce what major challenges arise for the Union from implementing culture as a vehicle of development in its external relations.

4.1) Cultural cooperation under the bilateral framework: cultural development or culture for development?

4.1.1) Culture under the Lomé and Cotonou Agreements

Nuances of culture as a possible vector for development were present under the partnership agreements that the Union concluded with the ACP countries. Above, I mentioned Article 139 of the *Lome IV Convention,* aiming at establishing a dialogue and mutual understanding between the ACP and the Community.[172] Under Articles 145-149, actions in this field of cooperation had to focus on the recognition and

[171] The Convention was jointly negotiated by the European Commission, on behalf of the Community, and the Council Presidency, on behalf of the Member States, on the basis of the Code of Conduct 5518/05 CULT 3. Furthermore, according to the Statute of UNESCO, only sovereign States can become members and participate in the General Assembly of UNESCO. Nonetheless, in this concrete situation, UNESCO was very inclined to permit the EU to take part in the negotiation; in order to allow this participation, a provision opening the participation to regional organisations was specifically introduced in the text of the Convention (Article 27).
[172] Above quoted (n 101).

promotion of the cultural identities of the ACP countries, preservation of their cultural heritage, stimulation of the production and distribution of cultural goods and the organisation of cultural events in and outside ACP countries. Mostly, the support of the Community took place through the funding of these cultural activities.

Nonetheless, references to culture under the Lomé regime were scarce. A step forward was made with the signature of the Cotonou Agreement[173] – which became the cornerstone for a strong cultural development policy in external relations. Article 27 of the Agreement states that development policy in the area of culture shall aim at *integrating the cultural dimension at all levels of development policy; at recognising, preserving and promoting cultural values, heritage and identities to enable inter-cultural dialogue; at supporting the development capacity in this sector, developing cultural industries and enhancing market access opportunities for cultural goods and services*. The formulation of Article 27 shows an increased awareness towards the protection of cultural diversity as a global concern: the EU also engages in protecting and promoting cultural heritage and diversity of third countries through its cultural cooperation programmes (going beyond the protection of *European* cultural diversity alone).

On the basis of Article 27, the financial and technical assistance initiatives in the cultural sphere mainly focused on the preservation of tangible cultural heritage, as well as on the exchange of best practices, teaching and training, and dissemination of information.[174] Looking at the EU initiatives in the field of cultural cooperation, a high degree of convergence is noticeable between the internal and the external dimension: as above described, several programmes were promoted to grant financial and technical supports to Member Sates in heritage conservation and the promotion of local cultures. In the light of this, it can be stated that the Union focused on 'cultural development' rather than the "culture for development".

Within the overall Cotonou frame, culture was treated in a traditional sense of mere cooperation between nations and not as a potential vehicle of development interacting with other policies, (e.g. trade). Indeed, the Cotonou Agreement contains provisions – largely general or hortatory – that establish a framework for cooperation in the area of cultural heritage-safeguard and inter-cultural dialogue. However, it is

[173] Above quoted (n 101).
[174] J A McMahon, "Preserving and Promoting Differences? The External Dimension of Cultural Cooperation", in R Craufurd Smith (ed.), *Culture and European Union Law*, (Oxford University Press, 2004), 327-352.

worth remarking that the cultural dimension of the EU-ACP relationship emerges also in Article 41 of the Cotonou Agreement, which states that "*the Community shall support the African Caribbean and Pacific States' efforts to strengthen their capacity in the supply of services*" and "*particular attention shall be paid to services related to labour, business, distribution, finance, tourism, culture and construction and related engineering services with a view to enhancing their competitiveness and thereby increasing the value and the volume of their trade in goods and services*." Such a provision already shows a certain understanding of the economic dimension of culture, yet it does not establish any specific commitment to include it in commercial strategy and accommodate cultural concerns.

4.1.2) Cultural cooperation with other world regions

Culture is also integrated into the policy dialogue in the framework of Asia–Europe meetings (ASEM) and EU–Latin America, Caribbean (LAC) summits. Concerning the Mediterranean region, cultural actions form part of Chapter III "Partnership in social, cultural and human affairs" of the 1995 Declaration on the Euro-Mediterranean Partnership (the Barcelona process) in which the dialogue between cultures is the core of the third pillar. The Barcelona process started on November 1995 with the Euro-Mediterranean Conference of Ministers of Foreign Affairs. The conference marked the starting point of the Euro-Mediterranean Partnership for a broad framework of political, economic and social relations between the Member States of the European Union and partners of the southern Mediterranean. Since the Barcelona process was launched, two main regional initiatives dealing with culture have been launched: *Euromed heritage*, which has been one of the main financial instruments for the implementation of the Euro-Mediterranean partnership; and the *Anna Lindh Euro-Mediterranean Foundation for the Dialogue between Cultures*.[175] The final goal behind these programmes is to support the dialogue beyond the traditional mechanisms of international and regional cooperation and assistance, in order to promote mutual awareness and understanding, not only among States and institutions but also among the societies and people living within this area.

[175] Based in Alexandria (Egypt), this is an institution jointly established and financed by all 35 members of the Euro-Mediterranean partnership. It is a network of networks and promotes dialogue between cultures.

4.2) The 2007 Agenda for Culture: a shift to culture as a vector of development

In 2007 the adoption of a European Agenda for Culture in a globalising world signalled a step forward for the acknowledgment of culture as a component and a vector of development.[176] The Agenda for Culture was adopted following the European consensus on the ratification of the UNESCO Convention on Cultural Diversity[177] and aims at strengthening the international role of the Union within the "culture for development debate". While recognising that the worldwide protection of cultural diversity and intercultural dialogue have become major global challenges, the EU places itself at the centre of the international efforts towards the integration of culture in development policies: "*Europe's cultural richness and diversity is closely linked to its role and influence in the world. The European Union is not just an economic process or a trading power, it is already widely – and accurately – perceived as an unprecedented and successful social and cultural project. The EU is, and must aspire to become even more, an example of a "soft power" founded on norms and values such as human dignity, solidarity, tolerance, freedom of expression, respect for diversity and intercultural dialogue, values which, provided they are upheld and promoted, can be of inspiration for the world of tomorrow*."[178] Further, the Commission acknowledges that "[*t]he rapid entry into force of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions illustrates the new role of cultural diversity at international level: as parties, the Community and its Member States have committed themselves to strengthen a new cultural pillar of global governance and sustainable development, notably through enhancing international cooperation*."[179] The Commission does not refer expressly to culture as the fourth pillar of sustainable development governance, nonetheless the wording adopted in the text and the emphasis on a "new cultural pillar of global governance" strongly recalls the debate towards the affirmation of culture as the fourth pillar of development.

It is interesting to note that the Commission upholds the definition of "culture" as shaped under the major international debate and embedded in the UNESCO

[176] **"**Communication from the Commission 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.
[177] Council Decision of 18 May 2006, above (n 138).
[178] *Agenda for Culture*, at 3.
[179] *Ibidem*, at 7.

Convention on Cultural Diversity: culture as a complex phenomenon and a double dimension. In this way, the Commission reveals it has a broader and more comprehensive understanding of culture, in line with the evolutions of this concept developed under different international fora. Indeed, culture is taken into account both in its anthropological meaning – as values, beliefs, and way of life – and as creativity, cultural goods and services. According to the words of the Commission, the social and economic dimensions of culture play a fundamental role for human sustainable development.[180]

The European Agenda for Culture adopts a "two-track" strategy: a systematic integration of the cultural dimension and of the various components of culture in all external and (not only) development policies, projects and programmes as a means of consolidating the efforts made in terms of cultural cooperation; and support for specific action in the cultural sector and cultural industries. Whereas the first track enhances the role of culture as a soft and diplomatic power, the second track addresses culture as a *resource in its own right* and upholds access to culture as a priority for development. As a legal basis to carry out these activities, the Commission expressly refers to Article 167 TFEU, and in particular to the clause of integration under paragraph 4. In order to put this strategy into practice, the Commission singles out three interrelated sets of objectives out: a) the promotion of cultural diversity and intercultural dialogue; b) the promotion of culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs; c) the promotion of culture as a vital element in the Union's international relations. Under the first set of objectives, promoting the mobility of artists and professionals in the cultural field and the circulation of all artistic expressions beyond national borders is a priority. The second set of objectives takes culture into account as a catalyst for creativity and requires its integration in the framework of the Lisbon Strategy for growth and jobs. With this aim, in 2010 the Commission published the Green Paper *Unlocking the potential of cultural and creative industries,* which recognises the potential of the creative and cultural industries to create jobs, enhance creative economy and release positive spill-over effects for the whole society.[181] While the first two sets of objectives concern the internal dimension of the EU, the third set of objectives of the Agenda for Culture deals with the external action of the Union.

[180] *Ibidem*, at 3.
[181] Green Paper *Unlocking the potential of cultural and creative industries,* COM(2010) 183.

Aware of the diplomatic power of culture, the EU commits to fostering political dialogue with all countries and regions in the field of culture and promoting cultural exchanges between the EU and third countries and regions. On a parallel level, the EU commits to promoting market access, both to European and other markets, for cultural goods and services from developing countries through targeted actions as well as through agreements that grant preferential treatment or trade-related assistance measures. The EU further endorses to use its external and development policies to protect and promote cultural diversity through supportive actions for the preservation of cultural heritage and the active encouragement of cultural activities across the world. So, while on the one hand the EU commits to open its market to cultural goods and services from developing countries by fostering trade exchanges, on the other hand it shows an awareness of the fact that more trade can both hinder and promote the protection of cultural diversity. The renewed efforts in granting technological and financial support to heritage conservation projects and the promotion of cultural events appears to be a tool to counterbalance possible negative effect deriving from further trade liberalisation. Similarly, the Union's statement that "*all its cooperation programmes and projects take full account, in their design and their implementation, of local culture*" seems to be responding to another emergency: the need to take into account the local context when implementing projects and programmes in order to preserve local identities and not to impose a foreign model.

4.3) Implementing "culture for development": EU challenges in the challenge

The European Union, through the ratification of the UNESCO Convention on Cultural Diversity and the adoption of the 2007 Agenda for Culture, embraces the global challenge to mainstream culture as a vector of development while ensuring the protection of cultural diversity. Bearing in mind the issues of coherence and the features characterising the external action of the Union, this sounds like an overly ambitious task. Indeed, the implementation of the 2007 Agenda for Culture demands an enormous effort in coordinating the goals and activities of the EU policies, and a greater commitment of the Member States and of the EU institutions in collaborating and carrying out complementary activities. In particular, a greater effort is necessary to pursue the following objectives: increasing the access to market of cultural goods and services coming from developing countries; fostering the mobility of artists and

cultural workers, and avoiding collateral negative effects of other EU cooperation policies on local cultures. From an outside perspective, achieving concrete results in pursuing these objectives is an indicator of the degree of coherence between what the Union says and what the Union does. Yet, the concrete implementation of these objectives demands the coordination of different policy areas, which may fall within the exclusive or not-exclusive competence of the Union and may require a careful balancing of the different (and often opposing) interests at stake. Risks of erosion of Member States' competences may be supposed with such a complicated framework. Hence, it is not a case that the Commission within the text of the 2007 Agenda for Culture holds its hands up by clarifying that *"[c]ulture is and will therefore primarily remain a responsibility of Member States*" and recalls that Article 151 does not allow harmonisation of the laws and regulations of the Member States in the cultural area.[182] It is quite striking, though, the formulation used by the Commission to declare that all action undertaken at *EU level* must fully respect the principle of subsidiarity, *with the role of the EU being to support and complement, rather than to replace, the actions of the Member States*. While the declaration is included under a general chapter in a way that would concern both the internal and the external dimension, the emphasis seems to be on the necessity to respect the principle of subsidiarity in the internal level (EU level), so as to interfere with Member States' cultural competence only when necessary to support and complement it. The same emphasis on the principle of subsidiarity is not stressed for the action on the external level. This seems to suggest that a certain flexibility for a *margin of manoeuvre* in external relations – where the mainstreaming of culture as a vector of development becomes an even greater challenge – may be needed. Indeed, flexibility in the cultural sector is also claimed by the Council Resolutions on a European Agenda for Culture, which approves the Commission's proposal, when it asserts "*these objectives should be considered as a flexible framework for guiding future action in the cultural field*".[183]

More precisely, as far the enhancement of the circulation of cultural goods and services is concerned, this can be considered a matter falling under the Common Commercial Policy: an exclusive competence of the Union, but with some special rules for the cultural sector that allow Member States to have a significant weight in

[182] Agenda for Culture, above quoted, at 4.
[183] Point 5 of the Resolution of the Council of 16 November 2007 on a European Agenda for Culture, (2007/C 287/01).

the decision-making process.[184] In particular, Member States become very active actors when such an objective must be combined with the protection of cultural expressions in the frame of multilateral negotiations, namely under the WTO. These issues will be the object of a thorough analysis in Chapter 4, in which I will look at the position of the EU within the WTO negotiations concerning the battle for the cultural exception, firstly moved by Member States and later upheld by the EU. The Union's trade competence encroaches upon the Member States' cultural interests to preserve and promote their internal market, namely in the audiovisual field.

Further, fostering cultural exchanges also means strengthening the mobility of cultural workers and artists. Although this issue may be treated as supplying of services (mode 4 under the WTO frame), it overlaps with national migration regimes. In the last decade migration has become a hot issue for the Union, whose competence in the field is very fragmentary. In fact, although the Lisbon Treaty introduced structural change to the legal foundation of the Area of Freedom, Security, and Justice, and the Union extended its competence in the field of economic migration, migration policy still remains mostly within the Member States' sphere of competence. Facilitating the mobility of artists and cultural professionals coming from developing countries to the Union demands a high level of cooperation (and a strong political will) between the Member States and the Union. Issues related to the mobility of artists and cultural workers will be object of analysis in Chapter 4.

In addition, the Union committed to take into account the needs of local cultures. This also entails avoiding the superimposition of the European model on local contexts. Although the Agenda for Culture does not mention the protection of traditional knowledge in developing countries, this issue can be conduced to the overall goal to preserve cultural diversity and local identities. Under the research and technological development chapter, the Union carries out technical assistance projects focusing on Intellectual Property rights in developing countries.[185] These projects usually aim at helping third Countries to bring their domestic regulatory framework into conformity with the standard of TRIPS agreements and/or WIPO standards. In this way, the Union is contributing to the worldwide strengthening of the protection of intellectual property and fighting piracy. However, it is also contributing to spread the

[184] Cremona, "A policy of bits and pieces", above (n 104).
[185] E.g.: Technical Assistance to the Uganda Ministry of Tourism, Trade and Industry in the Area of Intellectual Property Rights, Project Reference: 9.ACP.RPR.007.

Western understanding of IP property rights, which may be in conflict with local models of development. Further, the Union is a party to the Convention on Biological Diversity and ratified the Nagoya Protocol (recently entered into force). Hence, the EU is involved in the discussion around finding an appropriate framework for the protection of traditional knowledge related to the genetic resources. Again, the EU does not enjoy a full mandate in negotiations concerning Intellectual Property and the Union position in international negotiations depends upon internal balancing. This situation will be analysed in Chapter 5.

5) Conclusive remarks

In the last decade the European Union strengthened its role as global actor within the frame of the "culture and development" debate. The EU, as a successful model of regional integration and a major global actor capable of influencing rules and governance processes, raises great expectations amongst those supporting the idea of culture as a fourth pillar of development. Although the Union never officially affirmed that culture should be integrated as the fourth pillar of development, since the ratification of the 2005 UNESCO Convention and the adoption of the 2007 Agenda for Culture the Union is showing a greater favour towards promoting culture as a vector of development. Further, the Union committed to promote cultural exchanges, access to market of cultural goods and services from developing countries and to protect cultural diversity as a common interest of mankind.

Whereas cultural cooperation is not a controversial issue, mainstreaming culture of development can turn out to be a contentious field. This is due to the interplay of different policies and issues at stake. In order to be successful in achieving this ambitious agenda and fulfil the expectations created, the EU needs to set up a coherent and consistent "culture and development" approach. Yet, pursuing a coherent strategy for the mainstreaming of culture and development in the external relations seems to be a real challenge because of the encroaching of culture with different policies and the difficulties of striking the right balance between the different interests at stake. Moreover, so far, actions in the cultural sector and in the development sector have mostly developed along different lines, without being based on a joint connection between the cultural competence and the development competence. In spite of the recognition of the transversal nature of culture since the

adoption of a cultural competence in 1992, the potential of Article 167(4) TFEU as a clause of integration has not been fully exploited.

Under the new frame set up by Lisbon, which strengthens the accent on coordination, complementarity and consistency for achieving coherence, such fragmentation should be overcome. But a coherent approach in mainstreaming culture for development also means applying principles of sustainable development that allow a sustainable use of culture as a resource. In the next chapters, the analysis of the EU actions in the three concrete cases will try to assess whether and how the Union is mainstreaming culture as a vector of development *vis à vis* major international trends and the internal constraints that influence its functioning.

CHAPTER 3

THE EU *VIS À VIS* CULTURE AND TRADE: THE CIRCULATION OF CULTURAL GOODS AND SERVICES WITHIN THE MULTILATERAL AND BILATERAL FRAMEWORK

---

1) Introductory note

In the first chapter, I singled out three specific cases out in which the use of culture as a vector of development can create tensions and lead to controversial outcomes, namely: the enhanced circulation of cultural goods and services; fostering the mobility of artists and cultural professionals; and the application of Intellectual Property Law to traditional knowledge related to the use of genetic resources. This chapter focuses on the first case study, and more specifically on the need to foster the circulation of cultural goods and services while protecting cultural diversity within multilateral and bilateral trade relationships. In order to provide a framework of the main legal initiatives addressing the interface between trade and culture at the international level, I will look at the provisions addressing the "culture and trade" interaction under the WTO regime, in particular to understand to what extent such rules are inadequate to cope with the protection of cultural diversity. To the eyes of most experts in the field of "culture and trade law", the above-sketched portrait may appear incomplete. The purpose of this chapter is not, in fact, to treat the subject extensively, but rather to analyse the legal context that is relevant to the analysis of this thesis. Further, bearing in mind the emergent need to find a balance between the promotion of development through more cultural exchanges and the risk of cultural homogenisation, I will look at the 2005 UNESCO Convention on the Diversity of Cultural Expressions as a specific instrument addressing this issue within the international legal context. The preliminary analysis of the international context will be used to see how the EU's action fit within this (changed) landscape. In particular, I will analyse the position adopted by the Union within the multilateral frame of negotiations (WTO and UNESCO) and its bilateral trade agreements (in particular, the EPA with the CARIFORUM States, the FTA with South-Korea and the trade agreements with the Andean Community and Central America). More broadly, the

overall analysis aims at assessing whether the Union is acting coherently on the external level in the light of its internal constitutional boundaries – the division of competences in the "trade and culture" arena, and its international engagements – in particular the obligations deriving from the WTO and the 2005 UNESCO Convention. Once I have assessed to what extent the Union is acting coherently in respect of these aspects, I will try to assess whether the Union's integration of culture within its external economic relations is responding to principles of sustainability.

A note needs to be made about the choices in selecting the relevant legislative framework under the WTO: in this chapter I focus on the likely cultural impacts of provisions included in the GATT and the GATS, because, in my opinion, they have driven the debate surrounding the relationship between culture and trade in the past decades, and determined the birth and evolution of concepts and instruments to address (and redress) such a complicated relationship. Yet, I am fully aware that the relationship between culture and trade also involves the TRIPS Agreement for Intellectual Property Rights under the WTO. The TRIPS Agreement aims at expanding Intellectual Property law standards worldwide, namely those based on the protection and enforcement of patent law and authors' rights, such as copyright and moral rights. Therefore, to a certain extent the TRIPS Agreement regulates and facilitates the legal cross-border movements and can contribute to foster lawful culture trade, with a positive return for development goals as well. Indeed, by limiting risks of counterfeit and allowing authors, artists and creators to gain remuneration from their authors' rights, the TRIPS Agreement is likely to create a positive legal framework in which creativity, cultural exchanges and development can flourish. In particular, Western Countries see copyright as an essential source of revenue for artists and the main instrument to secure investments for the marketing (advertisement) of cultural goods and services (mostly those distributed by big entertainment corporations). In this sense, most argue that global standards and rules to enforce copyright protection and the rest of IP related rights would benefit both developed and developing countries and produce positive spillover effects, such as boosting creativity. Although today this view is greatly challenged by some commentators who have expressed their doubts about the fact that "author's rights" can protect the creativity and originality of author's works, and see them rather as the commercial prerogative of a few with detrimental effects for the cultural/creative

flourishing and development of poorer countries,[1] I have decided not to focus on this debate for the purpose of this thesis. Rather, I have chosen to focus on the TRIPS Agreement for its implications on the protection of traditional knowledge related to genetic resources, a highly debated issue under international law (see Chapter 1) which also reveals a potential clash of two different understanding of "property" and "development", namely one based on IP law as a source of economic growth (the Western model) and another based on common property and traditional heritage as elements of a local and more sustainable model of development (those still perpetrated by indigenous and rural communities in most developing countries or emergent economies). Thus, I will explore relevant provisions under the TRIPS agreement, namely Article 27(3)(b) of the TRIPS Agreements, in Chapter 5 of this thesis.

2) "Culture and trade": circulation of cultural goods and services under the current international law framework

2.1) Challenges under the WTO law framework: liberalisation v. protectionism

Strengthening the positive contribution of culture for development – and in particular the economic, social and cultural dimension of development – calls upon the enhancement of the circulation of cultural goods and services. Increasing the flowering of cultural goods mainly involves removing barriers to the cross-border trade of works of art, records, films, books, etc. Similarly, enhancing the flowering of cultural services is about creating a regulative framework which facilitates the cross-border mobility of broadcasting programmes, and other intangible services, or of

[1] For example Joost Smiers argues that, for the good of culture, freedom of creativity, and the development of poor countries, it would be better to abolish the copyright regime. Briefly, he affirms that copyright and authors' rights have always been strictly related to the importance of securing investments. In the last century, the trade system increasingly moved in the direction of investment protection and copyright is about extremely large investments that enjoy an ever-longer protection in time and scope. The consequence is that the public domain of artistic creativity and knowledge is being increasingly privatised. Moreover, in many branches of art copyright has never fulfilled the expectation of providing many artists with a reasonable income. Others, such as Geiger, also believe that copyright and related intellectual property rights are increasingly evolving into an investment protection mechanism, in favour of big investors (usually the big corporations that own copyrights and distribute cultural goods and services). Further on the work of these two authors: J Smiers and M Van Schijndel, *Imagine there is no copyright and no cultural conglomerates/An essay*, (Institute of Network Culture, 2009); C Geiger, "Constitutionalizing Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property Rights in the European Union", (2006), 37:4 *International Review of Intellectual Property and Competition Law*, 379.

peoples providing such services, as well as theatre, music and other forms of cultural performance. Further, looking at the whole issue through the development lens, more mobility of cultural goods and services has to be combined with more access to global cultural markets for cultural products originating in developing countries. Within the frame of international economic law, wider liberalisation in the cultural sector may, then, be desirable. Nonetheless, over the last decades, the relationship between "culture and trade" has rather been depicted as "culture *versus* trade" and further liberalisation of trade in cultural goods and services has been object of a fierce debate.[2] At the different levels and *fora*, many NGOs, interest groups, and even States argue that more liberalisation of trade in the cultural sector is a threat to the preservation of national identities and cultural diversity.[3] The discussion around "culture and trade" is often framed in terms of "protectionism *versus* liberalisation". From the point of view of those in favour of the free market, cultural policies and the quest for exempting cultural goods and services from free trade rules are a disguised form of protectionism. From the standpoint of those supporting trade restrictions to cultural products, further liberalisation commitments would lead to cultural homogenisation, in particular under the WTO rules which do not grant appropriate recognition of cultural values and permit the coexistence with more protective cultural national policies. This last view argues that the current treatment of cultural products under the WTO frame does not take into account the double nature of this special category of goods and services and advocates for the establishment of a general "cultural exception". In the following paragraph I will assess why the WTO regime is deemed to be inappropriate for the protection of cultural values and trace the lines of the claims towards the adoption of a cultural exception.

2.1.1) Cultural values and trade values under current WTO law: an appraisal

As with the protection of the environment or social values, increased trade liberalisation intensifies the possibility of a clash between trade values and cultural

[2] M Burri Nevona, "Trade and Culture: Keep the Border Fuzzy Please", Working Paper N. 2009/2, at 1.

[3] For instance, in 1996 the OECD's negotiations were initiated in order to draft a comprehensive agreement on investment in favour of a special treatment for cultural goods and services under international trade. The attempt to draw a Multilateral Agreement on Investment (MAI) was abandoned in 1998.

values.[4] Nonetheless, WTO texts seem not to take into account the potential conflicts between trade and cultural values. At first glance, no connection between cultural concerns and development issues is directly or indirectly inserted in the preamble of the Marrakesh Agreement, which seems to be embedding a notion of sustainable development that mostly focuses on economic development and some concern about environmental emergences, along the major international mainstream.[5] Indeed, the preamble of the Marrakesh Agreement, while clarifying that the WTO's final goal is to eliminate all barriers and national discriminations hindering free trade,[6] acknowledges the importance of certain values – like the environment, and certain specific issues – like developmental concerns for developing and least-developed countries and the *optimal use of the world's resource* in accordance with sustainable development; but it does not formally recognise culture as a value in need of protection from the probable impacts of free trade. Similarly, the text of Article XX of the GATT 1994 listing the general exceptions to the WTO rules, allows Members to adopt measures to protect human, animal and plant life and health, and the conservation of exhaustible natural resources, but does not include the protection of cultural identities or cultural expressions that are at risk.[7] Other tools under the WTO address biosafety related issues, such as the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT).[8] Some special clauses take into account the disparities among countries and developmental

[4] For an extensive literature on conflicts between trade and other values, see, among the others: P Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), (ch. 4 and 5); J Trachtman, "Trade and…Problems, Cost-Benefit Analysis and Subsidiarity", (1998) 9:1 *European Journal of International Law*.

[5] As some have commented, the notion of sustainable development endorsed by the WTO is a very narrow one and is still mainly focused on the economic component, see: F Macmillan, "Development, cultural self-determination and the World Trade Organization", in A Perry-Kessaris, *Law in the pursuit of development Principles into Practice?* (Routledge, 2010), 68-96.

[6] Preamble of the Marrakesh Agreement Establishing the World Trade Organization (LT/UR/A/2, signed 15 April 1994 in Marrakesh as the conclusion of the Uruguay Round negotiations). The Preamble of the Marrakesh Agreement recites "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". See also GATT chapeau and GATS' preamble, Ministerial Declaration to Launch the Uruguay Round of Multilateral Trade Negotiations MIN.DEC (20 Sept 1986).

[7] Para (b) and (g) of Article XX GATT 1994.

[8] Agreement on Sanitary and Phytosanitary Measures, 15 Apr 1994, available at http//www.wto.org/English/docs_e/legal_e/15-sps.pdf; Agreement on Technical Barriers to Trade (TBT), 15 Apr 1994, available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

issues, like the Enabling Clause allowing some discrimination in favour of developing countries.[9] However, as far as cultural concerns go, no trade-off devices are envisaged by the WTO rules.

Looking in more depth at the provisions under the GATT, a certain degree of awareness about the protection of cultural heritage is revealed under the general exceptions of Article XX. Article XX(f) GATT allows Members to adopt exceptional measures for the protection of national treasures of artistic, historical or archaeological value.[10] Such a provision, already envisaged in GATT 1947, has the potential to provide some flexibility to Member States to derogate from the general rules on free trade in order to preserve their cultural heritage. Yet, the exception under para (f) has quite a narrow focus: its application is limited to cultural goods that are notably recognised as "national" and embedding "artistic, historic and archaeological" values. Thus, it is mostly antiquities, archaeological relics, historical artworks, and art objects representing the national cultural heritage of a State that may fall under this category. Cultural goods that are not formally recognised as having a national status (most often by being inscribed in national lists), and "new" or "modern" cultural products like those generated by the audiovisual and printing-publishing industries – which are unlikely to be of historical and archaeological value and might not be of sufficient artistic value – are excluded.[11] In particular, the exclusion of cultural industries' products from the notion of "national treasures" is supported by the absence of an equivalent exception within the GATS.[12] Furthermore, exceptions under Article XX (f) are bound by the general requirement for all general exceptions to comply with the *chapeau* of the GATT. As a consequence, exceptional measures are admitted to the extent they do not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised

[9] Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903).
[10] Para (f) Art. XX General Agreement on Tariffs and Trade (1947). This provision inspired Article 30 of the former Treaty on the European Community, mentioned in chapter 2.
[11] T Voon, *Cultural Products and the World Trade Organization*, (Cambridge University Press, 2007), at 105. On the exclusion of audiovisual services from the field of application of Article XX(f) see also: C Graber, "Audio-Visual Policy: The Stumbling Block of Trade Liberalisation?", in D Geradin and D Luff (eds), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*, (Cambridge University Press, 2004), at 200.
[12] T Voon, *supra* (n 11). Cultural industries generally involve both goods and services. Audiovisual products are mostly considered as being "services" (in particular, this is the position of the European Union) and, therefore, they fall under the field of application of the GATS.

restriction on international trade.[13] In order to fully empower the potential of the cultural exception embedded in Article XX(f) an "evolutionary" approach in interpreting its content is sought. Until now, no case relying upon Paragraph (f) of Article XX has been raised under the WTO, and so no interpretation of the Dispute Settlement Body (DSB) on this provision is available.[14] In future, interpreting Article XX(f) through a more evolutionary approach could be a possible path to carve out more space for cultural exceptions. As some commentators notice, there are no international or commonly defined guidelines for the interpretation of "treasure" or for the assessment of "artistic, historical and archaeological values" – which may vary according to times, taste and the way people relate to art.[15] Nonetheless, as others suggest, an evolutionary interpretation of these words according to evolutions under international law and emergent changes/needs over time may help to wided the ordinary meaning of these terms.[16] The Appellate Body (AB) has often recognised the utility of referring to different relevant international instruments to interpret the ordinary meaning of particular words (in accordance with article 31(1) of the VCLT). This has been the case for the interpretation of the notion of "exhaustible natural resources" under Article XX(g). In the famous case *US-Shrimp*, the Appellate Body held that such an interpretation must be carried out "*in the light of contemporary concerns of the community of nations about the protection and conservation of the environment*" and by drawing upon other relevant international conventions.[17] In this case the AB, referring to international treaties such as the UNCLOS and the CBD, concluded that the words "natural resources" include living resources. Similarly, the AB could refer to more specific cultural-matter conventions, such as the UNESCO Convention on Cultural Property[18] or the UNESCO Convention on Cultural Diversity, to include new cultural goods (such audiovisual products) or manifestations of cultural diversity (whose protection is a contemporary concern recognised by international law) under the notion of national treasures. A broader interpretation of

[13] See: *chapeau* to GATT 1994, Article XX.
[14] World Trade Organization, WTO Analytical Index – Guide to WTO Law and Practice, available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm (last access on 1st June 2014).
[15] J M Cheng, "The Problem of National Treasure in International Law", (2010), 12 *Oregon Review of International Law*, at 142.
[16] T Voon, above quoted (n 11).
[17] Appellate Body Report, *US-Shrimp*, 129, 130 and 131.
[18] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted on 14 Nov 1970, *Records of the General Conference, 16th Session*.

Article XX(f) is certainly an interesting proposal, yet the practice developed so far by the Dispute Settlement Body in disputes concerning cultural issues is not very encouraging in this regard. During recent years, the Dispute Settlement Body has been frequently called to decide about disputes encompassing various cultural aspects. For instance, in a case involving Japan and the US, the latter challenged a Japanese law demanding import licences on certain kinds of leather and the respect of import quotas. In its defence, Japan argued that such measures aimed at protecting the traditional tanning industry of a Japanese minority group, namely the Dowa communities, that would otherwise collapse in a regime of free international competition. The Panel stated that these provisions did not provide a justification for import restrictions and refuse to take into account Japan's historical and socio-cultural arguments "since its terms of reference were to examine the matter *in the light of the relevant GATT provisions*" [19] (emphasis added). In a rather more notorious case concerning Canada and its adoption of certain domestic measures supporting the Canadian magazine industry, the Panel did not accept Canada's argument affirming that such measures aimed to safeguard and promote Canadian cultural identity. The Panel did not consider that the issue of cultural identity was at stake and instead condemned Canada for an infringement of its trade obligations.[20]

Although very different by nature and in terms of the interests involved, these claims represent concrete examples of the likely repercussions of free trade on culture. They also reflect the different approaches of WTO Members towards "culture and trade" issues, as well as a certain insensibility on the part of the DSB to deal with such issues. One may argue that the lack of cultural clauses (or similar instruments recognising the specificity of cultural issues) does not entitle WTO Members to found their arguments on a cultural basis under the WTO and would explain the DSB's propensity to neglect the relevance of cultural concerns.[21] In spite of this, cultural concerns increasingly enter through the back door in trade disputes and their

[19] *Japanese Measures on Imports of Leather*, L/5623, BISD 31S/94 (adopted 15 May 1984), (44). To support its opinion, the Panel recalled a previous report adopted by the Contracting Parties in 1983 which, in a similar situation, concluded 'that [such matters] did not come within the purview of Articles XI and XIII of the GATT and ... lay outside its consideration'. See: Panel report on Quantitative Restrictions against Imports of Certain Products from Hong Kong (L/5511, paragraph 27).
[20] The case referred to is *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R 1997, which will be further analysed in the following paragraphs.
[21] On this see: T Voon, above (n 11), at 18. Tania Voon argues that Members are aware that the absence of a legal basis to legitimise their measures in defence of cultural interests does not leave hope for a successful action in this sense. This is probably why they often use cultural arguments as a "complementary argument" rather than the founding basis for their measures.

emergence sounds like an alarm bell for the inadequacy of the WTO rules to address the relationship between "culture and trade".

2.1.2) The treatment of cultural products under the WTO

The lack of sensitivity towards issues concerning cultural diversity under international trade seems to be a consequence of the absence of a specific definition of cultural products under WTO law and the consequent assimilation of cultural goods and services to other trade goods and trade in services. The General Agreement on Tariffs and Trade (GATT) 1994 and the General Agreement on Trade in Services[22] do not define cultural goods or services, nor do they acknowledge the special nature of cultural products, as tradable products embedding both economic and cultural values.[23] Therefore, commitments concerning the reduction of tariff barriers and the elimination of other measures restricting the import and export of goods undertaken under the GATT and rules concerning the elimination of barriers and restrictions to trade in services under the GATS apply indiscriminately to cultural products. In more specific terms, obligations under the GATT centre around two crucial non-discrimination rules: the Most Favoured Nation clause (MFN)[24] and the national treatment provision.[25] Hence, *a priori* if a WTO Member offers more favourable treatment to certain cultural goods traded to one State, it equally has to offer the same treatment for the same or like products over all other contracting parties. Further, imported cultural goods should enjoy the national treatment as like domestic cultural products. As for the provision on services, Article I(3)(b) GATS states that "services" includes any service in any sector (except services supplied in the exercise of governmental authority); cultural services are then covered by GATS provisions.[26]

[22] Respectively: Annex 1A and Annex 1B to the Marrakesh Agreement.
[23] Looking closely, the GATT do not contain any definition of "goods", whereas a limited definition of "services" is contained in Article I(2) of the GATS where it defines "trade in services" as the supply of a service: (a) from the territory of one Member into the territory of any other Member (Mode 1); (b) in the territory of one Member to the service consumer of any other Member (Mode 2); (c) by a service supplier of one Member, through commercial presence in the territory of any other Member (Mode 3); by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (Mode 4). As some comment, the emphasis is on the way the product is traded rather that its characteristics and nature. Further on this: F Smith and L Woods, "A Distinction Without A Difference: Exploring The Boundary Between Goods And Services In The World Trade Organization And The European Union", (2005) 12(1) *Columbia Journal of European Law*, at 14.
[24] Article I, GATT.
[25] Article III, GATT.
[26] It is worth clarifying that "services supplied in the exercise of governmental authority" refers to services that are not supplied on a commercial basis, or in competition with one or more service suppliers. In several countries governments provide for supplying certain cultural products, like TV or

GATS draws mostly upon GATT's rules: it includes the application of the MFN clause and national treatment to the provision of services.[27] Besides these general measures, article XVI of the GATS includes a specific market access commitment greatly connected to the MFN and national treatment rules.[28] Article XVI(2) lists the measures that a Member cannot maintain or adopt in sectors where market-access commitments are undertaken, such as limitations in the form of numerical quotas, monopolies, the number of peoples that can work in that specific sector, etc.[29]

The aim of both the GATT and the GATS is to achieve a higher level of trade liberalisation in all goods and services' sectors, however the WTO Members have the capacity to decide whether to undertake or exclude commitments to liberalise certain products or service sectors. This possibility leaves room for some flexibility in terms of liberalisation commitments for cultural products. Under the GATT, States can list specific goods subject to tariff barrier reduction commitments in schedules that are annexed to the main agreement, and specify exceptions (a negative list or "top-down" approach).[30] Within the GATS, contracting parties enjoy greater flexibility: Article XVI (market access) and Article XVII (national treatment) are not general obligations, but strictly apply to the sectors and to the extent of the specific commitments included in the Schedules of Member States annexed to the main agreement. Each State so defines its commitments in a positive list ("bottom-up approach") and is even allowed to impose limitations and conditions to such commitments.[31] For instance, so far a only few Member States have made commitments in the audiovisual sector. As a consequence, most WTO Members are still able to adopt and to maintain national policy measures to protect and promote their audiovisual industry, even if these measures represent a restriction to trade in this sector.

---

radio transmissions through public broadcasting, or partially finance broadcasters through public fees imposed on television and radio users and owners (as in the case of the Italian fee on Television ("Canone RAI"). One may think, then, that such services may fall under the exclusion for services supplied in the exercise of governmental authority. Yet, this is very unlikely due to the fact that many public broadcasters compete with private broadcasters and increasingly operate on a commercial basis. They may rather fall under the application of Article VIII GATS imposing additional obligations on Members in connection with monopolies and exclusive service suppliers. Further on this, T Voon above (n 11), at 91.

[27] Respectively Article III and Article XVII of the GATS.

[28] Article XVI of the GATS, according to which any member undertakes full liberalisation commitments without restrictions in one service sector in their schedule to give MFN treatment to all services and service suppliers in that sector from other members.

[29] See para (a)-(f) of Article XVI of the GATS.

[30] Article II of the GATT.

[31] Article XX of the GATS.

Besides this margin of flexibility, another provision taking into account cultural concerns is Article IV of Part II of the GATT agreement, named "Special provisions relating to Cinematographic Films". Article IV GATT permits screen quotas to require the exhibition of domestically made films for a specified minimum proportion of total screen time.[32] Article IV GATT exceptionally derogates from the general rule on national treatment. It was inserted at the time of the drafting of GATT 1947 under the pressure of those States – mostly European ones – willing to protect a slice of the market for their domestic film industries.[33] These States feared that the import of foreign films, in particular American films, would have been a threat to the survival of their weak domestic movie industries, and argued that the regulation of film production is a matter of cultural policy rather than economic policy.[34]

The protection of cultural interests was already a concern under GATT 1947, and still seems to be a major preoccupation today under the overall WTO system of rules. The margin of flexibility under the GATT, and in particular under the GATS, has never been considered sufficient by most WTO Members.[35] Further, it should be recalled that under the WTO, Member States are committed to reach the furthest extent of liberalisation, both in trade of goods and services. Therefore, they are bound to progressively remove trade barriers to foster trade exchanges, despite their permitted margin of flexibility.[36] In particular, the achievement of greater liberalisation in the audiovisual sector is highly problematic. Considering the digital shift and the technology evolution in the audiovisual market, it is rather difficult today to draw a clear distinction between cultural goods and cultural services and Article IV of the GATT focusing on cinematographic products sounds almost obsolete.[37] New media and new forms of emissions have appeared (e.g. satellite transmissions of television programmes or the delivering of audiovisual services through the internet),

[32] Screen quotas are allowed under certain conditions specified in para (a), (b), (c), and (d) of Article IV GATT.
[33] See: GATT, *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, L/1741 (13 March 1962). See also: B de Witte, "Trade in Culture: International Legal Regimes and EU Constitutional Values", in G de Burca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects*, (Hart Publishing, 2001), at 242.
[34] GATT, *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, (here above quoted), at 8.
[35] M Burri-Nevona, above (n 2), quoting S Cahn and D Schimmel, "The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS?", (1997) 15 *Cardozo Arts and Entertainment Law Journal*, at 287-289.
[36] See the WTO Preamble, above quoted.
[37] For a different view on this and a suggestion for interpreting Article IV GATT in a more modern key, see: L Ehring, "Article IV of the GATT: an obsolete or still a basis for cultural policy?", in I Govaere *et al* (eds), *Trade and Competition Law in the EU and Beyond*, (EE Publishing, 2011), 96.

which are mostly distributed in non-traditional cross-border ways. These kinds of cultural products may fall both under the GATT or the GATS, yet it seems that the GATS provisions are the ones most directly affecting the exchange of these cultural goods and services.[38] The *querelle* about whether audiovisual products should be considered goods or services exploded in the 1980s, when the expansion of the trade in television programmes brought the European Union to adopt common measures – namely quota provisions – to favour the European broadcasting market and limit the exportation of American TV programmes.[39] According to the US, Article IV had to be interpreted in a narrow sense, as applying only to cinema films and leaving aside TV broadcasting. To the contrary, the EU (still the European Community at the time) argued that TV programmes are services rather than goods.[40] It was during the Uruguay Round negotiations for the new General Agreement on Trade and Services (GATS)[41] that the debate around this issue became very animated, and the claim for inserting an explicit *exception culturelle* for cultural products within the text of the GATS was advanced. Broadly speaking, the underlying *rationale* for the formal introduction of a cultural exception in the WTO context is that such an exception would justify subsidies and quota restrictions in favour of national cultural industries' productions. Indeed, because the current rules under the GATT and the GATS are considered inadequate to strike a proper balance between trade and cultural interests, Member States adopt domestic cultural policy measures to counterbalance the implications of WTO rules on cultural diversity. Domestic cultural policy measures very frequently consist in States' financial support for national creative productions, or the adoption of quotas to restrict the import of foreign cultural products. Although

[38] L Richieri Hanania, "The International Commercial Rules on the Exchange of Cultural Goods and Services", *ESIL Founding Conference Paper* (Florence, 2005), available at http://www.esil-sedi.eu/sites/default/files/Hanania_0.PDF, at 3.

[39] The European common measures grounded in the Directive 89/552/EEC of 3 October 1989, OJ L298, as amended by Directive 97/36/EC of 30 July 1997. Directive 89/552/EEC is known as the "Television without Frontiers" Directive.

[40] B de Witte, above (n 33), 242-243. As far as it concerns the definition of "cultural services", UNESCO highlights that, currently, there is neither a common definition, nor a single standardised system of descriptions for traded cultural services. According to UNESCO's understanding of "cultural services", this includes: performing services (theatres, orchestras, circuses, etc.), publishing, news, communication and architectural services, as well as audiovisual services (distribution of films, television/radio programmes, and home videos; all aspects of production such as dubbing and print duplication; exhibition of films; and ownership and operation of cable, satellite and broadcasting facilities or cinemas, etc.). Library services, archives, museums are also included. See: UNESCO, *Culture, Trade and Globalization: Questions and Answers* (2000).

[41] The Uruguay Round started in 1986 and takes its name from the place where this international negotiation was started (Punta del Este in Uruguay). The Uruguay Round lasted 7 years and ended in 1994 with the signature of the Marrakech Agreement, creating the WTO.

justified by the aim to preserve national cultural integrity and diversity, this kind of national measure may often be in conflict with the application of the WTO regime, and can turn into an infringement of the international obligations of the State within the WTO. Therefore, in the past decades, several WTO Members have extensively discussed the urgency to create a special regime for the treatment of cultural goods and services, which would recognise the dual nature and public function of cultural products under the WTO.

2.1.3) Searching for a tool to redress cultural imbalances: the rise and demise of the "*exception culturelle*"

2.1.3.1) Origin and evolution of the "exception culturelle" under the WTO

Supporters of the "cultural exception" argue that cultural products are the expressions of national and cultural identity and, as such, need special protection and support. It is actually true that quite often cultural industries – film and audiovisual ones in particular – can survive thanks to certain national policy measures, such as import restrictions, subsidies, domestic content quotas, etc.[42] If subject only to commercial considerations, many local (and small) cultural industries would hardly resist the competition of those with greater financial structures, because of their multinational presence and monopoly position.

During the Uruguay Round a clear demand for a special trade regime for cultural goods and services stood out. On this occasion, the possibilities to reach further liberalisation on trade in services through a new General Agreement and to bring intellectual property rights under common international GATT/WTO rules were widely debated.[43] Some countries expressed a concern that the enforcement of the GATT principles – in particular MFN and national treatment rules – on cultural goods and services as well as on copyright-protected products would undermine their cultural specificity and only consider their commercial aspects. Canada, many European Countries, and the majority of the Group of 77[44] asked, then, for a general

[42] For a detailed description and discussion on domestic cultural policy measures: M Footer and C B Graber, "Trade Liberalization and Cultural Policy", (2000) 3 *Journal of International Economic Law*, 115, 122.

[43] During the Uruguay Round the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was also negotiated and concluded.

[44] The Group of 77 (or G-77) was established on 15 June 1964 by seventy-seven developing country signatories of the "Joint Declaration of the Seventy-Seven Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. Although

exemption for cultural products under GATS.[45] In particular, the idea of an "*exception culturelle*" was strongly cherished by France and Canada, which aimed at maintaining tariffs and quotas to protect their cultural market from other cultural products, most notably US films and television. However, the European Union, as a member of the WTO,[46] chose not to sit on a side and joined the battle for a cultural exception by taking the French request under its aegis. The *exception culturelle* soon became the flag of the EU advocacy for the protection of European cultural diversity.

The Union, together with Canada, took the leadership of this battle within the Uruguay Round, with the US as the major opponent. Since the beginning the emphasis of the Union for a cultural exception was placed on audiovisual services. Indeed, while the European Union has engaged with certain commitments under GATS for recreational, cultural and sporting services, it has never undertaken commitments on further liberalisation of the audiovisual sector. [47] The attention of the EU in protecting the specificity of the audiovisual sector is grounded on internal EU law interests: further commitments to liberalise audiovisual services would hinder the integrity of the Television Without Frontiers Directive,[48] whose ultimate aim is to create a European broadcasting space, while undermining national monopolies in the

---

the members increased to 131 countries, the original name was retained for historical reasons. The Group of 77 is the largest intergovernmental organisation of developing countries in the UN providing the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development. For more information, see: http://www.g77.org/doc/.

[45] Other countries supporting this request were Austria, Peru, Brazil, Egypt, India, and the Nordic countries. Although all of these Countries aimed to obtain an exceptional treatment for cultural goods and services due to their peculiar nature, they differed about the fields of application of a cultural exception: some were in favour of a general exemption, whereas others preferred a sectorial approach for services, and others only for audiovisual services (namely, the EU). Tania Voon offers a detailed and precise description of these different positions, see: T Voon, *Cultural Products* above (n 11), 22 and ff.

[46] The European Union has been a member of the WTO since 1 January 1995 (until 30 November 2009 it was the European Community (http://www.wto.org/english/thewtoe/countriese/europeancommunities.htm).

[47] It is worth pointing out that cultural services encompass two main categories: recreational, cultural and sporting services, and audiovisual services. The WTO services classification currently lists the following sub-sectors as part of "Recreational, Cultural and Sporting Services": entertainment services, news agency services, libraries, archives, museums and other cultural events, sporting and other recreational activities. According to WTO, audiovisual services include motion picture and videotape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services, and sound recording. See: http://www.gatswatch.org/docs/offreq/EUincoming/summaries/Recreational.pdf and http://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm.

[48] References above (n 39).

sector.[49] In spite of the EU's strong contribution to the battle, it never gained the expected success: a formal "cultural exception" was not included in the final text of the GATS. Indeed, the current GATS does not contain any special clause for cultural products, nor official recognition of their special nature.[50]

Nevertheless, WTO Members have managed to obtain some flexibility for liberalising services. In the end, the Uruguay Round's concluding negotiations did not insist on applying all the GATT rules to film and audiovisual goods and services (falling under the GATS).[51] Since then, this tacit *understanding* (or *compromise*) has been known as the "cultural exception".[52] The "cultural exception" lacks a proper legal status and can, rather, be considered as a doctrine based on the principle that cultural products are not like any other merchandise because of the values they embed; hence they should be treated differently.[53] Relying on this argument, WTO Members have gained the right to decide individually whether to accept commitments

[49] M De Cock Buning, *Cultural Diversity in Mass Media Regulation*, in H Schneider and P Van Den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, (Intersentia, 2008), 250. B de Witte, "The European Content Requirement in the EC Television Directive – Five Years After", (1995), 1 *The Yearbook of Media and Entertainment Law*, 101.

[50] Three main options took place during the Uruguay Round negotiations: 1) a cultural exclusion clause; 2) a cultural exception clause; 3) a cultural specificity clause. Under the first option, a total exclusion of cultural goods and services from trade's rights and obligations was claimed. The second option, instead, would limit such exclusion to those goods and services of cultural relevance; in this case, the extension of the exclusion will depend upon the definition and interpretation of the cultural exceptional aspects. The third option calls upon the introduction of a formal recognition of the cultural specificity of cultural goods and services: it goes beyond the sole recognition of economic aspects, but does not deny them and would allow cultural goods and services to benefit from a special treatment. None of these proposals succeeded. Instead, an example of cultural exclusion from trade obligations can be found in Article 2005 CUSFTA (NAFTA), exempting cultural industries from the provisions of that Agreement. For a commentary on this norm see: R Neuwirth, *The Cultural Industries in International Trade Law. Insights from the NAFTA, the WTO and the EU*, (Verlag Dr. Kovač, 2006), 69-78.

[51] The exclusion of audiovisual services from further commitments under GATS has been extended also to future agreements in the sector: for instance, in January 1998 the WTO adopted an agreement on basic telecommunication services – which came into force as the Fourth Protocol to GATS – that does not apply to the distribution of audiovisual services.

[52] As B De Witte observes, the result was a de facto exclusion of audiovisual services from the GATS regime, above quoted (n 33), at 244. It is interesting to note that France was the first Country to introduce the concept of "cultural exception", given the strong role played internationally to protect the French language and the French cultural industries. For instance, in 1994 France legislated to protect the French language and the French music industry by imposing a quota of French-language songs on radio play-lists. However, the principle underlying this doctrine was evoked by the USA in the early 1950s when it adhered to the Florence Agreement, the first multilateral treaty of cultural goods. See: UNESCO, *Culture, Trade and Globalization*, above (n 40), at 37.

[53] Several efforts have also been made within other international *fora* to strengthen the worldwide acceptance of a "cultural exception". For example, a few years later, following the recommendations of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998), UNESCO brought together a group of experts to discuss the issue 'Culture: a Form of Merchandise Like No Other?' (1999). The shared understanding that 'culture was not only a matter for the economy or an economic concept' inspired the conclusions of this symposium.

concerning market access and national treatment, and to exempt some cultural policy measures from the MFN obligation. So far, only a few Members have made commitments for the audiovisual sector,[54] whereas most of them, the EU and Canada included, inscribed a great part of cultural services in the Annex to Article II Exemptions. Article II(2) of GATS, indeed, establishes that the Members can maintain national measures, which would normally be incompatible with the WTO rules, as far as they are included under (and meet the conditions of) the Annex on Article II Exemptions.[55] On the basis of this provision, today the EU is still allowed to develop public policies to support the audiovisual sector, such as broadcasting (TV and radio) quotas, financial aid (for production and distribution programmes like MEDIA), regional co-production agreements (like Eurimages) and the Directive Television Without Frontiers. The doctrine of cultural exception was also reflected in the decision to maintain Article IV of Part II of the GATT agreement.

2.1.3.2) The demise of the "cultural exception" and rise of "cultural diversity"

The *de facto* exclusion of cultural services, and mainly audiovisual services, from the GATS appears to be a Pyrrhic victory within the overall WTO system.[56] In fact, we should not forget that Members had to agree on the principle of progressive liberalisation in the trades' services in order to reach this agreement: this entails that all kinds of exemption from provisions on liberalisation will have to progressively decrease. The formal inclusion of an exception based on the recognition of the special nature of cultural services could strengthen the support for States' choices in maintaining this category outside the GATS. Further, the cultural exception seems not to apply within the GATT, which is less flexible in allowing exemptions for cultural products other than the cinematographic ones (for which Article IV GATT is still in

[54]At that time, the number of WTO members with commitments in this sector was still the lowest (30, as of 12 January 2010). A large proportion of these commitments have emerged from accessions negotiations (12 Members). Almost all Members with commitments in the sector are developing countries, except Japan, New Zealand and the United States. See: WTO, Council for Trade in Services, Audiovisual Services - Background Note by the Secretariat, S/C/W/310 (12 January 2010), at 17. See also: http://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm (last access 30 July 2014).

[55] According to the wording of the GATS Annex on Article II Exemptions (para 5 and 6), the exemptions included under the Annex that are intended to last more than five years, shall be reviewed and they shall not be exceed a total period of 10 years.

[56] Commentators often refer to the outcome of the Uruguay Round on cultural services as the "agreement on disagree". See: B de Witte, above quoted (n 33), at 245; T Voon, above (n 11), at 14; R Neuwirth, above at (n 50), at 204.

force).[57] This unsolved tension came back to fore in the 1997 Panel decision *Canada – Certain Measures Concerning Periodicals.*[58] On that occasion, indeed, the WTO Panel declined to acknowledge a cultural distinction between certain goods, namely some kinds of magazines. The dispute concerned the US claim against certain domestic measures[59] adopted by Canada in the periodical sector, considered overly protectionist and in violation of the GATT's rules. To be more specific, the measures at stake directly affected some special editions of US magazines, the so-called split-runs, limiting their access to the Canadian market. Canada argued that the measures were part of a broader and longstanding policy aimed at the protection of Canadian culture.[60] Further, Canada contested that magazines are not like regular trade objects, but they should be considered as cultural goods because of their intellectual content.[61] In arguing this, Canada tried to gain a differentiated treatment for magazines and split-runs under the GATT, based on the intellectual uniqueness of the Canadian magazines' content. None of these arguments were taken into consideration by the Panel, which instead stated that "the ability of Members to adopt measures to protect cultural identity" was not at issue.[62] As for the question concerning the likeness of the products, the Panel ended up by recognising no distinction in their common end use and considered them as "like products".[63] Both Canada and the US appealed the Panel Report under the WTO. The following Appellate Body's decision did not reverse the Panel's report, however it reached a different conclusion concerning the likeness of the products: it considered the kinds of periodicals under analysis as

[57] B de Witte, above (n 33).
[58] See references above at (n 20).
[59] The incriminated measures were: 1) The prohibition of certain periodicals considered a 'special edition', including a split-run or regional edition that contains an advertisement that was primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical's country of origin'; 2) the imposition of a tax equal to 80% of the value of all the advertisements contained in split-run editions (not already prohibited), in which more than 20% of the editorial material was the same or substantially the same as editorial material that appeared in other issues of one or more periodicals and contained an advertisement that did not appear in identical form in the aforementioned editions; 3) The preferred treatment of Canadian magazines by the Canadian Post Corporation (which is controlled by the Canadian Government). See *Canada Periodicals*, para 2.2-2.19.
[60] *Ibidem* at para 3.23-3.26. Sharing a large border and (for the majority) a common language with the United States, Canada is directly exposed to the US attempts at the Canadian market and faces the general diffusion of American culture (not only in the globalised media arena). See: C Carmody, "When 'Cultural Identity Was Not at Issue': Thinking about Canada – Certain Measures Concerning Periodicals", (1999) 30 *Law and Policy in International Business*, at 302.
[61] *Canada Periodicals*, at para 3.61, 3.84.
[62] *Ibidem* at 5.45.
[63] Nonetheless, the Panel showed *some* sensibility advocating the need for a case-by-case analysis to assess whether the Canadian magazines and the US split runs would be "like-products". *Ibidem* at 3.114.

directly competitive products.[64] In its analysis, the Panel avoided discussing any possible cultural implications in the case.

The *Canada – Periodicals* decision threw more oil on the fire that was lit during the Uruguay Round and revealed that the real efficacy of the "cultural exception" doctrine is rather weak. In striking a balance between trade and cultural interests at stake under the GATT, a lot will depend upon the interpretation of the law and the appreciation of the interests at stake by the Panel. The choice to disregard all cultural implications involved in the *Canada – Periodicals* dispute leads us to think that there is (and will be) little room for the assessment of cultural contents, or the distinct cultural goals inspiring certain national laws. Thus, it is quite hard to imagine that future WTO Panels will abandon the "dominant gaze", which seems to be mostly economic-oriented.[65] Such an approach is in conflict with the emergent international tendency, which calls upon the protection of cultural diversity and national cultures from the effects of increased globalisation. The introduction of a clear cultural clause or waiver within the WTO texts would probably help to orient Panel's decision towards a more "cultural friendly" interpretation of the issues and law at stake.[66]

However, "cultural exception" sounds today like a failing concept and the support towards its formal recognition is declining. It evokes a negative idea of hidden protectionism that goes against the principle of enhancing cultural exchange as a means to foster development. Both within and outside the WTO, the idea that cultural exchanges should be fostered rather than limited in order to promote development opens the door to seeing culture and trade as mutually supportive. The focus has shifted from cultural exception – which seems to be promoting a policy of "cultural exclusion" rather than inclusion, integration and mutual understanding – towards the more appealing concept of "cultural plurality (or diversity).[67] Some cultural operators argue that "*defending cultural diversity means allowing everyone to*

[64] *Canada – Periodicals*, WT/DS31/AB/R (30 June 1997), para. 29.
[65] See C Carmody, above (n 60), at 240 and 302.
[66] C Carmody, 309.
[67] H Dauncey, "L'exception Culturelle", in T Chafer and E Godin (eds), *The End of the French Exception? Decline and Revival of the 'French Model'*, (2010), 77-78; C B Graber, "The New UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO?", (2006), 9(3) *Journal of International Economic Law*, 555. Also: F S Galt, "The Life, Death, and Rebirth of the Cultural Exception in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture's Hegemony", *(2004) 3 Washington University Global Studies Law Review,* 909-935.

enjoy their own culture and to access the culture of others"[68], while cultural exception excludes – and exclusion is not compatible with the idea of culture as a positive vehicle for social and economic development. Finally, the notion of cultural diversity sounds more neutral,[69] and less *binding* in terms of political and legal measures. In effect, cultural exception shows a clear political will often associated with protectionist goals or some form of cultural ideology.[70] Instead, cultural diversity sounds like a more appealing concept: as Graber points out, "*after the demise of the cultural exception doctrine, advocates of culture recognized that a new concept was required to defend legitimate cultural values in the realm of international economic law*."[71] It is interesting to note that the concept of cultural diversity first entered the scene of international economic law towards the end of the 1990s. Again, the European Union played a relevant role: in the autumn of 1999, during the run-up to the WTO Ministerial Conference in Seattle, the EU Member States chose the safeguard of cultural diversity to be the new official guiding policy goal in negotiations regarding trade in audiovisual media.[72]

2.2) The 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions: a new international answer

Since the evidence of the failure of the cultural exception, the international debate on the need to combine protectionism and liberalisation in order to ensure a balance between culture and trade moved under UNESCO's aegis. In 2001, the adoption of the Universal Declaration on Cultural Diversity signalled a step forward for the recognition of the protection of cultural diversity.[73] The Declaration had an important political echo, but in terms of legal strength it was an inadequate response

[68] Hugh Dauncey, *above f. 203,* at 77. The author quotes a speech by Jean-Marie Messier (2001), Head Director of the media-music-film conglomerate Vivendi-Universal.
[69] M Hahn**: "***A Clash of Cultures? The Unesco Diversity Convention and International Trade Law",* (2006), 9:3 *Journal of International Economic Law*, 528.
[70] C B Graber, "The New UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO?", (2006), 9(3) *Journal of International Economic L*aw, 555.
[71] C B Graber, *ibidem*.
[72] European Commission, Communication to the Council and the European Parliament, The EU Approach to the WTO Millennium Round, COM(1999) 331 final, 8 July 1999.
[73] The 2001 UNESCO Declaration is the first international instrument recognising cultural diversity as affecting human dignity and a right in need of protection. However, the debate on the necessity to affirm cultural diversity as a *per se* value and a human right had already led to the adoption of a Declaration on Cultural Diversity by the Council of Europe in 2000 (adopted by the 733rd Meeting of the Ministers' Deputies of the Council of Europe on 7 December 2000).

for the complex issues related to culture and trade.[74] Therefore, in 2003, ministers of culture together with the International Network on Cultural Policy (INCP)[75] submitted to UNESCO a formal request to negotiate a truly binding standard-setting instrument on cultural diversity. The General Assembly of UNESCO accepted the task to negotiate a convention dealing with "the diversity of cultural contents and artistic expressions".[76] On 20th October 2005, UNESCO's General Assembly adopted the Convention on the Promotion and Protection of the Diversity of Cultural Expressions.[77] At the global level, the Convention was greatly welcomed by States, NGOs, and other stakeholders;[78] the EU strongly supported the adoption of this instrument and participated in the negotiations together with its Member States. This support was reflected in the following ratification process and in March 2007 the Convention entered into force.

2.2.1) The UNESCO Convention for the protection and promotion of the diversity of cultural expressions: content and main features

The 2005 UNESCO Convention's major aim is to fill a legal *lacuna* in the field of trade and culture regulations, as well as to establish the integration of cultural concerns in development cooperation policy, in order to erase disparities in development and global trade. It came to give a juridical *status* to cultural diversity as a human right and a *per se* value. Yet, the Convention does not establish new cultural rights. Although during the negotiations many Members preferred a human rights

[74] The 2001 UNESCO Declaration does not award a juridical status to cultural diversity. See the Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity, UNESCO doc. 166EX/28, Paris, 12 March 2003 available at http://unesdoc.unesco.org/images/0012/001297/129718e.pdf .

[75] The International Network on Cultural Policy was created at the end of the Decade on Culture and Development in Canada and was composed of more than 40 Ministers of Culture. INCP's official website: http://incp-ripc.org/.

[76] See Preliminary Study on the Technical and Legal Aspects, above (n 74).

[77] The Convention (references in chapter 1) was adopted on 20th October 2005, 148 States voted in favour, only four States abstained (Australia, Honduras, Liberia and Nicaragua) and two voted against (the USA and Israel). For a detailed history of the negotiations of the Convention, see: Y Donders, "The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", in H Schneider and P Van Den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, (Intersentia, 2008), 15; see also, H Ruiz Fabri "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", 43 *Revue générale de droit internatio*nal 2007, 43-87.

[78] Many NGOs, independent and institutional networks dealing with cultural issues, such as the International Network for Cultural Diversity (INCD), the Campaign for Communication Rights in the Information Society (CRIS) and the Cultural Industries Sectoral Advisory Group (SAGIT), were involved and played an important role in the drafting process of the Convention.

approach to cultural diversity and proposed the adoption of a specific and comprehensive instrument on cultural rights,[79] priority was given to an instrument that could regulate problems between culture and trade. Herein, the majority of the States on UNESCO's Executive Board opted to focus on a specific aspect of cultural diversity: the diversity of cultural contents and artistic expressions. The choice to narrow the scope of the Convention to the forms of cultural expressions was considered more appropriate to face the negative impacts of a wild economic globalisation and to counterbalance the WTO.[80] Nonetheless, the Convention recalls the respect for cultural rights as a fundamental guarantee for the full protection and promotion of cultural diversity.[81]

The important novelty of the Convention is the formal recognition of the double nature of cultural activities, goods and services as *vehicles of identity, values and meaning* (Art. 1.g) and as embedding *cultural expressions, irrespective of the commercial value they may have* (Article 4.4).[82] In this sense, the Convention fills a *vacuum* under international law. However, only a few provisions turn this concept into binding obligations. The language of the Convention is, in effect, often vague and imprecise. States are usually "invited" or "exhorted" or "may" take measures in order to support artistic and creative production, as well as the free circulation of ideas and cultural products on the national territory. What first strikes the attention of the reader is the emphasis on the word *rights* rather than obligations in the set of articles dealing with the rights and obligations of parties at the national level (articles 6-11). Indeed, the Convention strongly reaffirms the sovereign right of States to adopt, maintain and

[79] The other options proposed were: 1) a new comprehensive instrument on cultural rights; 2) an instrument on the status of artists; 3) a new Protocol to the Florence Agreement on Educational, Scientific and Cultural Materials.

[80] Canada and France played a leading role in the negotiations: their primary intention was to create an instrument shaped on the idea of an improved cultural exception to use it as a counterbalance for the WTO rules. The two countries exercised their influence on the entire block of French speaking countries and created the so-called *"group de la Francophonie"*. For a history on the evolution of the subject matter of the Convention during the *travaux préparatoires*, see: I Bernier, "A UNESCO International Convention on Cultural Diversity", available at http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/update0303.pdf.

[81] Article 2(1) of the Convention. See also the Preamble of the 2005 UNESCO Convention.

[82] This definition was one of the main causes of conflict among the States delegations during the negotiation. Major oppositions came from the US: they saw in this definition a clear attempt to create an international instrument aimed at ensuring a special treatment to cultural goods and services in trade negotiations. The US abandoned the negotiations of the Convention at their final stage, arguing that the subject matter of the UNESCO Convention was not cultural, but rather trade and economics and that UNESCO's mandate did not include the competence to negotiate such an instrument among its functions. They stressed that the participation of the European Union, which joined the negotiations in 2004, demonstrated the commercial nature of the Convention. On this issue: Y Donders, *supra* (n 77), 15-21.

implement cultural policies and measures, as if to clarify that culture is a matter of States' sovereign power and no supranational powers should interfere with this principle.[83] A symbolic example of this "affirmation of sovereignty" is Article 6, establishing that *each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory*. Article 6 expressly refers to regulatory, institutional, and financial measures that can provide assistance both to private and public sectors, such as public broadcasting measures. Clearly, this set of provisions focusing on national powers in the cultural sphere aims at offering an offset against the WTO impingements. According to some commentators, the Convention is inclined towards a return to some forms of protectionism and public intervention in the field of culture: in particular, they argue that because no mention of principles of proportionality or effectiveness is present in the text, distorting effects on competition are more likely to take place.[84]

From Articles 7 to 11, the Convention switches the focus towards the protection of cultural identities of groups and individuals. The Parties are "invited" to encourage the dissemination and the access to cultural expressions of individuals and groups, with special attention to women, minorities and indigenous peoples (Article 7); to preserve cultural expressions at risk of extinction (Article 8); to promote public awareness of cultural diversity through education (Article 10); to encourage the active participation of civil society in the efforts to pursue the objectives of the Convention (Article 11). Such provisions recall the human rights language, and advance the protection of a broader concept of cultural diversity, which is not all about cultural goods and services (namely, audiovisual services). Yet, their weak formulation does not empower individuals or groups to sue a State in case of non-action or non-compliance.

The most relevant articles for the purpose of this thesis are Articles 13-18, which rely on the principle of solidarity and expressly make the link between culture and development. These articles aim at strengthening international cooperation between developing and developed countries in the field of cultural exchange, trade

[83] During the negotiations, the importance given to the issue of sovereignty even resulted in the introduction of the "principle of sovereignty" among the guiding principles underpinning the Convention.

[84] M Burri-Nevona **"**Reconciling Trade and Culture: A Global Law Perspective"**,** (2010), 40 *Journal of Arts Management, Law and Society*, 4-3; R Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication order?" (2007) 1 *International Journal of Communication*, at 40.

and development, in order to promote mutual understanding and sustainable development. Adopted under the strong pressure of the developing countries group, this part of the Convention becomes much more specific and surprisingly sets out more detailed arrangements. As mentioned in Chapter 1, Article 13 establishes a duty on Parties to integrate cultural considerations in all their development policies and at all levels. This provision should lead to a careful assessment of the cultural impact of all actions undertaken in the framework of development policies at local, national and international level. Similar to what happens for an environmental impacts assessment, this "cultural impact evaluation" should be based on principles such as: intergenerational and intragenerational equity, precautionary principle, interconnectedness of economic, social, cultural and environmental issues, and the importance to protect diversity as a benefit for the humankind.[85] Hence, the Convention suggests various tools of cooperation, such as: technical and professional cooperation through the mobility of professionals and the exchange of best practices and knowledge in strategic fields, the reinforcement of partnership based on the interplay of all the stakeholders (civil society, local communities, governmental institutions, etc.). Particular emphasis is given to co-production and co-distribution agreements, facilitating the access to viable local and regional markets and the international distribution of cultural goods and services so as to foster the cultural industry of developing countries.

As the *free flow* of ideas is a central element of the Convention[86] and has a pivotal role for cultural cooperation, Article 16 of the Convention creates an obligation on Parties to ensure a *preferential treatment* to artists, cultural professionals and practitioners, as well as cultural goods and services from developing countries (emphasis added).[87] It is quite striking that the language of Article 16 differs from the rest of other obligations under the Convention: indeed, Article 16 is formulated as a clear-cut obligation; the non-fulfilment of a State could, thus, be challenged by a Party to the Convention. The implementation of Article 16 raises several interesting issues. It is clear that this provision is likely to affect delicate

[85] D Throsby, *"Culture in sustainable development: insights for the implementation of art. 13"*, (2008), 3 *Economia della Cultura, Anno XVIII*, 389-395.
[86] Recital 11, Preamble of the Convention.
[87] Article 16 of the 2005 UNESCO Convention: "Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries".

areas of national policies, such as migration and visa. It can also impact the internal labour and trade markets of States. It is natural to think, then, that States will be very cautious in implementing this provision. Indeed, at the time of negotiations, most of them insisted on introducing a safeguard clause of their internal national regulations: the preferential treatment has to be granted conformably to the appropriate institutional and legal framework of the States.[88]

2.2.2) Strengths and weaknesses of the 2005 UNESCO Convention

The 2005 UNESCO Convention introduces two important novelties: first, it formally recognises the double nature of cultural activities, goods and services as *vehicles of identity, values and cultural expressions* and as having *commercial value;* second, it recognises culture as a strategic component of national and international development policies and creates a favourable framework for the integration of cultural elements in development policies at all levels. Building on the principle of complementarity between culture and economics,[89] the 2005 UNESCO Convention adopts a broader notion of sustainable development in which both cultural and economic aspects have been granted an important role to play.[90] The 2005 UNESCO Convention encompasses the principle of sustainable development, equitable access and openness and balance as guiding principles for the Parties' action, so as to reach both goals of enhancing cultural exchanges and protecting cultural identities.[91] The principles of "equitable access" and "openness and balance" should mitigate distortive effects that may be embedded in some provisions (like the above-mentioned Article 6). They should help Parties to single out what measures are licit or illicit and contribute to override the uncertainties of the text and the risk of becoming an instrument of disguised protectionism.[92] Further, the exercise of the sovereign rights

[88] Some authors have argued that this clause limits the effects of Article 16, reducing it to a *bona fide* obligation, or simply to an obligation of results: M C Ciciriello and F Mucci,*"La cooperazione internazionale per lo sviluppo in materia di diversità delle espressioni culturali: un tratto saliente della Convenzione UNESCO del 2005"*, (2008) 1 *Studi in Onore di Vincenzo Starace,*130-132.
[89] Article 2(5) of the Convention.
[90] An interesting critical comparison between the different notions of sustainable development endorsed respectively by the WTO and the UNESCO Convention on Cultural Diversity is proposed by F Macmillan in "Development, cultural self-determination and the World Trade Organization", above (n 5).
[91] Article 2(6)(7)(8) of the Convention.
[92] I Bernier, "The relationship between the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and other International Instruments: the emergence of a new

of States should also be limited by the obligation to respect fundamental and human rights. In fact, although the Convention is not a human rights instrument, it is clear that the success of its full implementation is tightly connected to the respect of (cultural) human rights as promoted by other international and regional treaties.[93]

Looking at the overall Convention, despite its good intentions, it is a rather weak-binding instrument, which mostly sets out a series of incentives, good faith, and best-effort obligations. In particular, there is serious doubt as to whether it can counteract the WTO. In terms of interaction with other treaties, indeed, Article 20 limits the strength of the Convention. The first part of the article affirms that the Convention's implementation should not be subordinated and should be accomplished in mutual supportiveness with other treaties. It adds that the Parties should take into account the provisions of the Convention when interpreting and applying other treaties. In the second part, Article 20 takes a step back and clearly states that the Convention does not modify rights and obligations of the Parties under other treaties. So, the power of the Convention is conditioned by several elements. First of all, its application must be done in mutual support with other treaties: this means that the implementation of the Convention should be complementary or, at least, not contradictory with the provisions of other relevant treaties for the parties. Then, the second paragraph of Article 20 establishes a "non-prejudice" clause that prevents the Convention from having effects on other treaties. Hence, in case of conflicts between the Convention and the WTO law, it is very unlikely that the Convention could be the winner. This doubt has been resolved by the 2009 WTO Panel decision *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, where the Panel referred to the wording of Article 20 of the Convention to diminish its legal strength in the context.[94] In the end,

---

balance in the interface between commerce and culture", August 2009, available at http://www.diversiteculturelle.qc.ca/fileadmin/documents/pdf/ANG_Relations_entre_Convention_Unesco_instruments_internationaux.pdf., at 60 and ff.

[93] According to the US position during the negotiations, the Convention may, instead, threaten the respect of freedom of expression as shaped under Article 19 of the UN Covenant on Civil and Political Rights. For a comment on this: Graber, above (n 70).

[94] Briefly, the case involves a dispute about Chinese restrictions on import and distribution of foreign films for theatrical release, audiovisual home entertainment products, sound recordings, and publications. The US challenged seventeen legal measures for inconsistency with various provisions of the WTO, including the WTO Accession Protocol, Article III94) of the GATT, Articles VVI and WVII of the GATTS. China justified its measures on the basis of the 2005 UNESCO Convention on Cultural Diversity and the 2001 Declaration on Cultural Diversity. The WTO dismissed the recourse to the 2005 UNESCO Convention referring to Article 20.2. For a commentary on the decision see: R J Neuwirth, The " 'Culture and Trade Debate' Continues: The UNESCO Convention in Light of the WTO Reports

it seems that the Convention should rather have an impact on the interpretation of the application of the WTO rules, as well as of any other treaty (Article 20.1). In this sense, the 2005 Convention can contribute to reach a balance between cultural and economic interests in trade negotiations. It is quite striking, indeed, that such a possibility is explicitly mentioned in the Convention: it is the first case in international law that Parties agreed to use one instrument as an interpretative tool when negotiating and applying others.[95] However, even if the merit of the political will of such a clause can be acknowledged, the doubts about its effective implementation remain legitimate.

To conclude, the major merit of the Convention seems to be the inclusion of culture as a component of development, which underpins the idea of a sustainable development embedding a cultural dimension. In this sense, the Convention can act as an innovative tool for an evolutionary interpretation of sustainable development, perhaps also within the WTO.[96] Yet, the consideration made for interpreting article XX(f) of the GATT also applies in this case: evolutionary interpretation depends a lot upon the will of judges. More relevant in terms of practical implications seems to be the fact that the relationship between "culture and trade" is inscribed within a frame guided by sustainable development principles, which should drive the action of States and Organisations in terms of including culture in trade and development's agreements.

2.3) *Interim* considerations: towards more exchange or a return to protectionism?

2.3.1) The current situation: the Doha Round stalemate and the growth of bilateral negotiations

In 2001, the WTO Ministerial Conference held in Doha adopted a Declaration

---

in China – Publications and Audiovisual Products: Between Amnesia or De´ja` Vu?", (2010), 44 (6) *Journal of World Trade*, 1333–1356. See also: WTO Panel Report, *3*, WT/DS 363/R (12 Aug. 2009), www.wto.org/english/tratop_e/dispu_e/ 363r_e.pdf.

[95] H Ruiz Fabri, *supra* (n 77), at 83-86: Craufurd Smith, *supra* (n 84), at 46-52. For an overall comment on Article 20: I Bernier, "The relationship between the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and other International Instruments*",* above at (n 92).

[96] To support this vision, see: S V Uytsel, "The CDCE and the WTO – in search for a meaningful role after *China-Audiovisuals",* in L Richieri Hanania (ed), *Cultural Diversity in International Law The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, (Routledge, 2014), 40-53.

including *a priori* all kinds of services to reach further progressive liberalisation, and therefore the audiovisual sector as well.[97] The Doha Round is the latest round of trade negotiations among the WTO membership: its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about twenty areas of trade.[98] This round of negotiations was expected to have been concluded in 2005, yet it is still ongoing. Several issues were debated and did not meet the agreements of the contracting parties; in particular key topics concerning trade in services and IPR enforcement were strongly debated. In December 2013, the Ministerial Conference held in Bali re-launched the negotiations and adopted a work programme to conclude the Doha Round by the end of 2014.[99] The post-Bali action plan puts new emphasis on the need to achieve further liberalisation to broaden market access areas for trade in services, in parallel with other trade sectors such as agricultural products. Further, the promise to keep making progress in implementing the electronic commerce agenda may have relevant repercussions for the audiovisual services, which are today increasingly available and broadcast over the Internet.[100] Yet, as far as the negotiations of commitments to liberalise the audiovisual market are concerned, since 2001 these have reached a stalemate because of the opposing views and claims raised by Members. Currently, the audiovisual sector is still the one with the lowest commitments undertaken.[101] To overcome this deadlock, States have turned from multilateralism toward bilateralism. Indeed, since the 2000s, several Members have increasingly engaged in bilateral negotiations. The US, for instance, in the last ten years concluded Free Trade Agreements (FTA) with a considerable number of countries in different regions of the world (such as Singapore, South-Korea, Australia, Chile, Costa Rica, Colombia, the Dominican Republic, Morocco, Oman, and

[97] Ministerial Conference, WTO, Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf. (Also known as the Doha Declaration or the Doha Development Agenda**,** given that ministers placed development and developing countries at the centre of the Doha Round).
[98] http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#declaration.
[99] Ministerial Conference Ninth Session Bali, 3-6 December 2013, WTO, Ministerial Declaration adopted on 7 December 2014, WT/MIN(13)/DEC (11 December 2013), para 1.11, Available at http://www.wto.org/english/news_e/news14_e/serv_01apr14_e.htm.
[100] The "Work Programme on Electronic Commerce" was adopted on 25 September 1998 (WT/L/274). The Bali declaration reinvigorated the Work Programme on E-commerce, see Ministerial Conference, Work Programme On Electronic Commerce Ministerial Decision Of 7 December 2013, (WT/MIN(13)/32 WT/L/907), 11 December 2013.
[101] Above (n 54).

others).[102] Canada also engaged in bilateral negotiations, and the European Union concluded new bilateral agreements in the last decade. Each Country is adopting a different approach to the treatment of audiovisual services within the bilateral context. The US strategy aims at restricting the regulatory capacity of governments in the cultural sectors, like the adoption of broadcasting quotas, so as to obtain more space in the foreign markets for their investors and cultural enterprises. Considering that in bilateral negotiations, the asymmetric power of the parties engaged has a relevant weight in favour of one or another country, the US has managed to limit (when not entirely refuse) specific reservations for the audiovisual sector advanced by its partners.[103] Canada, instead, pursues a strategy aiming at the full exclusion of audiovisual services from agreements – a position that is very much in line with the original Canadian claim for a general "cultural exception" within the WTO negotiations. This strong protectionist approach fully emerged during the negotiations of the Comprehensive Economic Trade Agreement (CETA) with the EU, launched in 2009 and concluded on the 18th October 2013. Although the EU and Canada have been allies in the battle towards the recognition of a cultural exception in the WTO system and pushed for the adoption of the Cultural Diversity Convention, during their bilateral negotiation they revealed they had different understandings of what should be covered by a cultural exception. Canada uses a broad definition of cultural industries, including many services (such as telecom services) that the European Commission would not normally consider as falling under cultural sectors, and that the Members of the EU do not usually exclude from trade negotiations.[104] The sticking point concerning the treatment of cultural industries under the EU-Canada agreement was overcome through "chapter by chapter" negotiations including cultural exemptions. Canada's aim was to exempt certain sectors from the risk of judicial

[102] A Vlassis and L Richieri Hanania, "Effects of the CDCE on trade negotiations", in in L R Hanania (ed), op. cit. (n 96), at 27; other source: http://www.ustr.gov/tpp.

[103] It is interesting to note that Chile succeeded in protecting its 40% quota for public tradition broadcasting channels (thus, not applying to satellite and cable television), whereas South-Korea accepted to agree to remain in movie theatres 73 days per year, rather than the 146 days requirement existing before the opening of the negotiations with the US. *Ibidem*, at 28-29.

[104] A Vlassis "Accords commerciaux et diversité culturelle", (Janvier 2013), *Chronique des industries culturelles, vol. 8, Édition spéciale*, at 3. It is worth remarking that the CETA's negotiations highlights that Canada has not developed a coherent approach towards the protection of cultural diversity: while the Canadian government directs great efforts toward the protection of the French identity through linguistic policy and the strong defense of the Canadian audiovisual sector, the protection of intangible cultural heritage, folklore and the heritage of indigenous people is not among its priorities.

interpretation that would not include them in cultural exemptions.[105] Further, Canada insisted on including a reference to the Convention on Cultural Diversity in the Preamble of the Agreement, thus demonstrating that it interprets the Convention mainly as an instrument to justify protectionist measures in the field of culture and trade.

As for the European Union, in the last years several bilateral and regional agreements concluded have been given a new "cultural component". Regarding the treatment of cultural industries, although the EU seems to be adopting a more limited notion of cultural exception compared to the Canadian one, it has traditionally excluded the sector of audiovisual services from the non-discrimination rules of bilateral and regional trade agreements (usually through a horizontal exclusion of that sector under the services chapter). But what is more interesting is that since the entry into force of the Convention on Cultural Diversity, the EU has attempted to overcome the historical opposition between culture and trade by proposing the integration of cultural cooperation provisions expressly based on the Convention into trade agreements. As we will see later in this chapter, this has taken place in the form of a "protocol" or an autonomous "agreement" on cultural cooperation attached to the main trade agreement.

2.3.2) From cultural exception to cultural diversity via development: emphasis on co-productions and co-distributions

By looking at the debate on cultural exception through the development prism, some considerations will be made. First of all, it is interesting to notice that the battle for cultural exception within the WTO engaged both Southern and Western Countries against the hegemonic power of the US cultural industries.[106] Indeed, the battle for the preservation of cultural identities seems to be a common priority. In this regard, it is important to remember that the EU played a central role in this battle. Although the conflict between the EU and the US concerning the cultural exception may firstly appear as another face of the typical opposition of the two actors on economic

[105] A Vlassis, "Accord Canada-UE: l'exemption culturelle spécifique et ses implications", (Novembre 2013), Volume 8, numéro 9, *Culture, commerce et numérique*, at 2.
[106] For a broader view comparing the position of developed countries and developing countries within GATS' negotiations, see: M Footer, "The International Regulation of Trade in Services Following Completion of the Uruguay Round", (1995) 29 International Lawyer, 453.

aspects, it is the first time that the EU had Canada and Japan on its side, as well as the Group of 77 (guided by Brazil, China, India and South-Africa).[107] The effects of a mainly US-driven globalisation for culture have been a common concern in the last thirty years and in particular since the fall of the Berlin wall, which signalled the victory of a certain cultural and economic model, namely the North American one.[108] Some governments have understood that international trade law is exercising growing pressure on their ability to influence the production and distribution of cultural goods and services within their borders. This has increasingly polarised positions in trade negotiations whenever they deal directly or indirectly with cultural issues, as has been evident for the Uruguay and Doha Rounds. The EU, through its motto "United in Diversity", has been able to champion the battle for cultural identity and converge the interests of most of the developed and developing countries sharing the same preoccupation. At the same time, the strong political connections with its neighbours (and in particular the Mediterranean ones) highly contributed to create a homogenous Euromediterranean block that, together with Canada, Japan, and the Latin American countries, could counteract the US position.[109]

One front that has seen the joint efforts of this group has been that concerning the inclusion of co-production and co-distribution arrangements for film and television within the Annex on Article II Exemptions of the GATS. Indeed, a decent number of WTO Members – including the Latin American, Nordic, European and Arab Countries, as well as Canada – inscribed such exemptions on the list. As observed by some commentators, regional and bilateral co-production and co-distribution agreements are quite numerous and involve countries from almost all regions of the world (Asia, Middle-East, Africa, Europe, North and South America). Such agreements are by their nature incompatible with the MFN treatment, therefore it is only by including them in the Annex on Article II Exemptions that they could be preserved.[110] What is interesting, it is that – in almost all cases – States justify these exemptions with the need to preserve and promote national or regional identities. For

[107] G Mazzone, "Dall'eccezione alla diversità culturale: ministoria di una sfida per l'Europa", (2008), 3 *Economia della Cultura, Anno XVIII*, 329.
[108] *Ibidem*, 329-330.
[109] Further on the Euromediterranean alliance within the GATS negotiation of the Uruguay Round: V Guèvremont, "Industries culturelles et négociations internationales: portrait d'une dynamique multidimensionnelle L'exemple des pays de la zone euro-méditerranéenne", EUI Working Paper RSCAS 2007/33, 9.
[110] I Bernier and H Ruiz-Fabri *Evaluation de la faisabilité juridique d'un instrument international sur la diversité culturelle.* Rapport pour le Groupe de Travail franco-québécois, 2002, 4.

instance, the EU and its Member States have expressed their wish to include co-productions in the list of exemptions in order to keep promoting "cultural links", others, like India and Brazil, to promote "cultural exchange", or some, like the Arab and Nordic Countries, to preserve and promote the cultural identity of the region.[111] The EU also brought to the fore the importance of co-production for preserving and promoting cultural values and linguistic diversity within its internal borders.[112]

The 2005 UNESCO Convention emphasises the role of co-productions and co-distributions. Both developing and developed countries positively perceive co-productions and co-distribution arrangements. Through these forms of collaboration, developing countries are offered the possibility to boost and strengthen their capacities in the sector of creative industries and to gain access to foreign markets. In fact, their major problem derives from the lack of economic means and capacity-building to make their national cultural industries truly competitive on the international market, as well as to avoid their domestic market being dominated by foreign (Western) products. As the UNCTAD Secretariat pointed out in a note concerning the audiovisual sector and developing countries, these last ones are "*newcomers to global trade in this sector and their potential benefits are often limited, since they face the established global market structure and regulatory provisions at national levels*".[113] Co-production agreements can help developing countries to find financial support and access to distributions channels, as well as give international visibility to their products. On the other hand, co-productions constitute a possibility for developed countries to enhance cultural exchanges, having both economic and cultural returns. Further, co-production and co-distribution agreements fit well within the new approach towards culture and trade, which was taking place in the ongoing debate outside the WTO and stressed the beneficial effects of cultural exchanges on culture and economics. Such an approach still acknowledges the threats to the survival of cultural identities that are posed by increased globalisation, but also recognises that culture is *per se* a dynamic process that necessitates the flow of ideas

[111] WTO, European Communities and their Member States – Final List of Article II (MFN) Exemptions, GATS/EL/31 (15 April 1994); WTO, India - Article II (MFN) Exemptions, GATS/EL/42 (15 April 1994); Brazil – Final List of Article II (MFN) Exemptions, GATS/EL/13 (15 April 1994); Egypt - Article II (MFN) Exemptions, GATS/EL/30 (15 April 1994); Norway - Article II (MFN) Exemptions, GATS/EL/66 (15 April 1994).
[112] WTO, European Communities and their Member States – Final List of Article II (MFN) Exemptions, GATS/EL/31 (15 April 1994).
[113] UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries – Note by the UNCTAD Secretariat,* TD/B/COM.1/EM.20/2 (30 September 2002), 9.

to maintain its richness and diversity. The focus slowly switched from a strategy mainly based on the protection and conservation of culture as a static element of societies towards the preservation of the conditions creating the diversity of cultural manifestations. The exchange of cultural goods and services, as well as the circulation of cultural operators become, then, essential instruments for ensuring such conditions. As already observed, the notion of *cultural exception* became rather less fashionable and has been replaced by that of *cultural diversity*. However, if globalisation cannot be stopped and can even be beneficial to boost cultural exchanges, it is recognised that the huge economic and technological gaps between developed and developing Countries do not allow the latter to take advantage of it and to limit the risk of cultural homogenisation. The great challenge is then to redress this situation and reach equilibrium in international trade exchanges. Co-production agreements seem to be a valid tool to contribute to filling this gap, as well as regional cooperation,[114] although they cannot be fully sufficient to counterbalance the negative effect of unbalanced international trade rules on non-trade values.

3) The EU and "trade in culture": institutional and constitutional considerations

At this point, it is interesting to look more in depth at the EU attitude when culture interacts with trade, and in particular with international trade. As it emerged in the previous section, the EU played both a leading role in the attempt to establish a cultural exception for cultural goods and services under the WTO and for the adoption of the 2005 UNESCO Convention on Cultural Diversity. On several occasions, during the GATS negotiations, the EU recalled the need for the recognition of the specific features of the cultural industries, focusing on the audiovisual services. Relying on this argument, the EU was able to exclude the audiovisual service from the application of the MFN rule due to the "special nature" and the "cultural content and objectives" of this sector.[115] Until today, the Union and its Member States benefit from a room for manoeuvre in the audio-visual sector, which relates both to policies and measures at national and Union level. Nonetheless, the fact that the European Union, and in particular the Commission, took up the battle for cultural exception and

[114] *Ibidem,*at 12.
[115] GATT, Uruguay Round Group of Negotiations on Services, Working Group on Audiovisual Services, Note on the Meeting of 5 and 18 October 1990, MTN.GNS/AUD/2 (20 December 1990), points 2 and 9.

the leadership for the adoption of the 2005 UNESCO Convention has been a matter of concern for Member States, which always fear the extension of the Union's powers and the erosion of their competences. Certainly, although trade and culture belong to two different kinds of competences, it is difficult to define a clear-cut line between the Union and the Member States' competences. In the case of "trade in culture", trade competence may overlap, or impinge on the national sphere of action in the cultural sector. Member States, therefore, have always tried to secure this "*sensitive* sector" (namely trade in cultural services) through safeguarding mechanisms, which can limit the exercise of power of the EU on the external level.

In this section I will try to clarify what legal constraints limit the action of the Union in the "trade in culture" sector. This clarification on the linkages between the internal and the external dimension of the Union is instrumental here for understanding better the European position within the WTO and UNESCO.

3.1) Institutional issues deriving from the overlapping of the EU competence in trade and culture: internal and external parallels

The interest behind the EU struggle to obtain the exemption of the audiovisual services from international trade rules is determined by two main aspects: first, the protection of the internal *acquis commuautaire* – namely to secure an adequate protection of existing national and EU measures in the audio-visual sector – and second, the political influence played by some Member States in the decision-making process referring to trade in cultural services. As for the first aspect, the existing EU measures in the area of audiovisual services refer to the EU framework for the subsidisation and distribution of the audiovisual goods and services established through the 1989 Directive on Television without Frontiers[116] and the 2007 Audiovisual Media Services Directive (AVMSD).[117] As we saw in the Chapter 2, preserving the unity and integrity of the internal *acquis* is a priority for the European Union when undertaking initiatives on the external level. This is also a fundamental pre-requisite to ensure consistency and coherence of the Union legal system as a whole. Therefore, the necessity to preserve the internal system of subsidies and quotas

[116] *Supra* at 64.
[117] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

set up by the Audiovisual Directives highly influenced the choices of the EU within the GATS negotiations. The protection of the integrity of the *acquis communautaire* is, then, among the objectives behind the quest for a cultural exception. Although, the European Commission initially considered that a "cultural specificity" approach including minimal liberalisation commitments for audiovisual services could be sufficient enough for the purpose. Yet, States like France, Spain, Belgium and Ireland pressed for a full cultural exemption.[118] This leads us to the second element determining the EU choice in the field of audiovisual services: the political weight exercised by Member States on issues referring to trade in "sensitive sectors". Indeed, before the Lisbon reform, trade in services was not a field falling under the exclusive external trade competence of the Union. Overall, the competence of the EU in trade in services has always been a contentious issue. In Opinion 1/94, the Court of Justice did not recognise an exclusive EU competence to sign the WTO agreements, and engaged in a highly fragmentary repartition of competences between Member States and the EU which attributed only certain aspects of trade in services to the exclusive competence of the Union, while others remained in the sphere of competence of the Member States (this explains the fact that the GATS Agreement was concluded as a mixed agreement). In brief, the Court upheld that only the cross-border supply of services falls under the exclusive trade competence of the EU, because it is a situation similar to trade in goods, which is by no doubt covered by the common commercial policy.[119]As a consequence of this division, if we consider audiovisual products as a form of "cross-border supply of services" rather than goods, they could fall under the common commercial policy, and this entails the exercise of the exclusive competence of the EU. Nonetheless, under the former version of Article 133 ECT, paragraph 6 explicitly reminded that "agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the *shared competence* of the [Union] and its Member States. Consequently, in addition to a [Union] decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded *jointly* by the

[118] J Loisen and F De Ville, "The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit", (2011) 5 *International Journal of Communication*, 257.
[119] Opinion 1/94, WTO, para (44). In the following paragraphs, the Court specified that the other three modes of supply of services covered by GATS (consumption abroad, commercial presence and the presence of natural persons) are not covered by the common commercial policy (para 45-47).

Community and the Member States" (emphasis added). So, if on the one hand the recognition of the commercial dimension of cultural services could not but involve the Union's intervention in the framework of multilateral trade negotiations, on the other hand such intervention had to take place through means of a mixed agreement and respect the limits fixed by the internal allocation of competences.

The specific formulation of Article 133(6) ECT reflected Member States' fears concerning the EU intervention in the field of trade in culture, and in particular trade in cultural services.[120] The power of the Union to engage in legislative initiatives in this "sensitive sector" has often been contested by the Member States both on the internal and external level. On the internal level, the first tensions emerged with the introduction of the Television Without Frontiers Directive, which established a system of content requirements (commonly identified as the television broadcasting quotas) in order to open national markets to European broadcasting services and create a common production and distribution market in this sector.[121] Member States with a limited linguistic audience or weak media industries feared the invasion of audiovisual products originating from other Member States with widespread languages and well-established cultural industries.[122] States were afraid that such liberalisation in the audiovisual market would lead to a cultural homogenisation within the EU borders. In addition, Member States accused the establishment of content requirements for European works and independent productions[123] of overlapping with national cultural policies and eroding their national

[120] Article 133 ECT, concerning the CCP, was so amended by the Nice Treaty, which brought some substantial changes to the EU competences, and extended the common commercial policy to the commercial aspects of intellectual property, as well as the trade of cultural goods and services. The extension of the EU competence to cultural products in the external level was not accepted peacefully by the Member States, which sensed it was a threat for their shared competence in the cultural sector on the internal level. In particular, Member States were afraid that the ban of harmonisation in the cultural area (Article 167(5) TFEU) would have been infringed. As a result of these fears, the former Article 133(6) also explicitly reminded that "*an agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonization*". (Treaty of Nice, signed on 26 February 2001 and entered into force on 1 February 2003).

[121] Article 2(2) of Council Directive 89/552/EEC.

[122] For a comprehensive view on this issue and a critical assessment of the TWF Directive's impacts on cultural concerns see: E Psychogiopoulou, *The integration of Cultural Considerations in EU law and Policies*, (Martinus Nijhoff Publishers, 2008), 227. See also: T Lupinacci, "The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?", 24 *Vanderbit Journal of Transnational Law* (1991), 14; J Holmes, "European Community Law and the Cultural Aspects of Television", in R Craufurd Smith (ed), *Culture and European Union Law*, (Oxford University Press, 2004), 169.

[123] Article 4 of Council Directive 89/552/EEC.

competence. When the EU brought the defence of the TWF to the external arena[124] additional concerns mounted among the Member States, who worried about a further extension of the EU power in the cultural sector. It is, then, understandable that in such a fired climate the Commission's proposal within the GATS negotiations for a special treatment of cultural services including minimal liberalisation commitments encountered the opposition of the most conservative States. The mixed agreement condition, existing at the time of the negotiations, entitled each Member State to a veto right. Through this veto, protectionist States like France (and a few others) could heavily affect the status of the negotiations and re-direct the EU position towards a very conservative approach.

The reforms brought by the Lisbon Treaty has strengthened the Union competence on external trade and *should* overcome the problems deriving from the requirement of joint participation in agreements coping with the cultural and audiovisual services. Indeed, the new article 207 TFEU on the common commercial policy no longer contains references to shared competence and the joint participation of Member States and the EU. The whole CCP now falls within the exclusive competence of the Union, including cultural and educational services. But are the interests of the Member States in trade in "sensitive sectors" preserved (and if so, how) under the current Lisbon frame? According to the interpretation of the Court of Justice, the underlying purpose of former art. 133(6) ECT was to "*allow the interest of the [Union] in establishing a comprehensive, coherent and efficient external commercial policy to be pursued whilst at the same time allowing the special interests which the Member States might wish to defend in the sensitive areas identified by that provision to be taken into account*".[125] Article 133(6) was, then, a safeguard clause in specific cases in which different interests of the EU and of the Member States might be involved, like in the case of culture and trade in which the EU pursues the objectives of the CCP and the Member States may worry about the appropriate protection of cultural diversity. Under current article 207 TFEU, paragraph (4) now replaces this safeguard clause by introducing the requirement of the unanimity vote for the Council's decisions concerning cultural and audiovisual services, when the

[124] As Bruno de Witte points out, "*the European content requirement, while enacted within the framework of an internal EC policy instrument, is obviously also a measure of external trade policy"*. B de Witte, above (n **Error! Bookmark not defined.**).
[125] Opinion 1/2008 on agreement amending the EC's schedules of commitments under the GATS, para 136.

Union's cultural and linguistic diversity is at risk. Indeed, Article 207(4) TFEU states that "*the Council shall also act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; and in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them"*. Through the unanimity voting in the Council, Member States can still play a relevant role in decisions concerning cultural matters. Nonetheless, it should be noticed that unanimity is not the rule in all the agreements relating to the sensitive service sectors, but is rather the exception to the general qualified majority rule. Indeed, unanimity applies only when the agreement risks jeopardising the "*Union's cultural and linguistic diversity*". Considering that Article 207(4) does not give further indications, new difficulties may then arise to identify in which cases, according to whom and which standards, an agreement may imply risks for cultural and linguistic diversity. It is plausible that a Member State requesting unanimity will have to demonstrate the risks for cultural and linguistic diversity. In all cases, if other Members do not find the argument presented persuasive enough, they may reject the request and proceed with the qualified majority voting.

Overall, the possibilities for a veto opposing a decision involving cultural issues are reduced in the post-Lisbon framework. Hence, one may question whether the protection of Member States' cultural diversity and cultural-related interests involved in trade negotiations is appropriately ensured within this new frame. Although at first glance the answer seems to be a negative one, two considerations shall be made. The first one takes into account some procedural aspects, in particular the fact that the exercise of the new external trade competence may still take place through mixed agreements. As Marise Cremona comments, Article 207(4) is a new attempt to resolve the balance between the Union interest in a "comprehensive, coherent and efficient" external commercial policy and the special interests of Member States in the sensitive sectors, but it does not fully solve the problems of complexity existing under former Article 133(6) ECT.[126] Indeed, a situation involving more and different interests at stake, like a trade agreement embedding audiovisual or

[126] M Cremona, "Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon", (2010) 35:5 *European Law Review*, at 689.

cultural services provisions, may still involve the participation of the Member States to the negotiations by requiring the adoption of a double legal basis. In effect, while the Court's approach shows a preference for the choice of one single legal basis, in agreements pursuing several objectives that are inseparably linked and where it is not possible to assess whether one is secondary or instrumental to another, a dual legal basis may exceptionally be admitted.[127] This may be the case of horizontal agreements relating to trade in cultural fields, or in other sensitive sectors for which is very difficult to apply the gravity test in order to assess what objective and scope of the agreement is predominant. For instance, the Free Trade Agreement concluded between the EU and South-Korea in 2010, including – among others – provisions related to transport, trade in cultural services, intellectual property and a protocol on cultural cooperation, has been adopted on multiple legal bases, such as Article 207 TFEU, Article 167(3) TFEU for culture, and Articles 91 and 100(2) in conjunction with Article 218(5) TFEU for transport.[128] Therefore, the EU-Korea FTA and the Cultural Protocol annexed to it have been jointly negotiated by the EU and its Member States. In more general terms, mixity in external commercial agreements can still apply for those agreements involving different objects and in which different interests of the Member States and the EU may be at stake and when is difficult to apply the predominant purpose analysis. So, in these cases unanimous voting does not seem to be a possible alternative to joint participation,[129] and Member States can still try to protect their interests through participating in "trade in culture" negotiations. On the other hand, as AG Kokott notices "*the more players there are on the European side at international level, the more difficult it will be to represent effectively the*

[127] Opinion 1/2008, see para 23 in which the Court states that the choice of a dual (or multiple) legal basis is an exception.

[128] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, on the other part (2011/265/EU). It is worth to recall that "transports" is another trade sector for which special rules apply, as established under Article 207(5) TFEU. The FTA with Korea and the Cultural Protocol annexed to it will be further explored in the following part of this chapter.

[129] In Opinion 1/2008 the Commission argued that unanimous voting in the case of horizontal agreements is an alternative to joint participation, but the Court disagreed and specified that a rule which prescribes the manner in which competence is to be exercised is to be distinguished from a rule specifying the nature of that competence. (Opinion 1/2008, para 141-142). As Marise Cremona points out, Article 207 TFEU relies upon a rule which prescribes the manner in which the competence is to be exercised to protect the interests of the Member States (rather than the nature of the competence), one may argue that a standard centre of gravity test should be used to determine when the special voting rules will apply. But this seems to be very unlikely because of the difficulty to apply a case-by-case analysis centred on the purposes and objectives of the agreement at stake. See: M Cremona, "Balancing Union and Member State interests: Opinion 1/2008", above (n 126), 688-690.

interests of the [Union] and its Member States outwardly, in particular vis-à-vis significant trading partners".[130] In mixed-agreement negotiations, the risk is that "individual Member States can obstruct or protract negotiations with non-member countries in order to secure concessions for themselves.[131] So, in the case of negotiations involving trade aspects related to the cultural and audiovisual sectors, more protectionist Member States can still advance their specific requests and influence the outcomes of the negotiations. Lastly, it should be recalled that if Member States fear that the new extended trade competence may erode their national competences, Article 207(6) TFEU recalls that the exercise of the competences conferred by Article 207 in the field of the common commercial policy "*shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization*". This paragraph under article 207 may sound quite odd, because we know that the Union shall act in the limits of its conferred powers. However, this additional "safeguard alarm bell" may be connected to the changes brought by the Lisbon reform to the CCP competence, and which may affect the cultural sector (and thus the cultural competence of the Member States). The new wording of article 207 extended the scope of the (post-Lisbon) CCP, as confirmed in the recent decision *Conditional Access Services*.[132] In this case the Court annulled the decision to sign the European Convention on the legal protection of services based on, or consisting of, conditional access[133] because of an incorrect legal basis (namely, the legal basis choose by the Council was article 114 TFEU).[134] Relying on the fact that the European Convention on protection and conditional access of services is international agreement dealing also with criminal sanctions against unlawful activities, and therefore involving judicial cooperation and measures of a criminal law nature, and that the aim of the Convention is linked to the internal market policy, the Council - supported by some Member States - argued that

[130] Opinion of the AG Kokott in *Commission v Council* (C-13/07), delivered on 26 March 2009, para 72.
[131] *Ibidem*, para 73.
[132] Case C-137/12, *Commission v. Council*, (European Convention on Conditional Access Services) [2013].
[133] European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access, signed in Strasbourg on 24 January 2001.
[134] The contested decision is Council Decision 2011/853/EU on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access.

article 114 TFEU was the right legal basis for the decision. Yet, the Court retained that the European Convention has an international dimension, because "*a ban on the export of illicit devices to the European Union concerns the defence of the European Union's global interests and falls, by its very nature, within the ambit of the common commercial policy*".[135] Therefore, the correct legal basis for the adoption of the Convention is article 207 TFEU. In Conditional Access Services, the Court pointed out that the existence of internal legislation similar to an international agreement adopted on the basis of Article 114 TFEU does not affect the competence to conclude the international agreement on the basis of article 207 TFEU if the focus of that agreement is outside the borders of the EU. This is to say that international agreements can be concluded on the basis of the internal market when the agreement predominantly regulate internal trade, whereas article 207 TFEU can be used for agreements that predominantly regulate external trade. In relation to previous case law, the Court seems generally less concerned about the potential for Article 207 TFEU to encroach upon other competences and more willing to extend the scope of the CCP, as a result of Treaty amendments.

3.2) Constitutional issues: balancing trade and cultural objectives

The second consideration refers to some constitutional aspects, namely the balancing between the CCP objectives under Article 207 TFEU and the cultural objectives under Article 167 TFEU. The analysis above on the division of competences and procedural aspects to exercise the trade in cultural services competence served to show that Member States still have some mechanisms to safeguard their cultural interests. Nonetheless, we should not forget that the protection of cultural diversity is a constitutional objective of the Union, recognised by Article 167 TFEU and strengthened by the ratification of the UNESCO Convention on Cultural Diversity. In the field of "trade in culture" two different policy objectives compete: on the one hand, the Union shall pursue the objectives of the common commercial policy as established under Article 207(1) TFEU; on the other hand, the protection and promotion of cultural diversity should be taken into account while realising trade objectives, as required by the clause of integration included in Article

[135] C-137/12, *Commission v. Council,* para 69.

167(4) TFEU.

According to Article 207(1) TFEU, "*the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*". With regard to this last sentence, we just recalled that the protection of cultural diversity is among the objectives of the European Union. Further, among the general objectives of the Union's action, Article 3(3) TEU recalls that the Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Therefore, the CCP shall be conducted in such a way to take into account the respect and the promotion of cultural heritage and linguistic diversity (and not only European cultural and linguistic diversity, but the world's cultural diversity as we saw in Chapter 2). For this purpose, the clause of integration embedded in Article 167(4) TFEU may become useful. Indeed, Article 167(4) requires the EU to take into account cultural aspects in implementing all its policies, internal and external. By consequence, when acting within the framework of the WTO, or other multilateral and bilateral trade contexts, the Union should always balance between trade interests and the protection and promotion of cultural diversity. More precisely, the CCP shall be conducted in a way that does not threaten cultural diversity, but rather promotes it. Trade and cultural objectives should be seen as complementary. From this perspective, it can be observed that Article 167 TFEU does not directly affect the division of competences between the EU and the Member States in external trade, yet it affects the way these competences should be exercised.[136]

In the light of these considerations it can be ascertained that the European fight for the cultural exception under WTO is in harmony with the implementation of Article 167(4) TFEU and the attempt to find a balance between trade and culture.[137] The EU defence of its *acquis* in the audiovisual sector has been attacked from outside – namely from the US – for being an attempt to close its external trade frontiers and

[136] B de Witte, above (n 33), at 253.
[137] *Ibidem*.

as a form of misguided protectionism, rather than a strategy for genuine cultural purposes. If Europe's economic and competition interests certainly cannot be *a priori* excluded, it should be observed that the EU action in the audiovisual sector is bound by the respect of its internal allocation of competences and the obligation to achieve the objectives of the Treaties, among which there is the protection of cultural diversity. Further, the EU ratification of the UNESCO Convention for the protection and promotion of the diversity of cultural expressions seems to be in line with the overall EU Treaties' objectives, and has strengthened the acknowledgement to carry out a trade policy that is complementary to cultural goals. In this regard, it is interesting to note that complementarity between trade policy and the objectives of the 2005 UNESCO Convention is also mentioned in the 2010 Commission Communication "Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy". More precisely, the Commission states that further liberalisation in the services sector should be obtained whilst maintaining objectives in line with the 2005 UNESCO Convention on cultural diversity.[138] The 2010 Commission Communication places trade at the heart of the external dimension of the European strategy for smart, sustainable, and inclusive growth (European 2020 strategy)[139] and focuses on the benefits that can derive from more opened markets. It also sets bilateral agreements as an important element to complement the multilateral level. In so doing, the Commission states that the EU will deliver balanced free-trade agreements – which should initiate improvements in social inclusion, both around the world and within the EU. Therefore, the EU will employ a differentiated approach depending on the level of development of third partners. Further, this trade strategy will pay systematic attention to coherence with development policies – such as poverty eradication – and to complementarity between the EU's internal and external policies as a whole.[140] Linking this document back to the notion of sustainable development discussed in Chapter 2, it seems that the idea underpinning development is still based on increasing growth – albeit smart, inclusive and sustainable growth – and, for this purpose, trade still occupies a central place in the EU external dimension.

[138] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy", COM (2010) 612 final, at 5.
[139] Communication from the Commission "Europe 2020: A strategy for smart, sustainable and inclusive growth", COM (2010) 2020 final.
[140] COM (2010) 612 final, at 3-4.

The strategy is oriented towards achieving more liberalisation in all trade sectors, including services; and it is precisely in connection with the established goal to seek greater openness for the European services providers from main developed and emerging trade partners that cultural considerations find a space. So, while culture is not specifically addressed as a possible strategic sector in the 2010 Commission Communication on trade, the role of cultural and audiovisual products as a relevant sector of trade in services does seem to be acknowledged, at least as far as the 2005 UNESCO Convention is concerned. Finally, it seems that services market openings must be balanced with the respect and promotion of cultural diversity.

Hence, one might wonder whether the protectionist measures desired by some Member States – such as the full exclusion of cultural services from trade agreements through the affirmation of the "cultural exception" – are the appropriate means for this purpose, or whether economic and cultural goals may sometimes be achieved through the same instruments. The critical remarks about cultural exceptions expressed in the former section may question whether the EU "pro-exception" approach is promoting a sectoral cultural strategy that can entail negative effects on the global "culture and development" debate rather than positive ones. We saw that cultural exception has lost its power to enchant and is now perceived as a negative rather than a positive means for promoting cultural diversity. The focus has shifted from controlling and limiting the circulation of cultural products to their enhancement as a way to foster cultural exchanges and promote creativity and diversity, as well as economic growth. Further, it has been argued that cultural exception can undermine cultural pluralism and the full enjoyment of other fundamental freedoms (the right to information, freedom of expression, etc.), which is in contrast with the social function of culture as a means to spread and improve the respect of human rights and values such as tolerance and mutual understanding. A rigid EU application of cultural exception to external trade relations may, then, prove rather unpopular.

The EU seems to be aware of this and in the last decades it changed its approach by making the protection of cultural diversity its new flagship. In 1999, in the Communication to the Council and the European Parliament expressing the EU approach to the WTO Millennium Round, the Commission quoted cultural diversity

among the priorities of the new international debate.[141] In 2003, during the WTO Ministerial Meeting held in Cancun (Mexico), the EU reaffirmed its commitment to reach further liberalisation and market opening to improve the WTO functioning and increase the integration of developing countries in the world trade system. However, the EU clarified that it did not intend "*to seek general deregulation or privatisation of sectors where principles of public interest are at stake*", and that "*the EU is also committed to defending the right of WTO members to promote cultural diversity*".[142] Combining the preservation of cultural diversity (art. 167 TFEU) with trade goals (art. 207 TFEU) seems to be an unquestioned element of the new external trade strategy of the Union. The ratification of the UNESCO Convention on Cultural Diversity has increasingly strengthened the external action in the cultural sector and contributed to the international advocacy for the world's cultural diversity. In fact, as emerged from the analysis of the Convention, one of the central elements of this text is the integration of culture in all development policies and the commitment of all Parties to boost cultural exchanges through the mobility of cultural goods, persons and co-operational projects. Let us now explore in further depth the role undertaken by the European Union during the negotiation of the UNESCO Convention, and what constitutional issues emerged from such ratification.

3.3) The EU ratification of the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions

3.3.1) Some constitutional remarks concerning the negotiations

The EU ratification of the UNESCO Convention on the Protection and Promotion of the Expressions of Cultural Diversity seems to have strengthened the Union's international commitment to protect and promote cultural diversity. Yet, the EU ratification of the 2005 UNESCO Convention – an instrument focusing on cultural matters – raised some concerns among the Member States, which questioned in particular whether there was a real competence of the Union to become a party to such a Convention. To address this question, we should return to the analysis of the

[141] European Commission, Communication to the Council and the European Parliament, The EU approach to the WTO Millennium Round, COM (1999) 331 final, 8 July 1999.
[142] WTO Ministerial Meeting held in September 2003 in Cancun (Mexico), source http://ec.europa.eu/avpolicy/ext/multilateral/gats/gats2000/consult_1999/index_en.htm.

text of the Convention above, which shows that the UNESCO Convention is not only about culture. Indeed, the Convention is also about trade and competition law, it overlaps with migration regulations, and it deals with international development cooperation. Therefore, it is clear that many provisions established in the UNESCO Convention are likely to interfere with the Union law, both on the internal and external level. In particular, as far as it concerns the enhancement of the circulation of cultural workers and artists and the facilitation of access to global markets for works from developing countries, obligations under the Convention can affect internal market rules (namely, provisions concerning the free movement of goods, services and workers under Title II and Title IV) as well as provisions concerning immigration under Title V. Moreover, it emerged that the UNESCO Convention is inclined towards certain forms of state intervention in the audiovisual sector and, more generally, in the area of cultural industries. As we know, the regulation of state aid is a matter of competition law and falls within the exclusive competence of the EU; further over the last two decades the EU has taken several initiatives to support Member States' cultural industries (e.g.: TWF Directive and the Media Programme). In addition, the Convention can affect the European cultural policy and the cultural aspects of the development policy.[143] Some of the issues involved fall within the area of the EU's exclusive competence, such as the common commercial policy (Article 207 TFEU), others fall within the area of shared competence, such as cooperation to development (art. 211 and art. 212 TFEU): therefore, the EU was entitled to negotiate the Convention. Further, as the majority of the EU Member States were taking part in the negotiations of the UNESCO Convention, the Commission estimated that there was an urgent need to preserve the *acquis cammunautaire* as well as the unity of its representation in the framework of such negotiations.[144]

Considering the manifold objects covered by the Treaty and the fact that most of these fell within the area of shared competences, the Convention was adopted on the choice of multiple legal basis – namely former Articles 133, 151, 181 and 181a

[143] Recommendation from the Commission to the Council to authorise the Commission to participate, on behalf of the Community, in the negotiations within UNESCO on the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, 1.09.2004, SEC (2004) 1062 final, at 2-3.

[144] Communication of the Commission to the Council and to the European Parliament of 23 August 2003 COM (2003) 520 final; Recommendation by the Commission to the Council to authorise the Commission to participate on behalf of the Community in the negotiations within UNESCO, doc. 12063/04 CULT 61.

ECT – and negotiated as a mixed-agreement on the basis of former Article 300 ECT (now Article 218 TFEU).[145] Nonetheless, the EU assumed a leading role in the negotiations and acquired new and greater visibility on the international scene: indeed, it was the first time that the EU did not sit as an observer within a UN Agency, but obtained the right to speak, propose and amend in an executive organ of the UN type (the drafting and negotiation of the UNESCO Convention was undertaken in the UNESCO Executive Council).[146] It is also quite significant that UNESCO modified its internal rules for negotiating within its seat expressly for the European Union. In fact, according to the Statute of UNESCO, only sovereign States can become members and participate in the General Assembly of UNESCO. Hence, a provision allowing the participation of regional organisations was specifically introduced in the text of the Convention (namely: art. 27) in order to permit the EU to participate in the negotiations and drafting of the Convention on Cultural Diversity. This shows a certain acknowledgement of the EU's influence and relevance as an actor of international law, capable to influence global processes and inspire other actors' initiatives. The participation of the EU in the negotiations of the Convention was, indeed, seen as a positive element by other UNESCO Members involved in the process: first, because it could give greater visibility to the instrument, boost its adoption and contribute worldwide to raise awareness about cultural diversity; and second, because it could counterbalance the opposition of another major international actor such as the US.[147] On the other hand, several Member States felt quite frustrated by the new leading role assumed by the Commission during the negotiation and saw the new visibility acquired by the EU within UNESCO as a threat to their national competence in the field of culture and education.[148] In order to reassure Member States, a Code of Conduct was adopted at the time of the negotiations,[149] establishing that the Commission would only negotiate those areas falling within its exclusive

[145] Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/EC).
[146] P J Kuijper *et al*, *The Law of External Relations Cases Materials, and Commentary on the EU as an International Legal Actor,* (Oxford University Press, 2013), 159.
[147] Source: interview with the former legal adviser of the DG Culture and Education, conducted at a meeting during the 3rd Intergovernmental Committee on the Implementation of the 2005 UNESCO Convention, held at UNESCO Headquarter, 7-11 December 2009, Paris.
[148] Source: interview.
[149] Code of Conduct between the Council, the Member States and the Commission for the participation of the Community and its Member States in meetings regarding the implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 28 January 2005, (5518/05 CULT 3).

competence. More precisely, point 3 of the Code clarifies that the Commission will express, on behalf of the Union, common positions on matters in relation to: the free movement of goods, persons, services and capital; common rules on competition, in particular concerning aid granted by states; the internal market; Common Commercial Policy; legislative acts taken under title V relating to visas, asylum, immigration (subject to the special position of the United Kingdom, Ireland and Denmark under that Title); measures taken in the sphere of development cooperation, without prejudice to Member States' capacity to express positions on measures taken under their national competence. Aspects of cultural policies, education, cultural awareness issues concerning international cooperation in the field of culture with developing countries (except for trade related issues) and other national domains still remain within the competence of Member States. Despite the clear distinction of competences made in the Code (which also serves as a map for the other parties to the Convention to understand whether the Commission or the Member States are responsible for a particular obligation), with culture being such a cross-cutting theme, it seems quite difficult to apply a clear-cut distinction between initiatives that are purely "cultural focused" and other dealing with "trade and culture" or "culture and cooperation". Further, the implementation of certain provisions of the UNESCO Convention depends upon a high level of coordination between the Member States and the EU in delicate areas such as immigration and visas regulations. Some commentators have argued that the implementation of the UNESCO Convention by the EU can contribute to the slow process of erosion of State's competence and sovereignty. [150] It is undeniable that the ratification of the UNESCO Convention has strengthened the Union competence in the cultural field, in particular on the external level. While still leaving considerable autonomy to its Member States in defining their own cultural policies and cultural priorities, the Union has emerged as the common voice of its Member States in the world "trade and culture" arena.[151] Nevertheless, the mechanisms set out under Article 207(4) TFEU and the relevance of the principle of conferral stressed by the Treaty of Lisbon should preserve and guarantee Member States' sphere of competences. Further, as we saw above, within the multilateral trade

[150] D Ferri, "EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks", 3 *European Diversity and Autonomy Papers* – EDAP (2005), 11, (available at www.eurac.edu/edap).

[151] B de Witte, "The Value of Cultural Diversity in European Union Law", in H Schneider and P Van Den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, (Intersentia, 2008), 239

frame, the institutional framework still allows Member States to exercise a great influence in defining the EU position on international "trade and culture" commitments. The major role for the EU to be played in the cultural field seems than to be referring to the protection and promotion of cultural diversity in external relations.

This observation drives us to some considerations concerning the scope pursued by the Union in joining the negotiation of the 2005 UNESCO Convention. It is obvious that the first concern of the EU was to protect the integrity of its internal *acquis.* This is confirmed by the "unilateral declaration" contained in Annex 2 of the Council Decision that ratifies the Convention, when it states that "*Member States of the [EU] which are party to the Convention in their mutual relations apply the provisions of the Convention in accordance with the [Union]'s internal rules and without prejudice to appropriate amendments being made to these rules.*"[152] Such a declaration, unilaterally adopted on behalf of the Union, produces a sort of "disconnection effect" of the EU Member States from the Convention regime: when they apply the Convention in their relations, they must firstly fulfil their EU obligations. It is worth noting that this kind of "unilateral declaration" is a legal technique often used by the EU as an alternative to disconnection clauses in the case of mixed agreements or multilateral conventions.[153] The scope of this declaration is to affirm the supremacy and autonomy of EU law when the application of a Convention may interfere with the EU internal legislation; thus, unilateral declarations produce effects similar to a more classical disconnection clause.[154] As Marise Cremona clearly explains, "the disconnection clause does not depend on a conflict existing between the Convention rule and [Union] law; it is there to protect the autonomy of the Union

[152] Annex 2 to the Council Decision, *supra* (n 141).
[153] The EU does not make a constant use of unilateral declarations and disconnection clauses. So, we can find them also in agreements in which the EU is the only signatory part, or in which only the Member States are parties. See for instance Article 2 of the Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (2003/93/EC).
[154] It is worth to note that there is not a consistent developed literature on the "disconnection clause". The use of the "disconnection clause" is commonly discussed regarding the potential conflicts between treaty regime and EU Law, however, the notion is not EU-specific but it refers to all possible provisions in treaties that allow for two or more (but not all) contracting parties of the agreement to among themselves apply rules differently than those agreed in the adopted treaty. Further on this: M Cremona, "Disconnection Clauses in EU Law and Practice", in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited*, (Hart Publishing, 2010), 160-86.

legal order *per se*."[155] Klabbers observes that the disconnection clause can also be seen as a mechanism for the protection of the Union *acquis* from possible conflict with international law norms,[156] by preventing a Member State from being put into a position of having to choose whether to apply, in its relation with another Member State, an EU law norm or a provision of another international agreement to which they are both parties. In this sense, the disconnection clause (or the unilateral declaration) adds new strength to the application of the principle of loyal cooperation (Art. 4(3) TEU); or, in other words, it can be considered an expression within an international law context of the loyalty obligation established within the Union legal system. The insertion in the UNESCO Convention on Cultural Diversity of a unilateral declaration pursuing this scope shows that the preoccupation with preserving the integrity of the *acquis communautaire* has certainly determined the EU engagement in the negotiations. This should not be surprising: to the contrary, it seems to be responding to the need to pursue coherence and consistency on the external level and contributing to strengthen the effects of the duty of sincere cooperation in mixed agreements.[157] Further, the fact that the EU was mostly concerned with protecting the *acquis communautaire* from possible interference deriving from the Convention's implementation does not mean that the protection and promotion of cultural diversity is not among the *rationales* underlying the EU's ratification. In its Recommendation to the Council, the Commission "*considers that it is important for the Community and its Member States to confirm at international level their commitment to cultural diversity. It considers that a common European Union approach is necessary in order to contribute effectively to the development of a world-wide strategy for the safeguarding and the promotion of cultural diversity*."[158] The Union has therefore clearly expressed its will to effectively contribute to the shaping of an international strategy for cultural diversity. Whether and how the EU will effectively contribute to this objective, and if its action is coherent with the overall goal of the Convention to mainstream culture as a vector of development is

[155] M Cremona, *ibidem*, at 173.
[156] J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2008).
[157] It is interesting to remark that in the case of the UNESCO Convention on Cultural Diversity, EU Member States opposed the insertion of a disconnection clause and preferred to reduce it to a disconnection declaration. Comparing the unilateral declaration annexed to the UNESCO Convention, with the declaration embedded in Article 2 of the Council Decision on the Hague Convention (above n 153), it can be noticed that the first one acts more on a political level, whereas from the second one derives a binding legal obligation upon Member States.
[158] References above quoted (n 139).

another issue, which will be discussed through the analysis of the initiatives undertaken by the EU to implement the Convention (section 4 of this Chapter).

3.3.2) Assessing the impact of the UNESCO Convention on the EU "culture and trade" strategy

The entry into force of the 2005 UNESCO Convention within the Union's legal order brought an added value to the constitutional protection and promotion of cultural diversity as a *per se* value within and outside the EU. In general terms, it seems that the Convention gives further strength to the interpretation of the Treaty provisions concerning the protection of cultural diversity. This is, at least, what can be deduced by the *UTECA* decision (discussed in Chapter 2), so far the only case in which the CJUE made reference to the UNESCO Convention. In her Opinion to the case, AG Kokott refers to Article 20(1)(b) of the Convention to remark that "*the [Union] and the Member States that are Contracting States to the UNESCO Convention have undertaken to take that convention into account when interpreting and applying other treaties, that is to say inter alia when interpreting and applying the [EU] Treaty*".[159] Indeed, both the Court and the AG referred to pre-existing Treaty rules and case law allowing for the protection and promotion of cultural diversity which can justify restrictions of fundamental freedoms,[160] nevertheless the wording of AG Kokott suggests to the Convention is being used as an additional argument to interpret them and to ensure the protection of cultural diversity as a legitimate aim.[161]

The ratification of the Convention also represented a significant step towards a greater acknowledgement of culture as a vector of development, which brought some changes in the EU strategy concerning "culture and trade". We saw, indeed, that the UNESCO Convention looks at culture and trade as mutually supportive elements of a broader development strategy. In particular, enhancing cultural exchanges through the mobility of cultural goods, services and artists is a core obligation. Further, access to markets for cultural goods and services originating from developing countries should

[159] Opinion of AG Kokott to *UTECA* case, delivered on 4 September 2008, para 99. References of the *UTECA* case are quoted in Chapter 2 (n 133).
[160] AG Opinion, para 100.
[161] M Ličková, "The CDCE in the European Union – a mixed agreement and its judicial application", in L Richieri (ed), *Cultural Diversity in International Law,* above quoted (n 96).

be facilitated through preferential treatment. The Convention promotes, then, a balanced open approach to the integration of culture in trade relations, which should be combined with the principles of sustainable development. So, what seems concretely strengthened by the ratification of the Convention is the international commitment of the Union to foster cultural exchanges and include culture in all developmental policies. Such engagement of the EU was already established in the framework of its cooperation to development policy. However, the ratification of the UNESCO Convention reinforced this engagement and enriched it with new elements, like the economic function of culture. By embracing the new international trend that favours the circulation of cultural products and operators, the Union shifted from a rather protectionist approach towards a more open one in the field of culture in trade. The real challenge is, then, to pursue this new approach through a coherent way, which respects the internal allocation of competences and consistency with the other EU policies, in particular with the principles underpinning the EU trade and development policy.

Speaking in terms of concrete actions implementing the obligations deriving from the Convention, following its ratification the EU adopted the 2007 Agenda for Culture, which sets ambitious goals concerning the integration of culture and the protection and promotion of cultural diversity in the Union's external relations, and in particular the external economic relations.[162] Hints of the new integrated approach promoted by the Convention can be found in the Council Conclusions on Intercultural competences, a policy document adopted in the aftermath of the EU ratification of the UNESCO Convention.[163] The document, while referring to the importance of strengthening intercultural competences, sets a comprehensive agenda for the Union and its Members' actions in the areas concerning culture, education, youth and the audiovisual sector. This document shows a full understanding of all the possible linkages of culture with the societal dynamics. Among other things, the Council Conclusions exhort the promotion of media and audiovisual content that is culturally rich, diverse, and informative for all individuals by means of – *inter alia* – encouraging co-productions at European, national and regional levels.[164] Great emphasis in given to cooperation in the cultural audiovisual sectors – and more

[162] References quoted in Chapter 2 (n 174).
[163] Council conclusions of 22 May 2008 on Intercultural Competences, (2008/C 141/09).
[164] *Ibidem*, section D.

broadly in the field of cultural industries – as a means to foster cultural exchanges.[165] This is confirmed by the fact that in the years following the ratification of the Convention, the Union's major efforts to implement it dealt with the integration of specific protocols or annexes on cultural cooperation to new trade agreements concluded on the bilateral level. In 2008 the conclusion of the first Economic Partnership Agreement with the CARIFORUM States included an *ad hoc* protocol on cultural cooperation.[166] Since then, the EU started to increasingly integrate special sections or protocols concerning cultural cooperation within the frame of its bilateral relations. Indeed, a cultural protocol was also attached to the Free Trade Agreement with South Korea, and a similar one to trade agreements concluded with the Andean Countries. The next section is dedicated to the analysis of these protocols and the provisions concerning culture and trade in the EPA and FTAs agreements.

Finally, it should be noticed that although the Convention does not establish cultural rights and its focus is not on human rights, it affirms that the protection of cultural diversity as a common good and common concern for humanity passes also through the enforcement and the full enjoyment of cultural rights. More specifically, the Convention touches upon cultural rights, by recognising their fulfilment as a central element for the full implementation of the Convention.[167] Therefore, indirectly, the Convention should strengthen the EU's engagement in promoting such rights within and outside the EU. It is also desirable that the European Union's initiatives to implement the Convention's obligations – falling under its competences – would contribute to spreading the respect of human rights, such as freedom of expression and communication, and more specific cultural rights, such as access to culture and the rights of minorities or other ethnic groups.

---

[165] See also 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 Brussels, 20 November 2008. Here the Council reaffirms that "*cultural exchanges and cultural cooperation, including in the audiovisual sphere, can help to establish relations based on partnership, strengthen the place and the role of civil society, foster processes of democratisation and good governance and promote human rights and fundamental freedoms*".

[166] PROTOCOL III On cultural cooperation of the EPA between the CARIFORUM States, the EC and its Member States, OJ (2008) L 289. This Protocol was expressly adopted under the umbrella of the implementation of the 2005 UNESCO Convention, as it is stated in the Preamble of the Protocol.

[167] Y Donders, "The Cultural Diversity Convention and Cultural Rights: Included or Ignored?", in T Kono and S Van Uytsel (eds), *The Convention on the Promotion and the Protection of the Diversity of Cultural Expressions*, (Intersentia, 2012), at 10 (available at SSRN: http://ssrn.com/abstract=2015258).

4) Culture and trade under the bilateral agreements: the season of enhanced cultural cooperation

In this section I will analyse the practice of negotiating Cultural Cooperation Protocols (CCP) within the frame of bilateral trade agreements, which started with the first Cultural Protocol to the EPA with the CARIFORUM signed in 2008, and has been extended to the following bilateral agreements. This practice is grounded on the *2008 Council Conclusions on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States* and promotes the principle of the UNESCO Convention on Cultural Diversity and its implementation in the framework of EU relations with third countries.[168] The 2008 Council Conclusions call upon the Member States and the Commission, *within their respective spheres of competence and with due regard for the principle of subsidiarity* (emphasis added), to pursue the following objective: *"strengthening the place and the role of culture in the policies and programmes conducted within the framework of external relations and promoting cooperation with third countries and international organisations with responsibility in the field of culture, in particular UNESCO and the Council of Europe, in order to improve the quality and diversity of the cultural activities carried out, and, more generally, to contribute to the attainment of external policy objectives and to sustainable development"*. In order to set up a comprehensive and consistent approach to reach this goal, the Council needs to draw up a European strategy for incorporating culture *consistently* and *systematically* in the external relations of the Union. Such a strategy should contribute to the complementarity of the Union's activities with those of its Member States; establish specific regional and countries sub-strategies with a view to clarifying objectives and approaches in the area of cultural relations; and be tailored to the features and sustainable development prospects of third countries' cultural sectors, to the state of cultural exchanges with the Union and to their economic and social situations.[169] It is interesting to note that the systemic integration of culture into trade relations is framed within the broader external trade strategy and is in line with its objectives, so as to be coherent with other EU policies. Indeed the Council asks for an integrated approach that takes into account principles of sustainable development, local features and needs as well as regional specificities in the cultural sector. The inclusion of a tailored "culture and

[168] Point 6.A(2) of the 2008 Council Conclusions, references above quoted (n 161).
[169] Point B, 2008 Council Conclusions.

trade approach" in agreements with an economic integration dimension is also in line with the new trade strategy approach of the EU, which sees regional and bilateral agreements as an important component of the Union external trade relations, to be carried on as complementary to the multilateral strategies, and as a tool to promote sustainable development.[170] Further, in order to ensure also vertical coherence, the Commission and the Member States must act within their respective spheres of competence and with due regard for the principle of subsidiarity.

Cultural Protocols constitute an attempt to foster cultural exchanges through development cooperation, while overcoming the "culture and trade" dichotomy. In addition, they can be seen as an alternative to the bilateral strategy of liberalisation of cultural and audiovisual sectors set up by some countries.[171] Despite their good intentions and the enthusiasm through which the Commission introduced them as a tool to implement the UENSCO Convention, Cultural Protocols received several criticisms. Some criticisms came from the Member States and referred to the inadequacy of the "one size fits all" approach initially adopted by the Commission to draft the protocols and in contrast with the original Council indications. Other criticisms were raised by commentators and major stakeholders and concern the lack of a comprehensive approach to the cultural sector, as well as the legal weakness of most provisions.

4.1) The Economic Partnership Agreement between the EU and the CARIFORUM and its Cultural Protocol

4.1.1) Contextual background: the Economic Partnership Agreement (EPA)

Before exploring the content of the first Cultural Protocol it is useful to say a few words about the contractual context in which it has been adopted. The negotiations of the Economic Partnership Agreement (EPA) with the CARIFORUM have initiated the new Post-Cotonou era of cooperation agreements between the EU and third countries, based on reciprocity and more compliance with WTO principles and rules. The EPA was negotiated to supplement the trade provisions of the Cotonou

[170] See Commission Communication "Trade, Growth and World Affairs" above quoted (n 134).
[171] C Soury-Desrosier, "EU protocols on cultural cooperation An attempt to promote and implement the CDCE within the framework of bilateral trade negotiations", in L Richieri Hanania (ed), *Cultural Diversity in International Law,* (n 96), at 211.

Agreement, which governed trade, economic, and development relations between the EU and African, Caribbean, and Pacific (ACP) countries until 2007. The EPA includes provisions covering trade in goods and services, investment and trade related issues (competition, innovation, sustainable development, etc.) between the 27 members of the European Union on the one hand and the 15 members of the CARIFORUM group (CARICOM and the Dominican Republic) on the other. The overall goal of this kind of agreement is to reach a greater level of liberalisation for goods, services, and investment between the two regions. The Union should provide special development support to build the capacity of firms and other entities to take advantage of the market access and other provisions in the EPA. Through these elements, the new generation of cooperation agreements should be able to achieve the goals that the former agreements under the Lomé and Cotonu Conventions could not. In particular, it should make the EU trade agreements with the ACP countries more compatible with the WTO rules, foster deeper integration at the local level, while taking into account the diversity of contexts and needs of the countries and regions, and strongly contribute to the achievement of sustainable development in the area.[172] Indeed, the EPA is built on four pillars: 1) partnership; 2) regional integration; 3) development; and, 4) connection to the WTO. The use of the word *partnership* suggests the idea of a new kind of relationship between North and South: a relationship based on equal weight and free will in terms of influencing the negotiations; and reciprocity in terms of expected results and respect of the obligations to comply with.[173] The goals of eradicating poverty and realising development in the regions are highly connected to the EU commitments under the WTO. The overall idea underlying the EPA is that the progressive removal of the trade barriers and greater liberalisation in all areas will enhance economic development in the region. Such a vision stems from the general assumption that developing economies with open trade regimes spur economic development.[174] Further, in order to promote sustainability, economic development shall be

[172] For a comprehensive review of the EU-ACP EPA: G Thallinger, "From Apology to Utopia: EU-ACP Economic Partnership Agreements Oscillating between WTO Conformity and Sustainability", 12 (2007) *European Foreign Affairs Review*, 499-516.
[173] M Farrell, "A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa", 27:3 (2005) *European Integration*, 263-283.
[174] J Lodge, "A Trade Partnership for Sustainable Development", A Beviglia Zampetti and J Lodge (eds), *The CARIFORUM-EU Economic Partnership Agreement A Practitioners' Analysis*, (2011, Kluwer Law International), at 20.

accompanied by the strengthening of social and environmental standards, the respect of fundamental rights, the rule of law and democracy.[175] In relation to the Cotonou Agreement and the GSP schemes, the CARIFORUM-EU EPA represents a more comprehensive and sophisticated form of application of the principle of integration of sustainable development. In fact, sustainability is not only framed as conditionality for trade preferences, but it is integrated as a goal to be pursued through trade measures (see for instance provisions concerning renewable energy, the transfer of green technology or support for certification and label schemes which favour transition to the green economy and the fight against climate change; as well as provisions on tourism services seeking to promote sustainable tourism).[176]

In spite of all these good proposals, the EPA has been criticised for not bringing any real changes or sustainable development to the regions. Some authors argue that it is rather a new kind of free trade agreement that privileges compatibility with the WTO regime over sustainability.[177] For instance, Mary Farrell claims that the EPA does not build a genuine partnership, contending that the relationship still remains asymmetrical because of the unequal political and economic positions between the parties and the low bargaining power of developing countries. Reciprocity may lead to detrimental outcomes for the ACP markets, which are not yet well established and will have to compete with European products at the local and regional level. In addition, such an agreement is going to overlap with other sub-regional agreements and may undermine the possibility for deeper South-South cooperation and regional integration. On the basis of these considerations, Farrell questions who is really going to benefit from this new generation of agreements and challenges the adequacy of the model of regional integration proposed by the EPA for the African continent.[178]

It is within this controversial framework that the first Cultural Protocol has been adopted and annexed to the EU-CARIFORUM EPA. As far as it concerns

[175] The reference to sustainable development and sustainability widely recurs in the entire text of the CARIFORUM-EU EPA. See, for instance, the Preamble and Part I "Trade Partnership for Sustainable Development". See also Chapter 4 on Environment and Chapter 5 on Social Aspects under Title IV.
[176] See Articles 183-196 in Chapter 4 on Environment and Article 115 under the Section Tourism Services, Chapter 5 under Title II.
[177] Besides M Farrell and G Thallinger above quoted, see also: M G Desta, "EC-ACP Economic Partnership Agreements and the Question of WTO Compatibility: An experiment in North-South Regional Integration Agreements?", (2006) 43 *Common Market Law Review*, 1343; M Cremona, "The European Union and Regional Trade Agreements", 1 (2009) *European Yearbook of International Economic Law*, 18.
[178] M Farrell, *supra* (n 169), 269-275.

cultural provisions dealing with trade aspects, they are also included in the main EPA text, namely under Title II on Investment, Trade in Services and E-Commerce. The underlying principles of the EPA should then apply also to the cultural sector – and in particular to cultural industries. Therefore further liberalisation should be achieved also in the field of trade in cultural services (and namely audiovisual services), pursuing the idea that further liberalisation may contribute to achieve sustainable development: the principle of sustainability will also have to be applied to cultural industries; and the principle of reciprocity should apply to the EU-CARIFORUM relationship in cultural trade. As we will see, things are not exactly like this in all cultural sectors.

4.1.2) Treatment of Cultural Industries in the EPA with the CARIFORUM

The cultural and entertainment services are addressed through two instruments in the EPA with the CARIFORUM: a) through market access commitments by European States for entertainment services from CARIFORUM States that are governed by the rules of the Services and Investment Chapter and the general provisions of the EPA; and b) through a special Protocol on Cultural Cooperation annexed to the EPA.

Market access provisions in the main text of the EPA contribute to extend a certain level of liberalisation to the cultural industries sector. The attempt to reach a further degree of liberalisation in services mirrors the EU commitments under the GATS within the WTO framework. As said in the previous section, the EU and the rest of the WTO members have engaged in the effort to reach further liberalisation in services. Nevertheless, as far as it concerns cultural services – and audiovisual services in particular – no great changes in terms of further liberalisation of the sector have been made. Trade in cultural services still remains a very debated topic, also at the regional level. Taking a brief look at the CARIFORUM-EU EPA provisions concerning cultural services, one may suppose that for the first time the EU further opened the door of its market to Caribbean firms operating in cultural services. In fact, entertainment services are listed among the sub-sector falling within the field of application of Article 83 establishing more favourable conditions for the temporary entry of contractual services suppliers and independent professionals.[179] Yet, the

[179] Article 83.2(29), Chapter 4, Title II "Investment, Trade in Services and E-Commerce" of the

audiovisual sectors still remain outside the framework of broader liberalisation commitments.

As for the recreational, cultural and sporting services, for the first time the EU and its Member States granted legally binding and significant market access to invest in entertainment activities in Europe and for the supply of entertainment services through the temporary entry of natural persons for up to six months (categorised as Contractual Service Suppliers (CSS) under the EPA).[180] Looking at the provisions under the services chapter in the EPA through the lenses of the four modes under the GATS, the EU has liberalised its market to different degrees corresponding to its offer in each of the modes of supply under the WTO. Thus, the margin of preference granted to CARIFORUM countries for cross-border supply (Mode 1), as well as for consumption abroad (Mode 2) are not very significant given the EU listed reservations. More improvements have been reached for Mode 3 on commercial presence: in spite of the fact that the audiovisual services is still exempted, commitments for the other cultural services now cover more EU Members and involve the removal of several national requirements.[181] The area in which the CARIFORUM States gained the highest level of preferences deals with Mode 4 (movement of natural persons). These provisions will be object of analysis in chapter 4; here it will suffice to say that the conditions for doing business in the EU and the requirements to compete with local entertainment service suppliers are now more transparent. In some cases the commitments created new openings for Caribbean service providers in the EU Member States, in others they simply consolidated the existing situations.[182] Overall, considering that entertainment services are usually considered part of the cultural sector, which is a very sensitive sector in many EU

CARIFORUM-EU EPA; and Annex IV F List of Commitments in Services Sectors, Point 10 Recreational, Cultural And Sporting Services (Other than audiovisual).

[180] Provisions and conditions concerning Contractual Service Suppliers (CSS) will be further analysed in chapter 4, dealing with the mobility of artists and cultural workers. Here, it suffices to say that such provisions correspond to Mode 4 under the GATS. CSS are defined as 'natural persons (individuals) of the EU Party or of the Signatory CARIFORUM States employed by a juridical person (company or firm) of that EU Party or Signatory CARIFORUM State which has no commercial presence in the territory of the other Party and which has concluded a bona fide contract to supply services with a final consumer in the latter Party requiring the presence on a temporary basis of its employees in that Party in order to fulfil the contract to provide services'.

[181] K Nurse "The Economic Partnership Agreement and the Creative Sector: Implications and Prospects for CARIFORUM", in A Beviglia Zampetti and J Lodge (eds), *The CARIFORUM-EU Economic Partnership Agreement A Practitioners' Analysis*, (2011, Kluwer Law International), 157.

[182] KEA European Affairs, "Implementing cultural provisions of CARIFORUM-EU EPA. How do they benefit the Caribbean cultural sector?", Discussion Paper N. 118, European Centre for Development Policy Management, June 2011, at X.

states, it is the first time that a more comprehensive offer was made by the European Union in this sector. EPA's cultural provisions concerning the entertainment services give Caribbean companies more legal certainty when entering the European market. However, if the EPA marks a step forward for the enhancement of circulation of the entertainment services, the exclusion of the audiovisual sector from all commitments is quite striking. Article 66(c), under Title II Investment, Trade in Services and E-Commerce, clearly excludes audiovisual services from the field of application of this Title, without leaving room for future opening or negotiations. Another instrument has been set up to address the treatment of the audiovisual sector: the Protocol on Cultural Cooperation, here below presented.

4.1.3) The Protocol on Cultural Cooperation

Annexed to the main EPA, the Protocol on Cultural Cooperation has been adopted with the intention "*to effectively implement the UNESCO Convention and to cooperate within the framework of its implementation, building upon the principles of the Convention and developing actions in line with its provisions, notably its Articles 14, 15 and 16*".[183] The Preamble of the Protocol acknowledges the relevance of the cultural industries and the double nature of cultural goods and services as "*activities of cultural, economic and social value*". It also recognises that the regional integration process supported by the EPA is part of a "*global strategy aimed at promoting equitable growth and the reinforcement of economic, trade and cultural cooperation between the Parties*". By doing so, the Protocol places the contribution that culture can bring to development within a broader and comprehensive framework concerning development strategy. In addition, the Preamble of the Protocol reminds the Parties of the need to take into account, on a case-by-case analysis, "*the degree of development of their cultural industries, the level and structural imbalances of cultural exchanges and the existence of preferential schemes for the promotion of local and regional cultural content*".

The Protocol creates a cooperative framework to improve the conditions governing the exchanges of cultural activities, goods and services and to redress the structural imbalances and asymmetrical patterns which may exist in trade between CARIFORUM states and the EU. By far, the most innovative element of the Protocol

[183] See Preamble of Protocol III on Cultural Cooperation, annexed to the CARIFORUM-EU EPA.

is the inclusion of the audiovisual sector within the scope of application of its provisions.[184] The market access asset granted by the EU in the entertainment sector should, then, be complemented with this Protocol, which provides for bilateral cooperation on all cultural fronts and with special provisions on the audiovisual sector. The Protocol is based on the principle of preferential treatment established in Article 16 of the UNESCO Convention on Cultural Diversity, stating the duty upon developed countries "*to facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries"*. The text of the Protocol is composed of 2 sections: the first one encompassing horizontal provisions, and the second one concerning sectoral provisions.

The horizontal provisions cover issues dealing with the facilitation of cultural exchanges and dialogue through cooperation in all cultural fields.[185] The horizontal strand also addresses the issue of temporary entry for artists and cultural practitioners (Article 3 of the Protocol) and establishes a framework for enhancing technical assistance (Article 4). As for the temporary entry of artists and cultural professionals, the Protocol's rules apply to those who are not involved in commercial activities in the EU and, therefore, are not covered by the cultural provisions contained in the main text. In Chapter 4 I will describe in more depth the content and the limits of the provisions concerning the temporary movement of artists and cultural workers. Here it is worth recalling that, through the frame set by the Protocol, artists and cultural practitioners coming from the CARIFORUM Countries can enter the EU space to collaborate on projects, receive training, learn new techniques, engage in production, etc. Whereas previous EU trade agreements had almost nothing concerning the movement of artists. As for the technical assistance, the Protocol invites the Parties to strengthen their effort to improve technical assistance through different measures, *inter alia*, training, exchange of information, expertise, experiences and best practises, and counselling in elaboration of policies and legislation as well as in usage and transfer of technologies and know-how. This support will include cooperation

[184] Article 1 of the Protocol III on Cultural Cooperation.
[185] Articles 2, 4, 7, 8 and 9 of the Protocol, concerning areas from cultural exchanges to technical assistance and collaboration in performing arts, publications and the protection of sites and historical monuments.

between private companies, non-governmental organisations as well as public-private partnerships.

The sectoral provisions address the particularities of some specific sectors such as audiovisual cooperation and, where relevant, co-productions as well as cooperation in relation to publications, performing arts, and protection of heritage sites. The most advanced provisions are those concerning the audiovisual sector. As previously observed, the market access provisions contained in the EPA do not apply to the audiovisual services and confirm the EU position under the WTO and within the GATS' negotiations. Differently, the Protocol seems to open a door in the EU market for external audiovisual producers through bilateral co-production agreements. In fact, under Article 5 of the Protocol, the Parties shall encourage the negotiation and implementation of new and existing co-production agreements between one or several Member States of the EU and one or several CARIFORUM countries, and are required to facilitate access of co-productions to their respective markets. This means that, when a bilateral co-production agreement is signed, it will give CARIFORUM producers access to national film funding and make it easier for CARIFORUM audiovisual products to enter the EU market as a co-produced work. It is important to remark that the Protocol as such does not give Caribbean producers access to EU or national film funds: a bilateral co-production agreement has to be signed in order to get access to EU funding. The criteria for audiovisual co-productions are based on the Audiovisual Media Services Directive (AVMS), which also determines the definition of European works for co-productions. Although the AVMS is an act of secondary legislation and has effects on the internal level of the EU, it broadened the definition of "European work" to certain audiovisual productions with third countries.[186] Under the Protocol, the conditions for a co-production to be qualified as a European work are the following: the Caribbean partner funds at least 20% and the European partner a maximum of 80% of the total budget. When a co-production meets this requirement, it can enter the European market as a European work and benefit from the custom and commercial treatment in the Member States like all similar European products. The qualification of European work will also allow the CARIFORUM-EU Member State co-productions to benefit from the television broadcasting quotas set in the AVMS

[186] Under Article 1 of the AVMS the qualification of European work includes "works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements".

Directive. In addition, the co-productions will benefit from the existing preferential schemes for the promotion of local or regional content, as well as from future preferential schemes if they will be adopted. In the light of this, the Protocol seems to be in line with the principle of enhancing cultural exchange through granting further market access and trade facilitations, although in principle the Protocol will make it easier for CARIFORUM audiovisual products to enter the EU market only as a co-produced work. Nonetheless, the stress on co-productions seems also to be aligned to the international favour surrounding this kind of strengthened cultural cooperation, as above discussed.[187]

The remaining sectoral provisions encourage signatory States to support the temporary importation of material and equipment for the purpose of shooting cinematographic films and television programmes by promoting their territories as locations for such activities;[188] to promote joint productions in the fields of performing arts[189] and co-publications in the publishing industry[190] and create a friendly framework for the exchange of best practices and expertise concerning the protection of historical and cultural sites.

In line with the driving criteria of the EPA, all the criteria and provisions of the Protocol take into account asymmetries and are adapted for different partner countries.[191] In terms of preferential treatment, the Protocol focuses on preferential treatment for cultural goods, services and practitioners from developing countries, but only outside the trade liberalisation framework set by the main general trade agreement. According to some experts, the notion of preferential treatment included in the Cultural Protocol does not correspond to the notion of preferential treatment as used within the WTO framework, because it is based upon Article 16 of the UNESCO Convention. These voices argue that there are strong differences between the concept

[187] Further, the KEA Study cites: "An analysis of the data in the LUMIERE database carried out by the European Audiovisual Observatory showed the growing importance of films from third countries on EU markets. For some regions (in particular Latin America and Africa), co-productions with EU Member States are a positive factor in facilitating access to EU markets. 54% of Latin American films that made their way into the European market are co-productions with EU Member States. Films co-produced between third countries and EU countries are more successful than those that have not been co-produced". KEA European Affairs, above (n 178).
[188] Article 6 of the Protocol III on Cultural Cooperation, CARIFORUM-EU EPA.
[189] Article 7, *ibidem*.
[190] Article 8, *ibidem*.
[191] COMMISSION STAFF WORKING DOCUMENT, Quadrennial Periodic Report on behalf of the European Union on measures to protect and promote the diversity of cultural expressions in the framework of the 2005 UNESCO Convention, Accompanying the document REPORT FROM THE COMMISSION on measures to protect and promote the diversity of cultural expressions in the framework of the 2005 UNESCO Convention {C (2012) 3186 final}, at 24.

of preferential treatment or special and differentiated treatment under the WTO and the concept of preferential treatment deriving from Article 16 of the UNESCO Convention. Indeed, the first one is conceived as an exception to the rule that should temporarily redress a given situation, and it is therefore meant to have a limited field of application. In the second case, preferential treatment shall become the rule within the cultural cooperation framework and should lead to structural and durable effects on cultural exchanges.[192] This preferential treatment should be perceived as a "new deal" to contribute to redress the imbalances and disparities in the exchanges of cultural goods and services.[193]

4.1.4) Some considerations on cultural provisions under the CARIFORUM-EU EPA and its Cultural Protocol

As observed in Chapter 2, culture was already included in the Cotonou Agreement: in such a framework, it was treated in a traditional sense of merely cooperation between nations and did not really address market access for cultural products and services. The Cotonou Agreement contains, indeed, limited provisions concerning culture, most of which are largely general or hortatory, which establish a framework for cooperation in the area of cultural heritage-safeguard and inter-cultural dialogue.[194] Although these provisions already showed a certain level of awareness about the economic dimension of culture, they did not establish any specific commitment able to include it in commercial strategy and accommodate cultural concerns. In this sense, the provisions addressing cultural industries (excluding the audiovisual sector) encompassed by the EPA and the annexed Cultural Protocol (including the audiovisual sector) go beyond the cultural cooperation frame envisaged by the Cotonou Agreement.

Perhaps the most innovative aspect of the EPA is its Protocol on cultural cooperation. It is the first time that an additional instrument specifically addressing

[192] E Bourcieu, Expert Report on Preferential Treatment for Developing Countries. Article 16 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO – Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (CE/08/2.IGC/8), 2008, at p. 9.
[193] German Advocates and multidisciplinary research team, *Implementing the UNESCO Convention of 2005 in the European Union,* study for the European Parliament' s Committee on Culture and Education, May 2010 (available at http://www.europarl.europa.eu/studies), at 304.
[194] J A McMahon, "Preserving and Promoting Differences? The External Dimension of Cultural Cooperation", Rachel Craufurd Smith (ed), *Culture and European Union Law*, (Oxford Press, 2004), 330.

cooperation in the cultural sector is negotiated and annexed within the framework of a trade agreement between the EU and third countries. In particular, the inclusion of provisions for a greater cooperation of exchange in the audiovisual sector is an important new element. However, it must be recognised that the Protocol establishes only a set of best endeavours rather than real binding obligations. It is still not clear to what extent the provisions of the Protocol could create certain obligations for the EU Member States. Their binding strength seems to be more *political* than legal and recalls the nature of the provisions contained in the 2005 UNESCO Convention. So far, only the provisions allowing the CARIFORUM audiovisual sector to benefit from the broadcasting quotas for co-productions seem to be binding. This is due to the clear connection between the provisions concerning co-production under the Cultural Protocol and the AVMS Directive, which grants to co-productions the status of European work.

4.2) The Free Trade Agreement with Korea and its Cultural Protocol

4.2.1) The Cultural Protocol to the FTA with South-Korea

In 2009, the Union and South Korea finalised the negotiations for a Free Trade Agreement. The FTA was signed in 2010 in Brussels and began to be applied in 2011. Given the growing importance of South Korea on the international trade scene and the fact that Korea is one of the EU's largest trade partners,[195] the FTA was welcomed as a truly successful step forward for the Union's bilateral trade relations. Indeed, the agreement aims at achieving a greater level of liberalisation by lifting trade barriers and setting a friendly cooperation framework for European and Korean companies. Namely, the FTA includes regulatory convergence, provisions to further liberalisation in investment and services on a mutual basis, competition rules and the protection and enforcement of intellectual property rights.[196] However, such wider liberalisation does not encompass cultural services: differently from the CARIFORUM-EU EPA, there are no specific cultural provisions within the FTA addressing cultural services. For instance, under the Chapter dealing with trade in services, establishment and e-commerce, there is no mention of the entertainment sector.[197] Nevertheless, once

[195] http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/korea/ (last accessed August 2012).
[196] Article 1.1 Objectives, under Chapter 1 of the FTA between the EU and Korea.
[197] Chapter 7 of the Korea-EU FTA.

again audiovisual services are excluded from the scope of the trade agreement: both Article 7.4 on the cross-borders supply of services and Article 7.10 on establishment list audiovisual services among the areas to which their related provisions do not apply.

However, similarly to the EPA with the CARIFORUM, the treatment of cultural industries, and audiovisual services in particular, is addressed in another instrument called Cultural Protocol and attached to the main FTA with Korea. The structure of this second Cultural Protocol looks very similar to the CARIFORUM-EU Protocol on Cultural Cooperation. Also the Preamble of the Cultural Protocol with Korea recalls the duty to implement the UNESCO Convention on cultural diversity and the provisions are divided into horizontal and sectoral provisions. The entrance into force is subject to South Korea's ratification of the UNESCO Convention. Like the first Cultural Protocol, the Korea-EU Protocol also has its own institutional structure independent from other parts of the FTA, and also offers a special mechanism to settle disputes.

The Protocol sets a framework to cooperate in facilitating exchanges regarding cultural activities, notably in the area of performing arts, publications, protection of cultural heritage sites and historical monuments, as well as in the audiovisual sector. It also aims at ensuring a facilitated movement for artists and other cultural professionals and practitioners who are not engaged in providing services. The objectives and the scope sound very similar to those declared in the CARIFORUM-EU case: also for the Korea-EU Protocol, the Parties "shall endeavour to collaborate with the aim of improving the conditions governing their exchanges of cultural activities, goods and services and redressing the structural imbalances and asymmetrical patterns which may exist in exchanges".[198] Co-productions in the audiovisual sector are also envisaged. In particular, the Protocol's sectoral provisions on audiovisual co-productions encourage the conclusion of bilateral co-production agreements between South Korea and the Member States and allow certain finished audiovisual works co-produced by European and Korean partners to qualify as European and Korean works, for the purposes of respective legislations on the promotion of local and regional cultural content provided they meet the strictly defined criteria defined therein. These criteria should ensure that a balance is

[198] Article 1, Protocol 3 to the FTA Korea-EU.

maintained between financial and technical/artistic contributions of the parties and that that the rich tradition of cooperation between operators from different EU Member States is maintained by requiring participation from co-producers from several different EU Member States. In the case of animation works, the criteria are stricter and at least three partners from the EU are necessary in order to qualify as co-production.[199] As far as it concerns the audiovisual cooperation in order to promote audiovisual works produced by the Parties, no binding commitments providing market access are envisaged in the Protocol, but merely best endeavours provisions to enhance the exchange of audiovisual products, through festivals, seminars, etc., and to foster the dialogue to encourage cooperation in the area of broadcasting.[200]

The similarities in the structure and part of the content with the Cultural Protocol with the CARIFORUM generated a heated discussion and a lot of concern over the negotiation and adoption of the Protocol with Korea. Member States, France *in primis*, were very sceptical about using the same instrument on cultural cooperation and the same strategy to negotiate it together with a main economic agreement.[201] In addition, as for the specific case of South Korea, they argued that the conditions were not the same because of Korea's strength and development in the audiovisual sector. Also cultural diversity coalitions and cultural professional organisations expressed their concern about this new unilateral strategy of the EU: they alleged that the Commission speaking as the EU's single voice in these trade negotiations, would not adequately take into account the specificity of culture. They feared that the EU could stretch its competences by incorporating culture into trade negotiations and put culture and the audiovisual sector back into mere trade negotiations, whereas this sector should primarily belong to the Member States' policy domain. Moreover, they worried that through the new practice of linking negotiations on trade and cultural cooperation, the Commission could use the cultural and audiovisual sectors as just another bargaining tool for use in trade negotiations. This may put cultural diversity at risk rather than promoting it.[202]

---

[199] Article 5.6(c), Protocol 3 FTA Korea-EU.
[200] Article 6, *ibidem*.
[201] Ministére des Affaires étrangères et européennes, "Pour une nouvelle stratégie culturelle extérieure de l'Union Européenne", Communication de la France, Communication de la France, 2009, http://www.diplomatie.gouv.fr/fr/actions-france_830/culture_1031/colonne-droite_1695/strategie-culturelle-exterieure-union-europeenne_20100/pour-une-nouvelle-strategie-culturelle-exterieure-union-europeenne_80488.html.
[202] European Coalitions for Cultural Diversity (ECCD), *Final declaration (on the draft EU-Korea protocol on cultural cooperation)*, April 23, 2010, from http://www.coalitionfrancaise.org/eng/?p=96.

In spite of all the criticisms, the European Commission maintained the new practice of negotiating Cultural Protocols within the frame of trade agreements. Following the Cultural Protocol to the Free Trade Agreement with South-Korea, other similar protocols have been negotiated in conjunction with other trade agreements, namely in the case of the Association with Central Agreement and the trade agreement with Colombia and Peru. The Commission's argument to support the strategy of cultural protocols as a new specific instrument to enhance cultural cooperation in trade exchange mainly relies upon the need to implement the UNESCO Convention and to counterbalance WTO rules.[203] The Commission advocates that such protocols will benefit cultural exchanges and diversity and are envisaged as a means to put into practice the UNESCO Convention's provisions concerning culture, trade, and development. In addition, it seems to be a good tool able to gather global support.[204]

Nevertheless, the Commission retained some of the criticisms raised and changed parts of the content of the final Korea Protocol version. This is what emerges when looking at the first draft and the final draft of the Korea Cultural Protocol, and from comparing the final version with the CARIFORUM Cultural Protocol. More generally, the criticism affected the whole negotiation strategy adopted by the Commission, which in the end gave up on the practice to annex the Protocol to the main agreement and developed it under new forms, as in the case of Central America and the Andean Community.

4.2.2) Comparing the EU-CARIFORUM and the EU-South Korea Cultural Protocols

Although at first glance the EU-CARIFORUM and the EU-KOREA Cultural Protocols may seem almost identical, some differences between the two have been underlined since the initial drafting of the Korean Protocol. Starting from the beginning, whereas the EU-CARIFORUM Protocol refers in the preamble to the implementation of Articles 14 and 16 of the UNESCO Convention, the preamble of the first version of the EU-Korea Protocol mentioned Articles 7, 11,12, 20 and 21 of

[203] See discussion on this, above in para 2.2.1 of this chapter.
[204] European Commission, *Statement on the title on cultural cooperation in future EU trade agreements*. (2010), available at http://www.efah.org/components/docs/argumentaire%20EN.pdf; European Commission. *Follow-up statement on the cooperation protocol in future EU trade agreements*, 2010, available at http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137751.pdf.

the Convention, namely those best-efforts provisions referring to strengthening international cultural cooperation without establishing clear duties. In the final version of the EU-Korea Protocol there is no mention of this set of Articles, but just a general reference to the UNESCO Convention and its principles. So, while in the EU-CARIFORUM case the accent is on development and preferential treatment, there is no reference to such elements in the Korean Protocol. In addition, the latter one indicates that the protocol has to take into account the degree of development of both parties and, consequently, the different nature of cultural cooperation pursued. Further, this Protocol is based on strict reciprocity and balance on the basis of Article 12 of the UNESCO Convention, whereas the Protocol with EU-CARIFORUM countries is asymmetrical by nature. Both Protocols have the enhancement of cultural exchanges and cultural cooperation as their objectives, however the change in the EU-Korea Protocol's preamble seems to reflect the acknowledgement that Korea has well-developed cultural industries which do not necessitate the same preferential treatment granted to the Caribbean countries.

A more significant difference is given by the mechanism to solve possible disputes arising in the framework of the Protocols. *Vis-à-vis* the EU-CARIFORUM Protocol, the EU-Korea Cultural Protocol puts more stress on the institutional framework to control the follow-up of the Protocol's content. Indeed, it established the creation of a Committee on Cultural Cooperation to monitor the implementation of the Protocol,[205] made of senior officials with expertise and experience in cultural affairs and to which parties can ask for consultations about issues concerning the application of the Protocol. In addition, it is made clear that the Committee on Cultural Cooperation and the Trade Committee set up within the EU-Korea FTA are two independent and distinguished bodies. In particular, it is specified that the Trade Committee has no jurisdiction over the Cultural Protocol and the Committee on Cultural Cooperation shall exercise all functions of the Trade Committee as regards the implementation of the Protocol.[206] Such clarification has been introduced to exclude all possible hints of a *trade-oriented approach* to the Protocol and ensure, as much as possible, a cultural cooperation approach to it. Moreover, Article 3 establishing the Committee on Cultural Cooperation is complemented by the new Article 3BIS concerning the dispute settlement in the final text of the Korea's

[205] Article 3 of Protocol 3, Korea-EU FTA.
[206] Article 3.3, *ibidem*.

Protocol. Article 3BIS establishes that in case a dispute arises and the Committee does not reach a consensus, a general arbitration procedure as envisaged under Chapter Fourteen (Dispute Settlement) of the main Free Trade Agreement can be initiated, according to the following modifications: all the references in Chapter Fourteen to the Trade Committee shall be understood as referring to the Committee on Cultural Cooperation and the arbitrators must have necessary knowledge and experience on the subject matters of the Protocol.[207] It is clear that there is the will to keep any dispute referring to the content of the Protocol independent from the Free Trade Agreement.

Besides these aspects, the most striking differences are probably those concerning provisions on the audiovisual cooperation. The parallel Article 5 in the EU-CARIFORUM Protocol is divided into two provisions in the EU-Korea Protocol, separating audiovisual co-productions from other audiovisual cooperation.[208] As far as it concerns audiovisual co-productions, the EU-Korea Protocol sets stricter requirements than those in the EU-CARIFORUM Protocol by demanding higher thresholds for a balanced financial and artistic input by the Korean and European producers participating in a co-production.[209] Also the requirements for qualifying co-productions as a European work are more severe: EU Member States involved in the co-production must be at least two; while in case of animation co-productions, they should be at least three. Moreover, the co-production system can benefit from this entitlement on a limited temporal frame (for three years), after which it will be evaluated in order to assess the results of the implementation of the entitlement in terms of enhancement of cultural diversity and mutually beneficial cooperation on co-produced works.[210] A balanced cooperation over time is also preserved through a suspension mechanism, which can be activated if one of the parties was to modify its cultural content legislation in a way that adversely affects the other co-producers.[211]

The final text of the EU-Korea Protocol seems to have been influenced by the criticism raised during the drafting of its first version. The EU members were ready to accept this Cultural Protocol only after the changes concerning audiovisual

[207] Article 3BIS(a)(b), *ibidem*.
[208] Article 5 and Article 6, *ibidem*.
[209] Minimal financial participation cannot be lower than 30% (Article 5.6(d)).
[210] It can be renewed for other three years, unless one of the parties wishes to end it.
[211] Article 5.10, *ibidem*.

coproduction were made.[212] In the end, through the basis of their participation, Member States highly influenced the outcome of the protocol's negotiations. It is clear that the interests at stake underlying the adoption of the EU-CARIFORUM protocol and the EU-KOREA protocol are very different and a mere transposition of the CARIFORUM model to the Korean case would have not been appropriate. The high level of development of the cultural industries in Korea is considered a major threat by the EU member States: offering the same conditions for a preferential treatment to audiovisual co-productions would entail a risk for the protection of cultural diversity, which should be the overall priority of all the protocols.

4.3) Cultural Protocols to the Trade Association agreement with Central America and the Trade Agreement with Perú and Colombia

Since the negotiation and adoption of the EU-Korea Cultural Protocol were rather complicated and attacked both by EU Member States and civil society stakeholders, the Commission had to take seriously this criticism and changed its strategy to negotiate cultural protocol together with trade agreements. With regard to the Andean countries – Peru and Colombia – as well as with Central America, the negotiations concerning a Cultural Protocol have not been carried out in the same negotiation framework of the major trade agreement. They have still been simultaneously negotiated, but they are not annexed to it. The Cultural Protocols adopted in these cases are two stand-alone agreements on cultural cooperation. Although their title and structure look rather similar to the EU-CARIFORUM and the EU-Korea Protocols, some differences are clearly visible in the content. No preferential treatment on co-productions in the audiovisual sector has been included in these frameworks. In the case of negotiation with the Andean Community, audiovisual co-production – and in particular co-production of television programmes in the Colombian case – has been a controversial issue.[213] No agreement has been reached on this topic and the Protocols do not contain specific connections to trade but only best-efforts provisions to enhance cultural cooperation. This is probably why they are disconnected from the main trade agreement altogether.

[212] J Loisen and F De Ville, above (n 118), 264.
[213] *Ibidem*, 264.

However, the case of Central America is slightly different: it is a stand-alone agreement on cultural cooperation whose provisions are attached to the cooperation provision on cultural and audiovisual matters included in the Association Agreement. Indeed, title VIII of the Association Agreement between the EU and Central America is dedicated to culture and audiovisual cooperation. It does not contain very detailed provisions concerning co-production, nor are clear duties in the field of audiovisual cooperation established. Under Title VIII the Parties are encouraged to promote cultural cooperation through the enhancement of balanced cultural exchanges and intercultural dialogue.[214] The UNESCO Convention is also recalled and parties shall coordinate their action under its umbrella. In particular, cooperation shall include promotion of cultural diversity, including that of the indigenous peoples and cultural practices of other specific groups, as well as the education in autochthon languages.[215] Such provision does not appear in other contexts, like the Caribbean or the Korean framework. It is evident that different interests were at stake in the negotiation with Central America, namely the protection of indigenous peoples' cultural heritage and their traditional lifestyles. Such concerns are also linked to developmental issues, specifically when talking about the relationship between traditional knowledge (that is part of their intangible heritage) and intellectual property rights. However, this issue will be further addressed in Chapter 5 dedicated to culture and intellectual property rights.

As for the trade agreement concluded between the EU and Perú and Colombia, not many provisions concerning cultural industries and cultural goods and services are present in the main text of the agreement. Nevertheless, as a consequence of the EU attitude towards the treatment of audiovisual services, the audiovisual sector is always recalled among the exceptions to the application of the rules aiming at further liberalisation, such as those affecting the establishment in any economic activity or the supply of services.[216] Although directly referring to cultural products only when listing the exceptions to the application of the agreement's provision, the trade agreement with Peru and Colombia deals with culture and development in its title VII, concerning Intellectual Property Rights and traditional knowledge.[217] Under title IX dealing with trade and sustainable development, there is no mention of culture,

[214] Article 74, Title VIII, Part III, Trade Association agreement with Central America.
[215] Article 74(3).
[216] See Article 111 and 118 of the Trade Agreement between the EU and Colombia and Peru.
[217] The issue will be discussed further in the next chapter.

whereas there are provisions clearly referring to the sustainable use of natural resources, the protection of biodiversity, the enforcement of international commitments concerning climate change and other environmental issues, as well as the enhancement of the respect of social and labour rights. Nor are there specific references to action supporting and promoting technical and financial assistance to the cultural industries under the section concerning technical assistance and trade capacity building.[218] It seems that the broader vision of a sustainable development inclusive of culture and to be realised through the contribution of cultural activities does not apply to this trade agreement.

4.4) Current developments and some *interim* remarks

The Cultural Protocol adopted in the framework of the EU-CARIFORUM EPA launched the season of the enhancement of cultural exchanges through an *ad hoc* instrument linking up trade and cultural cooperation in bilateral negotiations. Cultural Protocols can be considered a valuable tool promoting culturally enriching and more balanced exchanges, without challenging the need for a specific legal treatment for cultural goods and services in trade agreements and without requiring commercial market access commitments beyond those that the Parties are willing to grant. From this perspective, Cultural Protocols are a useful tool to implement principles and obligations of the UNESCO Convention: they promote a balanced approach between trade openness and the protection and promotion of cultural diversity. Further, the first two Protocols grant sufficient flexibility to Member States for maintaining the largest policy space possible for existing and new national cultural measures, while indicating new methods and means supporting intercultural exchanges.[219] In the case of the Cultural Protocol with the CARIFORUM, the development precepts of the overall EPA context added new strength to the cultural cooperation framework by offering CARIFORUM contractual suppliers cultural services binding market access to the EU.

Nonetheless, the drafting strategy of the two first Cultural Protocols has been harshly criticised at different stages and the Commission had to change its practice to accommodate the various requests. In particular, the need for a differentiated

[218] See Title XIII of the same Trade Agreement.
[219] E Psychogiopoulou, "The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface", (2014) 41 *Legal Issues of Economic Integration*, 84.

approach, tailored on a case-by-case assessment of the different conditions of development of national cultural industries and the relevant cultural contexts emerged as an issue to be addressed. In particular, Member States brought this aspect to the fore at the time of the FTA negotiations with South Korea, and influenced the following practice of the Commission. Indeed, although at a first look all three Cultural Protocols and the stand-alone Cultural Cooperation Agreement concluded with Perú and Colombia may appear identical, it has been shown that their content varies according to the conditions of cultural industries, general development of the parties involved and major interests at stake. In some cases, the protocols are attached to the major trade agreement and complete the cultural provisions included in it. In the case of the Agreement with Perú and Colombia, parties opted for an independent tool to strengthen cultural cooperation. At the time of writing, no new Cultural Protocols have been concluded, whereas a considerable number of bilateral trade agreements has been signed. The negotiation of a protocol on cultural cooperation with Central Africa in the context of the EPA is ongoing; in the case of trade negotiations with Singapore, a cultural protocol was considered inappropriate because of the missed ratification of the UNESCO Convention and a lack of national policies and measures to support cultural diversity.[220] In the case of the Partnership and Cooperation Agreement concluded with Iraq in 2012 – the first trade agreement signed between the EU and this Country – no cultural protocol is annexed to it, but the Agreement integrates a more general provision on bilateral cultural cooperation which makes – inter alia – express reference to the UNESCO Convention.[221] Within the frame of the Canada-EU CETA a cultural protocol was initially discussed, but then the idea was abandoned due to the large exemptions taken by both sides to the MFN in the cultural sector and the lack of a real added-value of such a framework in this specific case. In the ongoing negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA, the adoption of a cultural protocol seems not to be an option. Cultural issues other than strengthening the frame for cultural exchanges are crucial in the TTIP negotiations. The Commission and EU Member States are here concerned with keeping the audiovisual sector outside the trade agreement and the ability of the EU or EU Member States to

[220] C Soury-Desrosier, above (n 167), at 219.
[221] Article 109 of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed on 11 May 2012.

provide financial support to cultural industries.[222] This approach shows that the Commission received the concerns and proposals expressed by Member States and stakeholders, [223] and is increasingly developing a case-by-case approach to mainstream the integration of culture within trade agreements.

Returning to the concluded Cultural Protocols and the Cultural Cooperation Agreement, the most revolutionary aspect of the protocols is the inclusion of the audiovisual sector among the area of cultural cooperation (although this is not the case of the EU-Central America Cultural Protocol). This is complementary to the traditional exclusion of the audiovisual services from further liberalisation commitments in trade agreements retained by the EU. This should reassure Member States – especially France – cultural professionals, and stakeholders about the risk to open up the market for the audiovisual service.

But, considering that no substantial change has been brought to the trade in audiovisual services and that most provisions are measures of cultural cooperation, do the cultural protocols really add something new to the trade and cultural relationship of the EU with third countries? To some extent, the answer can be a positive one. Certainly it is the first time that an *ad hoc* instrument with very detailed provisions and a mechanism of dispute settlement and control over its implementation has been adopted in the field of cultural cooperation. Further, the accent on cooperation may be a signal of the fact that cultural cooperation may be a more valuable path to foster cultural exchanges and promote cultural diversity than purely trade-oriented mechanisms. In addition, this strengthened cultural cooperation is integrated within a trade frame, or a "trade and development" frame like in the case of the EPA, so as to cope with the emergent needs to combine culture and trade within a more balanced scheme, as required by the UNESCO Convention, with a view to contribute to development goals.[224] In fact, via the frame created by the cultural protocol, those countries that have kept a certain level of flexibility for preferential cooperation in the field of trade in cultural and audiovisual services by listing exemptions to the MFN

[222] See position document "TTIP and Culture" of the Commission, 16/07/2014, available at http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf.
[223] See in particular the French Communication, quoted above (n 197).
[224] The integration of cultural protocols within trade agreements is also in line with the directives given by the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions to the Parties of the Convention: Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions Reports of the experts on preferential treatment (Art. 16 of the Convention), 10, CE/08/2.IGC/8, 17 September 2008, http://unesdoc.unesco.org/images/0017/001779/177924E. pdf.

clause within the WTO enjoy possibilities for developing independent cultural exchanges with the EU under the form of cultural cooperation measures.[225] Another positive aspect in terms of improvement to foster cultural exchanges through cooperation schemes is given by the introduction of co-production in the audiovisual sector. For example, in the case of developing countries, audiovisual co-productions may constitute a good opportunity to find co-funding partners, gain technological support, improve skills, and acquire better knowledge concerning the making of audiovisual products. In addition, the qualification of co-production products as European products grants them access to the EU market, offering the co-producers coming from developing countries the possibilities to make contacts and be known on the European scene. Nonetheless, some critics in the CARIFORUM countries argue that the percentage of the budget to be financed by CARIFORUM individuals or producers to qualify as a European work would be in practice very difficult for them to meet.[226] Thus, this will not make it easier for Caribbean co-productions to enter the EU market. Other criticism towards the co-production provisions has been raised under the umbrella of the EU-Korea cultural protocol. Although the final version of the protocol adopted stricter financial thresholds for co-productions in order to be qualified as European products, most EU members fear that, given the level of development of the Korean audiovisual industry, Korean products will increasingly enter their markets and this may be detrimental for the protection of their cultural industries, as well as cultural identities. However, it should be recalled that all the provisions in the EU-Korea protocol should be implemented on a reciprocal basis. This entails that access to the Korean market should also be facilitated for the EU members. It is difficult to abandon traditional visions and old habits, however it may also be counterproductive to maintain a very protective approach in the audiovisual services and reduce the protection of cultural identities to trade provisions on market access. If it is true that cultural services have a double nature, then their social function as vectors of values, traditions, and knowledge also has to be recognised. To achieve this goal, they should circulate as much as possible. The final scope of cultural cooperation as framed in the EU cultural protocols is to foster the exchange of cultural goods and services in order to promote both economic development and

[225] E Psychogiopoulou, "The External Dimension of EU Cultural Action and Free Trade", above (n 214), at 86.
[226] KEA European Affairs, "Implementing cultural provisions of CARIFORUM-EU EPA", above (n 178), at 14.

mutual understanding. Therefore, it seems that co-productions can help to reach this goal. Then, for future negotiations of cultural protocols, it is important to bear in mind the differences among the partners and take into account their level of economic and technological development in order to avoid the trade and cultural dominance of the richer party over the others. For this reason, the principle of asymmetrical duties and reciprocity as a driving principle for the implementation of the co-production provisions may be helpful.

Finally, in order to be more efficient in achieving sustainable development goals, it is desirable that the Sustainability Impact Assessment (SIA) usually undertaken by the Commission during the negotiation of a trade agreement will also include the assessment of potential cultural impacts of measures adopted within the frame of the Protocol. In fact the SIAs carried out in the agreements analysed here do not take into account possible cultural impacts.[227] As observed in Chapter 2 in more general terms, the existing Strategic Impact Assessment and the Sustainability Impact Assessment do not take into account of cultural impacts (or at least only to a limited extent such as impact on tangible cultural heritage). This gap is related to the lack of a comprehensive understanding of sustainable development, in which culture does not play a relevant role except as a component of the social pillar. The time seems to be ripe for a broader inclusion of cultural considerations within these instruments. Prior consultation with stakeholders and cultural associations, which have been done for the cultural protocol with the CARIFORUM and South Korea,[228] should also be better structured and more transparent. In this respect, dialogue among decision-makers and stakeholders must be improved not only between the EU institutions, national levels and civil society, but also within Member States.

[227] Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements Summary of key findings, policy recommendations and lessons learned, May 2007; Trade Sustainability Impact Assessment of the EU-Korea FTA: Final Report – (Phase 3), March 2008 Revised June 2008; Sustainability Impact Assessment of the EU-ACP Economic EU-Andean Trade Sustainability Impact Assessment, Final Report October 2009; Trade Sustainability Impact Assessment of the Association Agreement to be negotiated between the EU and Central America TRADE08/C1/C14 & C15 - Lot 2 Final Report September 2008, all available at http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/.

[228] Source: interview with the former legal adviser of the DG Culture and Education. The interview was conducted at a meeting during the 3rd Intergovernmental Committee on the Implementation of the 2005 UNESCO Convention, held at UNESCO Headquarter, 7-11 December 2009, Paris.

5) Concluding remarks: a critical appraisal of the EU action in culture and trade

The protection and promotion of cultural diversity in the context of trade seems to be an eternal dilemma, whose solution can be achieved only at the price of one or the other. For the EU Member States, this issue appears as a double challenge: on the one hand, most States fear the risk that more liberalisation in trade in cultural services, especially audiovisual services, would undermine their national cultural industries and identities; on the other hand, they are concerned about the increased presence of the Commission in the international "trade and culture" arena. In particular, the EU ratification of the 2005 UNESCO Convention increased Member States' scepticism, which saw in the growing action of the EU in the field of culture an attempt to erode their national competences. To the contrary, the EU ratification was warmly welcomed by other international actors, stakeholders and associations, which counted on the positive influence that the EU as a global actor could exercise in fostering the implementation of the Convention. Furthermore, since the adoption of the Convention, the Union took a step towards the integration of culture within all its external relations.

As far as it concerns the Member States' fears, they do not seem to have been warranted: several safeguard mechanisms are available under the EU constitutional treaties to guarantee the respect of the principle of conferral. In the pre-Lisbon asset, the action of the Union dealing with trade in culture in the multilateral frame was very much bound by procedural limits fixed under Article 133(6). According to this provision, agreements relating to trade in cultural, educational, and audiovisual services belonged to the *shared competence* of the EU and its Member States and the negotiation of such agreements required the *joint participation* of the EU and the Member States. We saw that such a mechanism highly influenced the EU approach towards agreeing to open the cultural services sector under the GATS: although through the cultural exception the EU aimed at preserving its internal *acquis*, the original position was not a full exclusion of cultural services from the GATS. Under current Article 207 TFEU, possibilities for Member States to apply a veto in trade negotiations are reduced: indeed, joint participation is no longer a requirement. Yet, paragraph (4) of Article 207 TFEU now replaces this safeguard clause by introducing the requirement of the *unanimity* vote for all the Council's decisions concerning

cultural and audiovisual services. Although unanimity is not the rule, but only occurs when the agreements at stake *risk prejudicing the Union's cultural and linguistic diversity,* Member States can still foresee the possibility for mixed agreements which allow their participation. This is the case when two or more different objectives are at stake and it is not possible to establish which one is predominant, so the agreement will be concluded on multiple legal grounds which may touch upon the shared competences of the Member States and the Union, as in the case of culture (see for instance the FTA with South Korea, which was adopted on both Article 207 and Article 167). Finally, Member States should bear in mind that the protection of cultural diversity is a constitutional objective of the Union: therefore a coherent external action in the field of culture and trade requires that the external commercial competence should be exercised in a way to be complementary with the cultural objectives under Article 167 TFEU.

On the bilateral level the Union made a step forward towards the integration of trade and cultural objectives through the adoption of Cultural Protocols within the frame of trade agreements. As we saw, this strategy raised strong criticism regarding the way new Protocols on Cultural Cooperation were initially negotiated, yet the EU's attempt offers a practical example of implementation of the principles included in the Convention and creates a favourable context for cultural exchanges. The new EU strategy seems to be aimed at striking a balance between the two opposite trends: a protectionist one, set up in the name of protecting existing cultural diversity, and a more liberalist one, calling for more cultural exchanges in the name of cultural diversity and more development. Also the adoption of co-productions as a framework for cooperation is positive. Nonetheless, Member States were able to maintain within the Union's bilateral trade agreements the "cultural exception" for the audiovisual sector, which does not allow developing countries to gain access to the cultural market.

CHAPTER 4

THE EU *VIS À VIS* THE MOBILITY OF ARTISTS AND CULTURAL PROFESSIONALS

---

1) Introductory note

Enhancing the free flowering of ideas and the interaction of cultures is connected to the free mobility of artists and cultural professionals in the world. In Chapter 1, we clarified how artists and cultural professionals play a social, cultural and economic role and bring multidimensional benefits to the development of societies. We also saw that when artists and cultural professionals come from developing countries or difficult contexts, moving in the context of provision of services or for professional training is becoming increasingly difficult. These difficulties not only derive from economic and social disparities, but mostly from the fact that the movement of artists coming from developing countries is often assimilated to "migration", a political minefield in many European and developed-world countries. The overall situation is made more complicated by the lack of a harmonised definition of artists, and the lack of a regime for the recognition of diplomas and qualifications for cultural workers, which would facilitate the release of visas for the purpose of cultural exchanges.

Since the ratification of the UNESCO Convention, the European Union committed to strengthen the framework for facilitating the cross-border mobility of artists and cultural workers and enhancing mobility of artists is among the core objectives of the 2007 Agenda for culture. Yet, the realisation of this objective faces a double challenge: on the one hand, the traditional aversion of Member States towards opening their borders to foreign providers of cultural services, especially in the audiovisual sector; on the other hand, the difficulties deriving from different and rigid economic migration regulation, a field belonging to national competence. Putting in place a coherent approach towards facilitating the transnational mobility of artists and cultural workers is quite a challenge for the Union.

In this chapter I will firstly frame the issues deriving from the lack of the recognition of a special regime for artists and from their assimilation to migrant

workers in the framework of international regimes. Then, I will focus on the same issues within the frame of EU law.

2) Culture and migration: mobility of artists and cultural workers under current international law

2.1) Mobility of artists and cultural workers: the lack of a uniform regime

It has been said that the overall question of mobility is strictly connected to the problematic definitions of the status of "artists" and "cultural workers", and the lack of a harmonised international legal and policy frame addressing mobility as a fundamental condition of artistic and cultural professions. At the regional level, the European Parliament is among the institutions that have shown more awareness about this problem. In the 2003 report on creative industries, the European Parliament recalls that the cultural and creative industry "*could not develop without the leading role of creators*",[1] and in its 2007 resolution on the Social Status of Artists acknowledges that "*flexibility and mobility are indissociable in the context of professional artistic activity*", and, by virtue of this, stresses the need to "*distinguish between mobility specifically relating to artists and that relating to workers in general in the EU*".[2] The recognition of the need to differentiate artists from other workers calls for the need to guarantee a special treatment of this category under national and international law, in order to properly ensure their enjoyment of the right to free movement. The EU Parliament seems to be taking into account the peculiarity of the artistic and cultural professions. Assuming the category of artists and cultural professionals can be included within the broader category of 'workers' can be too reductive. Certainly, under legal and economic terms, artists and cultural professionals are workers since, either as self-employed or regularly employed, they undertake activities that have both cultural and economic value.[3] Therefore, they are entitled to fully enjoy their economic and social rights and – with free circulation

[1]Report on cultural industry of the Committee of Culture, Youth, Education, the Media and Sport of the European Parliament, 14 July 2003, FINAL A5-0276/2003.
[2] European Parliament resolution of 7 June 2007 on the social status of artists (2006/2249(INI)), P6_TA(2007)0236, point E and point 12.
[3]From a labour law perspective, artists are usually deemed atypical workers, because they easily switch from the self-employed status to that of salaried worker or to that of company head, all the while being able to combine one or another status.

being among such rights – to move freely for the purpose of creating, performing or supplying services. Yet, when treating them as 'workers',[4] the special nature of their activity and the fact that mobility is an essential condition for such activity should be taken into account, in order to properly ensure their enjoyment of the right to freedom of movement. There is, thus, a need to differentiate the status of artists or cultural professionals from other workers, so as to guarantee a special treatment of this category both under national, regional and international law.

Certainly, a uniform definition of the cultural-professional categories worldwide would facilitate the release of visas and work permits, contributing, in this way, to support cultural exchanges. To be more precise, it is the aim here to make a differentiation between issues deriving from the lack of a clear definition of the artist and a lack of a uniform definition of cultural professionals. In effect, even though the absence of a unanimously accepted definition of cultural professionals does not help to establish a uniform framework of provisions granting them special protection, it must be admitted that the existence of a contractual work relationship – though atypical – contributes to identify 'who is a cultural worker'. The label usually refers to people involved in the field of creative industries and whose activity is *patterned on the creative, innovative practices of the artist,*[5] such as distributors of films, festival promoters, cameramen, photographers, etc. Diversely, considering that artists quite often work as self-employed and outside the framework of regular work contracts, the lack of a uniform definition of the artist creates problems in order to distinguish 'who is an artist'. Within the framework of International Organisations and academic research, several attempts to define a universal status for artists have been made, but with scarce practical outcomes.[6] At the international level, the most notable contribution to provide a universally accepted definition of 'artist' is given by the *UNESCO Recommendation concerning the Status of the Artist*,[7] adopted in 1980.

[4] To avoid misunderstanding with the terminology commonly used under EU law, the world "worker" is used here to indicate both employed and self-employed.
[5] G Yudice, *The expediency of culture: Uses of culture in the global era* Durham, NC, 2003, at 331.
[6] Capian and Wiesand observe in their report on the status of artists produced for the Commission that, traditionally, defining the term 'artist' has been difficult and, by consequence, it was ambiguously used. See: S Capian, J A Wiesand, *The Status of Artists in Europe*, ERICarts for the Directorate General, Policy Department Structural and Cohesion Policies, Bonn 2006, p. 7. Among the relevant authors on the subject, I quote here: R Florida, *The Rise of the Creative Class – and how it's transforming work, leisure, community and everyday life*. New York, 2004; G Yudice, *The expediency of culture: Uses of culture in the global era* Durham, NC, 2003.
[7] UNESCO Recommendation concerning the Status of the Artist, adopted on the report of Programme Commission IV at the thirty-seventh plenary meeting, on 27 October 1980.

However, before further discussing the provisions contained in the 1980 UNESCO Recommendation, it is important to focus on the interaction between cultural mobility, development and migration law and policy. In fact, broadly speaking, hindrances and obstacles to mobility affect all sorts of artist and cultural professionals from around the world. Nevertheless, the mobility of artists and cultural workers coming from developing and least-developed countries is more seriously threatened by regulative migration measures and visa policy. As will be underlined in the next paragraph, this sectoral mobility shows elements of connection with the broadest "migration and development" nexus.

2.2) Association and (dis)similarities with the 'migration and development' nexus

2.2.1) The migration and development nexus: an introduction

Undoubtedly, the mobility of workers across borders is an integral feature of our modern globalised societies. However, today a great number of workers from developing and least-developed countries still move towards the wealthier parts of the world with the hope of finding a better life, attracted by work opportunities and higher living standards. Migratory movements can have multiple serious impacts on development: when migrants leave their countries looking for opportunities to gain a better life, sending countries are often deprived of their labour force and skilled workers. On the other hand, receiving countries benefit from the professional and labour contribution that migrants workers can bring to their economies, but, at the same time, have to deal with issues relating to the economic, social, and cultural accommodation of people coming from very diverse socio-cultural contexts. In addition, host countries also face challenges of irregular migration, whose control has become a priority in national, regional, and international agendas over the last few decades of increased international migration waves.[8] Migration presents, then, different challenges and opportunities to countries of origin, transit, and destination.

[8]The 2012 World Population Prospect of the United Nation Population Division reports that net migration to the more developed regions has been increasing constantly from 1960 to 2010, with Europe being the major area with the highest level of net migration from 2000 to 2010. *UN DESA Population Division*, 'World Population Prospect: The 2012 Revision, Highlights and Advance Tables', ESA/P/WP.228, 2013, at 21.

For a long time, migration has been seen as a primary cause of brain drain, therefore aggravating problems of underdevelopment in the countries of origin, which remain unable to solve the structural conditions at the roots of migration. This negative approach considers migration as a factor increasing developmental disparities inter and infra regions and, by consequence, maintaining the conditions for more migration, creating a sort of vicious circle.[9] Nevertheless, in the past years, the international community has shown a new and growing interest towards the 'migration and development nexus', which has become the new formula to foster dialogue and cooperation between sending and receiving countries.[10] For instance, in 2007, the UN General Assembly adopted the Resolution *International migration and development,*[11]which calls upon all relevant international, regional and sub-regional bodies, agencies, and organisations to cooperate in addressing the issue of international migration and development, including a gender perspective and *cultural diversity*, in a more coherent way within developmental strategies.[12]

The strengthened cooperation under the 'migration and development nexus' shows a shift from the negative approach to a more positive view: migration is eventually considered as a primary fact and an opportunity for development rather than a problem in itself or the failed outcome of development. In truth, the underlying *ratio* of the institutional initiatives at regional and international level dealing with 'migration and development' aim at using development as a tool to control migration.[13]

2.2.2) Similarities and dissimilarities between the mobility of artists/cultural workers and migrants' circulation

[9]This phenomenon is also known as the 'migrant syndrome', a theoretical framework according to which migration deploys a series of negative effects contributing to the 'development of underdevelopment' and, by consequence, creates more migrants. Further on this: J S Reichter, 'The migrant Syndrome: Seasonal U.S. Labor Migration and Rural Development in Central Mexico', (1981) 40 *Human Organization*, 56-66. For an exhaustive analysis of the "migration and development" theories: H De Haas, "Migration and Development: A Theoretical Perspective", (2010) *International Migration Review,* 227-264.

[10] See, for instance, recommendations and programmes under the Global Commission on International Migration, the International Agenda for Migration Management (IAMM) or the UN High Level Dialogue on Migration and Development.

[11]Resolution adopted by the General Assembly on 6 March 2007,61/208 International migration and development, A/RES/61/208.

[12]*Ibidem*, point 7, emphasis added.

[13]V Chetail, "Paradigm and Paradoxes of the Migration-Development Nexus: The New Border for North-South Dialogue", Electronic copy available at: http://ssrn.com/abstract=1641210.

How is the case of artists and cultural professionals' mobility connected to the migration and development nexus? As previously mentioned, major obstacles hindering artists and cultural workers' mobility derive from visa and work permit issues. Artists and cultural workers coming from developing and least-developed countries – as well as from certain critical areas such as the Middle-East and Mediterranean areas – are those whose mobility is more hampered by visa and work permit issues. Artists and cultural professionals coming from disadvantaged contexts are often assimilated to all other migrant workers coming from developing or least-developed countries: host countries, relying on a biased approach, deem that arts and culture are just a special channel to grant people coming from third countries a preferential treatment to cross national borders. Once having entered the country, they are alleged to stay longer and reside illegally in the country, thus increasing irregular immigration.[14] Because of such prejudices, artists and cultural professionals from developing countries receive a discriminatory treatment when applying for visas and entry permits, compared to their more famous colleagues from more privileged contexts. Besides this discrimination, it should be highlighted that the existing disparity of economic, social, and cultural conditions between the North and the South already heavily affects the possibility for artists and professionals coming from the South to travel for work purposes.[15] Most of them can only move thanks to bilateral agreements and cultural cooperation programmes, and frequently the nature of these exchanges shows the unfairness and imbalance between the Southern and the Northern position. Further the objectives of these exchanges are differently perceived by the parties and such different expectations lead Northern countries to raise barriers in order to stop the free movement of Southern artists and cultural workers, which could allegedly turn into an uncontrolled flow of migrants. By consequence, artists and cultural workers have to deal with national migration rules and increasingly restrictive policy.

Mirroring the issue through the lens of migration and development, artists and cultural workers from developing countries temporarily moving to different contexts for the purpose of economic improvements, as well as cultural and professional

[14] In the report *Visas/The discordant note,* a respondent reflecting on the behavior of embassy's officers, says that "Visa application procedures have huge human costs. Artists are subject to pointless queuing, often in disgraceful conditions and subject to disrespectful treatment by embassy staff." Quoted in Chapter 1 (n 103) at 12.
[15] See para 2.3.2 in Chapter 1.

growth, can be seen as a specific category of migrants. Concerning mobility, it is worth noting that artists and cultural workers not only move to give live performances. For their education and professional growth, it is also fundamental to travel and reside for shorter or longer period in different countries, which can offer diverse cultural backgrounds and opportunities to train by acquiring new knowledge and better technologies. On the other hand, they enrich the economic and cultural contexts of host countries and create opportunities to foster dialogue among diversities. Facilitating the conditions to boost the mobility of artists and cultural workers is, therefore, a tool to contribute not only the economic dimension of development, but to the social and cultural ones as well. Nevertheless, a coin always has a double face: looking at the situation from the perspective of the countries of origin, they risk losing their artists and most qualified cultural professionals, who are a resource for local economies as well as for the cultural richness of the country.[16] In this sense, facilitating artists and cultural workers' mobility may be a cause of brain drain, with the consequent incapacity to remove the roots of underdevelopment.

In my opinion, it is important to look at the whole set of issues bearing in mind that mobility of artists and cultural workers is mostly temporary and very atypical. Indeed, they move and reside abroad for shorter or longer periods, often changing country, sometimes in order to supply services, sometimes as self-employed individuals, and sometimes simply in search of inspiration. After moving abroad, they may come back to work and reside in the country of origins for certain periods of time. Under certain aspects, this sort of mobility can be assimilated to the so-called category of "circular migrants", referring to the tendency of migrants to move back and forth between the source country and the destination country. Within the debate concerning migration and development, circular migration – together with return migration – is perceived as a solution to mitigate the effect of brain drain and to offer significant potential for both source and destination countries, as well as the migrant and his/her relatives in the country of origin.[17] It fosters brain circulation, defined as the possibility for developing countries to draw on the skills, know-how and other forms of experience gained by their migrants. According to this idea, artists and

[16] On this issue, African countries have showed great concern regarding their African musicians. See: M Tchebwa, *Musiques Africaines: Nouveaux enjeux, nouveaux defies* ,(2005, éditions UNESCO).
[17] Communication from the Commission to the Council, the European Parliament, the European and Social Committee and the Committee of the Regions, *Migration and Development: some concrete orientations*, COM(2005) 390 final, at 25.

cultural professionals returning, even temporarily, to the country of origin are likely to lead to the transfer of skills, know how and/or new cultural attitudes. Removing obstacles to and facilitating circular mobility of artists and cultural professionals would help liberate the potential of brain circulation for development in the creative and cultural sectors.

The mobility of artists and cultural workers certainly shares similar traits with circular migration, yet cultural artists and workers moving from developing countries cannot be fully assimilated to circular migrants. As discussed in Chapter 1, mobility is an inner element of artistic and cultural production and an essential condition for artists to work and provide services. In this sense, the reasons motivating artists to move are different from those of migrants. It is perhaps more appropriate to look at the issue of artistic mobility through the lenses of diversity. If artistic mobility must be promoted in order to avoid the risk of cultural homogenisation, it is important to ensure equal opportunities to travelling for artists coming from different parts of the world. For this purpose, provisions concerning the cross-mobility of services providers may prove to be useful: economic law can serve the cause of diversity.

2.3) Possible solutions to facilitate the mobility of artists and cultural workers under international law

2.3.1) The UNESCO Recommendation concerning the Status of the Artist

A first step for overcoming the obstacles hindering mobility would be to have an internationally recognised definition of an artist. The most ambitious attempt in this sense is the *UNESCO Recommendation concerning the Status of the Artist.* The UNESCO Recommendation was adopted in 1980 with the scope to establish an overall framework for the conditions in which artists can exist as creative workers. At present, only a few States have ratified the 1980 UNESCO Recommendation and transposed it into national and regional regulations or cultural policies.[18] Some attribute the failure of the UNESCO Convention to the fact that it contains more philosophical tenets concerning the role of culture and artists in society rather than detailed measures aiming at achieving and preserving such a role.[19] Indeed, the definition of the artist given by the UNESCO Recommendation is mainly based on a

[18]Only Canada, France, Germany and recently Latvia adopted a comprehensive framework of law and cultural policy implementing the Recommendation. Source: www.unesco.org.
[19]See again Capian and Wiesand, above (n 6), at 5.

"merits-based" approach instead of touching upon the atypical elements justifying special provisions for the social treatment of artistic professionals. Article 1 of the Recommendation defines an artist as *any person who creates or gives creative expression to, or recreates works of art, who considers his artistic creation to be an essential part of his life, who contributes in this way to the development of art and culture and who is or asks to be recognized as an artist, whether or not he is bound by any relations of employment or association*.[20] The definition, while underlying the merits of the artistic and creative process, seems quite abstract and does not effectively help to shape artists as a category of special workers, whose work needs to be assisted through special measures. As for the mobility aspect, the definition does not contain any reference to mobility as an essential feature of the status of the artist. However, under the title dealing with vocational and training aspects, the UNESCO Recommendation recognises that artistic life and the practice of the arts have an international dimension and asks the States Parties to "take all appropriate steps to promote the free international movement of artists, and not to hinder the freedom of artists to practice their art in the country of their choice". Although not establishing a serious obligation upon the Parties, the Recommendation recognises in some way the importance of international mobility for artists and links it to the enjoyment of the right to work ("freedom of artists to practice their art"). However, in order to facilitate international mobility, no mention to visa facilitation in national legislations or regional agreements is given in the text of the Recommendation. Only soft-instrument or policy initiatives fostering cooperation, like the establishment of travel and study grants, are suggested.

Ultimately, it is interesting to note that the Recommendation shows an awareness of the potential conflict between fostering cultural exchanges, preserving diversity, and local development. It recommends that States Parties, while promoting international mobility, ensure that this does not prejudice the development of endogenous talents and the conditions of work and employment of national artists, as well as to give special attention to the needs of traditional artists, in particular by facilitating their travel inside and outside their own country to serve the development of local traditions.

[20] *Ibidem*, Article I.1.

In spite of the good intentions, because of its legal weakness the Recommendation did not succeed in establishing a common definition and a policy framework for artists at the global level. However it contributed to raise awareness about issues concerning the status of the artist and to nourish the debate over the need for a definition. Today, the most common definition of the artist in existing literature in the field of art and creative economies, refers to the artist as *a person who gives his/her important contribution to the economic, social and cultural development of a society through its creative work.*[21]

2.3.2) The 2005 UNESCO Convention on Cultural Diversity

Under the UNESCO aegis, a stronger contribution may derive from the adoption of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions in 2005, which celebrates cultural exchanges as a central element for development. The 2005 UNESCO Convention was welcomed by most cultural organisations representing professional artists, authors, and other cultural workers as an important reference towards a practical change of administrative procedures regarding visa and work permit procedures. Indeed, the Convention specifically addresses measures that are relevant to mobility in the cultural and creative sector.

First, under Article 14 concerning cooperation to development, the Convention establishes a duty upon the Parties to cooperate with the aim to foster the emergence of a dynamic cultural sector in developing countries, by, *inter alia*:

- facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services (Art. 14, point a (ii));
- adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries (Art. 14, point a (iv));
- providing support for creative work and facilitating the mobility, to the extent possible, of artists from the developing world (Art. 14, point a (v)).

[21] R Florida., *The Rise of the Creative Class – and how it's transforming work, leisure, community and everyday life*. New York, 2004.

Through this provision on cooperation, the UNESCO Convention aims at creating equal opportunities for freedom of expression of the economically weaker cultures. The Convention asks developed countries to take all appropriate measures to facilitate mobility of both cultural works and workers, including artists, in order to enhance cultural flows and give developing countries a chance to use their cultural resources to build development.

Nonetheless, the most relevant obligation is contained in Article 16, which establishes a preferential treatment for developing countries in the sector of cultural exchange. Article 16 states that "*developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries*'. Even if the provision addresses the movement of cultural goods and services and the free movement of artists and cultural practitioners, this last element is certainly the most innovative. For the first time, Article 16 clearly establishes a duty to facilitate, also through legislative measures, the mobility of artists and cultural workers from developing countries. Looking at the multilateral framework, this preferential treatment obligation is consistent with the *ratio* underlying the "Enabling Clause for Developing Countries" of the GATT and the general acceptance of WTO for differential and more favourable treatment for developing countries.[22] However, during the Convention's negotiations, such provision was overly discussed and reshaped because of the implied implications on delicate national policies, such as migration and visa policy.[23] The sentence "*through the appropriate institutional and legal frameworks*' was inserted at the final stage of negotiations in order to reach an agreement among the parties, as if to confirm that States remain sovereign over their policies.

Article 16 is a clear-cut obligation among the Parties whose non-fulfilment could turn into a dispute between them under the dispute settlement procedure of the Convention.[24] Nevertheless, some argue that, despite its effort, Article 16 is likely to be reduced to a *bona fide* obligation because of the clause requiring compliance with the appropriate national institutional and legal frameworks, which conditions its

[22] For a general discussion on the Enabling Clause under the GATT: P Van den Bossche, *The Law and Policy of the World Trade Organization*, 2005, Cambridge University Press, at 679-682.
[23] For more details on this: M C Ciciriello and F Mucci, quote in (n 88) chapter 3, at 130-132.
[24] Article 25 and Annex to the Convention rule the settlement of disputes.

application.[25] Since its entry into force, States parties within the framework of their national legislation have set up no real changes to implement Article 16. However, the raised awareness around the issue pushed the Parties to promote studies and round tables aiming at finding solutions to overcome obstacles to mobility. Among the parties to the Convention, the EU, together with France and Canada, have been the most pro-active in this sense. As we have seen, the adoption of Cultural Protocol within the EPA with the CARIFORUM falls within the implementing actions of the 2005 UNESCO Convention. Later in this chapter I will look at the relevant provisions concerning mobility contained in the Protocol.

2.3.3) Solutions within the WTO framework: mobility under the GATS

Once it is ascertained that artists and cultural professionals, from a legal point of view, are also workers, the possibility for mobility offered by Mode 4 of Article I:2 of GATS[26] deserves to be taken into account. Under GATS, services are supplied through one of the following four modes:

Mode 1 - cross-border supply: supply from the territory of one Member into the territory of any other Member;

Mode 2 – consumption abroad: supply in the territory of one Member to the service consumer of any other Member;

Mode 3 – commercial presence: supply by a service supplier of one Member, through commercial presence in the territory of any other Member;

Mode 4 – presence of natural persons: supply by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.[27]

For the purposes of our analysis, the supply of services under Mode 4 is the most relevant. In fact, artists, but mainly cultural workers, temporarily move as providers of cultural services. According to Mode 4, services are supplied through the presence of natural persons of a Member in the territory of another Member. Also under Mode 3, the service supplier moves across borders, yet under Mode 4 he/she is

[25]M Hahn M.**:** "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law (2006) 9 *Journal of International Economic Law***,** 515-552.
[26] General Agreement on Trade and Services, signed 15 April 1994.
[27] Article I:2(a)(b)(c)(d) of GATS.

only present as a natural person and does not establish a commercial presence. Given that the free movement of natural persons across borders is involved, Mode 4 is likely to encroach with national labour migration rules and policy, although access to the labour market is not covered by GATS. Indeed, the Annex on Movement of Natural Persons Supplying Services Under the Agreement, complementing Mode 4, clarifies that GATS does not apply to measures concerning access to the employment market and measures regarding citizenship, residence, or employment on a permanent basis.[28] Therefore, permanent migration is not covered by Mode 4, which only involves services provided by non-nationals that are self-employed or employees of a foreign employer, who have temporarily moved to another State.

In light of this, Mode 4 potentially offers a path for managing labour migration and, in particular, for promoting circular migration schemes.[29] The Annex on the Temporary Movement of Natural Persons encourages commitments within the entire range of skills: from lower skilled to highly skilled. Paraphrasing with the arts and culture labour sector, Mode 4 offers a scheme for mobility of cultural workers such as light technicians and photographer's assistants and for highly skilled performers, such as musicians, dancers, art directors, etc. Recalling the principle of the Most Favoured Nation (MFN), at the heart of the WTO's functioning, artists and cultural workers from developing countries should benefit from the same treatment as their colleagues from developed countries to access the cultural services market of all WTO Members.

Nevertheless, the regulation of temporary mobility under Mode 4 remains quite unexplored and underestimated for several reasons. First, because of its connection to national political issues, such as the regulation of labour migration, most WTO members are sceptical towards the application of Mode 4. This is confirmed by the very few Mode 4 commitments undertaken during the Uruguay Round.[30] States remain biased towards the regulation of temporary migration under Mode 4 because of a gap under GATS commitments to manage irregular migration risks. There are no measures requiring regulatory obligations upon the source country

[28] Point 2 of the Annex on Movement of Natural Persons Supplying Services Under the Agreement.
[29] M Panizzon "Standing together apart: Bilateral migration agreements and the temporary movement of persons under "mode 4" of GATS", Working Paper n. 77, University of Oxford, 2010.
[30] Only 17% of all WTO members' commitments in low skills under Mode 4 were done at the Uruguay Round. Currently, Mode 4 flows represents a very small percentage of the global services trade (around 5%). IOM, GATS Mode 4, http://www.iom.int//jahia/Jahia/about-migration/developing-miration-policy.

to ensure the timely return of the service providers at the end of the contract. This means that liberalising low-skilled migration, where the risk for overstaying and the potential burden on the country's social welfare system are higher, is not a good option under Mode 4 for WTO members. Instead, they prefer to use Mode 4 for highly skilled migration and to conclude bilateral migration agreements to regulate low skilled migration, which introduce obligations concerning returns.[31] Such a situation entails two consequences mainly affecting developing countries' interests. First, Mode 4 is likely to exacerbate the risk of brain drain because it fosters highly-skilled labour liberalisation at the multilateral level, while the already limited liberalisation of low-skilled labour is left to unequal bilateral negotiations; and because there are no commitments upon receiving countries to reduce the risk of skill depletion in sending countries.[32] Second, privileging bilateral migration agreements mainly answers the host countries' interests and needs, such as border control and return warranties, while Mode 4 of GATS would offer a less biased approach towards labour migration.[33] According to some authors, because GATS Mode 4 disconnects labour mobility from migration, it is likely to apply a market-based logic of offer and demand to global migration governance rather than a border-control based approach.[34] Such a neutral approach would better suit developing and least-developed countries' interests in market access to developed countries, whereas bilateral migration agreements do not really liberalise services market.[35]

However, the potential for Mode 4 to regulate temporary (or circular) labour migration is challenged by major shortcomings deriving from the scheduling structure of GATS commitments. Indeed, through the Scheduling systems WTO members decide to what extent they are committed to liberalising their services market.[36] The Schedule of commitments contains WTO members' clarifications concerning the type

[31] See, for instance, the bilateral migration partnership agreement concluded by France or the cooperation agreement signed by Spain, as well as the Mobility Partnerships concluded by the European Union (which will be further discusses in Section II of this chapter).
[32] M Panizzon, *supra* (n 29), at 9-10.
[33] A Carzaniga, "A warmer welcome? Access for natural persons under preferential trade agreements', in J A Marchetti and M Roy (eds.), *Opening Markets for Trade in Services Countries and Sectors in Bilateral and WTO Negotiations*, (2009, Cambridge University Press), at 500.
[34] Panizzon, *supra* (n 29), at 24; A Betts and K Nicolaidis, "The Trade and Migration Linkage: GATS Mode IV", memo prepared for the Global Trade Ethics Conference, presented at Princeton University, 19 February 2009.
[35] M Panizzon, "GATS Mode 4 Trade and Labor Migration Agreements: A Tale of Two Speeds"', (2010), *47 Dialogue on Globalization Occasional Paper Series*, Friedrich-Ebert-Stiftung, at 10.
[36] J P Trachtman, 'The International Law of Economic Migration: Toward the Fourth Freedom', (2009) *W.E. Upjohn Institute for Employment Research*, at 249.

of services sectors opened to foreign competition, how much market access is offered, the length of stay for the categories of persons included in the list and what equal or more favourable conditions will be applied to foreign services providers. The possibility to limit or exempt access to services sectors, to qualify and condition such access and the rigid structure of scheduling commitments, which are binding and difficult to modify, makes it hard to apply GATS Mode 4 on a broader scale. In order to fully deploy its potential benefits to international migrants and development, Mode 4 under GATS requires some amendments, like the addition of regulatory clauses within the scheduling structure to ensure migrants' timely return and to retain skill exhaustion.[37] In any case, as we know, the GATS revision is proceeding very slowly and changes to Mode 4 do not appear to be at the top of the WTO Members' agendas.[38]

2.4) Some remarks: when migrants are not migrants

The mobility of artists and cultural operators shares certain similarities with issues connected to migration and development, especially circular migration. Because of the peculiarity of the status of artists and the centrality of mobility for their creative activity, the assimilation to migrant workers can be reductive. In many cases, it is because artists coming from developing countries are alleged to move for migration purposes rather than for practicing and providing their services that they encounter difficulties when applying for visas. Unfortunately the UNESCO Recommendation on the Status of Artists is not of concrete help to solve issues deriving from this problem. So, while an international recognition of the category of artists is still missing, States play a relevant role in establishing rules and programmes that can facilitate the mobility of artists. Economic law appears in this specific case a more convenient frame to facilitate their mobility through channels concerning the freedom to provide services.

[37] Panizzon M., "GATS Mode 4 Trade and Labor Migration Agreements", (n 29), 24-26. The author also highlights that there is a residual mandate from the Uruguay Round in Art. X GATS for WTO members to negotiate safeguard mechanisms to temporarily close markets to adjust labour market's demands, but industrialized countries have so far refused to concretize this mission. *Ibidem*, at 28.

[38] For a wider vision of proposals to improve GATS Mode 4 horizontal scheduling, see: L Puri, "Assuring development gains and poverty reduction from trade: the labor mobility and skills trade dimension", UNCTAD Document UNCTAD/DITC/TNCD/2007/8, UN Publications (2008) 73-74

3) Mobility of artists and cultural professionals through the lenses of the Union

3.1) The EU and the mobility of artists and cultural professional

Within the EU's architecture, freedom of mobility of workers is a central element that has gained more and more relevance in the new enlarged and globalised European context. Free movement of persons is one of the four freedoms established in the founding Treaty of Rome for the realisation of the internal market and, today, is also an important element of the EU strategy for growth and employment.[39] Enhancing mobility of persons within Europe today also means dealing with the increased presence of third-country nationals.

As far as the specific mobility of artists and cultural professionals in the EU is concerned, this has not always been among the priorities of the Union's internal and/or external action. Special attention has been given to this issue since the establishment of the Culture 2000 programme (as highlighted in Chapter 2). However, it is with the entry into force of the UNESCO Convention on the Protection and Promotion of Cultural Expressions that the EU's attention to this issue has been emphasised. Following this ratification, the Union is committed to enhancing cultural exchanges both on the internal and the external level. The *European agenda for culture in a globalizing world*, adopted by the Commission in 2007, recognises mobility as a cross-cutting theme in the three civil society platforms (Access to Culture, Cultural Industries and Intercultural Dialogue) and as a means to facilitate a structured dialogue with the cultural sectors, which is fundamental in order to promote the European cultural heritage, to foster creativity and enhance social cohesion and multicultural understanding.[40] The improvement of the conditions for the mobility of artists and other professionals in the cultural field is, then, instrumental to achieve the objective under article 167 TFEU and was among the priorities of the 2007 European Agenda for Culture.

The renewed EU emphasis on the need to improve and foster cultural exchanges is paralleled by an increasing understanding of the relevance of improving

[39] Point 3.3 of the Communication from the Commission to the Council and the European Parliament, "Common Actions for Growth and Employment: The Community Lisbon Programme", COM(2005) 330 final.

[40] Communication from the Commission 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**.** See also the interview with Xavier Troussard, Head of Unit – Culture at DG for Education and Culture of the EU Commission, in *Special Mobility e-zine - European Cultural Foundation*, April 2007, by Cristina Farinha, available at http://www.eurocult.org/uploads/docs/598.pdf.

the transfer and the exchange of artists and cultural professionals as a way to promote development in this globalised world. At the same time, the EU seems to be well aware of the debate surrounding the need to protect and promote the diversity of cultures against the negative effects of fostering cultural exchanges in a globalised world.[41] Within the EU context, this awareness has been recently confirmed by some research projects on the impediments to the mobility of artists, promoted under the conjoined initiative of UNESCO and the European Commission. [42] The state of the art in this field shows, indeed, that there are a number of difficulties that inhibit artists and cultural professionals from crossing their national borders and that the mobility of performing artists and cultural professionals within the EU is not without frontiers. On the one hand, since the entry into force of the Maastricht Treaty, the free movement of EU workers in the European Union is a fundamental right. The full enjoyment of this right is complemented by a system for the coordination of social security schemes and by a system to ensure the mutual recognition of diplomas. However, this system does not seem to be fully efficient because EU artists and cultural workers still encounter difficulties in working outside their national borders and the main hindrances to their mobility derive from a lack of harmonisation of the recognition of qualifications and social security regulations. On the other hand, third-country national artists and cultural workers have to face – in addition to the above-mentioned issues – even greater problems when trying to cross the EU borders. Also in this case, the major obstacles for artists coming from developing countries relate to the release of visas, work permits and the diversity of national migration policies.[43] Such domains fall within the area of shared competence between the EU and its

[41] The Union's adoption of the 2005 UNESCO Convention follows this stream. On this point: C B Graber, *Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity*, in Hildegard Schneider and Peter van den Bossche, (eds), *Protection of Cultural Diversity from an International and European Perspective*, 2008, 141

[42] E.g.: O Andeoud, *Study on the Mobility and Free Movement of People and Products in the Cultural Sector*, Study No DG EAC/08/00, Study for the Commission and the Directorate General Education and Culture, Partnership CE JEC- Université de Paris 2002; S Capian, A J Wiesand, *The Status of Artists in Europe*, ERICarts for the Directorate General, Policy Department Structural and Cohesion Policies, Bonn 2006; D Cliche, A J Wiesand, *Arts and Artists in Europe: New Challenges*, ERICarts, Bonn 2007; R Polacek, *Study on impediments to mobility in the EU Live performance sector and possible solutions*, Mobile.Home, Brussels 2007. These studies have involved the participation of cultural associations, leagues of artists, cultural professionals and other relevant stakeholders in the field.

[43] The European Parliament also showed concerns about this problem. Point E of the EP Resolution on the Social Status of Artists recognises that artistic productions frequently involve Third Country performers whose mobility if often restricted by difficulty in obtaining medium-term visas. EP Resolution on the Social Status of Artists, references above quoted..

Members. Despite the entry into force of the Treaty of Lisbon, which establishes the ambitious objective of a common immigration policy, there is still no full harmonisation in the field of visas, asylum and immigration in the Union. Given the increase of migrant flows from the South and threats to security posed by terrorism, most of the Member States are adopting restrictive migration policies likely to affect the mobility of third-country artists and cultural workers. Yet, if we look at some initiatives on the external level – like the Cultural Protocols trying to facilitate the entry into and temporary stay of performing artists, cultural professionals and practitioners in the EU's territories – it seems that the Union is following an inverse trend. However, the facilitation of the mobility of artists and cultural professionals coming from third countries is not as easy a task as it might appear. To the contrary, it is a delicate topic since it overlaps with other sensitive areas where Member States' competences and national interests have a relevant weight. Before analysing what solutions exist in the framework of the Union's external multilateral and bilateral relations and current EU law regulating regular labour migration, it is important to have a quick look at the EU competence in these delicate areas and the evolution of the European migration policy.

3.2) The EU competence on external borders and the evolution of the European migration

Initially, a common migration policy was not included among the objectives of the European integration process. The term "immigration" did not appear in the founding Treaties, meaning the absence of an established legal basis for the EC/EU competence in this area. However, like most of the subjects not included in the Treaties, migration increasingly became a matter of interest for the EC/EU because of its interaction with the EU Treaties' objectives, namely the realisation of the four fundamental freedoms.[44] Indeed, free movement of persons and services involve migration related aspects. The lack of harmonisation concerning these aspects and the fragmented governance deriving from the different national provisions regulating third country nationals' residence entailed risks for the full realisation of the internal

[44] Being precise, some references to Third Country nationals can also be found in the EEC Treaty: the second paragraph of Article 59 extended the rules to nationals of third countries who provide services, so long as they are established within the Community. However, this option has never been exercised. See: A Coninanzi, A Lang, B Nascimbene B., *Citizenship of the Union and Freedom of Movement of Persons*, (Martinus Nijhoff Publishers, 2008), 201.

market. Around 1970, when migration flows towards Europe started to become more significant, to reach a certain degree of coordination among the Member States became a priority within the EU's Agenda. The first attempts towards such coordination were made by the Commission with the adoption of Regulation 1408/71 extending the protection of Community's social security rights to third-country workers in the territory of the EU.[45] The full extension of social rights to non-Community workers, however, occurred only in 2003.[46]

Legislative initiatives dealing with migration policy issues have been the object of an intense competence debate. Member States have persistently challenged the legitimacy of the EU's legislations on the ground of a lack of competence. Claiming for the preservation of their national spheres of competences, Member States have always preferred intergovernmental cooperation to regulate migration's issues at the Community level. Such competence skirmishes often left migration policy regulations in a sort of *limbo* between intergovernmentalism and the Community's method.[47]

The adoption of the Single European Act, adopted to re-launch the common market goal and provide the EC with a set of new legal foundations for the adoption of relevant measures, represented a small step forward for the harmonization of borders controls and visa rules. It did not confer any specific competence on migration to the EC institutions, but the reinvigorated abolition of controls at the internal level called for a strengthening of controls at the external borders, which necessitated common rules for visas and asylum in all the Member States. The latter opted for strengthening intergovernmental cooperation in this sense, however the Community's institutions were increasingly involved in these forms of cooperation.[48] The following adoption of the Schengen Agreement (1985), establishing certain common provisions for external border control and the release of short-term visas, was an additional part of the construction of a common migration policy. However, it was with the adoption of the Maastricht Treaty, and the following amendments

[45] Regulation No 1408/71 of 14 June 1971.
[46] Regulation No 859/2003 of May 2003 extending the provisions of Regulation No 1408/71 and Regulation No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.
[47] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, (Martinus Nijhof Publishers, 2006), 1, 42-51.
[48] For a detailed description of the debate surrounding the SEA on this issue see again: Papagianni, *ibidem*, 9-13; Coninanzi *et al*., *supra* (n 44), 205-209.

brought by the Amsterdam Treaty, that a real improvement for a common migration policy was reached. Title IV of the Treaty on European Union finally established the EU's competence in the field of immigration, by introducing the third-pillar of the EU's temple devoted to justice and home affairs. This pillar set rules for intergovernmental cooperation between the Member States concerning immigration policy, conditions of entry, movement and residence of third countries and the fight against illegal migration.[49] If the Maastricht Treaty was still marked by a strong attachment to intergovernmentalism, the adoption of the Treaty of Amsterdam provided for the *communitarisation* of relevant aspects of migration policy by moving them from the third-pillar to the first. Article 63, under the new Title IV of the Treaty of Rome, conferred the competence to the Council for some aspects on visas, asylum, immigration and other policies related to the free movement of persons. Through a Protocol Annexed to the Treaty of Amsterdam, the Schengen *acquis* was integrated into the EU framework.[50]

Certainly the Treaty of Amsterdam provided a strong legal basis for the EU to enact a common migration policy. However, the exercise of such powers was hindered by the partial character of the communitarisation of the former third pillar. In fact, not all of the Member States were involved in this change[51] and the communitarised provisions preserved intergovernmental features, which are reflected *in primis* in the choice of submitting the decision-making process to the unanimity vote.[52] Indeed, today, the European migration policy is mainly constituted by a fragmented body of regulations and directives concerning third-country nationals' entrance, movement and residence in the EU, which are often mismatched with the intentions and goals declared by the EU institutions.[53] In 1999, the first multiannual programme on the EU's area of Freedom, Security and Justice (AFSJ), held in Tampere, contained an Agenda for the development of a "Union for Freedom, Security and Justice" during the years 1999-2004 and called for a common EU policy and approach to be progressively established on issues such as labour immigration, integration of third countries nationals (TCNs), external border controls and asylum,

[49] Article K(1)(3) of the Treaty on the European Union, 1992.
[50] Protocol integrating the Schengen *acquis* into the framework of the European Union.
[51] Ireland and the UK are out and Denmark is only bound on the basis of an international agreement.
[52] Papagianni, *supra* (n 47), 25-45.
[53] E.g.: the Long-Term Residents directive, the Family Reunification Directive.

in order to make "*full use of the possibilities offered by the Treaty of Amsterdam*".[54] In terms of implementations, the ambitious political goals of the Tampere Programme did not always correspond to legislative initiatives. Such discrepancy is mostly attributed to the difficulties to reach an agreement during the decision-making process.

The entry into force of the Lisbon Treaty, which introduced important transformations to the legal foundations of the Area of Freedom, Security and Justice and its policies on migration, borders and asylum, together with the endorsement of the Stockholm Programme by the European Council – the third multiannual programme setting a new AFSJ political agenda for the next five years – in December 2009 created great expectations in terms of strengthening the EU powers and, finally, achieving a uniform common immigration policy.[55] The Treaty of Lisbon extended the Union's competence in the field of migration and the ordinary legislative procedure (the former co-decision) to measures on the visa format, the visa list, as well as to aspects concerning labour migration.[56] Indeed, by extending the ordinary legislative procedure to this sector, Article 79 TFEU confirmed the existence of a legal competence by the EU to legislate in the field of legal economic migration. In addition, according to some authors, by recalling that that the provision of this Article shall not affect the exclusive right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed, the Treaty gave the competence to the EU for legislating on labour immigration policy covering other aspects of the admission of economic migrants, such as the technical aspects of the admission process or the grounds of admission.[57] As Carrera argues, the existence of such a competence on the internal level leaves the door open for an implied external competence of the Union to undertake legal initiatives concerning labour migration issues also in its relations with third countries.[58]

---

[54] European Parliament, Tampere European Council 15/16 October 1999, Presidency Conclusions.
[55] S Carrera, "The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme", in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law*, (2012, Martinus Nijhoff Publishers), 229-254.
[56] Articles 77-79 of the TFEU. For a detailed analysis of the changes brought by the Lisbon Treaty in the field of migration, see, *inter alia*: Carrera, *ibidem*; S Peers., E Guild. and J Tomkin (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*, (Martinus Nijhoff Publishers, 2012), 7-31.
[57] Article 79.5 TFEU. For the interpretation in this sense, see Peers (2008) quoted above.
[58] Carrera, *supra* cit., at 248.

This new phase of the common migration policy, however, did not have a shining beginning. In fact, the Commission's Action Plan to implement the Stockholm Programme, '*Delivering an area of freedom, security and justice for Europe's citizens*',[59] published in 2010, was perceived by certain EU Members as an attempt of the Commission to go too far beyond the Council's guidelines and, for the first time since 1999, the AFSJ has witnessed a direct clash between the Council and the European Commission over the ownership of the policy and legislative agenda stipulated inside the Stockholm Programme.[60]

In spite of the re-allocation of areas like cooperation on migration, borders and asylum to the shared EU competence, a strong "intergovernmentalism" is still influencing the governance of such domains. This mainly translates into the transfer of national political priorities at the EU policy level, which has led and still leads to the frequent re-shaping of the EU agenda and challenges over the existence of legal grounds for the Commission to enact legislation in these fields.

3.3) The EU approach to the Migration and Development nexus

Notwithstanding the piecemeal development of EU migration policy, an increased number of issues related to the management of immigration flows has been covered by EU legislation and policy documents. In order to overcome the difficulties in reaching an agreement within the Council on legislative proposals concerning migration matters, the Commission often adopted a sectoral approach by choosing to address specific targets like categories of persons[61] or the readmission of migrants in the country of origin.[62]

In 2000, in the *Communication on a Community Immigration Policy,*[63] the Commission suggested following a two–tier approach: to define a common legal framework on admission of economic migrants and to launch an open coordination mechanism on Community immigration policy. Since then, the EU's attention

[59] Commission Communication, *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan implementing the Stockholm Programme,* COM(2010) 171 final.
[60] This skirmish is also known as the Stockholm Affair. For more details on this, see Carrera, *supra* cit., at 230.
[61] E.g.: Directive 2004/114/EC on admission for the purpose of studies, pupil exchanges, unremunerated training and voluntary service; Directive 2005/71/EC on the admission of Third Country researchers; Directive on Long-Term residents; Directive for highly skilled persons (see infra para. 5.1.2)
[62] Several agreements containing readmission clauses have been concluded by the EU, both within the bilateral and multilateral framework.
[63] COM(2000) 757 of 22 November 2000.

towards the economic aspects of migration has grown significantly. The ambitious Tampere programme already included the management of economic migration within the goals of a comprehensive immigration policy, together with the fight against illegal migration. So far, due to the difficulties above highlighted, the adoption of legislative measures in the field of economic migration has been the most difficult. This, of course, has consequences also on the external dimension of the common migration policy, which is progressing through soft-power instruments rather than hard law tools.[64] Indeed, the EU implied external competence is narrow, given the few far-reaching EU regulations dealing with migration aspects on the internal level. Most of the agreements concluded with third countries focus on the establishment of visa facilitations or cooperation against irregular migration and readmission, these latter topics being highly cherished by Member States. Nevertheless, in light of their tight connection to developmental issues, the economic aspects of migration gained increasingly attention within the external policy of the EU.

In the 2002 Communication on the integration of migration issues within the EU relations with third countries[65] for the first time the Commission explores the links between migration and development, taking into account issues concerning remittances, returns, brain circulation and skill depletion. The Commission looks at both negative and positive aspects of migration for the countries of origin and destinations and also recalls the necessity to promote coherence between the two policies.[66] With this Communication, the EU endorses the root causes approach, which constitutes the first of its three-pronged strategy to boost cooperation on migration with third countries. When addressing the causes of migration, the Commission promotes a balanced overall approach, ranging from the promotion of human rights and democracy to combating poverty, preventing conflicts and improving the economic and social situation in general. The second prong of the EU migration strategy is to build a partnership on migration stemming from a definition of common interests with third countries, in order to more effectively manage migration flows. The Commission points out that the dialogue should focus not only

[64] A Wiesbrock, Legal Migration to the European Union, (Martinus Nijhoff Publishers, 2010), at 153.
[65] COM (2002) 703 final, 3.12.2002.
[66] The importance of ensuring coherence and consistency between migration and development is also reiterated in the Council/Commission Joint Statement on Consensus, see in particular: points 38, 49, 110. (Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', (2006/C 46/01).

on illegal immigration but also on the channels for legal immigration. The third prong is the assistance to third countries in increasing their capacity in the area of migration management, supporting third countries in their efforts to deal with the problems associated with both legal and illegal migration. In 2005, the Commission published a Communication providing for some concrete orientation on migration and development.[67] The Commission breaks down the whole set of questions concerning the migration and development nexus. Among the others, circular migration emerges as a useful tool to foster the transfer of skills to developing countries, together with other forms of brain circulation. In order to facilitate temporary migration, the Commission reiterates the necessity to improve access to short-term visas. Concerning the mitigation of the brain drain effect, the Commission admits that a uniform and simple answer is not possible, given the complexity of the issue. However, it has to be said that the Commission in the 2002 Communication proposed the idea of a EU code of conduct with a view to disciplining recruitment in cases where it would have significantly negative repercussions on developing countries. Yet, this proposal did not receive any follow-up: such a code of conduct would encroach on national policies concerning admissions' quotas, an area of Member States' exclusive competence.

Circular migration has become a core goal of the EU's Migration and Development Agenda. In 2007, the Commission released a new Communication on this topic, individualising mobility partnerships as an innovative instrument to favour this kind of migration.[68] This is in line with the new Global Approach to Migration adopted by the EU. Indeed, in December 2005, the European Council launched the *Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean,*[69] which was subsequently endorsed by the Commission with the 2006 Communication *The Global Approach to Migration one year on: Towards a comprehensive European migration policy.*[70] The Global Approach, aiming to tackle migration comprehensively, addresses a vast range of migration issues and links them

[67] *Migration and Development: Some concrete orientations*, COM (2005) 390 final.
[68] *On circular migration and mobility partnerships between the European Union and third countries*, COM, (2007) 248 final
[69] Doc. 15914/05, 17.12.2005. The need to approach migration as a global phenomenon was firstly highlighted by the Commission in its Communication *Priority actions for responding to the challenges of migration: First follow-up to Hampton Court* COM (2005) 621.
[70] *The Global Approach to Migration one year on: Towards a comprehensive European migration policy,* COM (2006) 735.

together with various relevant policy areas including external relations, development, employment, and justice, freedom and security. Although the fight against irregular migration and the return of migrants remain high on the list of priorities of the Union, the Global Approach tries to go beyond the sectoral approach adopted so far and puts mobility at the heart of the tools to foster such an approach. The Global Approach foresees the adoption of a Mobility Packages *with a number of interested third countries, which would enable their citizens to have better access to the EU.* This has to be realised through 'mobility partnerships', which should combine the interests of the countries of origin and the Member States. Dialogue among the EU and third countries is, then, highly important to shape the content of the mobility partnerships, which should be tailored according to case-by-case interests. The stress on 'mobility' makes us think that such agreements will focus only on one aspect concerning migration: the mobility of third-country nationals across the external EU borders. However, as the Commission makes clear, a series of commitments is expected from the third country concerning the fight against illegal migration (although the commitment would differ from case to case).[71] The *Communication on the Global Approach to Migration and Mobility* (GAMM),[72] issued by the Commission in November 2011, further puts the accent on the mobility aspect and re-launches the visa dialogue within the broader framework of the Global Approach. This is always connected to the need to ensure legality within the framework of migration movements.[73]

Although aiming at controlling and reducing migration, through its Global Approach to Migration the European Union seeks to ensure that the positive benefits of migration are harnessed to bring mutual benefit to the EU and its partner countries. The Policy Coherence for Development process is also instrumental to ensure such a delicate balance. However, it is quite striking that in all the documents and initiatives concerning this new comprehensive approach to migration, cultural aspects are rarely mentioned. Certainly, when the EU lists among its priorities the promotion of human rights and the need to take into account intercultural elements concerning migrants,

[71] COM, (2007) 248 final, *supra* (n 68), at 4.
[72] *Communication on the Global Approach to Migration and Mobility*, COM (2011) 743 final.
[73] The Commission says that the GAMM should be based on four equally important pillars: 1) organising and facilitating legal migration and mobility; 2) preventing and reducing irregular migration and trafficking in human beings; 3) promoting international protection and enhancing the external dimension of asylum policy; 4) maximising the development impact of migration and mobility.

cultural rights receive some attention. However, culture as a vector of development does not seem to be considered by the Union within its migration and development agenda.

4) Mobility of artists and cultural professionals within the Union trade multilateral and bilateral framework

If the facilitation of cultural mobility is not a target of the Union's Global Approach to migration, after the entry into force of the 2005 UNESCO Convention this issue received great attention within the external trade framework. However, if bilateral negotiations reached interesting results through the adoption of the Cultural Protocols, the same outcomes are not being achieved within the multilateral framework of negotiations, namely the WTO.

4.1) Implementing article 16 of the UNESCO Convention: cultural mobility in the bilateral trade agreements

Agreements facilitating visa access are not a new thing within the framework of bilateral relations of the Union with third countries. Association and Partnership Agreements with third countries often contain special provisions in this field. The Association Agreement with Turkey, for instance, contains a facilitating regime for the admission of Turkish nationals. However, they also contain a clause on readmission and cooperation to combat illegal migration. The Cotonou Agreement goes even further: it integrates the goals of the EU migration agenda within the EU-ACP partnership agreement and ensures equal treatment to ACP workers in the territory of the EU as a counterpart to their cooperation, but does not establish any initial right of entry to the territory of the Union.[74]

None of the existing bilateral agreements concluded before the ratification of the UNESCO Convention contain provisions directly addressing matters related to the mobility of artists and cultural workers. In this sense, the Cultural Protocols annexed to the EPAs with the CARIFORUM and the Trade Agreements with Korea, Central America and Peru and Colombia constitute a real innovation. The Cultural Protocols so far adopted pursue the objective to put Article 16 of the UNESCO Convention into practice. The Cultural Protocol of the EPA with CARIFORUM establishes a duty

[74] Article 13, Cotonu Convention (references quote in footnote 96 of Chapter 2). See also: Wiesbrock, *supra* (n **Error! Bookmark not defined.**), 130-131.

upon the Parties to facilitate, *in conformity with their respective legislation*, the entry into and temporary stay in their territories of artists and other cultural professionals and practitioners from the other Party.[75] A similar provision is contained in the Cultural Protocol annexed to the FTA with Korea (Article 4), in the Cultural Protocol with Central America (Article 3), and in the Agreement on Cultural Cooperation with Perù and Colombia (Article 5). These provisions do not contain a definition of cultural worker or artist, but they make a non-exhaustive list of the cultural professionals and practitioners that may enjoy the preferential regime.[76] Since the most relevant provisions are very similar, when not identical, in all the mentioned agreements, as an example I will focus on the CCP within the CARIFORUM-EU EPA. According to Article 3 of the Protocol, artists, actors, technicians and other cultural professionals, included those working in the audiovisual sector, are allowed to stay in any EU state for periods up to 90 days in any 12-month period (provided that they are not engaged in commercial activities). The scope of this provision is to set better conditions for the entry into and the temporary stay in the EU (or the Cariforum) of artists and cultural professionals so as to facilitate their training, exchange of information, expertise and experiences and to make contacts. Previous EU trade agreements said almost nothing concerning the movement of artists: the CARIFORUM-EU EPA is the first to have provisions of this manner, likely to have an impact on visa policy. The Protocol's mechanism will be useful, in particular, for the smaller artists and entertainers and any cultural practitioners who do not yet operate as a firm or have a well-established position on the market and often encounter financial or technical difficulties to get a waiver or visa to travel into other countries.[77] Through the Protocol, they should be granted the possibility to enter EU states under the cooperation element and, over time, develop contacts that can lead to commercial contracts. Yet, it must be recognised that the clause conditioning the granting of preferential treatment to national rules may hinder the full implementation of this provision. It would be ideal to have a standard visa procedure for the purpose of article 3 of the Protocol – agreed and applied by all the EU Members – but for now this is not a concrete option.

[75] Article 3 of the Cultural Protocol III.
[76] See, for instance, Article 3(4) of the Cultural Protocol III within the CARIFORUM-EU EPA.
[77] KEA European Affairs, "Implementing cultural provisions of CARIFORUM-EU EPA. How do they benefit the Caribbean cultural sector?", Discussion Paper N. 118, European Centre for Development Policy Management, June 2011, at XII.

Further, as far as it concerns the Agreement with the CARIFORUM, the EPA's market access provisions concerning the temporary presence of natural persons for business purposes on a partner's territory (mode 4) and touching upon the entertainment services sector offer wider opportunities for artists and cultural workers coming from the Caribbean area to move within the frame of economic exchanges. With respect to this, it must be observed that the EU-Cariforum EPA differs substantially from the EU-Korea, the EU-Central America, and the EU-Peru/Colombia agreements, as the EU Member States (with the exception of Belgium) have granted their CARIFORUM partners binding market access for the supply of entertainment services (other than audiovisual services) by contractual services suppliers (CSS). The market access provisions for the entertainment sector included under the chapter "Investment, trade in services and e-commerce" contribute to enhance the mobility of CARIFORUM cultural professionals. They grant, indeed, legally binding access to almost all the EU markets, including those significant markets where the culture-trade interface is a contentious and very sensitive issue, with the exclusion of the audiovisual sector. It is the first time that the EU and its Member State made significant market access commitments for the provision of entertainment services by professionals of third countries in the EU. We should bear in mind that developed countries are normally willing to allow the supply of entertainment services through investments and commercial presence, but immigration concerns make them more reluctant to allow the temporary entry of natural persons into their territories: from this point of view, the commitments made by most EU Member States (except Belgium) for the temporary entry of natural persons under the EPA are of particular relevance. A wide range of Contractual Service Suppliers (CCS) in entertainment services is addressed by these wider commitments, such as theatrical producers, singing groups, bands and orchestras, authors, composers, sculptors, entertainers and other individual artists, etc.[78] As we

[78] Contractual Service Supplier include the following areas:
CPC 9619 Entertainment services (other than audio-visual):

- 96191 Theatrical producer, singer group, band and orchestra entertainment services
- 96192 Services provided by authors, composers, sculptors, entertainers and other individual artists
- 96193 Ancillary theatrical services n.e.c.
- 96194 Circus, amusement park and similar attraction services
- 96195 Ballroom, discotheque and dance instructor services
- 96194 Circus, amusement park and similar attraction services
- 96195 Ballroom, discotheque and dance instructor services

saw in Chapter 3, the provisions under the Title on Investment in the main EPA covers mostly modes 1, 3 and 4 of the supply of entertainment services. This last one is probably the area in which the CARIFORUM States gained the highest level of preferences (and is the most relevant for the purpose of this analysis). The EPA market access provisions increase the possibilities for the temporary presence of natural persons for business purpose as it follows: Cariforum staff can work in a EU Member State if the Cariforum company has a commercial presence in that EU Member State; and Cariforum entertainers (CSSs) are allowed to provide services in the EU Member States.[79] However, access to artists and professionals in the entertainment sector is not unconditional. The EPA lays down some limitations to the market access commitments that also apply to entertainment services.[80] According to this, CSSs from the Cariforum countries wishing to provide entertainment services in the EU Member States may be subject to Economic Needs Tests (ENT)[81] and specific qualifications may be required. It is interesting to remark that the economic needs tests (ENTs) condition was negotiated in exchange for a full commitment to market opening by the EU without quotas. ENTs are not a new tool, but they have been put in practice in several states for a long time.[82] Since the EPA did not introduce any changes to the way the ENTs are applied in the different Member States, nor a set of criteria for uniform application, each Member State will use its own definition and will apply the Test according to its national practice. This may provide some uncertainties and disparities in terms of access to European national markets.[83] Further, qualifications may still be required. If the qualification has not been obtained in one of the EU Member States, the country concerned may evaluate if they are equivalent to the qualifications required in its territory: this may be an additional

---

- 96199 Other entertainment services n.e.c.

[79] See respectively Article 83 and 80 of the EPA.

[80] Annex IV D to Article 83 on Reservations on Contractual Services Suppliers and Independent Professionals, CARIFORUM-EU EPA.

[81] Point 6 of Annex IV D. The main criteria for economic needs tests will be the assessment of the relevant market situation in the Member State or the region where the service is to be provided, including with respect to the number of, and the impact on, existing services suppliers.

[82] For instance, in the case of the United Kingdom see, *Work Permits, Sports and Entertainment: Guidance for Employers*, 19 November 2007 – 30 March 2008. (www.bia.homeoffice.gov.uk/workingintheuk/workpermits/workpermitarrangements/sportsandentertainments/)

[83] KEA European Affairs, "Implementing cultural provisions of CARIFORUM-EU EPA. How do they benefit the Caribbean cultural sector?", Discussion Paper N. 118, European Centre for Development Policy Management, June 2011, at 12.

obstacle.[84] Finally, in order to take advantage of the market access granted under the EPA, persons supplying entertainment services are expected to meet other conditions stipulated in the EPA, such as obtaining a service contract for a period not exceeding 12 months and possess at least three years professional experience in the sector of activity that is the subject of the contract.[85]

Either included within the main text of the bilateral agreement, or in a specific protocol focused on culture and annexed to the main agreement, mobility of artists and cultural professionals is fostered *via* the basis of economic and cooperation relations. Although certain limitations to the entrance and stay of third-country artists and cultural workers still remain – mainly because of Member States' concerns about the impacts on their cultural industries and labour market – the effort of the Commission to include special provisions facilitating cultural exchanges within the frame of bilateral economic agreement is laudable. Of course, from the perspective of artists, cultural organisations and other stakeholders, a better result was expected. But that expectation does not take into account the limits on the external action of the EU when dealing with the mobility of persons and services, especially if this mobility concerns sectors of national competence such as admissions quotas and culture. Indeed, we should not forget the Cultural Protocols, the EPA and the other trade agreements taken into account were negotiated as mixed agreements: therefore, Member States could play a significant role in negotiating provisions touching upon sensitive sectors (such as trade in cultural services and mobility of artists and cultural workers). As we saw in Chapter 3, the exclusive competence of the Union in trade matter is, to some extent, *less* exclusive in these delicate areas. As for provisions concerning the facilitation of visa release, an area in which the Union gained a considerable degree of harmonisation, the Union could extend the Schengen *acquis* to the Cariforum artists and cultural workers. However, if these subjects wish to travel and stay in a European Country for a period longer than 90 days, their application will be subjected to national rules.

From the perspective of migration and development, facilities granted under these provisions to artists and cultural workers can be seen as a step forward to facilitate circular migration. Mitigation of brain drain, however, does not seem to be taken into account. Yet, it must be remarked that co-productions, which are strongly

[84] *Ibidem*.
[85] Article 83(2) of the CARIFORUM-EU EPA.

promoted under the Cultural Protocols, can offer a possible solution. Indeed, within this co-productions frame, artists and cultural workers involved in such activities should be granted visas that allow them to move back and forth from the country of origin to the EU. Co-productions have been put forward as the appropriate tool to promote the exchange of ideas, knowledge, and skills in the field of cultural industries. Under this framework of cooperation, artists and cultural workers from third countries can take advantages of their experiences abroad and use the acquired skills and knowledge back in their own countries. However, the real impact of such a tool will depend upon the allocation of funds and investments that the Member States would be willing (or not) to provide.

4.2) Implementing GATS Mode 4

Observing the EU's attitude within the framework of multilateral negotiations, we noticed that the possibility to limit access to services is quite relevant for the cultural sectors, especially in terms of access to the EU services markets. In fact, the preference for a sectoral approach adopted by the EU in its external trade policy, which was officially introduced by the Treaty of Nice and re-confirmed in the Lisbon Treaty,[86] lead to the exclusion of liberalising commitments for the cultural services. Former Article 133, as amended by the Nice Treaty, submitted those services sectors considered more sensitive and problematic – like cultural, audiovisual, and educational services – to the shared competence of the EC and its Member States. As we saw in Chapter 3, the Lisbon Treaty cuts down all reference to the competence question in the field of culture, but introduces the unanimity vote for the Council when negotiations cover trade in cultural, audiovisual and educational services. By making the decision-making process harder at the Union level, Member States' interests in such sensitive sectors should be better preserved on the external dimension. As discussed in Chapter 3, the Union still excludes the audiovisual sector from the application of GATS commitments. Although audiovisual services do not entirely cover the definition of cultural services, their exemption certainly limits the access of third-country nationals to a considerable part of the Union's cultural services market. In Chapter 3 I widely discussed the reason underlying such a

[86] M Krajewski, "Of Modes and Sectors External Relations, Internal Debates, and the Special Case of (Trade in) Services", in M Cremona, *Developments in EU External Relations Law*, (2009, Oxford Scholarship Online), at 25.

restrictive approach, mostly determined by the combination of constitutional internal legal constraints (the overlapping of different competences and the respect of the principle of conferral) with political considerations (the protection of the EU Members' national interest, as well as of cultural diversity). It must be added here that the Court of Justice in Opinion 1/94 underpinned such sectoral approaches specifying that "*the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy*" and *"[…] the existence in the Treaty of specific chapters on the free movement of natural and legal persons shows that those matters do not fall within the common commercial policy*".[87] While assessing the extent of the Community's external competence on trade in services, the Court's reasoning focuses on the distinction between the movement of persons and the Common Commercial Policy without mentioning the fact that the GATS does not deal with migration and permanent access to the employment market. The Court's approach seems rather to rely on a conscious knowledge of the intimate interaction of trade in services with national policies such as migration, visa regulations and access to the labour market. The Court seems to be assuming that the movement of services providers is a "sensitive area", placing it within the shared competence sphere.[88]

Considering that freedoms of movement of workers and services are among the four pillars of the internal market's construction, one may see restrictions to further liberalisation of the EU services market within the multilateral frame of negotiations as a sort of *schizophrenic* European behaviour in international trade. This could be judged even more inconsistent if we recall that, although culture remains mostly a matter of national competences, on the internal level the Commission triggered several legislative initiatives, such as the Audiovisual Directives, to open the internal cultural services market.[89] However, fostering liberalisation in the services sector does not appear to be the priority of the Union in the multilateral trade framework of negotiations. As Cremona points out, in Article 133 ECT (now Article 207 of the Lisbon Treaty) there is no reference to the principle of non-discrimination in the common commercial policy, whose aim is, instead, to ensure uniformity as between the Member States in the context of the principles and objectives of the

[87] Opinion 1/94 *WTO*, para 46.
[88] M Krajewski, *supra* (n 86), at 20.
[89] See chapter 3

Union's external action (Art. 133(1)).[90] As highlighted in Chapter 2, preserving uniformity also means ensuring harmony and consistency between all the EU policies, on the internal and external level. So, at first sight, the fact that on the internal level the EU made the elimination of trade barriers and discrimination its flagship in order to create an open internal market based on freedom of movement of goods, services, workers and capital, while on the external level the EU endorses a more protectionist attitude towards liberalisation, may appear inconsistent. Yet, as far as it concerns trade in cultural services, this apparent inconsistency responds to the need to combine the CCP with other constitutional priorities, namely the protection of cultural diversity, as highlighted in Chapter 3. When trade also encroaches on other areas, such as economic migration, impinging on the sphere of national competence and interests, external coherence may be limited by internal constraints.

In conclusion, the Union is, in practice, adopting a more restrictive approach concerning mobility of services providers within the multilateral framework of trade negotiations than at the bilateral level. Considering the repercussions stemming from the battle for the cultural exception, there is no concrete reason to imagine that the EU will engage in a further use of GATS Mode 4 to foster the mobility of artists and cultural professionals.

5) Other relevant frameworks: initiative concerning visa facilitation

5.1) An ambitious project: the rise and fall of the EU proposal for a Cultural Visa

In April 2009, during the International colloquium "Culture and creativity, vectors for development", held in Brussels and organised within the framework of development cooperation between the African, Caribbean, and Pacific (ACP) countries and the European Union, the idea to create a uniform cultural visa for artists and cultural workers was advanced.[91] The aim of the international meeting was to provide a forum in which new solutions can be identified that might substantially contribute to future EU action with its ACP partners in the fields of culture and development. The outcomes of the forum were highly influenced by the enthusiasm of cultural operators following the recent (at the time of the symposium) EU adoption of

[90] M Cremona, "Neutrality or Discrimination? The WTO, the EU and External Trade", in G De Búrca and J Scott (eds) *The EU and the WTO. Legal and Costitutional Issues*, (2001, Hart Publishing), at 152, 160.
[91] http://www.culture-dev.eu/website.php?rub=documents-generale&lang=en.

the UNESCO Convention on Cultural Diversity. However, the ambitious proposal soon became silent and was forgotten.

From a realistic point of view, the abortion of the idea to create a uniform Cultural Visa was quite predictable. The idea would certainly have helped artists and cultural workers coming from the ACP countries to easily move to and cross the EU's borders, by creating a simplified visa release procedure specifically addressing the category of artists and cultural workers. It would have also facilitated a homogenous implementation of the provisions contained in the Cultural Protocols and concerning the facilitation of cultural movements. Nevertheless, the proposal appears overly challenging. First, such a visa would require the adoption of a uniform definition of artists and cultural workers, at least among the parties involved in a facilitating agreement promoting the adoption of a cultural visa. As is known, similar proposals, also concerning other categories of workers, have already been discussed in other multilateral frameworks, like the WTO, with unsuccessful results. There is little reason to think that this would have been an easier task within the EU framework, if we consider the fears and interests of the EU Members when dealing with the further opening of their external borders. Second, thinking about the tensions characterising the adoption of legislative initiatives under the AFSJ umbrella, it is hard to foresee that such a political initiative could become a concrete legislative initiative. On the one hand, visa still falls within the area of a shared competence, which is still largely depending upon national policies. Second, the Commission lacks the power to carry out such an initiative, which would not favour Member States' support (or that of the Council). Let us recall here the fiery debate around the Action Plan implementing the Stockholm Programme, published only one year after the colloquium, and in which the Commission tried to overcome the traditional intergovernmentalism that had characterised the working method in the AFSJ. On that occasion, the Commission pointed out that the Action Plan was not supposed to be a fixed agenda and, in order to be able to face unexpected events, future challenges and opportunities, the Commission will use '*its rights of initiative whenever necessary'*.[92] Such a declaration was interpreted as a provocation by some Member States, who manifested their opposition within the Council. Among the main points of divergence was the idea to

[92] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM (2010) 171 final.

propose by 2013 an Immigration Code focused on the Consolidation of legislation in the area of legal migration, taking into account the evaluation of the existing legislation, needs for simplification and where necessary extend the existing provisions to categories of workers currently not covered by EU legislation.[93] It is this last point that could offer the Commission a path for extending rules facilitating the release of visa and other aspects of mobility to new categories of workers, as artists and cultural professionals potentially are. Yet, this is clearly a non-feasible path. Notwithstanding, to conclude this parenthesis on the short rise and fall of the proposal for a cultural visa, it can be acknowledged that the Commission's efforts, under the auspices of DG Culture and Education, gathering together thousands of artists and cultural professionals from around the world and embracing their proposal for a uniform visa is quite striking. Further, it is worth remarking that in early April 2014, the Commission announced proposals to shorten and simplify the procedures for visa applications for individuals from third countries, including artists and cultural professionals, who wish to make short visits to Schengen area countries. The proposals include a new type of visa (touring visa) enabling legitimate travellers to circulate in the Schengen area for up to one year. Measures to facilitate the granting of visas to attend major events are also envisaged. As these proposals need to be accepted by both the Council of the EU and the European Parliament, the earliest they could come into force would be 2015.[94]

5.2) Sectoral approach for visa facilitation: the Blue Card Directive

The proposal for a directive concerning the conditions of entry and residence of highly skilled workers appeared for the first time in the Policy Plan[95] following the Commission's Green Paper on a *EU approach to managing economic migration*.[96] The proposal came after the Commission's proposal to the Council of a comprehensive directive on the admission of workers and self-employed[97] in 2001.

[93] *Ibidem*.
[94] Six Member States would not adopt these measures: Bulgaria, Croatia, Cyprus, Ireland, Romania and the UK. Source: "Preparatory Action Culture in EU External Relations", Report prepared for the European Commission, published in June 2014, at 118. This report is the outcome of a sixteen-month inquiry that has been the centrepiece of the Preparatory Action "Culture in EU External Relations".
[95] Communication from the Commission, Policy Plan on Legal Migration , COM(2005) 669 final.
[96] Green Paper on *An EU approach to managing economic migration*, COM (2004) 811 final.
[97] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (presented by the Commission) COM (2001) 386, 11 July 2011. For a commentary on the draft directive see: G

Because of the difficulty to reach an agreement on this text, the proposal was soon withdrawn and the debate surrounding labour migration was re-launched by the use of a sectoral approach. Given that most Member States objected to a general EU instrument regulating legal labour migration arguing that demographic, social and structural diversities among the Members' contexts did not allow them to establish what common issues had to be addressed, except for certain sectors,[98] the Commission opted to propose four sectoral directives concerning labour migration issues.[99]

The *Directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment* (Directive 2009/50/EC)[100] was adopted in 2009 with the scope to regulate admissions of highly qualified third-country nationals to the EU Member States. It is known as the Blue Card Directive because it intends to create a mechanism similar to the US Green Card. The overall goal of the Directive is to attract and retain highly qualified third-country workers in order to strengthen the EU's economic competitiveness. More precisely, the Directive recognises that legal migration can play an 'important role in enhancing the knowledge-based economy in Europe, advancing economic development'.[101] In order to reach this goal, it is necessary to address major shortages deriving from the often complex and very diversified legal provisions concerning TCN admissions to the Member States. Therefore, Directive 2009/50/EC establishes a set of common provisions facilitating the admission and the mobility of highly qualified TCNs for more than three months into the territory of the Union by issuing a European Blue Card that entitles the holder to reside and work in the territory of a Member State.[102] Only a 'highly qualified employer' who hold higher professional qualifications proving that they have the required adequate and specific competence can apply for a EU Blue Card. Besides holding higher professional qualifications, for the purpose of

---

Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, (Martinus Nijhof Publishers, 2006), 170-172

[98] Y Pascouau, *La politique migratoire de l'Union Européenne. De Schengen à Lisbonne*, (Fondation Varenne, 2010), at 482.

[99] Besides the Directive concerning highly skilled workers, the three other proposals focused on conditions for the entry and stay of seasonal workers, Intra-Corporate Transferees (limited to temporary movement) and remunerated trainees.

[100] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment. The UK and Ireland opted out of the Directive and Denmark did not take part.

[101] *Ibidem*, Recitals 4 of the Preamble.

[102] See Article 1 and Article 2(c) of the Directive 2009/50/EC.

the Directive a 'highly qualified employer' is defined as an 'employee protected under national employment law and/or national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else' and 'is paid' (with no further specification on this point).[103] The Directive does not apply to some categories of persons, like those in seek of temporary protection, family members of EU citizens who already enjoy free movement rights under the umbrella of other EU legislations[104] or persons who entered on the basis of international agreements facilitating the cross-border movement of certain categories of natural persons (such as services providers under the GATS).[105] Nor does it apply in the case of more favourable conditions granted to TCNs within the framework of other bilateral or multilateral agreements concluded by the EU and/or the Member States.[106]

To obtain the Blue Card, the highly qualified TCN has to meet the following conditions: to have a 'valid work contract' or, if specified under national law, a 'binding job offer for highly qualified employment', show documents attesting the relevant higher professional qualifications, present a valid travel document and visa application or a valid residence permit if required and be covered by a sickness insurance. Of course, he/she must not be considered a threat to public policy, public security or public health. Member States can also require the applicant to provide his or her address in the territory of destination.[107] An additional room for manoeuvre of Member States is given by the requirement concerning the gross annual salary received by the TCN, which must not be inferior to a relevant salary threshold defined by the Member States (and at least 1.5 times the average gross annual salary in the Member State concerned).[108] If the TCN applicants comply with all these conditions, the Member State concerned by the application shall facilitate the release of the requisite visas and issue a EU Blue Card to the applicant. The EU Blue Card holder is entitled to enter, re-enter and stay in the territory of the Member State issuing the

[103] Article 2(b) of the Directive; for the definitions of higher professional qualification see point (g) of the same Article. The definition of employer under the Blue Card Directive is similar to the definition of 'worker' under EU free movement law.
[104] E.g.: family members of EU citizens who are not EU-citizens are granted free movement rights under Directive 2004/38, also known as the EU citizens Directive.
[105] For the full list of categories excluded from the field of application of the Directive, see Article 3.
[106] Article 4(1) of the Directive 2009/50/EC.
[107] Article 5(1)(2) of the Directive 2009/50/EC.
[108] Article 5(3) of the Directive 2009/50/EC.

Blue Card and to enjoy freedom of movement rights among the Member States.[109] For the first two years, the EU Blue Card holder's access to the labour market is limited to those paid employment activities that permitted their entrance. After this period of time, he/she can be granted equal treatment as nationals of the Member States regarding access to highly qualified employment.[110]

The set of mandatory requirements for a successful application seems to be quite complex and this can discourage TCN professionals from opting to apply for a EU Blue Card. Further, the Directive does not establish a complete set of common requirements valid for all the EU Members. To the contrary, it leaves a considerable power to Member States to make the admissions requirements more demanding when implementing the Directive at the national level, as in the case of the minimum salary threshold.[111]

The Directive also recognises a large discretion to Member States concerning the decision to refuse or issue the Blue Card. Besides the non-fulfilment of mandatory conditions set out in the Directive, Member States can reject applications on the ground of national policies, such as quotas on labour migration,[112] or after having examined the conditions and needs of their internal labour market (such as temporary vacancies or unemployment), or if the employer has been sanctioned under national law on employment.[113]

The adoption of a legal scheme facilitating the mobility of highly skilled migrants towards Europe raises concerns about a possible brain drain in developing countries. Although the impact assessment report prepared by the Commission advanced the possibility to require Member States to pursue ethical recruitment policies by avoiding recruiting in countries suffering from recognised situations of skills depletion,[114] the adopted text of the Directive does not contain a clear obligation in these terms. Using the language of soft law, Article 8, which establishes the

[109] Article 7 of the Directive 2009/50/EC. Concerning the freedom to move to a Member State other than the first for the purpose of highly qualified employment, Article 18 establishes a condition of 18-months of legal residence in the first Member State, after which the person and his/her family can freely move.
[110] Article 12 of the Directive 2009/50/EC.
[111] On this point, Pascouau reflects that due to the very diverse social and economic contexts of the EU Members, it is likely that the implementation will lead to 27 different thresholds. Y Pascouau, *supra* (n 98), 484.
[112] The Directive, indeed, does not affect the right of Member States to determine the number of third-country national admissions (Article 6 of the Directive 2009/50/EC).
[113] Article 8 of the Directive 2009/50/EC.
[114] Impact Assessment Report (SEC (2007) 1403), at 65.

grounds for refusal of the application, says that Member States *may* reject an application 'to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin'. As formulated, this seems to be an additional option for Member States to decide whether to grant (or not) a Blue Card, rather than an obligation to cooperate with the country of origin to properly address the brain drain issue. In any case, as some have commented, if a good number of Member States will exploit the many opportunities granted by the Directive to restrict its field of action, the brain-drain effect will not occur as frequently.[115] In fact, as above remarked, the frame of demanding requirements and the large discretion for refusal left to the Member States do not encourage applications from third countries. Others have pointed out that other existing schemes for highly skilled workers have proved to be more successful in attracting workers when they provide for permanent stay.[116] In conclusion, it is quite a common opinion that the Blue Directive's potential in making the EU more attractive for highly skilled migrants is quite weak and that, eventually, Member States opted for an instrument which saved the integrity of their national migration policies.[117]

Looking at the Blue Card Directive from the perspective of artists and cultural workers, we can ask in what ways can they benefit from the Directive? If we consider that the Blue Card grants the right to enter for a temporary period, in which the holder can leave and re-enter the territory of the Member States, and move between Member States (although after 18 months of permanence in the first State), the Blue Card Directive seems to be offering a potential alternative framework to facilitate the atypical mobility of artists and cultural workers from third countries. However, some further considerations demonstrate that this potential is quite limited. First, the Directive only addresses employees and not the self-employed. This is already a limit for the broader impact of the Directive: if its scope is to attract highly skilled persons to Europe, it is hardly understandable why it should focus only on employees and not create a frame for the self-employed too.[118] In the case of artists and cultural workers, this limitation is particularly relevant: as above specified, artists mainly work as self-employed; when they do work for someone, they often have atypical contracts that

[115] Peers S., *et al* (eds), *EU Immigration and Asylum Law,* above (n 56), 69.
[116] P Zalatel, "Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration", (2006), 12 *European Law Journal*, at 627.
[117] In this sense, see Y Pascouau, *supra* (n 98), 482-488; S Peers, E Guild *et al*, (n 56), at 69.
[118] Peers S., Guild E. and others, p. 67.

may not fulfil the requirement of the directive for a valid work contract. So, the Blue Card is more of an option for cultural professionals, who frequently work under a contract as an employee, and only those artists who can prove they have a work contract or a binding offer of employment. Considering the difficulties for artists and cultural professionals of developing countries to get information about vacancies, as well as limited access to the internet and other communication services for making such applications, the Directive seems to be benefitting only a small elite of artists and cultural professionals from third countries. In addition, the problem of recognition of higher education and higher professional qualifications should not be underestimated: as documented by several studies on the status of artists and cultural workers, major hindrances to their mobility derive from difficulties concerning the recognition of diplomas and qualifications. If we think that the Directive only gives general definitions of higher professional qualifications and higher education qualifications, and that the assessment of their adequacy is left to Member States' national authorities, the Directive does not appear to offer an efficient solution to such a problem. Finally, it must be recalled that the Directive does not affect the most favourable provisions under existing bilateral or multilateral agreement concluded the EU or its Member States: therefore, in the case of artists and cultural professionals, it would apply only to those coming from third countries which have not signed any of these agreements.

In conclusion, the implementation of the Blue Card Directive presents only a small contribution to fostering the mobility of artists and cultural workers from third countries. However, it would be auspicious to extend the application of the sectoral approach, which led also to the adoption of other directives – like the one concerning researchers – facilitating the entrance of specific categories to the EU's territory. Ideally, to propose (and adopt) a sectoral directive concerning the access, movement and residence of third-country artists and cultural professionals would signify a concrete step forward.

5.3) Visa facilitations through Mobility Partnerships: a possible room for artists and cultural workers?

Mobility Partnerships are the privileged instruments of the new Global Approach to Migration and Development. The choice to use a "partnership" rather

than other forms of agreement usually used by the Union in its relations with third countries corresponds to the reparation of competences within the EU system. Indeed, concerning a vast array of legal and illegal aspects of migration, a more legally binding agreement would require the participation of all Member States (as in the case of mixed agreements). With the partnership form, Member States can choose whether to take part given their relationship and interests with the third-country involved. Partnership also evokes a negotiation frame in which all the parties engaged share equal positions. Indeed, such a form of agreement should also accommodate needs and interests of the third countries.

So far, the Union concluded mobility partnerships with Cape Verde, the Republic of Moldova, Morocco, Georgia, and Armenia. Given the case-by-case approach that should tailor the content of mobility partnerships, once may expect that these concluded partnerships differ from each other. In fact, they are all very similar in terms of substantial provisions included in the text. First, there are no real binding obligations established in the texts: the mobility partnerships concluded so far are more similar to a political programme or declaration of intents. Second, there are no concrete actions set by the Parties to achieve the goals declared in the text. The most deceiving aspect is the lack of real binding obligations upon the Parties in terms of visas. In fact, although the Parties engage in further improving aspects of the conditions of consular services and procedures for the issuing of Schengen visas and simplifying the procedures for access and legal stays (including the possibility of issuing multiple-entry), such a commitment remains a mere declaration. Great attention is given, instead, to strengthening cooperation for border control and fighting irregular migration. The implementation of visa-issuing facilities seems to depend upon the level of real engagement of the third parties in achieving, first, these goals. In addition, no specific categories are addressed by the partnership: concerning the cultural sector, there is no mention of facilitating mobility in this area.

In the end, mobility is not really included in these partnerships – other than in the name. So far, there seems to be little room for concretely encouraging the mobility of artists and cultural professionals through this instrument. On the one hand, it is clear that the Member States' interests highly influence the content of such partnerships. On the other hand, the Commission should focus more on the EU *acquis* on visa liberalisation today and adopt the same schemes regulating security aspects and visa facilitations as in those of association agreements. To use a sectoral

approach, addressing specific categories, may – once again – be the solution for including specific provisions on visa issuing. Artists and cultural workers could be among these categories.

6) Concluding remarks

Artists and cultural workers coming from developing countries or other critical areas often encounter more problems than their colleagues from developed countries because of their association with economic migrants. Although certain similarities between the circulation of cultural professionals and economic migrants can be singled out, especially when looking at the whole question through the lenses of the migration and development nexus, assimilating the movement of cultural workers coming from disadvantaged contexts to the general category of migrants can be reductive. Indeed, transnational mobility is an inner aspect of the professional activities of artists and cultural workers: this aspect should be taken into account and specific regulations tailored to the needs of this category should be adopted. While such specific regulative regimes are missing, rules concerning the cross-borders supply of services under the frame of international economic law may help to support the mobility of artists and cultural workers. The UNESCO Convention seems to be aware of this and requires its Parties to establish preferential treatment scheme to facilitate the mobility of artists and cultural workers coming from developing countries so as to increase their possibilities for market access (Article 16 of the Convention). Further, preferential mobility schemes should also aim at facilitating cultural workers' training, exchange of information and experiences. The European Union strategy to foster transnational mobility of artists and cultural workers in the framework of bilateral trade agreements seems to be based on both these aspects: increasing possibilities for non-EU cultural professionals to access the EU market through provisions improving the temporary presence of cultural services suppliers (in cultural sectors other than the audiovisual one); and creating better conditions though the Cultural Protocols to simplify and promote mobility of artists and cultural workers within the frame of co-productions, cultural and training exchanges. At this point, two distinctions are needed: the first one relates to the evidence that on the bilateral level the Union is able to engage in more ample commitments than in the multilateral framework; the second one concerns the differences between the EPA

with the CARIFORUM and the other trade agreements analysed in relation to cultural services' market access concessions. As for the first point, once more it is unsurprising that the Union is more daring at the bilateral level than the multilateral one. Within the multilateral framework the Union's action is highly influenced by internal policy interests and legal constraints, as we saw in the case of GATS Mode 4. Yet, Member States also influenced the Union's final decisions concerning the temporary presence of natural persons supplying cultural services within the frame of bilateral trade negotiations. This links with our second observation, concerning the substantial differences between the CARIFORUM-EU EPA and the other Agreements. In the EU-Korea agreement Member States strongly opposed the allowance of preferential treatment for co-productions and further access to cultural sectors because of the level of development of Korean cultural industries, in order to defend the European cultural creative sector in the name of cultural diversity. As we saw, the criticism towards the Commission's approach in negotiating the FTA with Korea strongly affected the following negotiations for the EU-CA and EU-Colombia and Peru agreements. In both these contexts, a wider access for services providers in the entertainment services like in the CARIFORUM-EU agreement has not been granted. The unprecedented market access commitments granted for cultural services suppliers in the EPA are therefore characterised by a strong development policy paradigm. Overall, they seek to facilitate the circulation of CARIFORUM artists and other cultural professionals and practitioners in the EU, which might generate important capacity building effects.[119] This approach is coherent with the international commitments undertaken by the EU, coping with the promotion of culture as a vehicle of development. The different level of commitments undertaken in the other Trade Agreements is in line with the case-by-case approach, yet the fact that the EU-CA and the EU-Colombia and Peru agreements do not contain the same level of access for cultural services suppliers shows that a better prior assessment should be made. Indeed, it is also unclear for what reasons artists and cultural workers from Central America, Colombia and Peru cannot enjoy the same preferential treatment granted to the cultural workers of Caribbean countries. In these two contexts development issues are also at stake, but do not seem to play the same significant role as in the CARIFORUM-EU EPA. The mobility of artists and cultural workers from

[119] E Psychogiopoulou, "The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface", (2014) 41 *Legal Issues of Economic Integration,* at 79.

Central America, Colombia and Peru is facilitated only through the basis of the cultural cooperation provisions contained in the cultural protocol/agreement.

Besides the need to preserve cultural diversity, the EU's undertaking of commitments to foster the mobility of artists and cultural workers is made more complicated by the fact that these initiatives encroach upon sensitive national spheres like visas and migration control. As we saw, visa issues are at the heart of the obstacles hindering the mobility of artists and cultural workers from third countries. Current EU legislation on migration does not offer appropriate solutions for this problem. For the future, the sectoral approach, which led to the adoption of directives such as the one dealing with researchers, could be a good way to promote the adoption of a directive concerning artists and cultural workers. Yet, it is difficult to imagine that this could take place with the agreement of all Member States. Nonetheless, the intention of the Commission to work on proposals to shorten and simplify the procedures for visa applications for individuals from third countries, including artists and cultural professionals, who wish to make short visits to Schengen area countries, re-launched in April 2014, still leaves room for better future outcomes.

The analysis of the Union's policy documents on migration and development shows that only little attention is given to culture within the frame of the legal and political initiatives adopted addressing mobility issues. The analysis of mobility and migration carried out in this chapter demonstrates that "culture as a vector of development" seems to be relevant mostly when the economic aspects of cultural activities are at stake. So far, the integration of culture as a vector of development has gained more space in the context of trade policy than in migration policy.

CHAPTER 5

THE EU *VIS À VIS* INTELLECTUAL PROPERTY LAW, CULTURE AND DEVELOPMENT

1) Introductory note

This chapter looks at the third selected case involving issues deriving from the relationship between culture and development, namely the protection of Traditional Knowledge, particularly when it is related to the use of genetic resources. In Chapter 1 I explained why the protection of certain cultural traditions is highly debated today; and to what extent the protection of such traditions through intellectual property rights is connected to issues of sustainable development. To briefly recall the debate, there are two major issues associated with the implementation of current international Intellectual Property (IP) law: the first is that the possibility to patent biogenetic resources granted under international law limits the access of Indigenous and Local Communities (ILCs) to natural resources, therefore hindering the survival of their traditional ways of living; the second challenge, involves the inadequacy of IP law to adequately protect traditional knowledge (TK) holders – in particular from serious risks of misappropriation or biopiracy - and to ensure a fair distribution of benefits.

European States, like most of the other industrialised Western countries, are directly interested in this debate because they are among the major users of genetic resources originating in developing countries. The EU, on behalf of its Member States, is also interested in the international negotiations around this debate. This European interest is evident in the ratification of the UN Convention on Biological Diversity and of the recent Protocol of Nagoya,[1] as well as its participation with the ongoing negotiations and discussions under the WIPO and the TRIPS' framework. Further, the EU adopted internal regulation concerning the patenting of biotechnological inventions,[2] and is widely engaged in spreading the fulfilment with IPRs worldwide in order to promote common IPRs standards. In this chapter I will try

[1] Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity; Council Decision of 14 April 2014 on the conclusion, on behalf of the European Union, of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.
[2] Directive 98/44/EC on the Legal Protection of Biotechnological Inventions, OJ L 213/13.

to scrutinise the attitude of the Union towards major threats to the protection of traditional knowledge connected to the use of genetic resources on the international level. As with the previous chapters, I will first present the international landscape, so as to consequently focusing on the EU position within this multilateral frame of negotiations - namely the TRIPS' review of Article 27.3(b) and the WIPO's initiative to adopt a legal text to protect TK worldwide. Then, I will explore whether and how TK and IPR-related issues are integrated and treated under the bilateral agreements taken into analysis in the former chapters. Finally, I will highlight some relevant internal initiatives, such as the 2013 adoption of the European Parliament Resolution on development aspects of intellectual property rights on genetic resources, and the more recent adoption of the EU Regulation 511/2014 on Access to Benefit Sharing (16 April 2014), implementing compliance aspects of the Nagoya Protocol.

2) Culture and Intellectual Property Law: Traditional Knowledge, IP law and development issues under the international law framework

2.1) How Traditional Knowledge, IPRs and development issues link together

2.1.1) The notion of Traditional Knowledge

Before exploring the theoretical debate and major criticism of the relationship between IPRs and development, it is convenient to specify the meaning of the term *traditional knowledge* (TK). Article 2 of the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage, when defining the expression *intangible heritage*, lists traditional knowledge among the elements that constitute the immaterial cultural heritage of people and communities.[3] Yet, the 2003 UNESCO Convention does not give any clearer definition of this terminology. In effect, there is no universally accepted definition of traditional knowledge because it is a term that

[3] Article 2 of the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage so defines intangible cultural heritage: *"[…] 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as instruments, objects, artefacts and cultural space associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. […]".*

takes on many meanings for different people and cultural contexts.[4] However, when studying the main literature on this topic, some general criteria based on the collective understanding of the term as developed by leading experts, academics and directly involved stakeholders in international fora can be detected.[5] According to the common perception, TK is widely understood as knowledge that has developed over time and is transmitted from generation to generation. It is typically orally transmitted and collectively held, owned and shared by groups of peoples and communities who have developed and safeguarded it over time. It is usually of a practical nature – indeed, it often relates to the use and management of natural resources -– and is tightly connected to the specific features of the surrounding environment. Given this peculiarity, it can be said that TK is embedded in specific environmental settings, as well as in customs, languages, local practices, and cultural heritage. It often takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local languages, and agricultural practices. Although it is quite common to think about TK as a fixed and static set of knowledge,[6] TK is quite dynamic and evolves according to environmental and external influences. A concrete examples of such innovation is provided by the maintenance system – such as the management of lands, forests and natural resources – practiced in indigenous contexts,[7] that are constantly challenged by (and thus adapted to) the natural evolving of ecosystems, as well as the effects of climate change...

This brief introduction to the peculiarities of the notion of TK highlights two major issues. First, there is no common and worldwide-accepted definition of TK, but only a broad definition given by the 2003 UNESCO Convention and some general parameters which have been elaborated at the national and international level. This

[4] D Robinson, "Beyond 'Protection': Promoting Traditional Knowledge Systems in Thailand" in J Gibson, *Patenting Lives. Life Patents, Culture and Development*, (Ashgate Publications, 2008),121-138, at 121.

[5] The features here presented draws upon the work of the 8(j) Working Group of the Convention on Biological Diversity's Secretariat (more extensively treated in the following part of this chapter), the work of the Traditional Knowledge Division of WIPO Secretariat, and major literature on the subject such as: G Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, (Earthscan 2004); P Drahos, "When cosmology meets property: indigenous people's innovation and intellectual property", (2011), *29:3 Prometheus*; R J Coombe, "Protecting Cultural Industry to Promote Cultural Diversity: Dilemmas for International Policy-making Posed by the Recognition of Traditional Knowledge" in K Maskus and J Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, (Cambridge Press 2005), 563; J Gibson, "Traditional Knowledge and the International Context for Protection", (2004) 1:1 *SCRIPT-ed.*.

[6] Commonly, according to the Western understanding of TK, TK is associated with the revival of old traditions that have been preserved as such and have not changed over time.

[7] See P Drahos, "When cosmology", above (n 5), at 5.

implies that each State can decide what traditions and practices fall under this definition, and what level of protection is necessary. Secondly, the peculiarities of this notion show a certain degree of incompatibility with the standard criteria for IPRs, such as the fact that practices and knowledge are not written and are commonly shared among different communities, or the difficulties to identify the original owner. These features do no reconcile with the application of IPRs rules: thus, this kind of protection seems to be, than, inappropriate in the case of TK, as we will see later in this chapter.

2.1.2) Consequences deriving from Art. 27.3(b) of the TRIPS Agreement: the risk of misappropriation, biopiracy and unfair benefit-sharing.

Under international law, among the several treaties' provisions regulating IP law,[8] those contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are particularly relevant for TK protection and development. The TRIPS Agreement, adopted in 1994, reinforced the protection of IP rights by establishing a framework of minimum standards binding all WTO members. Under article 27 of the TRIPS, States are obligated to grant patent protection for innovations in all fields of technology implying novelty, an innovative step and a potential for industrial application.[9] Paragraph 3(b) of Article 27 establishes the possibility for States to exclude certain kinds of inventions from patenting, such as plants, animals and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes. This exclusion is rather narrow. In fact, micro-organisms, and non-biological and microbiological processes are eligible for patents, and this is particularly relevant in the case of biotechnological applications in the agricultural, pharmaceutical and cosmetics sectors, as well as other biotechnological industries which rely upon the use of genetic material and TK related to the use of such genetic material.[10] As for plant varieties, some form of

[8] I recall here, among others, the whole set of WIPO Conventions concerning all aspects of IP law. However, in order to narrow down the research area, I will mention here only international law provisions concerning IP law that are more pertinent for the protection of TK and "culture and development" related issues.
[9] Art. 21(1) of the TRIPS Agreement.
[10] Article 2 of the Convention on Biological Diversity (CBD) defines biotechnology as "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use". Convention on Biological Diversity, adopted on 5 June 1992 in Rio de Janeiro and entered into force on 29 December 1993.

intellectual property eligibility needs to exist, either through patent protection, or a *sui generis* system created specifically for the purpose, or a combination of the two. [11] Therefore, the choices are rather restricted, given that "some kind of protection" for plant variety is generally required by the provision, and micro-organisms, like the ones used today in biotechnology which cannot be exempted. In addition, even when the State can claim that plants and animals already exist in nature and no inventor can be identified, this is not enough to adequately protect the traditional knowledge and practices of indigenous and local peoples from the impacts of biotechnological engineering.[12] For instance, biotechnological agriculture includes a range of tools that scientists employ to understand and manipulate the genetic make-up of bio-resources – such as seeds, microorganisms, plant cells, etc. – for use in the production or processing of agricultural products. Often, the initial step for such genetic engineering is based on the acquisition of the specific traditional knowledge that isolated the natural element from the environment and made its potential application obvious. Starting to use the IP law language, such knowledge can be considered the *prior art* likely to make that discovery – and the connected invention – obvious.[13]

According to the TRIPS, the patent holder is the exclusive owner of the patented product and has exclusive rights to use and sell it. To provide concrete examples of the consequences that can arise from this situation for Indigenous and Local Communities in vulnerable contexts, I will use the narrative of biotechnological agriculture (BT agriculture). In the case of BT agriculture, seeds – that are used in genetic engineering to produce hybrids or GM seeds – are normally patented. The right to use these seeds includes: harvest, collection, saving, planting, re-planting and the exchange of patented plants or of plants containing patented cells and genes.[14] As a consequence, a great range of traditional agricultural practices – such as those based on the collection and conservation of seeds – as well as traditional agricultural systems are disappearing. Thus, unemployment is growing in indigenous and local

[11] An example of *sui generis* protection for plant verieties in the multilateral framework of agreements is the WIPO International Convention for the Protection of New Varieties of Plants (UPOV), 1961.
[12] M Footer and E Opuku Awuku, "Sustainable Agricultural Resources and Food Security: the Seed Treaty and Equitable Benefit Sharing" in M C Cordonier Segger and C G Weeramanatry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law*, (Martinus Nijhoff Publishers, 2005), 250.
[13] G Wei, "Fitting Biological Products Within the Intellectual Property Framework: Challenges Facing the Policy Makers", in B Ong (ed.), *Intellectual Property and Biological Resources*, (Marshal Cavendish International, 2004), 28, at 35-40.
[14] Article 28(1) TRIPS Agreement.

Communities that largely thrive upon these traditional activities. Moreover, requesting and obtaining a patent is usually a long and expensive procedure that cannot be initiated by those belonging to indigenous and local communities. The real subjects benefiting from this patent protection are essentially large transnational corporations, mainly based in Western Countries. Further, the whole patent system is based on the Western model of private intellectual property, based on the logic of individual economic profit, which encroaches and conflicts with the local sustainable model of development of these Communities. In fact, such a way of recognising individual property rights over natural resources does not suit the model of governance adopted within most indigenous and local communities.[15] First, the concept of individual ownership is right for these societies whose governance of public goods is mainly based on the logic of "common property".[16] Second, in terms of access, the sharing and conservation of traditional knowledge concerning the use and management of natural resources may rely on factors such as kinship relations, confidentiality or forms of spiritual respect that are unknown and not recognised under IP law.[17] These cultural differences, together with the economic and technological disparities affecting developing countries, makes it hard to envisage how IP rights over genetic resources might contribute to a better development for indigenous and local communities, as argued by those supporting the extension of the IP law-based system to the governance of genetic resources and related TK. Further, it should be remarked that the patenting of seeds and plants is increasing the phenomenon of unlawful appropriation of indigenous and local knowledge and related biogenetic resources, also known as *biopiracy*.[18] Indeed, most GM crops or hybrids derive from knowledge and technical skills already developed by Indigenous and local peoples. When such techniques are patented, original holders not only

[15] Considerations about what the most appropriate model of governance on natural resources would be cannot be properly addressed in the context of this paper. See: F Francioni, "Genetic Resources, Biotechnology and Human Rights: The International Legal Framework" in F Francioni (ed) *Biotechnologies and International Human Rights,* (Hart Publishing 2007), 3; also: K Aoki, "Weeds, Seeds and Deeds: Recent Skirmishes in the Seed Wars", (2003-2004), *11 Cardozo Journal of Int'l and Comp. Law*, 305.

[16] F Lenzerini, "Biogenetic Resources and Indigenous Peoples' Rights", in F Francioni (Ed) *Biotechnologies and International Human Rights*, (Hart Publishing, 2007).

[17] Drahos, above (n 5), 238-239; R J Coombe, "Protecting Cultural Industry to Promote Cultural Diversity: Dilemmas for International Policy-making Posed by the Recognition of Traditional Knowledge" in K Maskus and J Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, (Cambridge Press, 2005), 563.

[18] F Lenzerini, "Biogenetic Resources", (n 17), at 192.

cannot freely adopt them, but do not benefit from the revenues deriving from the patent system. I focused in this context on the narrative of agriculture as a concrete example, but a similarly negative scenario could be framed for the enforcement of patent law in traditional medicine.[19] The TRIPS rules allowing the patentability of genetic resources are likely to lead to disastrous consequences for vulnerable communities, such as the misappropriation of knowledge and unequal benefits sharing.

Nowadays the application of IP law to biogenetic resources also raises ethical and moral concerns: indeed, its compatibility with the respect of social, economic and cultural fundamental rights is highly questioned and debated.[20] Further, the current patent system regulating the trade and use of genetic resources such as plants and seeds significantly jeopardises the conservation of biodiversity and cultural diversity. As initially mentioned, in vulnerable contexts – like those of indigenous and local communities – the link between these two elements is crucial to ensure their sustainable existence.[21] It has been recognised internationally that biological and cultural diversity are mutually supportive: indigenous and local traditional knowledge contribute to preserve biodiversity and are eco-friendly, and at the same time the conservation of ecosystem biodiversity allows indigenous and local peoples to maintain traditional ways of living, therefore respecting their right to self-determination of development.[22] As we saw, by reducing *in-situ* biodiversity conservation and preventing the use of original domestic plants or seeds protected by

---

[19] One of the most famous case of medicine narrative is that one concerning the Neem Tree. For more on this, see: O B Arewa, "*TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks",* 10 *Marq. Intell. Prop. L. Rev.* 155 2006, at 170. More generally on tensions concerning the relationship among the right to health, access to medicine and the TRIPS Agreement: D Matthews, "Lessons from negotiating an amendment to the TRIPS Agreement: Compulsory licensing and access to medicines", in G Westkamp (ed), *Emerging Issues in Intellectual Property. Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith*, Edward Elgar Publishing, 2007, 222-249.

[20] Conflicts between the TRIPS Agreement and human rights have been addressed in several UN documents. See: Sub-Commission on Human Rights, 'Intellectual property and human rights', Resolution 2000/7 and resolution 2001/21; High Commissioner for Human Rights, 'The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights', UN Doc. E/CN.4/Sub.2/2001/13.

[21] This is also affirmed in the Resolution adopted by the General Assembly 65/166, 'Culture and development', A/RES/65/166.

[22] This has also been recognised by the jurisprudence of the Inter-American Court of Human Rights. See, for instance: *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua,* Judgement of 31 August 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf.

patents, a great number of traditional activities are abandoned. If no longer practiced, skills and cultural knowledge, which are part of the intangible heritage of indigenous and local communities, are lost.[23] This undermines the integrity of the cultural identity of these groups, as well as their possibility of innovation.[24] To come full circle, the loss of sustainable cultural practices leads to unpleasant consequences for ecosystem biodiversity and the environment.[25]

2.2) Possible solutions to redress the inadequacy of IP law to TK under international law

2.2.1) The revision of Art. 27 TRIPS Agreement

Certain types of local knowledge such as folklore were not protected within existing intellectual property frameworks until the twentieth centuries. Only in the post-colonial era, when newly independent former colonies had a place at the negotiating table of international IP law treaties, was attention paid towards those types of knowledge that had not previously been protected.[26] However, being mainly concentrated in Third World Countries, the hierarchical power dynamics that had played an important role in shaping international negotiations during the previous centuries drove the assumption that traditional knowledge is in the public domain and, therefore, freely accessible.[27] Although nowadays post-colonial countries have increased negotiating leverage, unequal power relationships still remain and highly influence the outcomes of international negotiations.

This is, for instance, the case of TRIPS negotiations and the revision of its article 27. The TRIPS Agreement has no specific provisions on the issue of traditional

[23] Traditional knowledge survives through practice. As with most of the elements labelled as "intangible heritage", they are not written, but orally conserved and passed from generation to generation.
[24] Innovation in an indigenous context refers mainly to the maintenance system (sustainable management of lands, forests and natural resources). See: P Drahos, "When cosmology" (n 5), at 244.
[25] For an extensive list of cases concerning the impacts of biotechnology, especially in the field of agriculture, on environment, see: V Shiva et al., *The GMO Emperor has no clothes, A Global Citizens Report on the State of GMOs - False Promises, Failed Technologies*, report coordinated by Navdanya and Navdanya International, the International Commission on the Future of Food and Agriculture, with the participation of The Center for Food Safety (CFS), (2001), available at www.navdanyainternational.it.
[26] During the 1967 Stockholm Revision Conference of the Berne Convention the lack of protection of folklore was raised by the Indian delegation. The Berne Convention was amended in 1971 to include folklore in the enumeration of literary and artistic works.
[27] Arewa, above footnote 41, at 162-163 and Dutfield G., TRIPS-Related Aspects of Traditional Knowledge, (2001) 33 Case W. Res. Journal of International Law 233, 238.

knowledge. Aware of the necessity to overcome the inadequacy of the patenting system for genetic resources and traditional knowledge, developing countries have asked for an amendment of Article 27.3(b) TRIPS. The review of Article 27.3(b) was already envisioned by the text of the TRIPS Agreement after four years from the entry into force of the WTO Agreement (1995). The reviewing process started in 1999 and is still ongoing. At the same time, WIPO, the UN Agency for Intellectual Property, organised a Roundtable on intellectual property protection and traditional knowledge. From this Roundtable, the voice of a group of indigenous leaders called for reform of the entire international body of IPRs, and for a ban of patenting on all forms of life under Article 27.3(b) TRIPS.[28] This request was encompassed within the proposals presented by developing countries to amend the TRIPS Agreement. The majority of them asked for the exclusion of patenting on life forms and all microbiological processes. They also requested recognition of not only formal systems of innovation but informal systems[29] as well, especially with regard to biodiversity and traditional knowledge. Since the Doha Ministerial Declaration, it has been clear that the protection of biodiversity, its sustainable use, and its tied connection with traditional knowledge could not be sidelined from the implementation of TRIPS.[30] Therefore, WTO has been increasingly involved in discussions concerning the tensions between access to intangible cultural heritage and the excessive patent protection system.

In 2010, Bolivia raised a significant claim in a Communication to the Council for TRIPS.[31] Bolivia asked for a ban on patenting of all life forms, including gene sequences, microorganisms as well as all biological, microbiological and non-biological processes, in order to ensure "*the protection of the innovations of indigenous and local farming communities and the continuation of the traditional farming practices including the right to save and exchange seeds, and sell their harvest*" and the "*protection for the rights of indigenous communities"* in order to "*prevent any private monopolistic intellectual property claims over their traditional*

[28] S Ragavan, "Protection of Traditional Knowledge", (2001) *2 Minnesota Intellectual Property Review*, 40.
[29] The expression "informal system" indicates the set of oral knowledge and practical skills that are not recorded in written material or codified. This kind of knowledge cannot be protected under classic IP law systems, but is usually protected through customary law.
[30] Article 19 of the Declaration charges the Council for TRIPS to examine the relationship between the TRIPS Agreement, the CBD and the protection of traditional knowledge and folklore, in order to pursue its review of Article 27.3(b). (WT/MIN901)/DEC/1).
[31] Communication from Boliva, IP/C/W/545, 26 February 2010.

knowledge". [32] Bolivia called upon the Bolivian Constitution which expressly recognises indigenous Cosmovision and local traditional knowledge as the common heritage and expression of the identity of the State[33]. It also refers to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), that recognises the "right of indigenous peoples to practice and revitalise their cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature".[34] According to Bolivia, the regime set by article 27.3(b) is inconsistent with its Constitutional provisions and the UNDRIP, and threatens the sovereignty of people regarding their own resources. The Bolivian position is shared and supported by most developing countries.

It is clear that issues concerning genetic resources and traditional knowledge are highly connected with development. Therefore, it is of crucial importance for developing countries to reach a better regulation under the WTO. Unfortunately, as recalled here, the bargaining power of developing countries is not strong enough and no agreement on the review of article 27.3(b) has been reached so far.[35] In addition, together with the request to modify Article 27.3(b), developing and least-developed countries strongly call for a solution to reconcile the TRIPS provisions with the content of the Convention on Biological Diversity, which provides a better frame for the recognition and protection of TK and related genetic resources (this point will be further explored in the following paragraph).[36]

---

[32] *Ibidem*, Point 30(a)(b)(c)(d).

[33] Bolivia quotes Article 100 of the Constitution, that "recognizes the Cosmovision, myths, oral history, dances and cultural practices, traditional knowledge and technologies of indigenous peoples and peasants as their heritage [and that] this heritage is part of the expression and identity of the State" and Article 382, that states: "it is the competence and duty of the State to defend, recover and protect biological material coming from natural resources, ancestral knowledge and anything else that originate in the territory".

[34] Articles 11.1 and 11.2 of the UNDRIP.

[35] Information about the current reviewing status of Art. 27.3(b) is available at http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm, last accessed on 4th June 2013.

[36] For a clear picture of the incompatibilities between TRIPS Agreement and the CBD, see: I Michael Q C Jeffery, "Intellectual Property Rights and Biodiversity Conservation: Reconciling the Incompatibilities of the TRIPS Agreement and the Convention on Biological Diversity", in B Ong (ed.), *Intellectual Property and Biological Resources*, (Marshal Cavendish International, 2004), 185.

2.2.2) Other relevant international frameworks

2.2.2.1) The FAO Seed Treaty

The protection of traditional knowledge and the obligation of fair and equitable benefits sharing deriving from genetic resources is also encompassed in the 1993 FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRA)[37], also known as the Seed Treaty. The Seed Treaty directly acknowledges the valuable contribution of indigenous and farmers' traditional knowledge and practices to modern agriculture and food variety, and establishes a multilateral system to facilitate access to plant genetic resources and benefit -sharing (Articles 10-13). The Treaty recognises the rights of farmers to conserve, use, exchange, and sell farm-saved seeds, and to participate in decision-making regarding the use of plant genetic resources for food and agriculture. It devolves the responsibilities for the realisation of farmers' rights to Parties (Article 9(2)), including *de minimis* the protection of traditional knowledge. However, the recognition of farmers' rights under the Seed Treaty does not include property rights, but only the residual rights, such as saving, using, exchanging and selling farm-saved seeds. This might be a limitation for granting appropriate protection of traditional knowledge and practices against patent law.

2.2.2.2) The Convention on Biological Diversity and the Nagoya Protocol

While waiting for the reform of the TRIPS, other solutions to grant fair recognition of the benefits deriving from TK to local communities and indigenous peoples can be detected in international tools focusing on environmental and cultural subject-matter.

Already in *Our Common Future*, the World Commission on Environment and Development highlighted the importance of traditional knowledge in the sustainable development process. In particular, the WCED observed that tribal and indigenous people need special attention to safeguard their traditional lifestyle from the impact of

[37] International Treaty on Plant Genetic Resources for Food and Agriculture, adopted on 3 November 2001 by Res. 3/01 FAO Conference, 31st Sess. The ITPGRA also abandons the "common heritage" wording, marking the change of mind about genetic resources' governance under the FAO.

economic development.[38] In 1992, the Convention on Biological Diversity established upon its party a duty to respect, preserve, and maintain the knowledge, innovations and practices of indigenous and local communities.[39] The Convention also advanced the affirmation of the principle of national sovereignty over genetic resources[40] and set a framework for a fair and equitable sharing of benefits arising from the utilisation of genetic resources and knowledge, innovations and practices of indigenous and local communities. Most importantly, it creates the obligation of the prior informed consent of the Contracting Party providing access to genetic resources.[41] This means that States, when facilitating access on a given genetic resource, should ensure that the original holder/s has been properly informed about the future use of that resource and consented to it. The Prior Informed Consent (PIC) should improve the possibility for indigenous and local communities to gain control on their own resources, as well as control over related knowledge and practices. It is also a fundamental base for the fair and equitable sharing of benefits.

Realising the equitable sharing of benefits and reaching an effective prior informed consent are challenging tasks. Some commentators observed that to reach a well-informed prior consent is difficult to put into practice within indigenous and local contexts.[42] Besides the technical barriers like the language, they notice how difficult it might be in these specific contexts to define the holder of the knowledge or practice. In the case of traditional knowledge, to define the ownership and the limits and rights of such ownership is the major challenge. As mentioned in the former section, the governance of genetic resources and traditional knowledge often belongs to the community and is regulated by a set of spiritual meanings and customary law that cannot be disclosed. Another challenge is presented by the difficulty to introduce concepts referring to IP law, such as "patent", "copyright" and all the set or related

[38] World Commission on Environment and Development, Our Common Future, (Oxford University Press, 1987), 12.
[39] Art.8(j) of the CBD; see also Preamble of the CBD.
[40] Article 15 of the CBD. The idea that genetic resources are part of the common heritage of humankind had been largely dominant until concerns about genetic and diversity erosion and issues of fair and equitable benefits sharing arose. The evolution of this thinking and the shift from the regime of "common heritage of humankind" to the sovereign rights of nations is described well in Keith Aoiki, 'Weeds, Seeds, and Deeds' above (n 16), 305. See also: C R McManis, "Intellectual property, genetic resources and traditional knowledge protection: thinking globally, acting locally", (2003-2004) *11 Cardozo Journal of Int'l & Comp. Law*, 554.
[41] Article 15 CBD, Access to genetic resources.
[42] See for instance: J D Dalibard and T Kono, "Prior Informed Consent. Empowering the Bearers of Cultural Traditions", in T Kono (ed) *Intangible cultural heritage and intellectual property: community, cultural diversity and sustainable development*, (Intersentia, 2009), 247-259.

rights, in these societies. In the current system, the knowledge of these concepts is essential for a fair and equitable benefits sharing deriving from the use of a genetic resource. This last point constitutes an additional problem: indigenous and local communities are not familiar with these economic concepts and often are not willing to give (and accept) an economic value to something that entails spiritual values.[43] The complexity of the issues at stake demands a definition of a *sui generis* system that could adjust the special holistic approach of indigenous and local communities to the use of genetic resources and maintain the possibility for outsiders to access such resources.[44] In this sense, the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity[45] in 2010 may signify a step forward. The Protocol expressly recognises that an innovative solution is required to address the fair and equitable sharing of benefits derived from the use of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations, or situations for which it is not possible to grant or obtain prior informed consent. It also specifies that it is the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources within their communities, and establishes an obligation on the Parties not to restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities when implementing the Protocol and the CBD.[46] However, the innovative element of the Protocol is the specific obligation to support compliance with domestic legislation or regulatory requirements of the Party providing genetic

[43] Lenzerini, above (n 17).
[44] Prohibiting *tout court* access to genetic resources and associated traditional knowledge would probably constitute the most efficient way to preserve the cultural identity of indigenous and local communities. However, without entering into a more philosophical debate that might entail subjective and emotional approaches about the "right and wrong" of the access to genetic resources for commercial purposes, Lenzerini rightly observes that such a solution would prevent traditional knowledge holders who desire to make commercial use of such knowledge from exercising their own rights. This may also have consequences for future possibilities of development, hindering the exercise of their right to self-determination of their model of development. See F Lenzerini, "Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge" in F. Francioni and M. Scheinin (eds), *Cultural Human Rights*, (2008), 143.
[45] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity, adopted on 29 October 2010, and entered into force UNEP/CBD/COP/DEC/X/1.
[46] Article 12(3)(d) of the Nagoya Protocol.

resources, and contractual obligations reflected in mutually agreed terms (MAT).[47] The obligation to conform to domestic legislation when setting the framework for the prior informed consent and the benefits sharing can be seen both as a positive and a negative element. Indeed, where national legislations recognise and grant protection to local and indigenous customary laws, or offer ILCs a role to play at the national level, then they certainly offer a better protection of indigenous and local communities' interests on their territory. For instance, domestic norms in numerous Latin American Countries recognise constitutional protection to indigenous and local communities' traditions and their holistic and collective nature (e.g., the case of Bolivia quoted in the former paragraph). Nevertheless, it must be recalled that this is not always the case, and the reference to national legislations can become problematic when domestic law denies or does not recognise a role to customary rules.

2.2.2.3) The World Intellectual Property Organization (WIPO)

The efficient protection of several domestic legal regimes protecting intangible heritage also emerges from the results of a study carried on by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore,[48] which explores the best examples of domestic legislation in view of drafting an international *sui generis* IP framework for the protection of traditional knowledge. In late 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established with the aim to address both policy and practical linkages between the IP system and the concerns of TK holders. The Committee is carrying out various studies to collect diverse national and international experiences and tools to safeguard TK, in order to move towards an international understanding of the shared objectives and principles that should guide the protection of TK. The Committee's work has not yet been completed, however progresses towards a draft text of an international legal instrument that will ensure the effective protection of

[47] Article 7 (Access to traditional knowledge associated with genetic resources), Article 12 (Traditional Knowledge associated with genetic resources), Article 15 (Compliance with domestic legislation or regulatory requirements on access and benefit-sharing), Article 16 (Compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources).

[48] *Composite Study on the Protection of Traditional Knowledge*, (28 April 2003) WIPO/GRTKF/IC/5/8.

Traditional Knowledge and Traditional Cultural Expressions has been made.[49] The draft text draws upon emergent solution in international *fora* to redress problems like biopiracy and misappropriation and best examples of domestic legislation.

To complete the overview of the international instruments aimed at the protection of cultural heritage, it is important to mention all the sets of Conventions under UNESCO's aegis, and in particular the most recent 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and the 2005 UNESCO Convention for the protection and promotion of the Diversity of Cultural Expressions. The UNESCO Conventions expressly address the conservation and promotion of both the tangible and intangible dimensions of cultural heritage (therefore including traditional knowledge and practices),[50] and aim at preserving their rich diversity from the impacts of economic development and globalisation.

The UNESCO Conventions, as well as the Nagoya Protocol may constitute useful legal instruments to address all the specific issues for the protection of traditional knowledge and counterbalance the WTO rules. Nevertheless, in these cases the relationship between these instruments and the WTO is neither clear nor pacific and a great part of their success will depend upon the political will of State Parties and the interpretation of judges (in case of international dispute settlement).[51]

2.3) Emergent paths for a solution: disclosure requirement, PIC and *sui generis* systems

[49] In Fall 2011, the WIPO Intergovernmental Committee received a mandate to expedite its work on text-based negotiations with the objective of reaching an agreement on a text (or texts) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. See: Decision "Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Agenda Item 31", Assemblies of Member States of WIPO Fortieth (20th Ordinary) Session (September 26 - October 5, 2011).

[50] Article 2 of the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage so definite intangible cultural heritage: *"[…] 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as instruments, objects, artefacts and cultural space associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. […]".*

[51] For instance, Article 20 of the 2005 UNESCO Convention on Cultural Diversity contains a "non-prejudice" clause similar to that one contained in Article 22 of the CBD (see Section 3.b of this paper) that may weaken the strength of the Convention in case of conflict with the WTO.

Given that the primary reason pushing countries today to protect traditional knowledge is the urgency to stop biopiracy, major actors and stakeholders are exploring – within the frame of international negotiations – various possible paths to solve this issue. When using the term "biopiracy", we usually refer to the use of biological resources and/or associated traditional knowledge without adequate authorisation, and/or patents based on such knowledge or resources without ensuring adequate compensation or recognition. A major problem is to identify who is entitled to grant the adequate authorisation, or, in other words, who *holds* the knowledge.[52] This is further complicated when a resource is widely distributed and traditional knowledge applications are applied in different geographical and social contexts. As Dutfield observes, "it is not always clear who the victims are, or indeed if there are any".[53] The attention granted to biopiracy grew out of the increasing recognition of the enormous value of TK and biological resources, especially for developing countries, where the world's biological wealth is predominantly located.

Although the contribution made by TK to local and global economies cannot be easily calculated, the attention towards the protection of TK shows its direct connection with the economic component of the developmental paradigm.[54] In order to avoid the risk of misappropriation of genetic resources and related TK, a *disclosure requirement* has emerged as the predominant potential mechanism for traditional knowledge whose use is related to genetic resources protection. The disclosure requirement should be jointly applied with the Prior Informed Consent (PIC) – which developed under the umbrella of the Convention on Biological Diversity – and appropriate mechanism of Access to Benefit Sharing (ABS).

Looking at the multilateral level of negotiations, a major role is played by the ongoing review of Article 27.3(b) of the TRIPS Agreement. In this frame, the adoption of the disclosure requirement has been discussed as a central aspect.[55] The

[52] Here, the use of the verb "to hold" may sound inappropriate to experts in the field of traditional knowledge and related issues. To hold, indeed, implies the concept of 'ownership', which is generally understood and acknowledged as a Western concept and, therefore, inappropriate for different contexts like local or indigenous communities in Africa, Latin America, India, etc.
[53] Dutfield, above (n 5).
[54] For some concrete examples, see "Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions. Section III: Harnessing Traditional Knowledge for Development", Sophia Twarog and Promila Kapoor (eds.), UNCTAD/DITC/TED/10, (2004).
[55] Point 6 of the document "Review of the Provisions of Article 27.3(b): Summary of Issues Raised and Points Made", Note prepared by the TRIPS Secretariat, IP/C/W/369/Rev.1 (9 March 2006).

requirement for disclosure of the source of the genetic resources and traditional knowledge involved in the claimed inventions was first submitted by Switzerland.[56] However, the Swiss proposal did not consider the possibility to modify Article 27.3(b) of the TRIPS and introduced the disclosure requirement as an additional possibility for Members.[57] That proposal did not meet the favour of other WTO Members, especially those who struggled for a real reform of the patent system and called for a mutually supportive implementation of the TRIPS Agreement and the CBD. Indeed, the African group counteracted by asking, together with the ban on patenting micro-organisms and non-biological and micro-biological processes,[58] that the rights under TRIPS would protect genetic resources and traditional knowledge from misappropriation through requirements for disclosure of the source of genetic resources and traditional knowledge involved in the claimed inventions, and for a demonstration of compliance with the applicable domestic procedures in the State where the genetic resources and traditional knowledge originate.[59] By recalling the compliance with national legislation regulating the access to genetic resources and related traditional knowledge, the African group went further than the Swiss proposal. As clarified by the African group's representatives, where certain domestic systems may fail to prevent patents that constituted a misappropriation of genetic resources and traditional knowledge, the introduction of such requirements within the TRIPS obligations would be useful in preventing or reducing the occurrence of such cases.[60]

---

[56] Article 27.3(b), the Relationship between the TRIPS Agreement and the CBD, and the Protection of Traditional Knowledge, IP/C/W/400/Rev.1 (18 June 2003).

[57] According to Switzerland, Article 27.3(b) as formulated represents a well-balanced solution for all the interests and needs of WTO Members (see document above quoted, at n. **Error! Bookmark not efined.**). Further, Switzerland pointed out that there was no necessity for an amendment of Article 27.3(b) so as to create a farmers' privilege, given that this is already possible under Article 30 'Exceptions to Rights Conferred'. Lastly, Switzerland observed that the most appropriate forum to discuss IPR issues and the protection of TK is WIPO, rather than the WTO.

[58] The African group underlined the incompatibility of the current patent regime established by Article 27.3(b) with the protection of public policy goals such as food security, nutrition, the elimination of rural poverty, and the integrity of local communities. The African group sought to pass from a discretionary exclusion principle to a mandatory exclusion for all life patents. See 'Taking forward the review of Article 27.3(b) of the TRIPS Agreement, Joint Communication from the African Group', IP/C/W/404, (26 June 2003).

[59] It is important to note that Article 29 of the TRIPS Agreement was considered as the most suitable for an appropriate modification to contain these rights and obligations. The African Group suggested that Article 29 be modified by adding the following sentence as paragraph 3: "Members shall require an applicant for a patent to disclose the country and area of origin of any biological resources and traditional knowledge used or involved in the invention, and to provide confirmation of compliance with all access regulations in the country of origin".

[60] 'Taking forward the review of Article 27.3(b) of the TRIPS Agreement, Joint Communication from the African Group', here above quoted at **Error! Bookmark not defined.**.

In addition, the African proposal addressed some specific issues concerning the inadequacy of applying IP law to traditional knowledge. Requirements like inventorship, novelty and industrial application do not reflect the way traditional knowledge is created and developed. Therefore, while recognising traditional knowledge as a category of intellectual property rights, the Group advanced the possibility for Members to adopt *sui generis* systems for more extensive protection. More precisely, the rights relating to traditional knowledge that shall be protected should focus on the empowerment and respect of local communities or traditional practitioners. The will and decisions of such communities and practitioners on whether or not to commercialise their knowledge shall be respected; as well as respect and honour of any cultural or religious value they attach to their knowledge. Prior and informed consent for any access and any intended use of their knowledge becomes, then, a central element to guarantee the respect of such rights, as well as the setting of a system for full remuneration for their knowledge. Finally, given that one of most critical aspects relating to the protection of TK is the difficulty to document the "prior art" and the prior existence of the knowledge belonging to local communities, Members may document traditional knowledge in their territories through competent authorities carrying out and maintaining registers and/or electronic databases of local communities and traditional practitioners. However, it is clearly pointed out that the lack of registration shall not prejudice the rights of any local community or traditional practitioner and local communities and the competent authorities shall have an exclusive right in perpetuity to any information that is documented or entered in the register, to prevent any access or use they have not expressly authorised or any application that is inconsistent with the rights of local communities and traditional practitioners.[61]

The request to introduce the disclosure requirement, evidence of prior informed consent and evidence of fair and equitable sharing under the relevant national regime as conditions to acquire patent rights was also supported by other

[61] This clarification is meant to prevent the occurrence of unpleasant consequences depending upon the lack of appropriate means and systems to carry out appropriate research to document the existence and the structural elements of the knowledge. On the role of databases for TK protection, see: *The Role of Registers and Databases in the Protection of Traditional Knowledge A Comparative Analysis,* UNU-IAS Report, January 2004, available at http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf.

countries, like India and Brazil.[62] In 2011, a draft decision to enhance mutual supportiveness between the TRIPS Agreement and the CBD was submitted by Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group.[63] The draft decision is an attempt to introduce the mechanisms for PIC and the disclosure of origin[64] as established by the Nagoya Protocol of the CBD within the TRIPS obligations. No decision has been reached today on this proposal and some industrialised Members, like the US, Japan New Zealand and Korea, have raised their voice against a compulsory disclosure requirement in patent application.[65]

While the TRIPS process of review is making slow progress, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore recently proposed a draft text establishing an international frame to better protect TK and genetic resources.[66] The provisional text introduces a principle of mandatory disclosure of country of origin and equity, including benefit sharing and sets up a specific provision for including the disclosure requirement in patent applications.[67] If such a requirement, which shall be jointly implemented with the PIC mechanism, is not fulfilled, patent offices will reject the application. If the WIPO assembly adopts this version of the legal text, it may signal a significant step forward for reducing misappropriation and ensuring equity in ABS.[68]

---

[62] 'The Relationship between the TRIPS Agreement and the CBD and the Protection of Traditional knowledge', IP/C/W/403, (24 June 2003). Led by India and Brazil, the group is made up of Bolivia, Cuba, the Dominican Republic, Ecuador, Peru, Thailand, and Venezuela.

[63] Draft decision to enhance mutual supportiveness between the TRIPS Agreement and the Convention on Biological Diversity, Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group. TN/C/W/59, (19 April 2011).

[64] Under the CBD "country of origin" means the country that possesses those genetic resources in *in situ* conditions. Still under the CBD, "in situ conditions" means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

[65] One argument used by the US against the application of a mandatory disclosure requirement for biological invention is that it would lead to increased discrimination between fields of technology, see US submission IP/C/W/257. See also 'Article 27.3(b), relationship between the TRIPS agreement and the CBD, and the protection of traditional knowledge and folklore', IP/C/W/434, (26 November 2004), in which the US argues that only a 'prior consent agreement itself (usually constituting a contract between two entities), and not a disclosure in a patent application, that manifests prior informed consent' can prevent misappropriation. For a more detailed excursus of TRIPS' negotiations on these issues, see: George Wei, above at (n. **Error! Bookmark not defined.**), 63-68.

[66] The Protection of Traditional Knowledge: Draft Articles Rev. 2 (April 26, 2013), WIPO/GRTKF/IC/24/FACILITATORS DOCUMENT REV. 2, published 14 May 2014 on http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=238182.

[67] *Ibidem*, Article 4bis of the draft text.

[68] Negotiations under the WIPO are still ongoing. The numerous brackets at the voice "Disclosure of origin" in the Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2 of February 7, 2014 show that an agreement on this item is still far off.

3) Intellectual Property Rights in the EU external relations

3.1) The Union's competence in the field of intellectual property

Before exploring in depth the EU's position on the issues concerning Intellectual Property Law, it is appropriate to look at the competence of the Union in this area.

Today, the entry into force of the Lisbon Treaty, legitimises the Union's legislative initiative on IPRs by establishing a specific legal basis under article 118 TFEU. This provision, indeed, confers to the Union the power to "*establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union*". However, the founding treaties did not contain any specific provision conferring competence to the European Community on intellectual property. Some authors even interpreted certain articles of the Treaty of Rome, such as article 295 ECT stating that the Treaty "*shall in no way prejudice the rules in Member States governing the system of property ownership"*,[69] as refraining the Community legislator from intervening in this field.[70] So initially the Community initiatives in the IP sector were based on fragmented legal basis. For instance, article 95 ECT (now article 114 TEU), which empowered the Community to act so as to approximate legislations that aim towards the establishment and functioning of the internal market, and article 308 ECT (now article 352 TFEU), which entitled the Community to adopt the appropriate measures when it should prove necessary to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, functioned as a legal basis for several directives in the field of intellectual property. Legislation concerning Community trademark, designs, and plant variety protection was adopted on these legal bases. Other rules were, instead, adopted within the framework of different competences: this is the case of geographical indications and appellations of origin, which relied on article 37 ECT (now article 43 TFEU) falling within the Common Agricultural Policy.[71] As the functioning of the internal market is one of its major goals, European

[69] In the TFEU article 295 became Article 345.

[70] C Geiger, "The Construction of intellectual property in the European Union: searching for coherence", in C Geiger (ed.), *Constructing European Intellectual Property Achievements and New Perspectives,* (Edward Elgar Publishing, 2013), 6.

[71] Many authors argue that, given such a lack of explicit competence, the EU's set of legislation on IPRs developed in a non-systematic and often incoherent way. See: C Geiger, *ibidem*, 5; G Tritton, *Intellectual Property in Europe*, 3rd Ed., (Sweet & Maxwell, 2008).

legislation on IP mainly approached IPRs issues from an economic perspective, leaving aside cultural, social, environmental and ethical concerns. However, such concerns increasingly entered the European sphere of debate the European Parliament, which often engaged in challenging discussions on controversial issues, – like ethical questions concerning biotechnology or impacts on human rights – and – played a pivotal role in pushing towards the adoption of more ambitious legislation.[72]

On the other hand, looking at the competence of the Union on the external dimension, former article 133 ECT (now article 207 TFEU) clearly included the "commercial aspects of intellectual property" within the box of the common commercial policy. The Union enjoys, then, an exclusive competence on the external dimension of intellectual property rights' commercial aspects. On this point, it is important to recall briefly here the *Daiichi Sankyo* decision released by the Court of Justice, in which, for the first time, the Court interprets article 207 as revised by the Lisbon reform..[73] In this decision the Court overturned its previous case law on TRIPs in light of the entry into force of the Lisbon Treaty and confirmed what some commentators had expected: the Treaty amendments of the Lisbon Treaty bring the TRIPs Agreement in its entirety within the scope of the Common Commercial Policy.[74] The Court, indeed, upheld that the new Article 207 TFEU "*differs noticeably from the provisions it essentially replaced*" (Nice version of article 133) and "*differs even more from the provision that was in force when the TRIPs Agreement was concluded*" (Maastricht Teaty). As a result of this significant development of primary law, the question of the distribution of the competences of the European Union and the Member States must be examined on the basis of the Treaty now in force (the Lisbon Treaty).[75] Then, the Court provided a wider interpretation of the concept of

[72] For instance, the adoption of Directive 98/44/EC on the legal protection of biotechnological inventions on 6 July 1998. For an overview on the EP's role and positions in the field of intellectual property: C Geiger and E Py, *La législation communutaire en matière de propriété intellectuelle et le rôle du Parlement européen, étude synthétique*, (May 2009), available at www.cepi.edu.

[73] C-414/11, *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* [2013]. *Daiichi Sankyo* concerned a reference for a preliminary ruling by a Greek court in a dispute between the Japanese company Daiichi Sankyo (the patentee) and the German company Sanofi-Aventis (a license holder), on the one hand, and the Greek company DEMO, on the other hand, on the patentability of a pharmaceutical ingredient called "levofloxacin hemihydrates". As a preliminary matter, the referring court wanted to know – inter alia - whether the Court of Justice or the courts of Member States had jurisdiction to interpret the TRIPs Agreement and decide on its effect in the national legal order.

[74] L Ankersmit, "The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments", (2014) 41:2 *Legal Issues of Economic Integration*, at 193.

[75] C-414/11, *Daiichi Sankyo,* para 48.

"commercial aspects of intellectual property". It first noted that the Common Commercial Policy operates within the context of the EU's external action as specified by Article 207 TFEU and therefore "*relates to trade with non-member countries, not to trade in the internal market*". The Court then reshapes the scope of the Common Commercial Policy in relation to other provisions of the E Treaties, by affirming that "a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade". Therefore, not all measures in the field of intellectual property will fall within the scope of the Common Commercial Policy, but, of the rules adopted by the European Union in the field of intellectual property, only those with a specific link to international trade are capable of falling within the concept of "commercial aspects of intellectual property" in article 207(1) TFEU. According to the Court, the TRIPS Agreement fall within the scope of article 207(1) TFEU, because TRIPS rules have a specific link with international trade.[76] Thus, the Court here reversed its Opinion 1/94, under which only the TRIPs rules on the release into free circulation of counterfeit goods were found to be specifically related to international trade. In conclusion, the Court states that it has jurisdiction to interpret the TRIPS Agreement and, by consequence, to determine the effects of TRIPs within the legal orders of the EU and the Member States. The decision will also have effects on the balance of power between the EU and its Member States: indeed, *Daiichi Sankyo* signs a significant step forward for the EU's visibility and power within the WTO.[77]

3.2) The Union's action on the external level: goals, instruments and new challenges

Having assessed the competence of the Union, it is now time to look at the Union's initiatives on the external level. Taking a broader overview, it seems to be difficult to pinpoint the most relevant actions for the issues raised in this chapter. In effect, whereas the Union's endeavours in the field of cultural industries as a means to foster development as well as to preserve cultural diversity is greatly deployed, the same enthusiasm has not been shown towards the protection of forms of intangible

[76] *Ibidem*, para 53.
[77] The Commission will now be able also *de iure* to be the sole representative at nearly all WTO meetings. On this, see L Ankersmit, (n 74), at 200.

cultural heritage which are directly connected to developmental issues, such as traditional knowledge. Certainly, within European borders, the protection of traditional knowledge is not a priority and major actions focus on the protection and valorisation of local traditional agricultural products and foodstuffs – like wine, spirits, olive oil, cheese, etc. – through Geographical Indications (GI) and Protected Designations of Origin (PDO).[78] GI and PDO are certainly successful tools to protect and promote certain forms of local produce and, as a consequence, preserve cultural diversity and local identities. However, European citizens and governments do not always easily perceive the connection of local traditional products with developmental issues. Although the protection of local cultural identities is a highly cherished topic for the majority of Member States, European countries do not share the same concerns as developing countries about the use of traditional knowledge and the safeguarding of traditional knowledge in Europe is rather a matter of preserving folklore. However, some legal measures coping with TK linked to genetic resources have been made to protect traditional knowledge both at the national and at the Union level, such as the legal protection of "Traditional Specialties".[79] Other legal initiatives, like Council Regulation 870/2004 and Council Regulation 1590/2004,[80] comply with international commitments undertaken by the EU, namely under the CBD. They include actions promoting the *ex situ* and *in situ* conservation, characterisation, collection and utilisation of genetic resources in agriculture exercised in the member states. Although answering some local farmers' needs, in

[78] See, for instance, Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. However, it is worth mentioning that the Commission is involved in the effort to extend GI protection to non-agricultural products, although keeping the focus on the economic aspects of such productions. In 2009, DG Trade commissioned an independent study on the protection of geographical indications for products other than wines, spirits, agricultural products or foodstuffs. The Study analyses 28 non-agricultural products of economic significance enjoying protection in certain EU Member States and in non-EU countries. It compares the protection systems available to these products and analyses the strengths and weaknesses of the protection systems identified. The study "Study on the protection of geographical indications for products other than wines, spirits, agricultural products or foodstuffs" is available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147926.pdf.

[79] For an extensive overview on these measures: A Leidwein, "Protection of Traditional Knowledge Associated with Biological and Genetic Resources. General Legal Issues and Measures Already Taken by the European Union and its Member States in the Field of Agriculture and Food Production", in 9:3 *The Journal of World Intellectual Property* (2006) 251–275. See also: T Kiene, "Traditional Knowledge in the European Context", (2006) 2 *Ressources Naturelles*.

[80] Council Regulation 870/2004 establishing a Community programme on the conservation, characterisation, collection and utilisation of genetic resources in agriculture and repealing Regulation (EC) No 1467/94; Council Regulation 1590/2004 establishing a Community programme on the conservation, characterisation, collection and utilisation of genetic resources in agriculture and repealing Regulation (EC) No. 1467/94.

Europe such initiatives do not encounter a general shared recognition and there is little awareness of their potential to contribute to sustainable development.

Because the external action of the Union is highly influenced by the internal dimension, the protection of TK is not included among the priorities of the Union. Instead, great attention is dedicated to the enforcement of IPRs within third countries so as to ensure that intellectual assets belonging to EU right-holders are properly warranted outside the EU borders.[81] Major goals of the Union are to preserve the integrity of the *acquis communautaire* as well as to create a favourable environment to enhance worldwide EU competitiveness and growth. In this sense, the Commission adopted in 2004 a *Strategy for the Enforcement of Intellectual Property Rights in Third Countries,*[82] which defines a broad framework to fight intellectual property rights infringements in third countries. The Union's Strategy aims at ensuring the enforcement of European intellectual property rights in third countries and to effectively fight infringement of such rights through both legislative and non-legislative tools. The non-legislative actions take place through intellectual property dialogues and programmes of technical co-operation and financial assistance within the frame of bilateral and regional cooperation.[83] As for the legislative initiatives, the Union is actively engaged both within the multilateral (TRIPS, WIPO, ACTA, etc.) and bilateral frame of negotiations in promoting the harmonisation and strengthening of IPRs at the global level. On the bilateral level, the EU Strategy concentrates on the inclusion of an intellectual property chapter within the agreement with third parties (FTAs, the recent EPAs, Association Agreements). Considering the increased difficulties to achieve results within the multilateral framework (let us recall for

[81] O Vrins and M Schneider (eds), *Enforcement of Intellectual Property Rights Through Border Measures Law and Practice in the EU,* 2nd Ed., (Oxford University Press, 2012).

[82] Strategy for the enforcement of intellectual property rights in third countries, 2005/C 129/03. The Strategy is drawn from the Enforcement Directive (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights), aiming at harmonising enforcement legislation within the European Union, and the revision of the Customs Regulation (Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights), that provides action against counterfeit or pirated goods at the Community's border.

[83] Some examples are: the IPR2 project supporting technical assistance to build intellectual property capacity in the Chinese administration, performed by DG Development and Co-operation; technical and financial assistance projects carried out within the frame of the MEDA programme with Mediterranean countries; technical cooperation programmes under the framework of the Cotonou Agreement for the African, Caribbean and Pacific (ACP) countries; specific lines of the TAIEX (Technical Assistance and Information Exchange) programme within the EU's European Neighbourhood Policy framework with Turkey, Russia, Ukraine and EUROMED countries.

example the *impasse* of the TRIPS review process), bilateral trade agreements are a more efficient tool to pursue the Union's objectives.

Among the priorities set in the Strategy's agenda, fighting counterfeiting and piracy are certainly central issues. Besides having developed a detailed internal legislation to fight these phenomena[84] at the EU and implementing the TRIPS and WIPO provisions on these issues, the Union recently signed the plurilateral Anti-Counterfeiting Trade Agreement (ACTA).[85] Although piracy and counterfeiting can also be analysed through the lenses of developmental issues, they are not of direct pertinence for the purpose of my analysis. Instead, it is useful to investigate what the Union's attitude towards IP interacting with culture for development issues is when it engages in multilateral and bilateral initiatives.

In effect, the 2004 Strategy's goal clearly shows that the international harmonisation of IPRs is based on the predominant western idea of intellectual property, as developed by the TRIPS Agreement and the WIPO's conventions. Notwithstanding that the Commission states that the Strategy does not intend to "*impose unilateral solutions*" to problems concerning the enforcement of IPRs and "*to propose a one-size-fits-all approach to promoting IPR enforcement*",[86] the implementation of the Strategy turns into the diffusion of the Western model of understanding and implementing IP law, which can bring up tensions in developing and least-developed countries' contexts. The EU has not been saved from the major criticisms raised by the international public opinion concerning IP and development issues. In particular, the IPR provisions included in bilateral agreements have often been blamed for being too demanding for developing countries, hindering the full enjoyment of fundamental rights and not meeting the interests and needs of third

[84] See above **Error! Bookmark not defined.**.

[85] Anti-Counterfeiting Trade Agreement, signed on 26 January 2012 in Tokyo, between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America. The ACTA negotiations have been quite controversial, they have been strongly criticised by public opinion for having been secret negotiations for over three years and setting an excessive frame of control hindering freedom of communication. See: C R McMains, "The Proposed Anti- Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty", (2009) 46/4 *Houston Law Review*, 1235. On the EU side, the adoption of the ACTA raised several concerns and has even been rejected by the Parliament (EP legislative resolution of 4 July 2012, P7_TA-PROV(2012)0287). ACTA has been accused of changing the existing European IP law and creating new obligations on criminal enforcement, which is an area of shared competence and for which the Union does not yet have any similar legislation.

[86] See the 'Introduction' of the Strategy for the enforcement of intellectual property rights in third countries, above (n **Error! Bookmark not defined.**).

countries.[87] Some analysts even pointed out that the EU Commission often advocates a rigid and extremely precise framework for the measures and actions States should adopt regarding intellectual property, often being more restrictive than TRIPS' obligations.[88] "*A flexible approach that takes into account different needs, level of development, membership or not of the World Trade Organisation (WTO), and main problems in terms of IPR (country of production, transit or consumption of infringing goods) of the countries in question*" seems to be the option adopted by the Commission to reply to such criticisms.[89] However, from a preliminary look at the range of FTAs and other trade agreements concluded in the last years, the IP measures included are quite standard and flexibility has been used to accommodate the Union's interests rather than those of third parties. For instance, the FTA with South Korea and the Trade Agreement with Colombia and Peru contain provisions on geographical indications shaped on the EU existing legislation, but no special (or *sui generis*) provisions addressing the specific protection of traditional knowledge (as we will see in the following paragraphs).

3.4) The Union position towards the "IPRs and culture for development" issues

3.4.1) The multilateral framework: WTO, WIPO and CBD

3.4.1.1) WTO

Concerning the TRIPS' review of Article 27.3(b), the EU is taking active part in the debate, demonstrating efforts to find a balance between the divergent claims of industrialized and developing countries. On the one hand, in a 2002 communication to the TRIPS Council, the EU clearly stated that there is no obvious reason to amend Article 27.3(b). The EU justifies such a position by arguing that the TRIPS

[87] See for instance: D Cronin, "Strong EU Trade Provisions On IP Seen As Threat To Poor Nations' Medicines Access", published on 18 February 2009 for IP watch, available at http://www.ip-watch.org/2009/02/18/strong-eu-trade-provisions-on-ip-seen-as-threat-to-poor-nations'-medicines-access/

[88] In most of the FTAs concluded, the EU wished to include the so-called 'TRIPS-plus' rules, which make it more difficult for states to use the WTO flexibilities. Most of the criticisms towards the IP chapter in EU bilateral agreements have been raised for IP measures likely to hinder access to medicine in developing countries. See, for instance, X Seuba Hernandez, *Health Protection in the New Association Agreement between the Andean Community (or some of its members) and the European Community in light of its provisions concerning Intellectual Property and recent experiences*, available at http://www.haiweb.org/20012009/19%20Dec%202008%20Policy%20Paper%20EU-CAN%20Association%20Agreement%20%28Final%20EN%29.pdf.

[89] 'Introduction' of the Strategy, above n. **Error! Bookmark not defined.**.

Agreement already grants Members sufficient flexibility to modulate patent protection according to national needs, interests and ethical standards on the basis of the exclusions under article 27.2 and the criteria for patentability under article 27. On the other hand, the EU did not completely ignore developing countries' requests and manifested its willingness to take into account the possibility of introducing a requirement for patent applicants to disclose information on the origin of genetic resources or traditional knowledge used in an invention.[90] A disclosure requirement would help Members to follow all patent applications at the global level concerning genetic resources for which they have granted access, therefore ensuring transparency of the patent system. However, the EU position is that such a disclosure requirement should be a "self-standing" clause and should be limited to information on the geographic origin of genetic resources and/or TK used in the invention, without requiring further evidence of compliance with ABS regulations. According to the EU, the "disclosure requirement should not act, *de facto* or *de jure*, as an additional formal or substantial patentability criterion". By consequence, legal implications for the non-respect of the requirement may only be invoked outside the ambit of patent law. It is obviously important to remark here that such a condition would not efficiently contribute to stop biopiracy and misappropriation, or to reduce economic, social and cultural impacts on the countries of origin. In fact, although a legal mechanisms may likely be activated under administrative or civil law (i.e.: asking a fee payment for refusing to submit information or a claim for compensation), this would not be enough to redress the consequences of having granted the patent in the first place. In addition, it is hardly conceivable that the TK-holder(s) would start an administrative proceeding or a civil trial against multinational corporations: as already highlighted in the case of filing a patent application, members of indigenous and local communities are often unaware they are entitled to such remedies; further, the linguistic obstacles and the costs to file such proceedings would prevent TK holders from taking the initiative. It is also hard to imagine that developing countries' governments would take the lead in such a task: foreign corporations are a source of investment and starting such actions would not be strategically convenient for them, considering that they may make the *political* environment hostile for investors. Lastly, such solutions

[90] 'Review of Article 27.3(b) of the TRIPS Agreement, and the Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore', IP/C/W/383 (17 October 2002).

do not address the socio-cultural implications of the implementation of the patent system. As for the limitations to geographical origin, this reflects Recital 27 of the Biotechnology Directive,[91] which states that if an invention is based on biological material of plant or animal origin or on the use of such material, the patent application should include information on the geographical origin of such material, where appropriate and if known (and, in all cases, this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents). The European proposal to limit information to geographical origin can be seen as an effort at preserving consistency and coherence between the external and the internal action in this field. Yet, taking into account that a great range of TK and genetic resources originate in more than one country and the difficulties to properly document the existence and development of TK,[92] it does not offer an efficient solution against misappropriation of TK and genetic resources. The EU suggests resolving this kind of problems through arrangements among the source countries concerned and/or in the context of the CBD.[93] Recalling the urgency of the issues at stake, this does not sound like a timely solution.[94]

Whereas for solutions directly affecting the current patent system (and likely to change it in a way to make the release of a patents harder) the EU showed a cautious approach, on questions concerning TK protection the EU manifested a more *empathic* attitude towards developing countries' claims. Although not considering the TRIPS Council as the right place to negotiate a tool for tackling TK legal protection issues and indicating WIPO as the most suitable arena, the EU left the door open for including TK issues on the future agenda of the TRIPS Council. The EU acknowledged that IP law is often inadequate to protect TK and the development of an international *sui generis* model of protection is suitable, hereby expressing its support for the adoption of an international model for the legal protection of TK.[95] In

[91] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.
[92] On geographical issues and the fact that similar TK have been documented in very different and distant geographical contexts, see Drahos, above (n 5).
[93] Communication from the European Communities and their Member States, *Review of Article 27.3(B) of the Trips Agreement, and the Relationship Between the Trips Agreement and the Convention On Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore*, IP/C/W/383, (17 October 2002), Para 58.
[94] Discussions on the feasibility of such negotiations are already ongoing under the CBD, however negotiations require time and are not always successful.
[95] EC Communication "Review of Article 27.3(b)", above (n 93), para 67 and 69. The EU also recalled its operative contribution to the WIPO Intergovernmental Committee's work.

spite of such political support, within the context of reviewing Article 27.3(b) the EC did not go any further in supporting actions to face specific issues of TK protection. Stating that, as a matter of fact, TK protection is relevant to other Articles of the TRIPS Agreement,[96] the EC approached the issue of preventing inappropriate patenting of TK mainly from an economic perspective, focusing on the facilitation of benefit sharing. Indeed, the EC does not contemplate the possibility of excluding TK from being patentable and suggests that the duly recognition of the "prior art" (e.g.: through databases and registers documenting and sharing information on TK) can constitute an effective way to halt misappropriation. When this is not possible, but TK is used as a basis for creating innovations, the inventor should enjoy the possibility to patent his/her innovation, without overriding existing legal or contractual conditions to reward TK holders or share the benefits deriving upon its use. The European position on ensuring fair access to benefit sharing and reward of TK holders is coherent with the engagement undertaken under the Convention on Biological Diversity, to which the European Union is party since 1993. Yet, the EU could have adopted a more comprehensive approach for its analysis in order to take into account the social and cultural implications of patenting TK.

However, the EU slowly manifested an openness towards developing countries' requests for disclosure requirement - even within the implementation framework of other international agreements. In a Communication concerning the implementation of the Boon Guidelines of the CBD, the Commission states it is willing to discuss the possibility of making such disclosure requirement a formal condition of patentability in the relevant international fora.[97] In that case, the consequences of the non-respect of the requirement would fall both within and outside the field of patent law.[98] In 2008 the EU delegation, together with India,

[96] Such as Article 29 on Patent's condition and Article 30 on exception to rights conferred. See Para 31 and 31, *ibidem*.

[97] Communication from the Commission to the European Parliament and the Council "The Implementation by the EC of the 'Bonn Guidelines' on Access to Genetic Resources and Benefit-Sharing under the Convention on Biological Diversity", COM (2003) 821, par. 18. The Bonn Guidelines support the implementation of the CBD on access to genetic resources and benefit-sharing, adopted at the 6th Conference of the Parties of the Convention on Biological Diversity (CBD) in April 2002, gives a possibility for Parties to the CBD of introducing a disclosure requirement in their legal systems, unilaterally, independently from the setting up of an international system.

[98] The Commission specifies that the disclosure requirement remains as a self-standing obligation under EU law.

Brazil, Switzerland and other countries,[99] communicated its agreement to amend the TRIPS Agreement to include a mandatory requirement for the disclosure of the country providing/source of genetic resources, and/or associated traditional knowledge for which a definition will be agreed, in patent applications. In this case, patent applications will not be processed without completion of the disclosure requirement.

3.4.1.2) WIPO

Similar discussions concerning the appropriate protection of traditional knowledge are also happening within the UN World Intellectual Property Organization. It is important here to clarify that under the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the protection of Traditional Cultural Expressions (TCEs) and traditional knowledge (TK) is addressed separately. Although worldwide in many communities traditional cultural expressions (or expressions of folklore), traditional knowledge and associated genetic resources form part of a single integrated heritage, according to WIPO the protection of TCEs raises some particular legal and policy questions in IP law and they receive a distinct focus in many national and regional IP laws. Therefore, the WIPO Intergovernmental Committee opted for such separation.[100] For the scope of this chapter, I focused on the activity dealing with the protection of Traditional Knowledge and with genetic resources.

At the invitation of the Conference of the Parties of the Convention on Biological Diversity, WIPO undertook the task to examine issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, including, inter alia, options for model provisions on proposed disclosure requirements.[101] In 2005, the European Union and its Member States submitted a document to the Intergovernmental Committee, with the aim to outline the basic features for a balanced and effective proposal on the disclosure of genetic resources and associated traditional knowledge (TK) in patent applications.[102]

[99] Draft Modalities for TRIPS Related Issues, TN/C/W/52 (19 July 2008). (Other countries: Albania, China, Colombia, Ecuador, Iceland, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Thailand, Turkey, the ACP Group and the African Group).
[100] http://www.wipo.int/tk/en/folklore/.
[101] WIPO/GRTKF/IC/6/13.
[102] Disclosure of origin or source of genetic resources and associated traditional knowledge in patent

In the document the EU takes into account the whole set of developments in WIPO, WTO, FAO, the CBD and other relevant fora that have enriched the discussion on the current issues. Summarising the content of the document, the EU proposed the introduction of a mandatory requirement to disclose the country of origin or source[103] of genetic resources in patent applications. This should apply to all international, regional and national patent applications at the earliest stage possible. As for the disclosure of traditional knowledge associated with genetic resources, the EU considers it possible to introduce such a requirement on the applicant, if he is aware that the invention is directly based on such traditional knowledge. However, the EU thinks that there is not yet a clear definition of "traditional knowledge" and a further in-depth discussion on the concept of "traditional knowledge" is therefore necessary. Overall, the EU position within the WIPO seems to be consistent with the more recent attitudes showed under the WTO.

3.4.1.3) Convention of Biological diversity and the Nagoya Protocol

Finally, the Union is a party to the CBD since 1993[104] and recently signed the Nagoya Protocol to the CBD, concerning access to genetic resource and benefit sharing deriving from their utilisation.[105] The Nagoya Protocol has recently entered into force and the European Parliament and the Council adopted Regulation 511/2014 on 16 April 2014 to implement the Protocol.[106] Having extraterritorial implications, the implementation of the Nagoya Protocol will require the EU and its Member States to ensure the respect of national legislations and requirement of the third country providing the genetic resource and related traditional knowledge. As it has been already pointed out, this is the most innovative aspect of the Protocol, which may contribute, in certain cases, to overcome problems deriving from the unclear ABS system under the CBD and grant a better protection to indigenous and local traditional

applications, WIPO/GRTKF/IC/8/11.

[103] If the country of origin is unknown, the applicant should declare the source of the specific genetic resource to which the inventor has had physical access and which is still known to him. The term "source" refers to any source from which the applicant has acquired the genetic resource other than the country of origin, such as a research centre, gene bank or botanical garden.

[104] Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity.

[105] Council Decision 2014/283/EU of 14 April 2014 on the conclusion, on behalf of the Union, of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

[106] EU Regulation No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.

knowledge. On this point, it is worth recalling that during the Protocol's negotiations, the EU created great expectations among ILCs members and stakeholders involved in the drafting process. Indeed, the Commission's initial position was in favour of retaining references to "customary laws, community protocols and indigenous and local community laws" in the prevalent draft Protocol text.[107] The EU negotiated the Nagoya Protocol on the basis of article 192(1) - in conjunction with article 218(6)(a)(v) – referring to the objectives of article 191 on environment, an area of shared competence. Therefore the Nagoya Protocol was negotiated in the form of a mixed agreement, together with the Member States. It was under the pressure of Member States – France in particular – that the EU had to backtrack from this position. France, indeed, did not agree to accept any wording including references to customary or local laws, fearing the fact that such a reference would affect French interests vis-à-vis their overseas territories (namely, the risk of claims for more ILC members' representation within the frame of their relationships with France). So, also in this case of joint participation of the EU and its Member States, Member States' interests highly determined the common position of the EU. If on the one side the EU was able to preserve its image as a one-voice actor and was coherent with the respect of its internal rules, on the other side third parties' expectations were deceived, therefore weakening the international image of the Union as an actor supporting ILC rights.[108] In the end, an agreement was reached and the reference to "customary law, community protocols and procedures as applicable with respect to traditional knowledge associated to genetic resources" was retained.[109]

The EU negotiating strategy was also disappointing for stakeholders and ILC representatives in that it aimed at keeping the compliance provisions preventing the misappropriation of traditional knowledge outside the Protocol's negotiations (current article 16 of the Nagoya Protocol). According to the Union compliance provisions relating to traditional knowledge should be treated under the WIPO

[107] K Bavikatte and D F Robinson, "Towards A People's History Of The Law: Biocultural Jurisprudence And The Nagoya Protocol On Access And Benefit Sharing", (2011), 7:1 *Law, Environment and Development Journal*, 35, at 45.

[108] This conclusion derives from information acquired through an interview to an Expert Member of the WWF-Bruxelles taking part as a representative of stakeholders at the Nagoya Protocol's negotiations, as well as from the participation to the ABS Expert Meeting organized by the Italian Ministry of Environment, Land and Sea in Rome, 4-5 September 2014, under the aegis of the Italian Semester of Presidency of the Council of the European Union.

[109] The reference to domestic law and the elimination of the wording "Indigenous and local communities law" were deemed satisfactory for France and helped to reach the agreement (article 12 of the Protocol). K Bavikatte, (n 107), at 46.

Intergovernmental Committee.[110] This forum shifting to WIPO from CBD of compliance provisions relating to traditional knowledge may be seen as an attempt to keep crucial aspects concerning access to genetic resources and TK under the umbrella of proper intellectual property law frames, such as WIPO. The original European position changed only when a paragraph requiring the Parties to the Protocol to take note of the developments at the WIPO IGC was introduced in the COP Decision.[111]This can certainly be seen as an effort to ensure coherence and coordination between similar decisions under different fora, such as the CBD and the WIPO in this specific case. Yet, the EU could use the negotiations of the Protocol on ABS as a playground to put forward improvements concerning some crucial aspects, which are highly debated under the WIPO, such as the adoption of the disclosure of origin as a mandatory requirement for patents. The final version of the Protocol does not mention the patent office among the checkpoints to monitor the respect of compliance measures: according to experts, including patent offices could have helped increasing pressure in forum such as the TRIPS Council towards an internationally binding disclosure of origin patent requirement.[112] Thus, the EU could have played a relevant role in influencing negotiations in this sense.

Overall, the implementation of the Nagoya Protocol appears quite challenging and its relation to other international instruments remains undefined and problematic.[113] The future implementation of the recently adopted Regulation on measures of compliance for ABS will be a very interest test for the Union and its Member State.

3.5) The bilateral framework: a look at the bilateral trade agreements

Following the adoption of the Strategy for the Enforcement of Intellectual Property Rights in Third Countries, the EU is systematically including an intellectual

[110] K Bavikatte, (n 107), at 44.
[111] Poin 6 of Decision X/1. Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, UNEP/CBD/COP/DEC/X/1 (29 October 2010).
[112] K Bavikatte, (n 107), at 48.
[113] M Buck and C Hamilton, "The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity", (2011), 20(1) *Review of European Community and International Environmental Law*, 47; V Koester, "The Nagoya Protocol on ABS: ratification by the EU and its Member States and implementation challenges", *03/12 STUDY*, June 2012, available at http://www.iddri.org/.

property chapter in its bilateral trade agreements. Through this IP chapter, the Union is trying to develop new and additional standards of IP enforcement in the context of bilateral relations, whose implementation will have a direct impact on the practical effect of the IPRs at national level. Provisions contained in the chapter are informed and influenced by two major sets of rules and standards for the IPR enforcement: one deriving from the international framework such as the TRIPS Agreement; the second one is the EU framework for IPR enforcement, namely the two Intellectual Property Enforcement Directives (IPRED).

In this paragraph I will look at the IP chapters included in the FTA with South-Korea, the EPA with the CARIFORUM, the trade agreement with Colombia and Peru and the Association with Central America. The scope of this analysis is to establish whether issues concerning the protection of traditional knowledge are taken into account and, if so, in which terms. This analysis will also be of help to assess whether the Union is behaving coherently and consistently on the multilateral and bilateral frame of negotiations.

Looking at IP chapters in the FTA with South-Korea, Article 10.40 addresses the topic "Genetic resources, traditional knowledge and folklore". Paragraph 1 of article 10.40 states that "*Subject to their legislation, the Parties shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional life-styles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices*". The wording of this article seems to be reproducing the language of the CBD: the recognition of the link between traditional knowledge and sustainable use and management of biodiversity' resources, the need to ensure the equitable sharing of benefits deriving from the use of such traditional knowledge and practices, and the involvement and approval of the holder. The language is mandatory (*shall*), yet how such protection should be realized is not further explained. Finally, dialogue among the parties under relevant international *fora* (WTO, WIPO, etc) should be ensured.

The CARIFORUM EPA's chapter on IP contains a very alike provision: article 150 titled "Genetic resources, traditional knowledge and folklore", whose first

paragraph reproduces the same wording.[114] However, article 150 CARIFORUM EPA is more detailed: under paragraph 2, which recognises the importance of taking appropriate measures, subject to national legislation, to preserve traditional knowledge, the parties engage in continuing to work towards the development of international *sui generis* models for the legal protection of traditional knowledge; paragraph 3 stresses that the patent provisions contained in the subsection shall be implemented in a mutually supportive way with the Convention on Biological Diversity. It is also worth noticing that article 149 of the EPA contains the possibilities for the parties to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material, provided they are in accordance with the international regime on plants variety (namely, the TRIPS Agreement. and the International Convention for the Protection of New Varieties of Plants - UPOV (Act of 1991).

Both of the bilateral agreements contain provisions on geographical indications.[115] However, Article 164 (on cooperation for the enforcement of IPRs provisions) demands that parties pay particular attention to promoting and preserving local traditional knowledge and biodiversity through the establishment of geographical indications protection.[116] Finally, Article 73 of the CARIFORUM EPA may contribute to strengthen the level of protection of local traditional knowledge. Article 73 refers to foreign direct investment (FDI) and requires the parties to ensure that FDI is not encouraged by lowering or by relaxing *inter alia* standards or laws aimed at protecting and promoting cultural diversity. It can be observed that under the CARIFORUM EPA protection of TK goes slightly further than focusing on TK related to genetic resources. Yet, the instruments suggested to protect and promote the diversity of local traditions are still tools existing under EU IP law (such as GI) and there is no reference to domestic rules that may enact different kinds of protection to TK.

[114] CARIFORUM- EU EPA, Article 150.1. Subject to their domestic legislation the EU Party and the Signatory CARIFORUM States respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.
[115] The geographical indication section is more extended and detailed in the EU-South-Korea FTA.
[116] Par. c of Article 160 CARIFORUM EPA.

The IP Chapter in the Free Trade Agreement with Central America also contains provisions on traditional knowledge related to use of biodiversity. Paragraph 4 of Article 229 reaffirms the sovereign right of States over their natural resources and the access to their genetic resources as established under the Convention on Biological Diversity. It adds that no provision contained in the IP section shall prevent the parties from adopting or maintaining measures to promote the conservation of biological diversity, the sustainable utilization of its components and the fair and equitable participation in the benefits arising from the utilization of genetic resources. Paragraph 5 focuses on TK, recognizing the importance of respecting, preserving and maintaining the indigenous and local communities' knowledge, innovations and practices that involve traditional practices related to the preservation and the sustainable use of biological diversity. The difference of the wording between the EU- Central America FTA and the CARIFORUM EPA is quite striking: provisions under the first one are shaped in a more general sense and no further reference to the protection of TK is made in the text of the agreement.

The section dedicated to IP in the FTA with Peru and Colombia (COPE) contains a rather unique chapter focusing on biodiversity and traditional knowledge (Chapter 2 under Title VII). It is interesting to note that the title of the chapter is "Protection of biodiversity and traditional knowledge" and does not mention protection of genetic resources, as if the third parties' intention was not to limit the protection of TK exclusively to TK connected with the use of genetic resources. It is also remarkable that there is a separate chapter named "Provisions concerning intellectual property rights" (Chapter 3). This seems to indicate that, although included in the IP Title, protection of TK is not a matter of regular intellectual property rights' enforcement and should be addressed separately. Further, the language adopted is not so standard as in the FTA with Korea, the CARIFORUM EPA or the FTA with Central America. In this case, the wording is more precise and emphasises the value of biodiversity and traditional knowledge as *per se* value, without putting the accent on their commercial use. Of course, statements are present concerning States' sovereign rights over natural resources and access to genetic resources, as well as to fair and equitable sharing of benefits arising out of the utilization of these genetic resources.[117] But the accent on biodiversity and traditional

[117] Article 201.1.

knowledge is such as to reflect a different way of approaching and understanding the link between traditional knowledge and development. Indeed, paragraph 2 of article 201 highlights the contribution of traditional knowledge of indigenous and local communities to the culture and the economic and social development of nations. Indigenous and local communities are recognised as having a primary role in shaping and promoting sustainable and cultural development of the parties.[118] This recognition is echoed in the following paragraph 3, where the Parties commit to respect domestic legislation (in accordance with article 8(j) of the CBD) when taking measures to preserve and maintain traditional knowledge and practices of indigenous and local communities. As known, domestic legislations in countries where local and indigenous communities are a relevant presence should often be shaped on the needs and interests of such communities. Respect of domestic legislation is stated again in paragraph 6 as a condition for ensuring that intellectual property rights will support the fulfilment of rights and obligations under the CBD. Once again, the detailed language is quite remarkable: besides using the adjective "supportive", it is clearly stated that the enforcement of IPRs must "not run counter" to the enforcement of CBD provisions. Although not inserted in the text as a standard clause regulating the relationship between different international agreements, such a specification could be interpreted in a way to provide solution in case of conflict between CBD rights and obligations (namely concerning traditional knowledge, genetic resources and ABS) and rights and obligations deriving from the IP chapter of the trade agreement with the EU.

Finally, concerning the possibility to patent innovations based on genetic resources and related TK, paragraph 7 "acknowledges the usefulness of requiring the disclosure of the origin or source". Comparing this paragraph with the previous one, the language sounds weaker: a clear obligation to respect the disclosure requirement as mandatory when filing patent applications would have been auspicious. This would have been coherent with the proposal for a mandatory disclosure requirement to the TRIPS Council, presented in 2008, and with the current WIPO evolutions in this sense. However, it is true that there is still no a common agreement on the content and modalities of the disclosure agreement.

[118] Article 201.2: "The Parties recognize the past, present and future contribution of indigenous and local communities to the conservation and sustainable use of biological diversity and all of its components and, in general, the contribution of the traditional knowledge of their indigenous and local communities to the culture and to the economic and social development of nations."

Looking a the whole set of provisions contained in the agreement, the FTA with COPE pays particular attention towards issues like culture, the environment, and sustainable development, almost promoting a holistic understanding of development. It is quite striking, for instance, that there is a provision entirely dedicated to biodiversity under the title "Trade and Sustainable Development" which features biodiversity as a *key element* for achieving sustainable development.[119] Under this provision, high relevance is given to indigenous and local communities' traditional lifestyles as contributing to sustainable development: paragraph 5 of this "biodiversity" provision recalls the respect of CBD obligations and domestic legislation to preserve and maintain traditional knowledge. The text goes quite far by demanding that the prior informed consent of the holders of such knowledge, innovations and practices is acquired before promoting their wider application. Certainly from a "culture for development" perspective, the FTA with COPE is the most advanced trade agreement concluded by the EU in this new season of bilateral agreement. But before assessing the real impact of such a text, we need to see how it will be implemented.

4) Relevant EU internal legislation

To provide a comprehensive view on the approach of the EU towards the protection of traditional knowledge, it is appropriate to have a look at the internal legislation of the EU that may have impacts or influence the action on the external dimension.

As it has been observed throughout the previous analysis, the EU often proposes geographical indications as a useful tool to protect traditional products. Besides the introduction or mutual recognition of GIs within bilateral agreements, Council Regulation n. 2081/92 on geographic indications[120] may be of relevance for third countries. This regulation enables groups and natural or legal persons to register *designations of origin* and *geographical indications* for agricultural products and foodstuffs. Both terms describe the region, specific place or (exceptionally) a country

[119] Article 272 of the FTA with COPE. For a comment on this aspect, see: G Marin Duran and E Morgera, *Environmental Integration in the EU's External Relations Beyond Multilateral Dimensions*, (Hart Publishing, 2012), at 126.
[120] Council Regulation n. 2081/92 (14 July 1992) on geographic indications.

where an agricultural product or foodstuff originates.[121] A third country may apply for the registration of a designation in its territory and the European Commission has the authority to negotiate agreements with third countries for the reciprocal protection of designations. In the Commission's view, regulations relating to the geographic origin and specific character of agricultural products and foodstuffs could work to protect associated traditional knowledge under certain circumstances.[122] However, it is quite obvious that such a tool cannot address all the social and cultural issues deriving from the exclusive rights granted to a patent holder of a patented invention based on TK. Further, one author questioning whether geographical indications create a valid and effective form of cultural preservation and promotion, argued that they are merely "*legal tools for granting commercial advantages to certain products, sectors and regions*".[123]

Another useful internal instrument that can contribute to keep track of TK in order to avoid misappropriation is Directive 96/9/EC of the European Parliament and of the Council (11 March 1996) on the legal protection of databases. The Directive extends copyright protection[124] to the content of databases, and potentially enables the protection of information derived from the collection and use of genetic resources and the associated traditional knowledge, innovations and practices. Databases are defined as collections of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. To qualify for protection, the database must be the author's own intellectual creation, whether by selection or arrangement of its contents.

Finally, a valuable contribution can derive from the recent adoption of the European Parliament resolution of 15 January 2013 on development aspects of

---

[121] A designation of origin refers to the quality or characteristics of an agricultural product or foodstuff, which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors. A geographical indication refers to the specific quality, reputation or other characteristics of an agricultural product or foodstuff, which are attributable to the defined geographical origin. Both terms also refer to quality and characteristics attributable to production, processing and preparation in the defined geographical area.

[122] Second Report of the European Community to the Convention on Biological Diversity Thematic Report On Access And Benefit-Sharing, October 2002.

[123] T Broude, "Taking "Trade and Culture" seriously: Geographical Indications and Cultural Protection in WTO law", (2005), 26(4) *University of Pennsylvania Journal of International Economic Law*, 623, at 678.

[124] The Directive grants the author the right to authorise, amongst others: reproduction; translation, adaptation, arrangement and any other alteration; distribution, communication, display or performance to the public; as well as first sale in the Community (Article 5).

intellectual property rights on genetic resources.[125] The EP Committee on development (DEVE) carried out the preparatory work for this resolution. The Committee showed a very conscious approach to the issues arising from the dichotomy between IPRs and genetic resources. Clearly saying that biopiracy is a threat for the achievement of MDGs, the Committee recognises the need to protect the rights of indigenous and local communities and traditional knowledge. Concerning this, it is very interesting to note that the Committee highlights the danger of assessing traditional knowledge only from a mercantile point of view. Therefore, it points out that "the existing IPR framework does not fit such a heterogeneous group as traditional knowledge holders" and stresses the need to define a *sui generis* international IPR regime that preserves the diversity of interest of local communities and reflects customary law, etc. Aware of the fact that difficulties faced by TK holders include monitoring and enforcement, in its final version, the Resolution states that the EU should grant traditional knowledge *at least* the same level of protection as genetic resources when implementing the Nagoya Protocol.[126] The Resolution recognizes that IP law may have a positive impact on indigenous and local communities' development (i.e. technology transfer), therefore, while emphasizing the need to prevent the negative impacts, it brings out that contracts between the parties may be identified by indigenous peoples or local communities as a more feasible solution to share benefits and to protect their interests while preserving the environment and preventing social and economic harm, e.g. by means of safeguard clauses. To halt biopiracy the Parliament stresses on the need to properly implement prior informed consent, although this may be a real challenge for developing countries as it requires substantial legal and institutional capacity building. Therefore, the EU development cooperation should provide developing countries with assistance for legal and institutional capacity building on access and benefit sharing issues. Concerning the proposal made by developing countries for a binding regulation requiring patent applicants to disclose the source and origin of genetic resources and associated traditional knowledge, the Parliament stresses that an international instrument comprising disclosure requirements should be adopted, and highlights that databases for genetic resources protection is not a substitute for an effective access

[125] European Parliament resolution of 15 January 2013 on development aspects of intellectual property rights on genetic resources: the impact on poverty reduction in developing countries (2012/2135(INI)).
[126] *Emphasis* added.

and benefit sharing mechanism at the national level. On the relationship between WTO-TRIPS and the CBD-Nagoya Protocol, the Parliament considers the establishment of a mandatory requirement on disclosing the origin of genetic resources during patent proceedings as crucial to ensure their compatibility and mutual support.

5) Concluding remarks

To connect the analysis here on IP and Development with the issues raised in the initial chapter, it is useful to offer some reflections concerning the evolutions of international law to protect TK (synthesised above) and models of development. Negative impacts may derive from the inadequacy of current IP law rules applied to sectors of development involving certain forms of intangible cultural heritage (i.e. traditional knowledge). These impacts could be economic, social, cultural, and environmental. In developing and least-developed countries these impacts not only affect local communities or peoples living in vulnerable contexts, but are also a threat for the sovereign rights of States over their national resources. From a more philosophical point of view, the wide application of current IP law in such contexts highly influences the model of development of States and affects the possibility for local communities to determine and preserve their own developmental model.[127] This being said, the debate initially recalled in this chapter about the potential of IP law to promote development should be reframed in the following terms: what kind of development is current IP law likely to boost and who will it benefit? Is such a model a good one to implement culture as a vector of sustainable human development? The environmental, social, and cultural implications described in the previous paragraph, as well as the biopiracy threat, present a gloomy picture and thus a negative answer to these questions. Although it cannot be denied that the application of the patent system to protect traditional knowledge related to natural and genetic resources may entail economic returns for local communities and national governments, the economic improvement is not the only sufficient component to assess whether sustainable development is achieved. In addition, the major solutions currently discussed under IL to redress IP law impacts focus on the protection of traditional knowledge as an

[127] The issue to self-determine developmental strategies and models is of particular relevance for local communities and indigenous peoples. Article 3 and Article 23 of the UN Declaration on Indigenous Peoples Rights affirm the right to self-determination of development. For a broader and critical view on this issue, see: Karen Engle, above at n.**Error! Bookmark not defined.**, at (insert p.)

element for economic revenues, like the disclosure requirement and the PIC. Instead respect of TK as a means for promotion and maintenance of cultural livelihoods, for conservation and sustainable use of the environment has hardly found space for discussion in legal and policy tools.[128] As is evident, the formulation of TK protection has predominantly taken place in the discourse of Western trade-related intellectual property rights, gaining much attention in trade and IP fora. Some argue that there has also been a tendency to focus on developing mechanisms to control the scientific and commercial use of TK, with the apparent aim of enabling indigenous and local communities to capture the anticipated benefits of commercialisation of TK – usually through profit sharing mechanisms.[129] However, they also note that such efforts are largely driven by national governments and are often in conflict with the expressed desire of indigenous and local communities to protect the integrity of traditional knowledge, as part of cultural heritage, rather than allowing it to become another marketable good.[130]

While the current focus of negotiations in multilateral agreements is important for the exchange of technology and for the reduction of biopiracy, it does not necessarily address the problems that directly and immediately threaten host communities and the continuity of their culture. Johanna Gibson suggests that there is "likely a fundamental difference between the object of protection that is understood in conventional legal discourse, and that sought by traditional and indigenous groups".[131] Conserving the method of knowledge creation and evolution in these contexts should be more directly addressed in order to support the first two roles of TK, not just the tangible object or a documented version of the knowledge, in order to allow indigenous and local communities to maintain local cultural continuity and pursue their own model of sustainable development.

In spite of all the critical aspects deriving upon a rigid application of IPRs in developing countries and the tensions arising with human rights, as above described, major trade actors on the international scene and international organisations have greatly spurred developing and least-developed countries into improving the

[128] I can quote here the efforts undertaken for the adoption of the 2003 UNESCO Convention on Intangible Heritage, though commercial aspects of TK are of relevance also in this framework.
[129] B Tobin, *Customary law as the basis for Prior Informed Consent of local and indigenous communities,* UNU-IAS*,* available at http://www.ias.unu.edu.
[130] Brendan Tobin, *ibidem,* 3; Daniela Robinson, above at 4, at123.
[131] Johanna Gibson, above at 5, 66.

enforcement of IPR. In the context of patent law applied to traditional knowledge and genetic resources, strong criticisms have been raised and developing countries call for a change to current IP law. The analysis carried out here shows that the Union is not fully replying to such request, both at the multilateral and bilateral level of negotiations. However, the EU Commission approach to tackling issues regarding IP law and TK is not really innovative. Following the major stream, which focuses on the economic damage caused by the current situation, the protection of cultural diversity and traditional lifestyle seems not to be so relevant. For instance, looking at the solutions proposed under the WTO and WIPO can certainly contribute to a better implementation of the ABS, however they do not tackle the social and cultural dimension of the problem at stake. In addition, it is important to be aware of the possibility that such laws and policies might conflict with another aspect of this issue: protecting traditional knowledge from extinction. The most important measure to protect traditional knowledge from extinction is the sharing of traditional knowledge. Laws and policies that make such sharing difficult, for example by providing for complicated procedures of prior informed consent, might negatively affect the sharing of traditional knowledge among farmers if they hinder conservation work.

The request to modify Article 27.3(b) so as to include a ban on patenting life would probably be the solution. However, being realistic, it is hard to imagine that an agreement on such a ban will ever be reached. In addition, this would open a Pandora's box on a new series of highly debated issues – such as reducing the possibility for fostering R&D, technological innovations, health care improvements, etc. So a balance could be found by looking at other instruments directly addressing the protection of intangible forms of cultural heritage or cultural diversity. The economic aspect is certainly important, especially when it can contribute to poverty reduction, but in the current debate the preservation of TK as a lifestyle is in danger of being forgotten entirely. Among the EU institutional actors, only the Parliament seems to be aware of this. As an effort to protect TK as a cultural model of life is required by the Union, the Union could sign up the 2003 UNESCO Convention on Intangible Heritage.

CHAPTER 6

CONCLUSIONS

1) Culture and development: the lack of a global governance for a challenging connection

This thesis was first motivated by my personal interest and curiosity in exploring the connection between culture and development, a topic that has been increasingly debated in recent decades. Looking through the lens of the European Union, as a major actor involved in international dynamics dealing with culture as a vector of development, this thesis has aimed at assessing whether a global governance for "culture and development" is emerging and, if so, to what extent the Union is contributing to such a process. More specifically, this research has explored the relationship between culture and other policies connected to development from a very practical angle, concerning concrete challenges and tensions deriving from the integration of culture with other policies.

Reconnecting with the background, the first chapter of this thesis focused on how the understanding of this relationship has evolved. It showed that a shift from a negative to a positive perception of the role of culture for development has occurred in the past fifty years. This shift is mainly due to a broader understanding of development, which is no longer solely meant as economic growth, and a broader understanding of culture, which is seen as a constantly changing social process whose manifestations are able to provide positive inputs to the economic, social, cultural and environmental development of societies. Yet mainstreaming culture as a vector of development in our globalising world is a challenge, in particular for developing countries. The three concrete cases dealing with the relationship between culture and development – namely the mobility of cultural goods and services, the mobility of artists and cultural workers, and the protection of traditional knowledge – show that different and opposite tensions arise from the use of culture as a vector of development. In particular, if on the one hand more circulation of cultural works as well as cultural workers can increase economic growth and employment and bring positive spillover effects such as social inclusion, social cohesion and cultural development, on the other hand technological and economic disparities and

globalisation can expand the risk of cultural homogenisation. The need to foster cultural exchanges should then be balanced with the protection of cultural diversity. Protecting cultural diversity is also a priority when managing traditional knowledge, especially when it is related to the use of genetic resources – which are a primary source of economic returns and innovation not only for indigenous and local communities but also for western companies and countries, which are increasingly involved in biotechnological engineering industries and research & development activities.

The main findings of the background analysis carried out in the first chapter demonstrate that a coherent and comprehensive global governance dealing with issues deriving from the interaction between culture and development has yet to be developed, although nuances of it are emerging – especially since the adoption of the UNESCO Convention on Cultural Diversity. Most difficulties are due to the fact that international law in the field of culture has developed through a sectoral approach (similarly to international environmental law), along with the fact that the relationship between culture and development remained unexplored for a long time. Further, developing a comprehensive global "culture and development" governance is extremely complicated, because of the peculiar issues of each specific case. In fact, besides the need to protect and promote cultural diversity, each concrete case is characterised by other challenges: for instance, in the case of artists and cultural workers, fostering their mobility meets the need to reduce illegal immigration and the management of labour migration; in the case of TK connected to genetic resources, the safeguard of such knowledge overlaps with the need to ensure fair and equal access and benefits-sharing deriving from its use, and to mitigate the risk of misappropriation. These practical challenges demand a case-by-case approach, in order to meet all the issues and interests at stake and strike the appropriate balance.

In spite of this evident difficulty, a minimum layer for a global "culture and development" governance is proposed in Chapter 1. Considering that cultural capital shows great similarities with natural capital, mainstreaming culture into development policies should take place through the use of the principle of sustainability, so as to ensure the durability of, as well as equal and fair access to, cultural resources. In *primis*, the use of the principle of integration should ensure that cultural considerations are integrated and taken into account in all programmes and at all policy levels. This would help to improve a systemic integration of culture in

programmes and policies, as desired by those supporting the idea of culture as the fourth pillar of sustainable development. Secondly, the precautionary principle and a cautious approach should help to strike the right balance between openness and preservation, both in order to foster cultural exchanges and development and to preserve cultural diversity. In particular, States should take preventive action and/or adopt a precautionary approach in situations where the survival of cultural identities is at risk of extinction or cultural homogenisation is a real threat. Further, given that cultural resources are "living" resources, their preservation is not simply a matter of static conservation; they need to be valued and used in order to maintain their ability to re-generate and adapt. This is particularly true in the case of traditional knowledge, which is considered an expression of "living" cultures, but it is also relevant in the case of cultural goods and creativity, which necessitate the continuous flowering of content and ideas. Sustainable use is, then, connected to ensuring sustainable and responsible access to cultural goods. Therefore, cultural policies should aim at ensuring a balance between the protection and preservation of cultural expressions – traditional or otherwise – and the free exchange of cultural experiences. Finally, the principle of public participation and a community-based approach to decision-making processes seem to be fundamental to empower local cultural communities. If culture is something "living" and continuously evolving, local peoples, ethnic and minority groups are the best custodians and spokesmen of cultural interests and concerns. Yet, empowering peoples through a participatory approach, especially in the case of minority groups or indigenous peoples, is always a controversial issue within the States' practice.

2) The Union and the "culture and development" debate: a fragmentary approach due to endemic features of the EU internal structure

The analysis undertaken in this thesis shows that, in the last decades, the integration of culture into the Union's external relations has grown significantly. The EU ratification of the UNESCO Convention on Cultural Diversity has contributed considerably to give greater visibility to the Union's engagement in the cultural field; it has also helped to create wider and ambitious expectations among third parties. On the Union's side, as a global actor capable of influencing political and legal outcomes in international relations, it is certainly contributing to the development of a global governance on culture and development. Yet, as this analysis shows, the Union's

action in mainstreaming culture for development is still fragmented and more awareness concerning the need to develop an EU strategy for culture in external relations is emerging (as confirmed by the Commission in its recent document *Preparatory Action Culture in EU External Relations*).[1]

In order to succeed as an external global actor, as well as to contribute successfully to the integration of culture in development policies, the EU needs to pursue a coherent and consistent approach when dealing with cultural issues. Such an approach is firstly based on coherence between the EU external and internal dimension, involving coherence and consistency between all the EU policies, the EU institutions, and its Member States. In the light of the analysis, pursuing a coherent strategy for the mainstreaming of culture and development in the external relations seems to be a real challenge because of the interaction between culture and other policies and the difficulties of striking the right balance between the different interests at stake. Moreover, actions in the cultural sector and in the development sector have – so far – mostly developed along different lines, without being based on a joint connection between the cultural competence and the development competence. In spite of the recognition of the transversal nature of culture since the adoption of a cultural competence in 1992, the potential of Article 167(4) TFEU as a clause of integration has not been fully exploited.

Under the new framework established by Lisbon, which strengthens the accent on coordination, complementarity, and consistency, such fragmentation could perhaps be overcome. Yet, the internal legal constraints, in particular deriving from the principle of conferral and the allocation of competences, makes it hard for the Union to set up a truly coherent approach in mainstreaming culture as a vector of development. In fact, culture is a cross-cutting issue and a complementary competence which overlaps with other shared or exclusive competences, as we have seen in the three case studies analysed in this thesis. Further, a coherent strategy to mainstream culture as a vector of development also means applying principles of sustainable development allowing a sustainable use of culture as a resource and striking a balance between the need to protect and to promote cultural exchanges.

The Treaties' internal rules and constraints affect the external action of the Union to varying extents. The Union's cultural external competence is rather limited,

[1] "Preparatory Action Culture in EU External Relations", Report prepared for the European Commission, published in June 2014, also mentioned in the Introduction and Chapter 4 (n 94).

and mainly focuses on initiatives concerning cooperation and the promotion of European cultural diversity. When culture interacts with other policies falling under the sphere of national competence, such as labour migration, or shared competence, such as intellectual property law, further limits bind the external action of the Union. The joint participation of Member States in the case of mixed agreements, or the requirement for the Council's unanimity to approve agreements dealing with sensitive sectors, both influence the treaty-making power of the Union. Certainly, this analysis reveals that the Union is more daring within the frame of its bilateral trade relationships. The Union's emphasis on bilateral relationships with third countries or regions is in line with the international mainstream. Indeed, it is increasingly difficult to reach agreements in multilateral negotiations, which often seem to reach a deadlock, whereas bilateral negotiations represent a viable and more efficient tool to develop international relationships and promote sustainable development. Nonetheless, Member States also play a relevant role in determining the treatment of the cultural sector within bilateral agreements. Further, when cultural considerations should be integrated in agreements coping with nationally sensitive areas, the Union's power of initiative is constrained. The following sub-paragraphs are a synthesis of these considerations for each of the three specific cases explored in the thesis.

2.1) The EU and the mobility of cultural goods and services

The protection and promotion of cultural diversity in the context of trade seems to be an eternal dilemma, whose solution can be achieved only at the price of one or the other. For the EU Member States, this issue represents a double challenge: on the one hand, most States fear that more liberalisation in trade in cultural services, especially audiovisual services, would undermine their national cultural industries and identities; on the other hand, they are concerned about the increased presence of the Commission in the international "trade and culture" arena. In particular, the EU ratification of the 2005 UNESCO Convention increased Member States' scepticism, which saw the EU's growing activity in the field of culture as an attempt to erode their national competences. In contrast, EU ratification was warmly welcomed by other international actors, stakeholders and associations, which counted on the positive influence that the EU as a global actor could exercise in fostering the implementation of the Convention. Furthermore, since the adoption of the Convention, the Union took a step towards the integration of culture within all its

external relations.

With regard to the Member States' fears, they do not seem to have been warranted: several safeguard mechanisms are available under the EU constitutional treaties to guarantee respect for the principle of conferral. In the pre-Lisbon arena, the action of the Union dealing with trade in culture in the multilateral frame was very much bound by procedural limits fixed under Article 133(6). According to this provision, agreements relating to trade in cultural, educational, and audiovisual services belonged to the *shared competence* of the EU and its Member States and the negotiation of such agreements required the *joint participation* of the EU and the Member States. We saw that such a mechanism highly influenced the EU approach towards agreeing to open the cultural services sector under the GATS: although through the cultural exception the EU aimed at preserving its internal *acquis*, the original position was not a full exclusion of cultural services from the GATS. Under current Article 207 TFEU, the possibilities for Member States to apply a veto in trade negotiations are reduced: indeed, joint participation is no longer a requirement. Yet, paragraph (4) of Article 207 TFEU now replaces this safeguard clause by introducing the requirement of the *unanimity* vote for certain Council decisions concerning cultural and audiovisual services. Although unanimity is not the rule, and only occurs when the agreements at stake *risk prejudicing the Union's cultural and linguistic diversity,* Member States can still foresee the possibility for mixed agreements which allow their participation. This is the case when two or more different objectives are at stake and it is not possible to establish which one is predominant, so the agreement will be concluded on multiple legal grounds that may touch upon the shared competences of the Member States and the Union, such as culture (see for instance the FTA with South Korea, which was adopted on the basis of both Article 207 and Article 167). Finally, Member States should bear in mind that the protection of cultural diversity is a constitutional objective of the Union: therefore a coherent external action in the field of culture and trade requires that the external commercial competence should be exercised in such a way as to be complementary with the cultural objectives under Article 167 TFEU.

On the bilateral level the Union made a step towards the integration of trade and cultural objectives through the adoption of Cultural Protocols within the frame of trade agreements. As we saw, this strategy raised strong criticism regarding the way new Protocols on Cultural Cooperation were initially negotiated, yet the EU's attempt

offers a practical example of implementation of the principles included in the Convention and creates a favourable context for cultural exchanges. The new EU strategy seems to be aimed at striking a balance between the two opposite trends: a protectionist one, set up in the name of protecting existing cultural diversity, and a more liberal one, calling for more cultural exchanges in the name of cultural diversity and more development. Additionally, the adoption of co-productions as a framework for cooperation is a positive move. Cultural protocols, indeed, mainly focus on co-productions and co-distributions: this may be a good match between opening markets, fostering capacity-building and cultural exchanges, while promoting creative industries and diversities in developing countries.

Through the adoption of cultural protocols the EU integrates culture in its trade and development policy, and thus contributes positively to the implementation of the principle of cultural integration embedded in Article 167(4) TFEU, and promotes the idea of systemic integration as supported by the theory of culture as the fourth pillar of development. However, this practice needs to be improved in order to allow a sustainable management of culture as a resource: namely, the Sustainability Impact Assessment should be extended to the cultural protocol and consultations should ensure a greater participation of cultural associations and other stakeholders.

2.2) The EU and the mobility of artists and cultural workers

The mobility of artists and cultural workers needs to be integrated into labour migration frameworks. Unfortunately, artists and cultural professionals from developing countries are often assimilated to migrant workers, and that assimilation may prove to be an obstacle for the mobility of this category. More efforts should be made to implement GATS Mode 4 or provisions facilitating the mobility of artists under the bilateral framework. Yet, here, the efforts of the Union meet greater obstacles deriving from Member States' national fears and interests. It seems difficult to envisage the development of effective EU governance in this specific sector.

Transnational mobility is an integral aspect of the professional activities of artists and cultural workers: this aspect should be taken into account and specific regulations tailored to the needs of this category should be adopted. While such specific regulatory regimes are missing, rules concerning the cross-borders supply of

services under the frame of international economic law may help to support the mobility of artists and cultural workers. The UNESCO Convention recognises this and requires its Parties to establish preferential treatment schemes to facilitate the mobility of artists and cultural workers coming from developing countries so as to increase their possibilities for market access (Article 16 of the Convention). Further, preferential mobility schemes should also aim at facilitating cultural workers' training, exchange of information and experiences. The European Union strategy to foster the transnational mobility of artists and cultural workers in the framework of bilateral trade agreements seems to be based on both these aspects: increasing possibilities for non-EU cultural professionals to access the EU market through provisions improving the temporary presence of cultural services suppliers (in cultural sectors other than the audiovisual one); and creating better conditions though the Cultural Protocols to simplify and promote the mobility of artists and cultural workers within the frame of co-productions, cultural and training exchanges. At this point, two distinctions are necessary: the first one relates to the evidence that on the bilateral level the Union is able to engage in more ample commitments than in the multilateral framework; the second one concerns the differences between the EPA with the CARIFORUM and the other trade agreements analysed in relation to the cultural services' market access concessions. As for the first point, once more it is unsurprising that the Union is more daring at the bilateral level than the multilateral one. Within the multilateral framework the Union's action is highly influenced by internal policy interests and legal constraints, as we saw in the case of GATS Mode 4. Yet, Member States also influenced the Union's final decisions concerning the temporary presence of natural persons supplying cultural services within the frame of bilateral trade negotiations. This links with our second observation, concerning the substantial differences between the CARIFORUM-EU EPA and the other Agreements. In the EU-Korea agreement Member States strongly opposed the allowance of preferential treatment for co-productions and further access to cultural sectors because of the level of development of Korean cultural industries, in order to defend the European cultural creative sector in the name of cultural diversity. As we saw, the criticism towards the Commission's approach in negotiating the FTA with Korea strongly affected the following negotiations for the EU-CA and EU-Colombia and Peru agreements. In both these contexts, a wider access for services providers in the entertainment services like in the CARIFORUM-EU agreement has not been

granted. The unprecedented market access commitments granted for cultural services suppliers in the EPA are therefore characterised by a strong development policy paradigm. Overall, they seek to facilitate the circulation of CARIFORUM artists and other cultural professionals and practitioners in the EU, which might generate important capacity-building effects. This approach is coherent with the international commitments undertaken by the EU, coping with the promotion of culture as a vehicle of development. The different level of commitments undertaken in the other Trade Agreements is in line with the case-by-case approach, yet the fact that the EU-Central America and the EU-Colombia and Peru agreements do not contain the same level of access for cultural services suppliers shows that a better prior assessment should be made. Indeed, it is also unclear for what reasons artists and cultural workers from Central America, Colombia and Peru cannot enjoy the same preferential treatment granted to the cultural workers of Caribbean countries. In these two contexts development issues are also at stake, but they do not seem to play the same significant role as in the CARIFORUM-EU EPA. The mobility of artists and cultural workers from Central America, Colombia and Peru is facilitated only on the basis of the cultural cooperation provisions contained in the cultural protocol/agreement.

Besides the need to preserve cultural diversity, the EU's undertaking of commitments to foster the mobility of artists and cultural workers is made more complicated by the fact that these initiatives encroach upon sensitive national spheres such as visas and migration control. As we saw, visa issues are at the heart of the obstacles hindering the mobility of artists and cultural workers from third countries. Current EU legislation on migration does not offer any appropriate solutions to this problem. For the future, the sectoral approach – which led to the adoption of directives such as the one dealing with researchers – could be a good way to promote the adoption of a directive concerning artists and cultural workers. Yet, it is difficult to imagine that this could take place with the agreement of all Member States. Nonetheless, the Commission's plan to work on proposals to shorten and simplify the procedures for visa applications for individuals from third countries, including artists and cultural professionals, who wish to make short visits to Schengen area countries, re-launched in April 2014, leaves room for better future outcomes.

The analysis of the Union's policy documents on migration and development shows that very little attention is given to culture within the frame of the legal and political initiatives addressing mobility issues that have been adopted. The analysis of

mobility and migration carried out in this chapter demonstrates that "culture as a vector of development" seems to be relevant mostly when the economic aspects of cultural activities are at stake. So far, the integration of culture as a vector of development has gained more space in the context of trade policy than in migration policy.

2.3) The EU and the safeguard of Traditional Knowledge

As for the protection of traditional knowledge, the action of the Union in the bilateral frame is deceptive, especially in terms of raised expectations. Again, the internal constraints do not help the Union to pursue higher goals. Nonetheless, the EU does not take into proper account the principles of sustainable development in approaching this issue. Indeed, the EU Commission's approach to tackling issues on IP law and TK does not seem to be really innovative and is mostly market based. Following the major stream, which focuses on the economic damage deriving from the current situation, the protection of cultural diversity and traditional lifestyle seems less relevant for the EU. In this specific case, preoccupations towards cultural diversity play a minor role in contributing to strike a balance among the different interests at stake; rather, other interests, underlying the whole issue – such as ensuring access to TK and genetic resources to European users – seem to be more relevant. For instance, when looking at the solutions proposed under the WTO and WIPO it is clear that they could contribute to a better implementation of the Access to Benefit Sharing, however they do not tackle the social and cultural dimension of the problem at stake. In addition, it is important to be aware of the possibility that such laws and policies might conflict with another aspect of this issue: protecting traditional knowledge against extinction. The most important measure to protect traditional knowledge from extinction is the sharing within their original Communities of such traditional knowledge. Laws and policies that make common sharing difficult, for example by providing for complicated procedures of prior informed consent, might negatively affect the sharing of traditional knowledge among farmers if they hinder conservation work.

The request to modify Article 27.3(b) TRIPS so as to include a ban on patenting life would probably be a solution. Being realistic, it is hard to imagine that

an agreement on such a ban will ever be reached. In addition, this would open a Pandora's box on a new series of highly debated issues – such as reducing the possibility for fostering R&D, technological innovations, health care improvements, and so on and so forth. So a balance could be found by reverting to other instruments directly addressing the protection of intangible forms of cultural heritage or cultural diversity. The economic aspect is certainly important, especially when it can contribute to poverty reduction, but in the current debate the preservation of TK as a lifestyle is almost being forgotten. Among the EU institutional actors, only the Parliament seems to be aware of this. An effort by the Union to protect TK as a cultural model of life is required. For instance, the Union could sign up to the 2003 UNESCO Convention on Intangible Heritage.

To conclude on this, it should be acknowledged that the Union has done a considerable amount of work in developing useful tools protecting traditional practices within the single market, in particular in the agro-industry and food sectors. I am referring here to the appellations of geographical indications and similar tools, which have gained an important place within the Union's borders and play a relevant role on the internal market as both promoters of food quality and local traditions. Although these tools may present some shortcomings in terms of a fully effective protection of local and indigenous traditional knowledge (as highlighted in Chapter 5 of this thesis), they can contribute to counterbalance the negative impacts of the current IP regime on access to TK and genetic resources, at least by directly granting economic benefits and visibility to local and indigenous communities. A greater effort by the Union is needed, both at the multilateral and bilateral levels, in promoting a wider application of these kinds of tools, perhaps under forms that takes indigenous and local communities' specificities into account.

3) Concluding remarks: assessing the Union's action in the "culture and development" debate

3.1) Cultural diversity as a common but differentiated scope

This synthesis of the major findings of this critical analysis demonstrates that the inner features of the European construct limit, to a considerable extent, the external action of the Union in the cultural sector. For this reason, it was shown that most significant initiatives, such as the adoption of the cultural protocols, take place within the bilateral trade agreements' frame, an area in which the European Union can

mostly rely on its exclusive trade competence. Conversely, in areas in which the Member States' competence and interests involved have a strong role to play, such as in regulating migration and negotiations concerning IP rules on access to TK and genetic resources (although it is worth recalling that the trade aspects of IPRs should now entirely fall under the exclusive trade competence of the Union), the Union's initiatives are weaker and often result in a different balancing of the protection and promotion of cultural diversity. Indeed, as was demonstrated in this thesis, the protection and promotion of cultural diversity emerges as a core issue at the heart of the "culture and development" relationship. The EU Treaties grant constitutional protection to cultural diversity, which is among the constitutional values of the Union (Article 3(3) TEU). The protection of cultural diversity is, therefore, being considered among the priorities and in the "common interests" of the Union. Further, such cultural diversity ought not to be seen uniquely as European cultural diversity, but as the world's cultural diversity, as suggested by the recent interpretation of the Court of Justice and AG Kokott in the UTECA decision (as pointed out in Chapter 2). It is worth recalling that, in the context of this decision, the Court made express reference to the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, and endorsed the UNESCO Convention's definition of cultural diversity as "part of the common heritage of humanity". It can be stated that the protection of cultural diversity has gained further strength from the entry into force of the UNESCO Convention within the EU. In addition, it also seems that in the protection of cultural diversity the EU now pursues a common interest that goes beyond the Union's interests: it rather seems to embrace an overriding reason of general interest (identified as the common interest of humankind).

However, the protection and promotion of cultural diversity carries a different weight in determining the outcomes of the Union's actions when mainstreaming culture as a vector of development. Indeed, it is extensively demonstrated that preoccupations towards protecting cultural diversity from the likely adverse effects that can derive from free trade rules is a central issue in the "culture and trade" policy of the Union. It was in the name of cultural diversity that the EU, together with its Member States, endorsed the battle for *cultural exceptionalism* under the WTO. It was also in the name of cultural diversity that the cultural protocols and rules facilitating cultural exchanges were adopted and integrated in the frame of bilateral trade agreements, with a view to both pursue developmental goals and contribute to

the free flow of cultural contents and creativity. Although Member States and the Commission may have different (or not entirely matching) positions towards the integration of culture in trade agreements, cultural diversity comes to the fore as a core element in the Union's "culture and trade" strategy, and is taken into account in the search for a balance between free trade and protectionism. Instead, the protection and promotion of cultural diversity is not equally taken into account when it comes to decisions concerning the mobility of cultural workers and artists or the access to TK related to the use of genetic resources. In the case of the interaction between culture and migration, the potential negative impacts of restrictive migration policies on the circulation of culture are not even discussed at the EU level. Member States still prefer to rely on their traditional national initiatives to promote the transnational mobility of artists and cultural professionals, such as the promotion of cultural exchanges through the granting of scholarships for artists or similar programmes. As for the issues underlying the overall question of the access to TK and genetic resources, only the European Parliament seems to be aware of the necessity to properly assess the possible impacts for cultural diversity of the application of current IPRs rules. Different interests, such as those pushed forward by European pharmaceutical and cosmetics companies, often supported by the Member States, seem to play a more relevant role in determining the final achievements of the Union's negotiations, at least at the multilateral level.

3.2) Is the Union contributing to the emergence of a global governance for culture as a vector of sustainable development?

Overall, the strategy of the Union to integrate and mainstream culture as a vector of development appears rather fragmentary and is not always coherent. Yet, it must be recognised that the EU is becoming more and more involved in the cultural arena and its efforts often constitute a positive contribution to the developing of global "culture and development" governance. As we saw, limits to the external Union's action derive from the need to respect internal constraints, something that is not always so obvious to observers outside the Union and that may appear as incoherence between "what the EU says and what the EU does". Further, the integration of culture into other policies seems only to work for certain aspects of

culture, mostly related to the economic dimension of culture (as just highlighted). This can entail a risk of the commodification of culture and the export of a model of development in which culture is reduced to a mere commodity. Although commodification is often an endemic risk deriving from the acknowledgment that cultural activities can contribute to economic growth and increase national GDP, the contributions of culture go beyond the quantitative dimension of development. The Union seems to be aware of the multidimensional contributions that culture can bring to development, nonetheless the fact that most of its actions are taken within the trade framework suggest that its idea of development is still very much grounded on economic growth. As we saw, the added value of recognising a central role to culture within the development paradigm (or culture as the fourth pillar of development) mainly raises further awareness about the promotion of a different model of development, more oriented towards sustainable human development criteria than the traditional one of economic development. Using the principle of the sustainable development discourse can provide useful tools for the European Union to manage culture as a sustainable resource and strike a more appropriate balance between cultural interests and other kinds of interests, when culture interacts with trade, migration, and IP law.

This is, for instance, the case of the cultural protocols and the provisions concerning the treatment of cultural industries in bilateral trade agreements, which have been framed in terms of granting greater and more equitable market access to cultural goods and services coming from developing countries, so as to promote more balanced cultural exchanges and strike a balance between openness and protectionism. In this sense, it can be affirmed that the Union is contributing to give concrete applications worldwide to the principles embedded in the 2005 UNESCO Convention on Cultural Diversity. In other words, it could also be stated that the 2005 UNESCO Convention is greatly influencing the external action of the Union, at least as far as it concerns the efforts in implementing the provisions aiming to foster more balanced cultural exchanges. As proposed above, this approach could also be adopted in the frame of mobility schemes promoting the mobility of artists and cultural workers. Principles of equity and fairness, as well as a cautious approach that takes into account the specificity of TK connected to the use of genetic resources should also influence the balancing of the different interests at stake in the culture and IP law dichotomy.

Another broader consideration should be mentioned. In spite of the fact that the Union is developing a "cultural approach" in trade and development issues, which may not always appear coherent from the outside, it must be acknowledged that the Union's increased engagement in ratifying and implementing relevant Conventions, such as the UNESCO Convention on Cultural Diversity or the Protocol of Nagoya to the CBD, is attracting greater attention, which is echoed not only in the external concrete actions of the Union itself, but also in the Member States' policies and legal initiatives. Further, it is increasingly raising awareness towards the integration of culture in development policies and the need to tackle issues and tensions arising from this relationship, both at the national, regional and international level. All this attention is producing positive outcomes: indeed, although the Commission and the Member States may pull in opposite directions, and the action of the Union is often restrained by limits imposed by the Member States, it must be acknowledged that this is opening the discussion on critical issues concerning the implementation of these relevant international conventions. A concrete example of this is given by the recent adoption of the EU regulation on Access to Benefit Sharing to promote measures of compliance with the Nagoya Protocol at the European level. The adoption of the above-mentioned Regulation is, indeed, obliging all Member States to start coping with the ratification and implementation of the Nagoya Protocol: it is very likely that in the absence of this Regulation most of them, especially those Members who are not great users or providers of genetic resources and are not engaged in the dialogue on the protection of indigenous or local traditional, would probably not have engaged so diligently in the ratification process. Finally, just to reconnect with the considerations in Chapter 1 on the positive role that a human-rights approach can bring to the "culture and development" debate, it can be added that more efforts in promoting cultural rights, which are often the forgotten dimension of development, could contribute to counterbalance an approach very much focused on trade. As clarified in the Introduction and Chapter 1 of this thesis, there was not enough room here to cover the discussion concerning human rights and their relationship with culture and development. In the initial part of this thesis, I addressed the human rights discourse to give a comprehensive vision of the most commonly discussed instruments that can turn into useful tools to strike a balance between culture and trade issues. Indeed, cultural rights rescue the human dimension of development. States and international actors could then adopt a rights-based approach to culture and respect for cultural and

linguistic diversity within national and regional policies and legal frameworks, including consideration for minorities, gender balance, and youth and specific indigenous peoples' concerns. The enforcement and the respect of cultural rights are perceived as beneficial for democracy, freedom of expression, gender equality, reducing discrimination, and other positive values that contribute to the overall wellbeing and development of societies.[2] This idea has not been further explored here in relation to the EU's external action: a choice was made to focus on practical implications of the multilateral and bilateral frame of negotiations in three specific sectors, at the expense of a full discussion of human rights. Yet, in reference to this point, it could be recalled here that a significant element of the EU's external human rights and democracy policy is represented in human rights conditionality: in order to be granted trade preferences, third countries are required to comply with labour and environmental standards, or ratify human rights conventions So far, no special clauses on cultural rights are contemplated under the range of human rights conditionality clauses. Specific cultural conditionality could start to be integrated; however, this proposal remains unexplored for the purpose of this thesis.

I wish to conclude my work with a thought concerning the current crisis that the EU is facing. The crisis we are living witnessing in Europe is not only a financial and monetary crisis, and nor is it solely not only an increased wave of Euro-scepticism. Europe is facing a crisis of values, which shows how little consideration in truth is given to culture. Jean Monnet said: "*Si c'etait à recommencer, je recommencerais par la culture*".[3] Perhaps, this now is the time to restart, and to do so restart by giving placing more value on to culture and the European cultural heritage more value within the reshaping of the Union. In July 2014 newspapers reports suggesteded that the Greek Government is ready to open negotiations to sell to private purchasers pieces stretches of the Greek coastline, small preserved islands, and ancient monuments and buildings, to private purchasers, in order to obey the demands of austerity imposed by the EU. But is Europe selling its cultural soul? Is Europe forgetting to preserve and protect its cultural heritage and the rich diversity of its Members in the name of a common interest? If so, which common interest? Should fiscal stability be considered a higher priority than preserving Member States' cultural

[2] Y Donders, "Do cultural diversity and human rights make a good match?", in *UNESCO 2010* (Blackwell Publishing Ltd , 2010).
[3] Jean Monnet quoted in Denis de Rougemont tel qu'en lui-même, in Cadmos 33/1986, at 22.

heritage? Leaving these questions open, I cannot avoid expressing my personal concern about the current situation that Europe is facing. It will be hard to see Europe as a credible or a reliable international actor if it does not first solves its inner problems of coherence. The approach towards cultural concerns is an example of this. Perhaps this is the right time to restart, by rescuing culture and values, to build the Europe of solidarity and peace of which Schuman and Europe's founding fathers had already dreamed.

BIBLIOGRAPHY

Books

O Andeoud, *Study on the Mobility and Free Movement of People and Products in the Cultural Sector*, Study No DG EAC/08/00,Study for the Commission and the Directorate General Education and Culture, Partnership CE JEC- Université de Paris 2002

K Arts and A K Dickson, "EU development cooperation: from model to symbol?", in K Arts and A K Dickson (eds), *EU development cooperation From model to symbol,* (Manchester University Press, 2004), at 5, 14

A M Autissier, *France and Artistic Mobility*, case study commissioned by the ERICarts Institute in 2006 for their study, *MEAC I: Dynamics,Causes and Consequences of Transborder Mobility in the European Arts and Culture*

S Baker, *The European Union: Integration, Competition, Growth – and Sustainability*, in Lafferty W.M. and Meadowcroft J. (eds.), *Implementing Sustainable Development. Strategies and Initiatives in High Consumption Societies*, (Oxford University Press, 2000,) 302-336

L Bartels, *Human Rights Conditionality in the EU's International Agreements*, (Oxford University Press, 2005)

L Bartels, "The Trade and Development Policy of the European Union", in M Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008)

H Bartoli, *Rethinking Development. Putting an end to poverty*, (UNESCO ed., Paris, 2000). 31-60

T Bennet, *Differing diversities: transversal study on the theme of cultural policy and cultural diversity*, Council of Europe Publishing, 2001

M Blakemore, R Polacek, J Staines: *Information systems to support the mobility of artists and other professionals in the culture field: a feasibility study. Final Report,* Study commissioned by the DG Education and Culture of the European Commission, March 2009

D Bodansky, *The art and craft of international environmental law* (Harvard University Press, 2010)

K Bosselman, *The principle of sustainability: transforming law and governance,* (Ashgate, 2008)

S Capian, A J Wiesand, *The Status of Artists in Europe*, ERICarts for the Directorate General, Policy Department Structural and Cohesion Policies, Bonn 2006

M Carbone, *The role of civil society in the Cotonou Agreement*, in *The European Union and the Developing Countries. The Cotonou Agreement*, O Babarinde and G Faber (eds), Martinus Nijhoff Publishers, 2005, 177-195

P J Cardwell (ed), EU External Relations Law and Policy in the Post-Lisbon Era (Springer, 2012)

S Carrera, "The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm" Programme, in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law*, 2012, Martinus Nijhoff Publishers, 229-254

A Carzaniga "A warmer welcome? Access for natural persons under preferential trade agreements", in J A Marchetti and M Roy (eds.), *Opening Markets for Trade in Services Countries and Sectors in Bilateral and WTO Negotiations*, 2009, Cambridge University Press, 475-502

D Cliche, A J Wiesand, *Arts and Artists in Europe: New Challenges*, (ERICarts, Bonn 2007)

A Coninanzi, A Lang, B Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, (Martinus Nijhoff Publishers, 2008)

R J Coombe, "Protecting Cultural Industry to Promote Cultural Diversity: Dilemmas for International Policy-making Posed by the Recognition of Traditional Knowledge" in K Maskus and J Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, (Cambridge Press 2005), 563

M C Cordonier Segger, *Sustainable development law: principles, practices and prospects*, (Oxford University Press, 2004), 29

M Cremona, "Coherence and EU external environmental policy", in E Morgera (ed), *The External Environmental Policy of the European Union EU and International Law Perspectives*, (Cambridge University Press, 2014)

M Cremona ad B de Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals,* (Hart Publishing, 2008)

M Cremona, "A policy of bits and pieces? The Common Commercial Policy After Nice", in A Dashwood, *et al*, *Cambridge Yearbook of European Legal Studies* (Hart Publishing, 2001)

M Cremona, “Neutrality or Discrimination? The WTO, the EU and External Trade”, in G De Búrca and J Scott (eds) *The EU and the WTO. Legal and Costitutional Issues*, (2001, Hart Publishing), 151-184

J D Dalibard and T Kono, “Prior Informed Consent. Empowering the Bearers of Cultural Traditions”, in T Kono (ed) *Intangible cultural heritage and intellectual property: community, cultural diversity and sustainable development*, (Intersentia, 2009), 247-259

H Daly, “Sustainable growth: an impossibility theorem”, in H Daly and K Townsend (eds), *Valuing the Earth: Economics, Ecology Ethics*, (MIT Press,1993)

H Dauncey, “L’exception Culturelle”, in T Chafer and E Godin (eds), *The End of the French Exception? Decline and Revival of the ‘French Model*’, (2010), 77-78

G de Baere, *Constitutional Principles of EU External Relations*, (Oxford University Press, 2008)

M De Cock Buning, “Cultural Diversity in Mass Media Regulation”, in H Schneider and P Van Den Bossche (eds), *Protection of Cultural Diversity from an International and European Perspective*, (Intersentia, 2008), 249-261

B de Witte, “Trade in Culture: International Legal Regimes and EU Constitutional Values”, in G de Burca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects*, (Hart Publishing, 2001)

B de Witte, “The Value of Cultural Diversity in European Union Law”, in H Schneider and P Van Den Bossche (eds), *Protection of Cultural Diversity from an International and European Perspective*, (Intersentia, 2008), 219-247

B de Witte “The EU and International Legal Order: The Case of Human Rights”, in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders Policy Interconnections between the EU and the Rest of the World,* (Hart Publishing, 2011)

B de Witte, “The European Union as an international legal experiment”, in G De Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism,* (Cambridge University Press, 2012), 19

D Dollar and A Kraay, *Growth is Good for the Poor*, (World Bank, 2000)

Y Donders, “The Cultural Diversity Convention and Cultural Rights: Included or Ignored?”, in T Kono and S Van Uytsel (eds), *The Convention on the Promotion and the Protection of the Diversity of Cultural Expressions*, (Intersentia, 2012), available at

SSRN:http://ssrn.com/abstract=2015258

Y Donders. "A Right to Cultural Identity in UNESCO", in F Francioni and M Scheinin (eds), *Cultural Human Rights*, (Martinus Nijhoff Publishers, 2008), 317-340

Y Donders, "The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", in H Schneider and P Van Den Bossche (eds), (*Protection of Cultural Diversity from an International and European Perspective*, 2008), 1-29

G Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, (Earthscan 2004)

L Ehring, "Article IV of the GATT: an obsolete or still a basis for cultural policy?", in I Govaere *et al* (eds), *Trade and Competition Law in the EU and Beyond*, (EE Publishing, 2011), 96-118

K Engle*, The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, (Duke University Press, 2010), 142-147

A Escobar, *Encountering Development: the making and unmaking of the third world*, (Princeton University Press, 1995)

J Ferguson, *The Anti-Politics Machine. "Development", Depoliticization, and Bureaucratic Power in Lesotho*, (University of Minnesota Press, 1994)

D Ferri, *La costituzione culturale dell'Unione Europea*, (CEDAM, 2008)

F Francioni, "Culture, Heritage and Human Rights: An Introduction", in F Francioni and M Scheinin (eds.), *Cultural Human Rights*, *Cultural Human Rights*, (Martinus Nijhoff Publishers, 2008), 1-16

F Francioni, "Genetic Resources, Biotechnology and Human Rights: The International Legal Framework" in F Francioni (ed) *Biotechnologies and International Human Rights,* (Hart Publishing, 2007), 3

D French, "Sustainable Development", in M Fitzmaurice, D M Ong and P Merkouris (eds), *Research Handbook on International Environmental Law*, (Edward Elgar Publishing Limited, 2010)

S Fukuda-Parr, and A K Shiva Kumar (eds.), *Handbook of Human Development: Concepts, Measures, and Policies*, (Oxford University Press, 2009)

C Geiger, "The Construction of intellectual property in the European Union: searching for

coherence", in C Geiger (ed), *Constructing European Intellectual Property Achievements and New Perspectives,* (Edward Elgar Publishing, 2013)

C B Graber, *Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity*, in *Protection of Cultural Diversity from an International and European Perspective*, H Schneider and P Van Den Bossche, (eds), (Intersentia, 2008), 141-158

C B Graber, "Audio-Visual Policy: The Stumbling Block of Trade Liberalisation?", in D Geradin and D Luff (eds), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*, (Cambridge University Press, 2004)

G Grevi, "The EU Strategic Partneships: Process and Purposes", in M Teló and F Ponjaert (eds), *The EU's Foreign Policy What Kind of Power and Diplomatic Action?*, (Ashgate 2013), 163

O G Hansen, "Cooperation for Development: Building cultural capacity", in *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions: making it work*, (Institute for International Relations, Zagreb, 2006), 111-123

L E Harrison and P L Berger (eds), *Developing Cultures: Case Studies,* (Routledge, 2006)

L E Harrison and S P Huntington (eds), *Culture matters: How values shape human progress*, (New York: Basic Books, 2000)

J Hawkes, *The fourth pillar of sustainability: culture's essential role in public planning*, (Common Ground Publishing Pty Ltd in association with the Cultural Development Network (Vic), 2001)

C Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union", in M Cremona (ed), *Developments in EU External Relations Law,* (Oxford University Press, 2008), 10-36

F Hoffmeister, "The Contribution of EU Practice to International Law", in M Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008), 37-127

S P Huntington, *The clash of civilizations and the Remaking of World Order* (Free Press, 1996)

I Katsirea, *Cultural Diversity and European Integration in Conflict and in Harmony*, (Ant. N. Sakkoulas Publishers, Athens, 2001), 31-49

P Kearns, "Culture and EU Law: The Exploration of an Interface", in R Craufurd Smith (ed),

Culture and European Union Law, (Oxford University Press, 2004), 385-405

J Kekes, *The Morality of Pluralism,* (Princeton University Press, 1993), 8

P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law*, (Hart, Publishing, 2001), 39

M Krajewski, "The Reform of the Common Commercial Policy" in A Biondi and P Eeckhout (eds) *EU Law After Lisbon,* (OUP, 2011), 292-311

P J Kuijper, *et al*, *The Law of External Relations Cases Materials, and Commentary on the EU as an International Legal Actor,* (Oxford University Press, 2013)

D Landes, "Culture Makes Almost All the Difference", in L E Harrison and S P Huntington, (eds), *Culture matters: How values shape human progress*, (New York: Basic Books, 2000), 2-13

E Laszlo, "The Role of Culture in Development" in E Laszlo and I Vitanyi (eds.), *European Culture and World Development*, (Pergamon Press, 1985), 19-32

F Lenzerini, "Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge" in F Francioni and M Scheinin (eds), *Cultural Human Rights*, (2008), 143

C Lévi-Strauss, *La pensée sauvage*, (Paris, 1962)

C Lévi-Strauss, *Race et Histoire*, (Edition Gonthier, 1961)

M Ličková, "The CDCE in the European Union – a mixed agreement and its judicial application", in L Richieri Hanania (ed), *Cultural Diversity in International Law The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, (Routledge, 2014), 225-237

J Lodge, "A Trade Partnership for Sustainable Development", A Beviglia Zampetti and J Lodge (eds), *The CARIFORUM-EU Economic Partnership Agreement A Practitioners' Analysis*, (2011, Kluwer Law International), 19-42

V Lowe, "Sustainable development and unsustainable arguments", in A Boyle and D Freestone (eds), *International law and sustainable development: past achievements and future challenges*, (Oxford University Press, 1999)

F Macmillan, "Development, cultural self-determination and the World Trade Organization", in A Perry-Kessaris, *Law in the pursuit of development Principles into Practice?* (Routledge, 2010)

G Marin Duran and E Morgera, *Environmental Integration in the EU's External Relations Beyond Multilateral Dimensions*, (Hart Publishing, 2012)

H Mayer, "The Challenge of Coherence and Consistency in EU Foreign Policy", in M Teló and F Ponjaert (eds), *The EU's Foreign Policy What Kind of Power and Diplomatic Action?*, (Ashgate, 2013), 105

J A McMahon, "Preserving and Promoting Differences? The External Dimension of Cultural Cooperation", in R Craufurd Smith (ed), *Culture and European Union Law*, (Oxford University Press, 2004), 327-352

N Mezey, "Law as Culture", in A Sarat and J Simon (eds), *Cultural Analysis, Cultural Studies and the Law*, 37-72

I Michael and Q C Jeffery, "Intellectual Property Rights and Biodiversity Conservation: Reconciling the Incompatibilities of the TRIPS Agreement and the Convention on Biological Diversity", in B Ong (ed), *Intellectual Property and Biological Resources*, (Marshal Cavendish International, 2004), 185

A Mignolli, *L'azione esterna dell'Unione Europea e il principio della coerenza*, (Jovene editore, 2009), 76-88

R Neuwirth, *The Cultural Industries in International Trade Law. Insights from the NAFTA, the WTO and the EU*, (Verlag Dr. Kovač, 2006), 69-78

K Nurse "The Economic Partnership Agreement and the Creative Sector: Implications and Prospects for CARIFORUM", in A Beviglia Zampetti and J Lodge (eds), *The CARIFORUM-EU Economic Partnership Agreement A Practitioners' Analysis*, (2011, Kluwer Law International), 149-164

G Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, (Martinus Nijhof Publishers, 2006)

Y Pascouau, *La politique migratoire de l'Union Européenne. De Schengen à Lisbonne*, (Fondation Varenne, 2010)

S Peers, E Guild and J Tomkin (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*, (Martinus Nijhoff Publishers, 2012), 7-31

S Peers, E Guild, D Acosta Arcarazo, K Groenendijk, V Moreno-Lax (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Vol. 2: EU Immigration Law, (Martinus Nijhoff Publishers, 2012), 69

A Persic and G Martin (eds), *Links between biological and cultural diversity-concepts, methods and experiences, Report of an International Workshop*, (UNESCO, Paris 2008)

P E Petrakis, *Culture, Growth and Economic Policy*, (Springer-Verlag Berlin Heidelberg 2014)

J C Piris, *The Lisbon Treaty: A legal and Political Analysis*, (Cambridge University Press, 2010), 72-74

L V Prott "Cultural Rights as Peoples Rights in International Law", in J Crawford (ed), *The Rights of Peoples,* (Claredon Press, 1998)

V L Prott and P J O'Keefe, *Law and the Cultural Heritage,* Vol I, (Professional Book, 1984)

E Psychogiopoulou, "Accessing Culture at the EU Level: an Indirect Contribution to Cultural Rights Protection?", in F Francioni and M Scheinin (eds), *Cultural Human Rights*, (Martinus Nijhoff Publishers, 2008) 223-246

E Psychogiopoulou, *The integration of Cultural Considerations in EU law and Policies*, (Martinus Nijhoff Publishers, 2008)

V Rao and M Walton (eds), *Culture and Public Action*, (Stanford University Press, 2004)

D Robinson, "Beyond 'Protection': Promoting Traditional Knowledge Systems in Thailand" in J Gibson, *Patenting Lives. Life Patents, Culture and Development*, (Ashgate Publications, 2008), 121-138

A Rosas, "The European Union and Mixed Agreements", in A Dashwood and C Hillion (eds), *The General Law of the EC External Relations* (Sweet & Maxwell, 2000)

M Ross, "Cultural Protection: a Matter of Union Citizenship or Human Rights?", in N A Neuwahl and A Rosas (eds.), *The European Union and Human Rights*, (Martinus Nijhof Publishers, 1995), 235-248

P Rossi (ed.), *Il Concetto di cultura*, (Einaudi, 1970)

H Ruiz Fabry, *Reflections on possible future legal implications of the Convention*, in *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions : making it work*, Institute for International Relations, Zagreb, 2006, 71-87

P Sands, "International Law in the Field of Sustainable Development: Emerging Legal

Principles", in W Lang (eds), *Sustainable Development and International Law*, International Environmental Law and Policy Series, (Martinus Nijhof Publisher, 1995), 61

N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, (Martinus Nijhoff Publisher 2008)

A Sen, *Development as capability expansion*, in S Fukuda-Parr, and A K Shiva Kumar (eds), *Handbook of Human Development: Concepts, Measures, and Policies*, (Oxford University Press) 2009

A Sen, *Development as Freedom*, (Oxford University Press, 1999)

J Smiers and M Van Schijndel, *Imagine there is no copyright and no cultural conglomerates/An essay*, (Institute of Network Culture, 2009)

K E Smith, "The ACP in the European Union's network of regional relationships: still unique or just one in the crowd?", in K Arts and A K Dickson (eds), *EU development cooperation From model to symbol,* (Manchester University Press, 2004), 60-79

C Soury-Desrosier, "EU protocols on cultural cooperation An attempt to promote and implement the CDCE within the framework of bilateral trade negotiations", in L Richieri Hanania (ed), *Cultural Diversity in International Law, The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, (Routledge, 2014), 209-224

E Steyger, *National Traditions and European Community Law: Margarine and Marriage*, (Dartmouth, 1997), 69-89

M Tchebwa, *Musiques Africaines: Nouveaux enjeux, nouveaux defies,* (Editions UNESCO, 2005)

M Teló and F Ponjaert (eds), *The EU's Foreign Policy What Kind of Power and Diplomatic Action?*, (Ashgate, 2013)

G Tesauro, *Diritto dell'Unione Europea*, (CEDAM, VII ed., 2012)

G Tritton, *Intellectual Property in Europe*, 3rd Ed, (Sweet & Maxwell, 2008)

E B Tylor, *Primitive Culture: Researches in the Development of Mithology, Philosophy, Religion, Language, Art and Custom*, (London, 1920)

M Ul Haq, *The Human Development Paradigm*, in S Fukuda-Parr and A K Shiva Kumar (eds.), *Handbook of Human Development: Concepts, Measures, and Policies*, (Oxford University Press, 2009)

S V Uytsel, "The CDCE and the WTO – in search for a meaningful role after *China-Audiovisuals",* in L Richieri Hanania (ed), *Cultural Diversity in International Law The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, (Routledge, 2014), 40-53

P Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005)

I Vitany, "Development and Culture: the New Concepts", in E Laszlo and I Vitanyi (eds.), *European Culture and World Development*, (Pergamon Press, 1985), 3-17

A Vlassis and L Richieri Hanania, *"Effects of the CDCE on trade negotiations",* in L Richieri Hanania (ed), *Cultural Diversity in International Law The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,* (Routledge, 2014), 25-39

T Voon, *Cultural Products and the World Trade Organization*, (Cambridge University Press, 2007)

O Vrins and M Schneider (eds), *Enforcement of Intellectual Property Rights Through Border Measures Law and Practice in the EU,* 2nd Ed., (Oxford University Press, 2012)

S Weatherill, "Finding Space for Closer Co-operation in the Field of Culture", in G De Búrca and J Scott (eds), *Constitutional Change in the EU. From Uniformity to Flexibility?*, (Hart Publishing, 2000), 237-256

G Wei, "Fitting Biological Products Within the Intellectual Property Framework: Challenges Facing the Policy Makers", in B Ong (ed.), *Intellectual Property and Biological Resources*, (Marshal Cavendish International, 2004), 28-40

T Wong, "Intellectual Property through the lens of human development", in T Wong & G Dutfield, *Intellectual Property and Human Development. Current Trends and Future Scenarios*, (Cambridge University Press*,* 2001)

Articles and papers

L Ankersmit, "The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments", (2014) 41:2 *Legal Issues of Economic Integration*, 193–210

K Aoki, "Weeds, Seeds and Deeds: Recent Skirmishes in the Seed Wars", (2003-2004), *11 Cardozo Journal of International and Comparative Law*, 305

L Azoulai, “The Acquis of the European Union and International Organizations”, 2 *European Law Journal*, 2005, 196-231

K Bavikatte and D F Robinson, “Towards A People’s History Of The Law: Biocultural Jurisprudence And The Nagoya Protocol On Access And Benefit Sharing”, (2011), 7:1 *Law, Environment and Development Journal*, 35 (available at http://www.lead-journal.org/content/11035.pdf)

I Bernier, “The relationship between the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and other International Instruments: the emergence of a new balance in the interface between commerce and culture”, August 2009, available at http://www.diversiteculturelle.qc.ca/fileadmin/documents/pdf/ANG_Relations_entre_Convention_Unesco_instruments_internationaux.pdf.

I Bernier, “Cultural Expressions Under Threat in the UNESCO Convention on the Diversity of Cultural Expressions”, (April, 2006), paper available at http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/Cultural_Expressions_under_Threat.pdf

I Bernier, “A UNESCO International Convention on Cultural Diversity”, available at http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/update0303.pdf

A Betts and K Nicolaidis, “The Trade and Migration Linkage: GATS Mode IV”, memo prepared for the Global Trade Ethics Conference, presented at Princeton University, 19 February 2009

J Blake, “On Defining the Cultural Heritage”, (2000) 49 *International And Comparative Law Quarterly,* 61-85

D Bradlow, “Differing conceptions of development and the content of International Development Law” (2005) 21 *South African Journal on Human Rights,* 47

M C Bruner, “Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products”, (2008) 40 *International Law and Politics,* 351-436

M Burri-Nevona, “Reconciling Trade and Culture: A Global Law Perspective”, (2010), 40 *Journal of Arts Management, Law and Society,* 1-16 (Electronic copy available at: http://ssrn.com/abstract=1427217)

C Carmody, “When ‘‘Cultural Identity Was Not at Issue’’: Thinking about Canada – Certain Measures Concerning Periodicals”, (1999) 30 *Law and Policy in International Business*, 302

J M Cheng, "The Problem of National Treasure in International Law", (2010), 12 *Oregon Review of International Law*, 144-174

V Chetail, "Paradigm and Paradoxes of the Migration-Development Nexus: The New Border for North-South Dialogue", Electronic copy available at: http://ssrn.com/abstract=1641210

M Chon, "Intellectual Property and the Development Divide", (2005-200627) *Cardozo Law Review*, 2823

M C Ciciriello and F Mucci, "La cooperazione internazionale per lo sviluppo in materia di diversità delle espressioni culturali: un tratto saliente della Convenzione UNESCO del 2005", (2008),1 *Studi in Onore di Vincenzo Starace*, 123-142

R J Coombe, "Legal claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference", (2005) 1 *Law, Culture and the Humanities*, 35-52

R J Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) 52 *DePaul Law Review*, 1171

R Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication order?" (2007) 1 *International Journal of Communication*, 24- 55

M Cremona, C-246/07 CASE LAW, (2011) 48 *Common Market Law Review,* 1639-1666

M Cremona, "Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon", (2010) 35:5 *European Law Review*, 678-694

M Cremona, "The European Union and Regional Trade Agreements", 1 (2009) *European Yearbook of International Economic Law*, 18

M Cremona, "EU external action in the JHA Domain: a Legal Perspective", *EUI Working paper* LAW N. 2008/24

M Cremona, "The Union as a global actor: roles, models and identity", (2004), 41 *Common Market Law Review*, 553

D Cronin, "Strong EU Trade Provisions On IP Seen As Threat To Poor Nations' Medicines Access", published on 18 February 2009 for IP watch, (available at http://www.ip-watch.org/2009/02/18/strong-eu-trade-provisions-on-ip-seen-as-threat-to-poor-

nations'-medicines-access/)

B Cvjeticanin, "The main challenges of the UNESCO convention and its implementation", (2008), 3 *Economia della Cultura, Anno XVIII*, 343-353

A Dashwood, "The Limits of European Community Powers", (1996), 21 *European Law Review*, at 113

G de Búrca, "The European Court of Justice and the International Legal Order After Kadi", (2010) 51:1 *Harvard International Law Journal*

H De Haas, "Migration and Development: A Theoretical Perspective", (2010) *International Migration Review,* 227-264

M G Desta, "EC-ACP Economic Partnership Agreements and the Question of WTO Compatibility: An experiment in North-South Regional Integration Agreements?", (2006) 43 *Common Market Law Review*, 1343

B de Witte, "The European Content Requirement in the EC Television Directive – Five Years After", (1995), 1 *The Yearbook of Media and Entertainment Law*, 101

A Dimopoulos, "The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy" (2010) 15 *European Foreign Affairs Review,* 153-170

P Drahos, "When cosmology meets property: indigenous people's innovation and intellectual property", (2011), *29:3 Prometheus*

M Farrell, "A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa", 27:3 (2005) *European Integration*, 263-283

D Ferri, "Approfondimenti. La diversità culturale come fattore (potenziale e problematico) di omogeneizzazione giuridica. Appunti e spunti a margine dell'approvazione della Convenzione UNESCO sulla protezione e promozione della diversità delle espressioni culturali", (paper available at http://centri.univr.it/europa/Approfondimenti/05_03_approfondimento.pdf)

D Ferri, "EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks", 3 *European Diversity and Autonomy Papers* - EDAP (2005), 11, (available at www.eurac.edu/edap)

S Foa and W Santagata, "Eccezione culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate", (2004), 2 *Aedon*, 13

M Footer and C B Graber, "Trade Liberalization and Cultural Policy", (2000) 3 *Journal of International Economic Law*, 115-144

M Footer, "The International Regulation of Trade in Services Following Completion of the Uruguay Round", (1995) 29 *International Lawyer*, 453

F Francioni, "*Realism*, *Utopia and the Future of International Environmental Law"*, EUI Working Paper LAW 2012/11

F Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity"; 25 *Michigan Journal of International Law*, (2003-2004), 1209-1228

F S Galt, "The Life, Death, and Rebirth of the Cultural Exception in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture's Hegemony", (2004) *3 Washington University Global Studies Law Review,* 909-935

C Geiger, "Constitutionalizing Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property Rights in the European Union", (2006), 37:4 *International Review of Intellectual Property and Competition Law*, 379

H Gherari, "L'Accord the partenariat économique CARIFORUM-CE: vers une nouvelle generation d'accords de libre-échange?", (2009) 3 *Revue Générale de Droit International Public*, 113

J Gibson, "Traditional Knowledge and the International Context for Protection", (2004) 1:1 *SCRIPT-ed*

C G Gonzales, "Genetically Modified Organisms and Justice", (2007) 19 *Georgetown International Environmental Law Journal,* 583

C B Graber, "The New UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO?", (2006), 9:3 *Journal of International Economic Law*, 555

V Guèvremont, "Industries culturelles et négociations internationales: portrait d'une dynamique multidimensionnelle L'exemple des pays de la zone euro-méditerranéenne"*,* EUI Working Paper RSCAS 2007/33

M Hahn, "A Clash of Cultures? The Unesco Diversity Convention and International Trade Law", *Journal of International Economic Law*, Vol. 9, Issue 3, 2006, 515-552

I Heiskanen, R Mitchell, A Wiesand, *MEAC-Pilot Project (2005-2006) – Dynamics, Causes and Consequences of Transborder Mobility in the European Arts and Culture*,

ERICarts Institute for LabforCulture, Bonn 2006

J Holmes, "European Community Law and the Cultural Aspects of Television", in R Craufurd Smith (ed), *Culture and European Union Law*, (Oxford University Press, 2004), 169

B Hopwood, M Mellor and G O'Brien, "Sustainable Development: Mapping Different Approaches", (2005) 13 *Sustainable Development*

P Houbanova, *Artistic Mobility in Europe*, in (2001) 1 Beyond Borders, Magazine of the European Cultural Foundation, 58-59, Amsterdam June 2001

M Iovane, "The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations", 14 *International Journal on Minority and Group Rights,* 2007, 231

T Kiene, "Traditional Knowledge in the European Context", (2006) 2 *Ressources Naturelles*

M Klamert and N Maydell, "Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law", (2008) 13 *European Foreign Affairs Review*, 493-513

J Kokotte and C Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?", (2012), 23:4 *European Journal of International Law*, 1015

N Lavranos, "Protecting its Exclusive Jurisdiction: the Mox Plant-Judgment of the ECJ", (2006), 5 *The Law and Practice of International Courts and Tribunals*, 479

N Lavranos, "Concurrence of Jurisdiction between the ECJ and other International Tribunals", (2005) 14 *European Environmental Law Review*, 213

A Leidwein, "Protection of Traditional Knowledge Associated with Biological and Genetic Resources. General Legal Issues and Measures Already Taken by the European Union and its Member States in the Field of Agriculture and Food Production", (2006) 9:3 *The Journal of World Intellectual Property,* 251–275

J Loisen and F De Ville, "The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit", (2011) 5 *International Journal of Communication*, 254–271

T Lupinacci, "The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?", (1991) 24 *Vanderbit Journal of Transnational Law*, 113

G Mazzone, "Dall'eccezione alla diversità culturale: ministoria di una sfida per l'Europa", (2008), 3 *Economia della Cultura,* Anno XVIII, 327-351

C R McMains, "The Proposed Anti- Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty", (2009) 46/4 *Houston Law Review*, 1235

C R McManis, "Intellectual property, genetic resources and traditional knowledge protection: thinking globally, acting locally"**,** (2003-2004) *11 Cardozo Journal of International & Comparative Law*, 554

M Montini, "Revising International Environmental Law Through the Paradigm of Ecological Sustainability" (2013) EUI Working Papers AEL 2013/05

J Neisse (ed.), *Made in Méditerranée. Les défies des échanges artistiques en Méditerranée*, Fonds Roberto Cimetta, 2008 available at http://www.cimettafund.org/documents/FR/FRC-F-.pdf

R J Neuwirth, The " 'Culture and Trade Debate' Continues: The UNESCO Convention in Light of the WTO Reports in China – Publications and Audiovisual Products: Between Amnesia or De ́ja` Vu?", (2010), 44:6 *Journal of World Trade*, 1333–1356

R J Neuwirth, "United in Divergency": A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", 66 *Heidelberg Journal of International Law*, 2006, 819-862

F P Nizery, "Culture et développement*",* (2006) 4 *Revue des affaires européennes*, 641-644

M Panizzon, "GATS Mode 4 Trade and Labor Migration Agreements: A Tale of Two Speeds", (January 2010), *47 Dialogue on Globalization Occasional Paper Series*, Friedrich-Ebert-Stiftung, 1-55

M Panizzon "Standing together apart: Bilateral migration agreements and the temporary movement of persons under "mode 4"of GATS", Working Paper n. 77, University of Oxford, 2010

E Psychogiopoulou, "The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface", (2014) 41 *Legal Issues of Economic Integration*, 65-86

L Puri, "Assuring development gains and poverty reduction from trade: the labor mobility and skills trade dimension", UNCTAD Document UNCTAD/DITC/TNCD/2007/8, UN Publications (2008) 73-74

S Ragavan, "Protection of Traditional Knowledge", (2001) *2 Minnesota Intellectual Property*

Review, 40

S Regourd, "Le paradigme européen de la diversité culturelle à l'aune de la Convention UNESCO", (2006), 4 *Revue des affaires européennes*, 607-613

J S Reichter, "The migrant Syndrome: Seasonal U.S. Labor Migration and Rural Development in Central Mexico", (1981) 40 *Human Organization*, 56-66

L Richieri Hanania, "The International Commercial Rules on the Exchange of Cultural Goods and Services", *ESIL Reflections*, available at http://www.esil-sedi.eu/sites/default/files/Hanania_0.PDF

H Ruiz Fabri "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", (2007) 43 *Revue générale de droit internatio*nal

R Schutze, "EU Development Policy: Constitutional and Legislative Foundation(s)", in (2012-2013) 15 *Cambridge Yearbook of European Legal Studies*

R Schutze "Lisbon and the Federal Order of Competences: a Prospective Analysis", (2008) 33:5 European Law Review

A Sen, *Culture and Development*, (Paper for the World Bank Tokyo meeting, 13 Dec 2001)

X Seuba Hernandez, *Health Protection in the New Association Agreement between the Andean Community (or some of its members) and the European Community in light of its provisions concerning Intellectual Property and recent experiences*, available at http://www.haiweb.org/20012009/19%20Dec%202008%20Policy%20Paper%20EU-CAN%20Association%20Agreement%20%28Final%20EN%29.pdf

E Stamatopoulou, "*Why Cultural Rights Now?*", (2004) Carnegie Council paper, available at http://www.cceia.org

G Thallinger, "From Apology to Utopia: EU-ACP Economic Partnership Agreements Oscillating between WTO Conformity and Sustainability", (2007) 12 *European Foreign Affairs Review*, 499-516

D Throsby, "Culture in sustainable development: insights for the implementation of art. 13", (2008) 3 *Economia della Cultura, Anno XVIII*, 389-395

D Throsby, "Sustainability and Culture Some Theoretical Issues", (1997) 4 *International Journal of Cultural Policy*, 7

J P Trachtman J. P., "The International Law of Economic Migration: Toward the Fourth

Freedom", (2009) *W.E. Upjohn Institute for Employment Research*

J Trachtman, "Trade and…Problems, Cost-Benefit Analysis and Subsidiarity", (1998) 9:1 *European Journal of International Law*

A Vlassis, "Accord Canada-UE : l'exemption culturelle spécifique et ses implications", *(Novembre 2013) 8: 9, Culture, commerce et numérique*

A Vlassis "Accords commerciaux et diversité culturelle", (Janvier 2013) 8 *Chronique des industries culturelles, Édition special*

A Von Bogdandy, "The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity-Elements of a Beautiful Friendship", (2008) 2:19 *European Journal of International Law*, 241-275

T Voon, "UNESCO and the WTO: a clash of cultures?", (2006) 55 *International and comparative law quarterly*, 635-652

C Welzel, R Inglehart and H C Klingemann, "The Theory of Human Development: A Cross-Cultural Analysis", (2002) Paper for the Center for the Study of Democracy, University of California of Irvine, , available at http://repositories.cdlib.org/csd/02-01

P Zalatel, "Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration", (2006) 12 *European Law Journal*, 613

Official documents

<u>EU documents</u>

Communication from the Commission to the European Council of June 2006, "*Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*", COM (2006) 278 final.

Communication From The Commission To The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions. Increasing The Impact of EU Development Policy: An Agenda For Change, COM (2011) 637 Final;

Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee of The Regions Of 24 July 2009 - Mainstreaming Sustainable Development Into EU Policies: 2009 Review of the European Union Strategy for Sustainable Development, COM (2009)

400 Final;

Communication from the Commission "Europe 2020: A Strategy For Smart, Sustainable And Inclusive Growth", COM (2010) 2020 Final;

Communication of the Commission to the Council and to the European Parliament of 23 August 2003 COM (2003) 520 Final;

Recommendation by the Commission to the Council to Authorize the Commission to Participate on Behalf of the Community in the Negotiations within UNESCO, Doc. 12063/04 Cult 61;

Recommendation from the Commission to the Council to Authorize the Commission to Participate, on Behalf of the Community, in the Negotiations Within UNESCO on The Convention On The Protection Of The Diversity Of Cultural Contents And Artistic Expressions, 1.09.2004, Sec (2004) 1062 Final

MEMO/05/387: Adoption of a Unesco Convention on Cultural Diversity, Brussels, 20 October 2005

Briefing Paper on UNESCO Convention on cultural diversity, EUROPEAN BROADCASTING UNION, Legal Department, 25.11.2005, DAJ/MW/mtp

Draft EUROPEA PARLIAMENT Legislative Resolution on the Proposal for a Council Decision on the Conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (5099/1/06 – COM(2005)0678 – C6-0025/2006 – 2005/0268(CNS)), PR\602288EN.doc, 28.02.2006

COUNCIL DECISION 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Council of the European Union, Code of Conduct between the Council, the Member States and the Commission for the participation of the Community and its Member States in meetings regarding the implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 5914/07

COMMISSION STAFF WORKING DOCUMENT, Quadriennal Periodic Report on behalf of the European Union on measures to protect and promote the diversity of cultural expressions in the framework of the 2005 UNESCO Convention, Accompanying the document REPORT FROM THE COMMISSION on measures to protect and promote the diversity of cultural expressions in the framework of the 2005 UNESCO Convention {C (2012) 3186 final}

European Commission, *Statement on the title on cultural cooperation in future EU trade agreements*. (2010), available at http://www.efah.org/components/docs/argumentaire%20EN.pdf

European Commission. *Follow-up statement on the cooperation protocol in future EU trade agreements*, 2010, available at http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137751.pdf

Communication from the Commission to the Council, the European Parliament, the European and Social Committee and the Committee of the Regions, *Migration and Development: some concrete orientations*, COM(2005) 390 final

European Parliament, Tampere European Council 15/16 October 1999, Presidency Conclusions

Commission Communication, *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan implementing the Stockholm Programme,* COM(2010) 171 final

Communication from the Commission, Policy Plan on Legal Migration , COM (2005) 669 final

Directive 2009/50/EC (blue card), Impact Assessment Report (SEC (2007) 1403)

Common Actions for Growth and Employment: the Community Lisbon Programme, Communication from the Commission to the Council and the European Parliament, COM(2005) 330 final

Green Paper on *An EU approach to managing economic migration*, COM (2004) 811 final

Final Report of Working Group V CONV 375/1/02 Rev 1

Convention Presidium CONV 724/03, Annex 2

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes; Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC

Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, (amended by Directive 97/36/EC)

Declaration on European Identity", *Bulletin of the European Communities*, December 1973, N 12, (Luxembourg: Office for official publications of the European Communities), 118-122

Council Regulation 870/2004 establishing a Community programme on the conservation, characterization, collection and utilization of genetic resources in agriculture and repealing Regulation (EC) No 1467/94

Council Regulation 1590/2004 establishing a Community programme on the conservation, characterization, collection and utilization of genetic resources in agriculture and repealing Regulation (EC) No. 1467/94

Strategy for the enforcement of intellectual property rights in third countries, 2005/C 129/03

UN documents

UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries – Note by the UNCTAD Secretariat,* TD/B/COM.1/EM.20/2 (30 September 2002)

Resolution adopted by the General Assembly on 6 March 2007, 61/208 'International migration and development', A/RES/61/208

UN DESA Population Division, 'World Population Prospect: The 2012 Revision, Highlights and Advance Tables, ESA/P/WP.228, 2013

Sub-Commission on Human Rights, 'Intellectual property and human rights', Resolution 2000/7 and resolution 2001/21; High Commissioner for Human Rights, 'The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights', UN Doc. E/CN.4/Sub.2/2001/13

UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the 33rd Session of the General Conference of UNESCO, Paris, 20 October 2005

Background Document on "Our Creative Diversity", Report of the World Commission on Culture and Development, 1998, CLT/1998/PI/H/1

UNESCO, *Culture, Trade and Globalization: Questions and Answers* (2000)

Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity, 166EX/28, Paris, 12 march 2003

Preliminary draft convention on the protection of the diversity of cultural contents and artistic expressions. Preliminary report of the Director-General, CLT/CPD/2004/CONF.201/1, Paris, July 2004

L'UNESCO et la QUESTION DE LA DIVERSITE CULTURELLE : Bilan et stratégies, 1946-2004. Etude réalisée à partir d'un choix de documents officiels, Version révisée (septembre 2004), DIVISION DES POLITIQUES CULTURELLES ET DU DIALOGUE, (http://portal.unesco.org/culture/en/files/12900/10958784663DivCult-BilanStrat%E9gies-FRA-20sept04.pdf/DivCult-BilanStrat%E9gies-FRA-20sept04.pdf)

UNGA Res 65/166 "Culture and Development", (28 February 2011) UN Doc A/RES/65/166.

UNDP *Human Rights and Human Development*, Human Development Report 2000

Declaration of the United Nations Conference on Human Environment, UNGA A/CONF.151/26

UNGA 38/161 Res (1983)

Our Common Future, UNGA Res 42/187

Rio Declaration on the Environment and Development, UN Report A/CONF.151/26

UNDP 2004 Human Development Report *Freedom in a Diverse World*

World Conference on Cultural Policies (MONDIACULT) and Mexico City Declaration, Mexico City, 1982Mexico

Background Document on "Our Creative Diversity", Report of the World Commission on Culture and Development, 1998, CLT/1998/PI/H/1

ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002 (70th Conference of the International Law Association, held in New Delhi, India, 2–6 April 2002

Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities, (14 Apr 2005), UN Doc E/CN.4/2005/L.10/Add.10

UNESCO World Report, Investing in cultural diversity and intercultural dialogue, published by UNESCO in 2009, available at http://unesdoc.unesco.org/images/0018/001852/185202E.pdfp

Sub-Commission on Human Rights, 'Intellectual property and human rights', Resolution 2000/7 and resolution 2001/21; High Commissioner for Human Rights, 'The Impact

of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights', UN Doc. E/CN.4/Sub.2/2001/13

UNDP Human Development Report 2001, *Making new technologies work for human development,* Oxford University Press (for UNDP)

UNGA Res "Keeping the promise: united to achieve the Millennium Development Goals", adopted by the UN General Assembly on 19 Oct 2010, A/RES/65/1

"Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions. Section III: Harnessing Traditional Knowledge for Development", (S Twarog and P Kapoor (eds.)), UNCTAD/DITC/TED/10, (2004)

WTO documents and cases

China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WTO Panel Report, *3*, WT/DS 363/R (12 Aug. 2009), www.wto.org/english/tratop_e/dispu_e/ 363r_e.pdf.

Audiovisual Services - Background Note by the Secretariat, S/C/W/310 (12 January 2010)

WTO, European Communities and their Member States – Final List of Article II (MFN) Exemptions, GATS/EL/31 (15 April 1994);

WTO, India - Article II (MFN) Exemptions, GATS/EL/42 (15 April 1994); Brazil – Final List of Article II (MFN) Exemptions, GATS/EL/13 (15 April 1994);

Egypt - Article II (MFN) Exemptions, GATS/EL/30 (15 April 1994); Norway - Article II (MFN) Exemptions, GATS/EL/66 (15 April 1994)

WTO, European Communities and their Member States – Final List of Article II (MFN) Exemptions, GATS/EL/31 (15 April 1994)

Ministerial Conference, WTO, Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001)

Ministerial Conference Ninth Session Bali, 3-6 December 2013, WTO, Ministerial Declaration adopted on 7 December 2014, WT/MIN(13)/DEC (11 December 2013)

Conferences and Round Tables' documents, studies, reports, working papers and other electronic resources

Schuman Declaration, presented by the French foreign minister Robert Schuman on 9 May

1950 and that proposed the creation of a European Coal and Steal Community (full text available at www.europa.eu/about eu/basic-information)

I Bernier and H Ruiz-Fabri *Evaluation de la faisabilité juridique d'un instrument international sur la diversité culturelle.* Rapport pour le Groupe de Travail franco-québécois, 2002

M Bouchenaki, *Diversità culturale. Le origini della convenzione e i suoi sviluppi futuri*, (speech by Mounir Bouchenaki, Director General of ICCROM, International Centre for the Study of the Preservation and Restoration of Cultural Property, prepared for the celebration of the "Giornata Mondiale UNESCO della Diversità Culturale, 21 maggio 2009, Rome

C Geiger and E Py, *La législation communutaire en matière de propriété intellectuelle et le rôle du Parlement européen, étude synthétique*, (May 2009), available at www.cepi.edu

K Nurse, "Culture as the Fourth Pillar of Sustainable Development", prepared for Commonwealth Secretariat, (London, June 2006)

R Polacek, *Study on impediments to mobility in the EU Live performance sector and possible solutions*, Mobile.Home, Brussels 2007

O Quintin, Direttore Generale per l'Educazione e la Cultura (DG EAC), Commissione Europea *Le posizioni comunitarie rispetto alla Convenzione sulla Diversità Culturale nei rapporti con gli Stati Parte*

I Ruigrok*, The missing dimensions of the Millennium Development Goals: culture and local governments, "Culture, local governments and Millennium Development Goals", Agenda 21 for Culture-United cities and local government, (2009)*

V Shiva et al., The GMO Emperor has no clothes*, A Global Citizens Report on the State of GMOs - False Promises, Failed Technologies, report coordinated by Navdanya and Navdanya International, the International Commission on the Future of Food and Agriculture, with the participation of The Center for Food Safety (CFS), (2001), available at www.navdanyainternational.it*

O Reitov and H Hjorth, *Visas / the discordant note. A White Paper on visa issues, Europe & artists' mobility*, 2008, published by Freemuse, ELMF and ECA

Germann Avocats and multidisciplinary research team, *Implementing the UNESCO Convention of 2005 in the European Union,* study for the European Parliament' s Committee on Culture and Education, May 2010 (available at http://www.europarl.europa.eu/studies)

Intergovernmental Conference on Cultural Policies for Development, 30 March – 2 April 1998, Stockholm, Sweden

International Conference: "Favoriser la diversité culturelle", 14 November 2005, Paris, published by UNESCO

KEA European Affairs, "Implementing cultural provisions of CARIFORUM-EU EPA. How do they benefit the Caribbean cultural sector?", Discussion Paper N. 118, European Centre for Development Policy Management, June 2011

"Preparatory Action Culture in EU External Relations", Report prepared for the European Commission, published in June 2014

Round Table of Ministers of Culture: Intangible Cultural Heritage – a Mirror of Cultural Diversity, 16-17 September 2002, Istanbul, published by UNESCO

Round Table of Ministers of Culture 2000-2010 : Cultural Diversity: Challenges of the Marketplace, 11-12 December 2000, UNESCO, Paris

Round Table of Ministers of Culture: "Culture and Creativity in a Globalized World", 2 November 1999, on the occasion of the 30th session of the General Conference, UNESCO, Paris

United Cities and Local Governments (UCLG), *Culture: Fourth Pillar of Sustainable Development*, Policy Statement adopted on 17th November 2010 at the World Summit of Local and Regional Leaders - 3rd World Congress of UCLG, held in Mexico (made available at: www.cities-localgovernments.org