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**Convention on the Protection and Promotion of the Diversity
of Cultural Expressions :
Implementation of Articles 16 and 21 in 51 Bilateral and
Regional Trade Agreements Concluded since 2005**

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This study began in 2014 and was completed in 2015. It followed the request of the Intergovernmental Committee of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions for regular monitoring of the implementation of Articles 16 and 21 of the Convention. This study will be updated in the future.

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PART I – TAKING STOCK

Introduction

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter "the Convention"), adopted in October 2005, recognizes the dual economic and cultural nature of cultural activities, goods, and services, and reaffirms the sovereign right of States to retain, adopt and implement policies and measures they consider necessary and appropriate in order to guarantee access to diverse cultural expressions. Provisions of the Convention refer to all policies and measures that are either focused on culture in itself or those having a direct effect on the cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services (Article 4 (6) of the Convention).

In the context of trade negotiations, the treatment of culture is often marked by requests to exclude cultural goods and services from trade agreements or to grant them a particular status that recognizes their specificity. In recent years, the negotiations around the Transatlantic Partnership on Trade and Investment (TTIP), the Trans-Pacific Partnership (TPP) and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union have placed these issues at the heart of public debate.

Within this context, this study examines 51 bilateral and regional agreements¹ concluded between 2005 and 2015. Although the list of agreements discussed is not exhaustive, the study covers a substantial number of agreements concluded between States from all continents, representing all regions of the world. Moreover, the study deals with a variety of models of bilateral and regional agreements and reveals trends that have emerged since the adoption of the Convention in October 2005.

The 51 bilateral and regional agreements analysed in this study were mainly concluded between Parties to the Convention. Thus, out of a total of 102 States plus the European Union (EU) participating in the 51 agreements covered, 92 are Parties to the Convention². Since the purpose of this study is to examine the impact of the Convention on the content of bilateral and regional agreements, it would have served little purpose to review all agreements between non-Parties to the Convention. Exceptionally, however, the list of agreements covered by this study contains a limited number of agreements concluded by Parties to the Convention with non-Parties. These include agreements concluded by the United States of America that deserve to be taken into consideration given the influence of the American model of free trade agreements on the development of international standards in this sector, even when those standards are negotiated in the absence of the United States of America. It also includes some agreements concluded by groupings of States where not all members are Parties to the Convention. Agreements concluded by the Association of South-East Asian Nations (hereinafter "ASEAN") illustrate this scenario given that out of this association's ten Member States, only four are Parties to the Convention.

The main aim of this study is to jointly evaluate the implementation of Articles 16 (Preferential treatment for developing countries) and 21 (International consultation and coordination) of the Convention.

It must be recalled that Article 21 requires Parties to promote the objectives and principles of the Convention in other international forums. This entails, for example, intervening in international fora to advance cultural objectives, affirming the objectives and principles of the Convention in agreements that are negotiated and implemented, consulting other Parties when signing new bilateral agreements that can have an impact on the objectives and principles of the Convention, engaging in dialogue with States not party to the Convention to encourage its ratification, or taking the Convention into account in the context of discussions on the link between culture and development. It is thus relevant to evaluate the treatment given to cultural

¹ See Table in Annex A.

² See Table in Annex B.

goods and services by Parties under bilateral and regional trade agreements since 2005. Also, since these agreements could open the door to granting preferential treatment aimed specifically at the exchange of cultural goods and services, as well as the mobility of artists and cultural professionals, a study on the implementation of Article 21 in trade agreements leads naturally to a further review of the implementation of Article 16.

Article 16 of the Convention, in fact, invites developed countries to implement preferential treatment for artists, professionals and cultural practitioners, as well as for cultural goods and services from developing countries. Through the appropriate institutional and legal frameworks, the provision calls for a new approach to international cooperation by promoting a more balanced exchange of cultural goods and services and increased mobility for artists and cultural professionals from the global South. This clause allows countries to introduce an exception to the principle of "non-discrimination", a standard principle of international trade, so as to favour developing countries.

Regarding the mobility of artists and cultural professionals, policies and measures include the simplification of entry and temporary residence visa procedures, and the reduction of related costs; capacity building through training, exchange and guidance; the provision of specific tax benefits for artists and cultural professionals from developing countries; and the implementation of funding systems and resource sharing.

Such measures may be applied at the individual level (for the benefit of artists and other cultural professionals), at the institutional level (regional and international market access for cultural goods and services), and at the industrial level (bilateral, regional and multilateral frameworks and mechanisms).

Read and analysed in conjunction with Article 16, Article 21 creates, through a mirror effect, a logical framework to address trade, development and international cooperation issues.

Lastly, it must be highlighted that faced with the rise of digital technologies in several areas of the cultural industries and considering the impact, both real and potential, of these technologies on the diversity of cultural expressions, this study pays particular attention to provisions of trade agreements dealing specifically with electronic commerce.

For all these reasons, the analysis of trade agreements conducted as part of this study addresses five topics:

1. Explicit references to the Convention;
2. The treatment of cultural goods and services;
3. Clauses on preferential treatment relating to culture;
4. The status of electronic commerce;
5. Other provisions relating to culture.

These topics enable a general examination of the relationship between the selected trade agreements and the Convention. More specifically, they make it possible to evaluate the implementation of Articles 16 and 21, as well as possible aspects of its implementation in the digital world. These five topics are dealt with sequentially in Part I. Its aim is to provide an overview of the 51 agreements discussed. These same topics also serve as the structure for each case study presented in Part II of this study.

In addition, this study puts forward a number of recommendations that could facilitate a better monitoring of the implementation of Articles 16 and 21, and the emergence of a new approach to international cooperation.

1. Explicit references to the Convention

The first point examined in this study focuses on explicit references to the Convention in the 51 bilateral and regional agreements discussed. Since Parties to the Convention recognize the dual economic and cultural nature of cultural goods and services, as well as their right to adopt cultural policies to protect and promote the diversity of cultural expressions, it makes good sense to examine the references to this instrument in trade liberalization agreements signed since October 2005.

Out of all the agreements examined, **seven agreements** incorporate such explicit references to the Convention³. These seven agreements were all concluded by the EU, and involve a total of 26 States. Bearing in mind that the EU is made up of 28 Member States, it can be concluded that the seven agreements including an explicit reference to the Convention involve 54 States as well as the EU. Since five CARIFORUM States have not ratified the Convention, a total of 50 Parties to the Convention are thus involved in the seven trade agreements containing an explicit reference to this instrument⁴. The following table lists the seven agreements in question.

Table of bilateral and regional trade agreements containing an explicit reference to the Convention

Title of the agreement	Signature	Entry into force	Parties
Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ⁵	30/10/2016	---	EU Canada
Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part	27/06/2014	01/09/2014	EU Georgia
Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part	27/06/2014	01/09/2014	EU Rep. Moldova
Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part	27/06/2014	---	EU Ukraine

³ See Table 1 in Annex A.

⁴ It should be noted that this list does not take into account the four Stabilisation and Association Agreements concluded by the EU with the Western Balkan countries not covered by this study. These four agreements include a reference to the Convention in one provision devoted to *Cultural cooperation*. Under that provision, often worded in similar terms, "the Parties undertake to promote cultural cooperation. This cooperation serves *inter alia* to raise mutual understanding and esteem between individuals, communities and peoples. The Parties also undertake to promote cultural diversity, notably within the framework of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions". These same agreements also contain a provision on *Cooperation in the audio-visual field*. Finally, the Preamble acknowledges the wish of the Parties to "establish closer cultural cooperation". These four agreements are: the *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part and the Republic of Montenegro, of the other part*, signed on 01/05/1 May 2010; the *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part*, signed on 16/08/ August 2008; the *Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part*, signed on 29/04/ April 2008; , and the *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part*, signed on 12/06/ June 2006.

⁵The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union was concluded on 5 August 2014.

Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other	29/06/2012	01/08/2013	EU Central America ⁶
Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part	06/10/2010	01/07/2011	EC Rep. Korea
Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part	15/10/2008	01/11/2008	EC CARIFORUM ⁷

Three of these seven agreements were concluded with the Republic of Korea, the CARIFORUM States and the Central American States. In addition to the free trade agreement they represent, these three agreements also include an annexed protocol on cultural cooperation (hereinafter "PCC")⁸. In some cases, references are first integrated into the main agreement, which deals mainly with economic and commercial aspects of the relations between the two Parties. These references may specifically relate to the Convention, or refer to certain concepts closely linked to it, such as cultural diversity, cultural cooperation and cultural development. The three PCCs attached to the three main agreements then incorporate certain references to the Convention. These refer, in particular, to the instrument of ratification deposited by the Parties to the Convention. The PCCs also state the willingness of Parties to implement the Convention and to cooperate within the framework of such implementation, based on its principles and in conformity with its provisions (or "building upon the principles of the Convention and developing actions in line with its provisions" for the PCC annexed to the agreement with the Republic of Korea). Some PCCs also contain an explicit reference to Articles 14, 15 and 16 of the Convention, as well as the definitions in Article 4. States Parties to agreements accompanied by PCCs thus openly express their willingness to structure their trade commitments in harmony with the rules contained in the Convention. This commitment is also reflected in many of the PCC provisions, as well as in the treatment of some cultural goods and services in the main agreements, two points discussed in Sections 2 and 3 below.

Of the four other agreements that contain explicit references to the Convention, three have been concluded with European States, namely Georgia, the Republic of Moldova and Ukraine. These references can be found in two articles of a chapter on "Cooperation in the Cultural, Audiovisual and Media Fields."

The seventh and last agreement to refer explicitly to the Convention is the *Comprehensive Economic and Trade Agreement* (hereinafter "CETA") concluded between the EU and Canada. The Preamble to the agreement refers specifically to the Convention, and to several of its objectives and principles.

Finally, while they do not incorporate explicit references to the Convention, other agreements refer to concepts closely linked to the aims of that instrument. These include various agreements concluded by the EU that do not have PCCs but refer to concepts such as cultural development or cultural diversity⁹. They also include seven other agreements to which Canada is a Party, the Preamble of which mentions cultural policies, cultural diversity and cultural products and services¹⁰, as well as one of the four agreements concluded by New Zealand¹¹. In these agreements, the Parties indicate, for example, that they are "committed to co-operate in promoting recognition that States must maintain the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity."

⁶The Central American States party to this agreement are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

⁷The CARIFORUM States are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago.

⁸See case study 1 (Part II).

⁹See case study 2 (Part II).

¹⁰See case study 4 (Part II).

¹¹See case study 9 (Part II).

Thus, **of the 51 agreements analysed, seven include explicit references to the Convention.** Finally, 10 other agreements refer to concepts closely linked to the objectives pursued by the Parties to the Convention in their Preamble, without explicitly mentioning the Convention itself.

2. Treatment of cultural goods and services

The second issue examined in this study focuses on the treatment of cultural goods and services in the 51 bilateral and regional agreements selected. This second point is significant because even in the absence of explicit references to the Convention, or to related concepts, the Parties have in some cases negotiated provisions and commitments that reflect a form of recognition of the dual nature of cultural goods and services. The text of the agreements may also reflect, with varying levels of clarity, the desire of certain States to preserve their freedom to take action in the cultural sector by adopting policies and measures likely to clash with the free trade rules established under those same agreements, for example relating to the application of national treatment, the application of most favoured nation treatment (hereinafter "MFN"), market access, performance requirements and many other things.

It should be noted that this section excludes from its analysis provisions that grant preferential treatment aimed specifically at cultural goods and services, or those that relate to the artists and cultural professionals of the Parties, as they will be addressed in the next section.

Based on their treatment of cultural goods and services, the 51 agreements examined can be classified into five categories. One presentation of these categories, beginning with the agreements that contain provisions offering the greatest recognition of the specificity of cultural goods and services, and ending with the agreements that do not recognize such specificity, could be the following:

- a) Agreements with a PCC
- b) Agreements containing a cultural clause (exemption or exception)
- c) Agreements offering the Parties the possibility of liberalizing cultural services through a positive list of specific commitments
- d) Agreements offering the Parties the possibility of liberalizing cultural goods and services through a negative list of commitments
- e) Agreements that do not grant any special status to cultural goods and services.

It should be noted that several agreements might belong to more than one category (for example, when they contain a PCC, a cultural clause and lists of specific commitments).

a) Agreements with a PCC

Section 1 of this study identifies three agreements concluded by the EU with the Republic of Korea, the CARIFORUM States and Central America, to which a PCC is annexed. These three agreements contain explicit references to the Convention and explicitly recognise the specificity of cultural goods and services. Additionally, they contain provisions specifically aimed at implementing Article 16 of the Convention on preferential treatment. For this reason, these three agreements accompanied by a PCC will be examined more closely in Section 3 below.

b) Agreements containing a cultural clause

Of the 51 bilateral and regional agreements in this study, 19 contain a cultural clause (exemption or exception)¹², the scope of which however varies. These clauses allow for the exclusion of certain goods and/or cultural services from the scope of the agreements in which they are included. They have the advantage of being permanent in the sense that once included in an agreement, they are not usually subject to further negotiations aimed at eliminating or

¹² See Table in Annex A.

reducing their scope, unlike specific commitments or reservations, which may be revised. The use of cultural clauses is a relatively flexible mechanism. That said, only a careful examination of the wording of the clause allows for an accurate assessment of the leeway it gives the Parties. In addition, a provision may be subject to differences of opinion as to whether it is classified as an "exception" or an "exemption".

Of the 19 agreements containing a "cultural clause", three were concluded by New Zealand and include a provision whose scope seems particularly extensive¹³. This clause, worded in similar terms in these various agreements, excludes a broad category of cultural goods and services. In fact, it applies to all chapters of these agreements. Its wording is as follows:

"[...] subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services or investment, nothing in these Chapters shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value".

A footnote explains that

" 'Creative arts' include the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities".

The scope of this cultural clause is therefore relatively broad, as it covers a wide range of cultural goods and services, extends to digital cultural products and even covers cultural practices.

The eight agreements signed by Canada since October 2005 also contain a cultural clause that applies to the main chapters of the agreements¹⁴, but it is more limited in scope than New Zealand's clause. With the exception of the agreement between Canada and the EU, the classic wording of the Canadian cultural clause is as follows:

"[n]othing in this Agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article [xxx] *National Treatment and Market Access for Goods and Tariff Elimination*".

The agreements contain a definition of "cultural industries", which reads as follows:

"a person engaged in one or other of the following activities: a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, but not including the sole activity of printing or typesetting any of the foregoing; b) the production, distribution, sale or exhibition of film or video recordings; c) the production, distribution, sale or exhibition of audio or video music recordings; d) the publication, distribution or sale of music in print or machine-readable form; e) radiocommunications in which the transmissions are intended for direct reception by the general public, all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services".

¹³ See case study 9 (Part II).

¹⁴ See case study 4 (Part II).

The exemption therefore covers both cultural goods and cultural services. In one case (the agreement with Colombia) a more extensive definition of cultural industries was chosen in order to include "f) The production and presentation of performing arts; g) The production and exhibition of visual arts; h) The design, production, distribution and sale of handicrafts". The cultural clause therefore has a relatively large scope. However, with the emergence of digital technologies in the audiovisual landscape of a growing number of States, this definition of cultural industries does not allow it to be claimed with certainty that digital cultural products are systematically covered by this clause. This study will return to that issue in Section 4 below.

The cultural clause included in the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the EU differs from the previous agreements and therefore deserves to be addressed separately. This cultural clause adopts a unique model because its scope of application is asymmetric, that is to say it varies depending on which Party benefits from it. More specifically, the Canadian cultural clause covers the "cultural industries", whereas the EU's is limited to "audiovisual services". In addition, this asymmetric clause applies to five chapters of the agreement, namely the chapters on subsidies, investment, cross-border trade in services, domestic regulation and public procurement. It should be recalled that the cultural clause included in the seven other Canadian agreements referred to in the preceding paragraph is more global in scope, in that it applies to all chapters of those agreements.

Finally, in addition to the CETA, mentioned above, seven agreements concluded by the EU contain a cultural clause. These are the three agreements concluded by the EU to which a PCC is attached¹⁵, the free trade agreement between the EU, Colombia and Peru¹⁶, and three agreements concluded by the EU with Georgia, the Republic of Moldova and Ukraine. By means of this clause, the seven agreements exclude audiovisual services from the scope of their section(s) or chapter(s) devoted to the cross-border supply of services and the establishment of a commercial presence on a State's territory. The notion of "audiovisual services" is not defined, however. It is relevant to note that, going beyond this cultural clause, the agreement with the Republic of Korea also excludes subsidies from the scope of application of the entire chapter devoted to trade in services, establishment and electronic commerce. Moreover, in the agreement with the CARIFORUM States, a specific provision on commercial presence indicates that Parties "shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity".

While the cultural clause preserves the State's ability to adopt measures in the cultural sector, it is clear that this leeway varies considerably from one agreement model to another. The clause included in the New Zealand agreements seems to be the most protective of the right of States to intervene in favour of culture, not only because it applies to all chapters of the agreements in which it is included, but especially because it covers both cultural goods and services that could be called "traditional" (that is, goods and services produced, distributed and broadcast in a traditional way) and digital cultural products. For these reasons, the New Zealand cultural clause provides a model for the negotiation of future bilateral and regional agreements.

c) Agreements offering the Parties the possibility of liberalizing cultural services through a positive list of specific commitments

One of the methods used by States to institute a progressive liberalization of services is to draw up specific lists of commitments, also known as the "positive list" of commitments method. In light of concerns regarding the impact of trade liberalization on culture, this approach has the advantage of allowing States to select the cultural services they wish to expose to the free play of supply and demand. It also allows States to adapt commitments so that liberalization applies only to certain modes of supply of services. Commitments are formulated according to a

¹⁵ See case study 1 (Part II).

¹⁶ See case study 2 (Part II).

relatively standard grid that generally covers two obligations, of market access and national treatment, and four modes of supply of services, namely:

- 1) Cross-border supply
- 2) Consumption abroad
- 3) Commercial presence
- 4) Presence of natural persons.

Finally, the commitments regarding services included in the lists may lead to full liberalization (for one or more modes of supply) or maintain certain restrictions (for one or more modes of supply). This is essentially the same approach that was adopted by World Trade Organization (hereinafter "WTO") members to liberalize services under the General Agreement on Trade in Services (hereinafter "GATS").

Of the bilateral and regional agreements in this study, 19 use this method. These include the agreements signed by the EU with States or groups of States (Republic of Korea, the CARIFORUM States, Central American States, Peru, Colombia, Georgia, the Republic of Moldova and Ukraine), by China with its trading partners (Chile, Costa Rica, New Zealand, Peru and Switzerland – with the exception of Iceland), by ASEAN members in their agreements with China and New Zealand, and by European Free Trade Association (hereinafter "EFTA") members in their agreements with Ukraine and Central America.

The 19 agreements that have used this method also include agreements that could be described as "mixed", as they use both positive and negative lists of commitments. In general, the positive lists are used to liberalize cross-border trade in services, while negative lists contain the commitments of the Parties with regard to investment. The agreements concluded by the EU with Georgia, the Republic of Moldova and Ukraine, along with the agreement between India and the Republic of Korea, are the four "mixed" agreements covered by this study.

As for the content of the lists of commitments, it varies from one group of agreements to the next. In fact, the lists of commitments annexed to the agreements concluded by the EU only to a very limited extent cover services that might be termed "cultural"¹⁷. This is explained by the presence of a cultural clause that has the effect of excluding audiovisual services from the scope of these agreements. Consequently, the commitments of only some of the Parties focus primarily on "entertainment services", "library, archive, museum and other cultural services" and "news and press agencies services". Moreover, more elaborate lists of commitments are annexed to the agreements signed by China, since these do not exclude any cultural goods or services from their scope (except for the agreement between China and New Zealand). As a result, Parties wishing to liberalize cultural services have undertaken more commitments with respect to audiovisual services and the other cultural services presented above.

The agreements concluded by the Member States of ASEAN¹⁸, as well as those concluded by New Zealand¹⁹, illustrate the two cases: the agreement between China and ASEAN contains lists of commitments that might include all cultural, audiovisual and other services; the agreement between Australia, New Zealand and ASEAN, and the agreement between China and New Zealand, contain more limited lists of commitments, which is explained by the inclusion of a cultural clause that is relatively wide in scope.

Nevertheless, there are exceptions to this general trend, which in reality reflect a degree of inconsistency between the content of an agreement and the specific commitments recorded in its annexes. For example, while the agreement between New Zealand and ASEAN contains a cultural clause that covers, *inter alia*, certain audiovisual services (films and videos), the ASEAN countries have undertaken commitments to liberalize these services²⁰.

¹⁷ See case studies 1 and 2 (Part II).

¹⁸ See case study 8 (Part II).

¹⁹ See case study 9 (Part II).

²⁰ See case study 8 (Part II).

Finally, it is interesting to note that States that have concluded agreements with China and the EU have agreed to the positive list of commitments method to liberalize their cultural services, whereas that method has not been used in agreements signed with other States. Costa Rica, Chile and Peru can be cited as examples since they accepted the positive list method for their agreements with China or the EU or both, while favouring the negative list method (presented below in subsection d)) when entering into agreements with other trading partners (the United States of America for example) or even amongst themselves (e.g., between Peru and Chile, or between Peru and Costa Rica)²¹. This is probably an example of the influence of the major trading powers on the choice of free trade agreement models when negotiating such agreements.

In the end, the conclusion is that the positive list of commitments approach offers States more flexibility in adapting their commitments, whether they cover audiovisual services or other cultural services. As regards the cultural policies of States, however, it fails to offer the same protection as that afforded by the cultural clause. Thus, it necessarily limits the room to manoeuvre for States in the areas covered by their commitments, and above all, it makes it difficult for them to go back on the content of these commitments to adopt new cultural policies that do not conform to the rules of the trade agreements to which they are party. On the contrary, the positive lists of commitments are generally intended to be improved upon, and thus to open up markets increasingly to foreign competition, by the addition of new service sectors and the elimination of restrictions that were previously maintained.

d) Agreements offering the Parties the possibility of liberalizing cultural goods and services through a negative list of commitments

States wishing to carry out rapid liberalization of trade in services generally abandon the previous approach of specific commitments (or "positive list") in favour of the "negative list" of commitments, which amounts to the use of "reservations". In theory, both of these methods could enable States to achieve the same degree of liberalization: in practice, the liberalization of cultural services resulting from a positive list containing few commitments in the field of culture can be equivalent to that resulting from a negative list containing numerous reservations related to cultural services. The negative list, however, entails greater risk for States seeking to preserve their freedom of action in favour of culture, since every policy and measure, whether cultural or otherwise, likely to affect free trade in cultural services must be entered in a list of reservations created for this purpose. Such an exercise calls for a detailed analysis of all the provisions of a trade agreement and requires a thorough knowledge of all the policies and measures directly or indirectly affecting trade in cultural services.

This method was favoured in 21 of the 51 bilateral and regional agreements in this study. It is used primarily by Canada, the United States of America, several countries in Latin America, and Australia²². It is also used in the four mixed agreements referred to in the previous section, namely, the agreements concluded by the EU with Georgia, the Republic of Moldova and Ukraine, as well as the agreement between India and the Republic of Korea.

Indeed, the eight agreements concluded by Canada, with the EFTA countries, Colombia, Peru, Jordan, Panama, Honduras, the Republic of Korea and the EU, use the negative list of commitments method. In this particular case, however, the lists have little impact on the liberalization of cultural goods and services because cultural industries, as defined in these agreements, are excluded from the scope of application of the most significant chapters through the cultural clause. An analysis of these eight agreements nevertheless reveals the existence of reservations with regard to culture that already appear to be covered by the cultural clause²³.

²¹ See cases studies 11, 13 and 15 (Part II).

²² See Table 1 in Annex A.

²³ See case study 4 (Part II).

Regarding the agreements signed by the United States of America, with Oman, Peru, Colombia, Panama and the Republic of Korea, the use of the negative list of commitments approach is equally consistent²⁴. In addition, by contrast with the Canadian agreements, there is no cultural clause allowing for the exclusion of cultural goods or services from the scope of these agreements. Consequently, some Parties have entered numerous reservations to preserve their margin of action in favour of culture. This is particularly true of the Republic of Korea²⁵, whose reservations cover a large number of cultural services. Significant reservations were also entered by Colombia, Panama and Peru²⁶. In contrast, Oman²⁷ has entered only a few reservations in the field of culture. As a consequence, the agreement between Oman and the United States of America has resulted in a major liberalization of audiovisual services and other cultural services.

Finally, the agreement between Chile and Australia also uses the negative list approach. In this case, each Party entered a fairly limited number of reservations²⁸.

e) Agreements that do not grant any special status to cultural goods and services

Finally, 13 of the bilateral and regional agreements examined in this study do not grant any special treatment to the cultural goods and/or services of the Parties. These are, for the most part, agreements involving African countries, as well as Cuba, Egypt, El Salvador and India, in addition to several agreements concluded by the EFTA States. It should be noted that many of these agreements only cover trade in goods. In any case, the States that are Parties to these agreements have not deemed it necessary to preserve the right granted to them under the Convention to adopt cultural policies and measures to protect and promote the diversity of cultural expressions.

3. Clauses on preferential treatment relating to culture

One of the most surprising findings to come from the analysis of the 51 bilateral and regional agreements in this study, which, it must be remembered, were entered into after the adoption of the Convention, is the very low number of clauses in these agreements granting preferential treatment to the developing countries involved. Five agreements containing such clauses were identified²⁹. Nevertheless, these agreements concern a total of 53 States as well as the EU. Of these, 49 are Parties to the Convention.

It should be made clear from the start that all the agreements examined in this study are preferential trade agreements, in that they derogate from the most favoured nation rule in Article I of the General Agreement on Tariffs and Trade (hereinafter "GATT") and Article II of GATS. Indeed, the Parties grant each other a trade preference that is not automatically given to other WTO members. Provided that certain conditions are met, such preferential arrangements are permitted by the WTO, and more specifically by GATT Article XXIV and GATS Article V. To be consistent with these provisions, preferential agreements must relate to "substantially all the trade" between the Parties when they concern goods, or to a "substantial sectoral coverage" when they also concern services. It can thus be understood that an agreement aimed at granting preferential treatment to a State or group of States in a single area of activity, such as culture, would be inconsistent with WTO multilateral trade agreements. Nevertheless, in the context of a preferential trade agreement compatible with GATT Article XXIV and GATS Article V, it is conceivable that specific preferences could be granted to a State or group of States in one or several specific sectors. However, as noted above, only five of the 51 agreements analysed in this study provide for preferential treatment specifically for cultural goods and services.

²⁴ See case study 5 (Part II).

²⁵ See case study 7 (Part II).

²⁶ See case studies 12, 14, and 15 (Part II).

²⁷ See case study 4 (Part II).

²⁸ See case studies 10 and 11 (Part II).

²⁹ See Table 1 in the Annex.

Three of those five agreements are identified in Section 1, and include explicit references to the Convention. These are the agreements concluded by the EU with the Republic of Korea, the CARIFORUM States and the Central American States, which are supplemented by a PCC³⁰ aimed precisely at ensuring that the Parties grant each other preferential treatment in the cultural sector. Beyond this general objective, the three PCCs also aim to strengthen the capacities and independence of the cultural industries of the Parties, and to promote local and regional cultural content. They also aim to recognize, protect and promote cultural diversity. In addition, they take into account various factors such as the degree of development of cultural industries, as well as the current level and structural imbalances of cultural exchanges. Finally, without prejudice to the other provisions of the main agreements to which they are annexed, the PCCs define a framework to facilitate the exchange of cultural goods and services, particularly in the audiovisual sector.

The PCCs contain various provisions in this regard. Some of them are common to the three protocols, while others are found in only one or two of the texts. The PCCs between the EU and the CARIFORUM States and between the EU and the Central American States for example, both contain provisions relating to technical assistance. Furthermore, the three PCCs provide for the granting of preferential treatment to the benefit of each Party. This preferential treatment involves an initial component relating to the entry and temporary stay of artists and other cultural professionals. A second component concerns the negotiation of new co-production agreements and the implementation of existing agreements between one or more Parties to the agreements. In addition, the PCCs involving the Republic of Korea and the CARIFORUM States include a third component on preferential trade access for audiovisual works. Finally, various complementary provisions can be found in the three protocols, including, in some cases, clauses aiming to establish certain cultural cooperation bodies or committees, as well as clauses on the settlement of disputes about matters falling within the scope of the PCCs.

Although no PCC is annexed to the Republic of Korea's agreements with India, Australia and Canada, these contain provisions on cultural cooperation and audiovisual co-production that are directly incorporated into the main agreement. The agreement signed with Canada merely expresses the will of the Parties to promote cultural cooperation and to examine the possibility of negotiating an audiovisual co-production agreement. As such, it does not, for the time being, grant any preferential treatment. The other two agreements go further and do grant such treatment. The agreement with India first includes an entire chapter devoted to audiovisual co-production, which provides for the negotiation of an audiovisual co-production agreement, as well as the awarding of preferential treatment for works co-produced by the Parties in accordance with the possible co-production agreement. The works thus co-produced will then be treated as national works and will be able to enjoy the resulting benefits (e.g., in terms of public aid).

In a chapter devoted to bilateral cooperation, the agreement between the Republic of Korea and India also states the will of the Parties to develop other forms of cooperation in the audiovisual sector.

As for the agreement between the Republic of Korea and Australia, one provision in the chapter on the cross-border supply of services covers audiovisual co-production and refers to an annex comprising 22 articles entirely devoted to this issue. This annex constitutes a proper co-production agreement and grants preferential treatment for co-produced works, which are accorded benefits normally reserved for works of national origin. It also lays down more flexible immigration rules for artists and cultural professionals involved in co-productions, as well as more flexible rules regarding the import of equipment for the making of these co-productions.

It is pertinent to note that three other agreements binding the EU to Georgia, the Republic of Moldova, and Ukraine contain one or two chapters dedicated to cultural cooperation and cooperation in the audiovisual sector. These chapters do not provide for the granting of preferential treatment to cultural goods and services, or the mobility of the Parties' artists and

³⁰ See case study 1 (Part II).

cultural professionals. They are therefore not counted under this section. Nevertheless, these agreements invite Parties to cooperate with regard to the aforementioned matters and encourage co-productions in the areas of film and television. They could therefore lead to new initiatives aimed at implementing Article 16 of the Convention.

Finally, in addition to the above comments, it is useful to clarify that there are many cultural cooperation agreements in force between the Parties to the Convention that pursue the objectives they have set themselves in terms of international solidarity and cooperation. However, since this study is limited to the analysis of trade agreements, no account is taken in this section of those cultural agreements or arrangements.

4. Status of electronic commerce

Twenty-seven agreements in this study contain one or more provisions on electronic commerce³¹. The content and the binding force of these provisions vary considerably from one agreement to another. For the purposes of this analysis, it is possible to define three levels of commitment to categorize the provisions of the 27 agreements concerned, and describe their implications for electronic commerce:

- 1) Agreements containing non-binding provisions that primarily aim to promote cooperation between the Parties on issues related to electronic commerce
- 2) A smaller number of agreements also containing provisions on the non-imposition of customs duties on products delivered electronically
- 3) A few agreements also containing provisions relating to the application of national treatment and MFN treatment to these same products.

It is difficult to systematize the provisions that make up the first level of commitment, as they are so heterogeneous. Moreover, although they are present in all of the 27 agreements that deal with electronic commerce, these provisions can be limited to a single article or be made up of a long list of principles. They might relate to the development of electronic commerce in general, consumer protection, transparency, the drawing up of codes of conduct for businesses, the exchange of information and good practices, electronic authentication processes, capacity building, the establishment of legal and regulatory frameworks, and many other subjects. Most of these provisions are not really binding. Some agreements state that they may not be subject to the dispute settlement procedures laid down.

The second level of commitment concerns twenty agreements, that is, all the agreements concluded by the United States of America³² and by Canada (with the exception of the Canada-EFTA free trade agreement (hereinafter "FTA"), which contains no provisions on electronic commerce)³³, six agreements concluded by the EU (with the CARIFORUM States, the Republic of Korea, Colombia and Peru, Georgia, the Republic of Moldova, and Ukraine)³⁴, the Republic of Korea-Australia agreement, and the Colombia-Chile Agreement³⁵.

These agreements all include a provision that commits States to not imposing customs duties on products supplied electronically. It must be emphasized that, in the agreements concluded by Canada and the four agreements concluded by the EU mentioned above, there are cultural clauses that effectively limit the scope of the provisions on electronic commerce. In the case of the EU agreements, audiovisual services would thus not be covered by this commitment on electronic commerce. With the agreements signed by Canada, the cultural industries covered by the cultural clause would be excluded. However, uncertainties remain, in practice, on the relationship between these clauses and the provisions on electronic commerce. For example,

³¹ See Table in Annex A.

³² See case study 5 (Part II).

³³ See case study 4 (Part II).

³⁴ See case studies 1 and 2 (Part II).

³⁵ See case studies 9, 10, 11 and 12 (Part II).

the definition of "cultural industries" contained in the Canadian agreements could be subject to different interpretations and might not cover all cultural products that can be traded electronically. Only after careful analysis of each of the cultural industries involved would it be possible to conclude that all digital cultural products are completely excluded from the scope of these agreements.

A third and final level of commitment can be found in 14 of the 27 agreements that deal with electronic commerce. Specifically, these are the five agreements concluded by the United States of America (with Oman, Peru, Colombia, Panama and the Republic of Korea), seven of the eight agreements signed by Canada, the Colombia-Chile FTA and the Australia-Republic of Korea FTA.

These agreements have the particular feature of extending the application of the rules relating to trade in services and investment to electronic commerce. In all cases, a provision indicates that services supplied by electronic means remain subject to the rules of the chapters on investment and trade in services, and to the non-conforming measures and exceptions applicable to these chapters (a reference, amongst other things, to cultural industries in the case of the Canadian agreements). In the case of the agreements concluded by the United States of America, other provisions create commitments relating specifically to digital products, such as the prohibition on imposing customs duties mentioned above, as well as the application of the rules on national treatment and MFN treatment. The distinction between a digital product and a traditional service provided electronically (covered by the chapters on investment and services, including applicable exemptions and reservations), however, is not clearly established. In general, the definition of digital products refers to products that have long been associated with the concept of "service". For example, for the purposes of the agreement between the Republic of Korea and the United States of America, "digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically". In the case of agreements that do not include a cultural exemption, this chapter will have significant repercussions on the scope of action of Parties wishing to develop and implement policies and measures to protect and promote the diversity of cultural expressions in the digital environment.

5. Other provisions relating to culture

Aside from the cultural considerations addressed by the provisions presented in the previous four sections that are directly or indirectly connected to the objectives and principles of the Convention, some agreements deal with other matters related to culture. First of all, many agreements contain one or more provisions on intellectual property. In addition, nearly half of the 51 bilateral and regional agreements examined in this study include references to persons belonging to minority groups and indigenous communities. These references often take the form of reservations that protect the Parties' right to intervene on behalf of these groups, which are often described as socially or economically disadvantaged. Such references are generally found in agreements concluded by Canada, the United States of America, some countries in Latin America (Chile, Colombia, Costa Rica, Honduras, Panama and Peru), China and Australia.

Other less common references are found in a limited number of agreements. They include, for example, references to cultural heritage³⁶, traditional knowledge³⁷, archaeological activities³⁸, illicit trafficking in cultural goods³⁹, and biodiversity and sustainable development⁴⁰. Finally, cultural considerations are sometimes mentioned in the general objectives of certain agreements⁴¹ or in provisions devoted to cooperation between the Parties⁴².

³⁶ See the Agreement between the EU and Eastern and Southern Africa and the Agreement concluded between the United States of America and the Republic of Korea.

³⁷ See the Agreement between the EU and Eastern and Southern Africa.

³⁸ See the Agreement between the United States of America and Colombia.

³⁹ See the Agreement between China and New Zealand.

⁴⁰ See the Agreement between the EU, Colombia and Peru.

⁴¹ See the Agreement between China and Costa Rica.

Conclusion

The analysis of the 51 agreements selected for this study was meant to enable an evaluation of the implementation of Articles 16 and 21 of the Convention in bilateral and regional agreements concluded since the adoption of this instrument. It found that five agreements were successful in jointly implementing these two provisions. The most innovative agreement model is probably the one developed by the EU, which is accompanied by a protocol on cultural cooperation. This model was chosen for three of the 51 agreements examined. These are the only three agreements to include explicit references to the Convention, to grant a particular status to certain cultural services, to carry out liberalization through a positive list of commitments and to grant specific preferential treatment to the Parties' cultural goods and services, artists and cultural professionals. Two other agreements are also worthy of interest because they contain provisions on cultural cooperation granting preferential treatment to the mutual benefit of the Parties. These are the free trade agreements between Australia and the Republic of Korea and between India and the Republic of Korea.

The cultural clauses (exemption and exception) used in over one third of the agreements examined remain an effective technique to preserve the States' leeway and capacity to take action regarding cultural matters. Nevertheless, cultural clauses can vary in scope and the more limited they are, the less room for action States have. Furthermore, a cultural clause does not in itself grant preferential treatment to cultural goods and services or to artists and cultural professionals from developing countries. The cultural clause models developed by Canada and the EU also present some risks in terms of the application of the provisions of an agreement to digital cultural goods and services. In this respect, the cultural clause included in the agreements concluded by New Zealand, which covers not only traditional cultural goods and services but also digital products, is an example of good practice that should be favoured by other States involved in the negotiation of bilateral and regional trade agreements.

In the end, it is more difficult to assess the impact of the Convention on the commitments undertaken (by positive or negative lists) in cultural sectors. The study found that when an agreement contains a cultural clause these commitments are more limited and, save for a few exceptional cases, logically apply to cultural goods and/or services not covered by the cultural clause. Moreover, where no such clause is included, several scenarios are possible. Parties may choose to ignore cultural considerations altogether and liberalize trade in cultural goods and services. This is the case of a number of agreements examined in this study, especially agreements concluded by African countries, Arab countries and India. Conversely, many States tend to significantly limit their commitments on culture. This is what chiefly emerges from the agreements signed by several Latin American States. It should be noted that although these agreements reflect greater prudence by the Parties and appear to implement the objectives and principles of the Convention, no reference is made to this instrument, making it impossible to state with certainty that this prudence or reservation is the result of their accession to the Convention.

For all these reasons, this study concludes that the Parties to the Convention have gradually developed new approaches in order to implement Articles 16 and 21 in the bilateral and regional agreements in which they have participated since the adoption of the Convention. Progress is still modest in terms of the "number of agreements" that succeed in implementing both provisions explicitly and effectively. However, these are real advances, and they involve a significant number of Parties to the Convention. They also stand as examples of good practice that could influence other Parties when they engage in new bilateral, regional or even multilateral trade negotiations.

⁴² See the Agreement between China and Chile, the Agreement between China and Peru, the Agreement between the EU, Peru and Colombia, as well as the Agreement between the EU and the Central American States.

Recommendations

The conclusions of this study allow us to draw priority lines of action which might help to better evaluate the implementation of Articles 16 and 21 in the future, and to shape national and international policies aiming to achieve a more balanced flow of cultural goods and services worldwide.

Achieving effective cooperation between different sectors at the national level

The implementation of the provisions of Articles 16 and 21 requires the cooperation of different sectors. This is particularly the case with the implementation of provisions on preferential treatment which could, notably, lead to the modification of national immigration rules, including visa regulations (i.e. in order to reduce obstacles to mobility), to the adjustment of customs or tax rules (i.e. in order to grant preferential treatment for imports and/or exports of cultural goods and services), or to the inclusion of references to culture and the elaboration of specific rules relating to cultural goods and services in the context of bilateral and regional trade treaties. While it remains a sensitive issue for the majority of Parties, they will have to invest a significant amount of effort in order to achieve the level of coordination that will result in concrete measure and policy changes.

Setting up appropriate policy frameworks in developing countries

In order to implement Article 16 on preferential treatment, it is not enough for developed countries to introduce specific policies and measures. It is equally important for developing countries to take a proactive approach. At the international level, they must make specific requests to their partners, particularly in the context of trade negotiations. Internally, they must work toward developing policies and other measures which allow them to take advantage of the preferential treatment granted to them.

Advancing the position of culture in the context of international trade negotiations

There are only few examples where Parties refer explicitly to the Convention with the intention of implementing Articles 16 and 21. Parties must continue to work on building, analysing and promoting the inventory of such cases, not only in the treaties they conclude, but also in the evolution of jurisprudence in national and international courts. In a context of slowing multilateral negotiations and intensifying bilateral and regional negotiations (which are more difficult to monitor), and where the Transatlantic Trade and Investment Partnership (TTIP) between the United States and Europe does not seem to be leading to a conclusion, the relevant provisions of the Convention should be evoked in order to question the position of culture and the impact of possible agreements on the diversity of cultural expressions.

Promote the specificity of cultural goods and services in the digital environment

References to the treatment of cultural goods and services in the digital environment, also referred to as “digital products”, are pervasively present. As the creation, production, dissemination, distribution and access to cultural expressions in the digital world are constantly evolving, Parties must pay particular attention to the commitments they make for the liberalization of electronic commerce. Beyond the traditional sectors of cultural goods and services that they must pay attention to, such as books, magazines, newspapers, audiovisual and other cultural services, they must also address new kinds of commitments that may have a significant impact on the diversity of cultural expressions. These commitments may cover digital products that are associated to text, video and images exchanged in a digital format. They can also interfere with rules relating to Internet service providers, or those regulating new means of accessing cultural content. These issues will become more important for the protection and promotion of the diversity of cultural expressions in the digital environment. Trade commitments that might interfere with these rules will have to be carefully negotiated.

Developing effective monitoring instruments

In determining the impact of the implementation of Articles 16 and 21, but also in the context of monitoring the impact of the Convention, there is still a lack of adequate benchmarks for evaluation and a lack of empirical data and evidence. Whether they wish to report on or adopt new measures for the implementation of the Convention, Parties must improve their coordination mechanisms and monitoring instruments at the national level. As part of the first Global Report on the 2005 Convention⁴³, three main indicators and a series of means of verification have been identified. These should allow Parties to generate a set of data and information for systematic monitoring of the implementation of Articles 16 and 21:

- Parties promote the objectives and principles of the Convention in other regional and international forums;
- International and regional treaties and agreements a) refer to the Convention and b) are evaluated;
- Policies and measures to implement international and regional treaties and agreements that refer to the Convention are a) established and b) evaluated.

⁴³ See V. Guèvremont, “Promoting the Convention in international forums”, in *Re|Shaping Culture Policies: A Decade Promoting the Diversity of Cultural Expressions for Development* (2005 Convention Global Report), UNESCO, 2015, pp. 135-147.

PART II – CASE STUDIES

List of the 17 case studies

Case study	Groups of agreements Sub-groups of agreements	Number of agreements analysed
Agreements concluded by Europe and North America		
1	Agreements concluded by the European Union supplemented by a protocol on cultural cooperation	3
2	Agreements concluded by the European Union without a protocol on cultural cooperation	10
3	Agreements concluded by EFTA	7
4	Agreements concluded by Canada	8
5	Agreements concluded by the United States of America	5
Agreements concluded by States in Asia and the Pacific		
6	Agreements concluded by China	8
7	Agreements concluded by the Republic of Korea	5
8	Agreements concluded by ASEAN	2
9	Agreements concluded by New Zealand	3
10	Agreements concluded by Australia	3
Agreements concluded by States in Latin America and the Caribbean		
11	Agreements concluded by Chile	6
12	Agreements concluded by Colombia	4
13	Agreements concluded by Costa Rica	4
14	Agreements concluded by Panama	4
15	Agreements concluded by Peru	7
16	Agreements concluded by States in Africa	7
17	Agreements concluded by Arab States	3

Case study 1

Agreements concluded by the European Union supplemented by a Protocol on Cultural Cooperation

This case study is based on the analysis of three free trade agreements supplemented by a protocol on cultural cooperation (hereinafter “PCC”) concluded by the European Union (hereinafter “EU”) since the adoption of the Convention in October 2005:

- 1) The *Economic Partnership Agreement between the CARIFORUM States of the one part and the European Community and its Member States of the other*⁴⁴, hereinafter the “EPA-CARIFORUM”
- 2) The *Free Trade Agreement between the European Union and its Member States, of the one part and the Republic of Korea of the other*⁴⁵, hereinafter the “FTA-Republic of Korea”
- 3) The *Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other*⁴⁶, hereinafter the “AA-EUCA”.

These agreements liberalize the trade in goods and services, as well as investment and certain aspects of electronic commerce. Provisions relating to trade in goods refer to all goods originating from the Parties, except where excluded. With regard to services and investment, the Parties use positive lists to record their commitments (thus adopting the same approach as the General Agreement on Trade in Services (hereinafter “GATS”). Finally, the PCCs contain provisions dealing specifically with cooperation in the area of culture.

1. References to the Convention

The agreements with PCCs are unique in that they contain one or more explicit references to the Convention. The three PCCs examined include a reference to the instrument of ratification of the Convention by the Parties (or, in the case of the PCC annexed to the EPA-CARIFORUM, a reference to the Parties’ intention to ratify it). PCCs also refer to the will of the Parties to implement the Convention and to cooperate within the framework of this implementation, basing themselves on its principles and in a manner consistent with its provisions (“building upon the principles of the Convention and developing actions in line with its provisions” for the PCC annexed to the FTA-Korea). The Preamble of the PCC annexed to the AA-EUCA also contains an explicit reference to Articles 14, 15, and 16 of the Convention, while Article 1 (3) (*Scope, Objectives and Definitions*) specifies that the Convention constitutes the point of reference for all definitions and concepts used in this PCC.

With regard to the wording of the agreements, some of them contain references to cultural diversity (AA-EUCA), cultural cooperation (EPA-CARIFORUM) or cultural development (EPA-CARIFORUM). Finally, an explicit reference to the Convention can be found in Article 74 of the AA-EUCA, on cultural and audiovisual cooperation.

2. Treatment of cultural goods and services (main agreement)

The three agreements exclude audiovisual services from the scope of their section(s) or chapter(s) on the cross-border supply of services and the establishment of a commercial presence on a State’s territory. The notion of “audiovisual services”, however, is not defined.

⁴⁴ Signed on 15 October 2008; entered into force on 1 November 2008. The CARIFORUM States are: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

⁴⁵ Signed on 6 October 2010; entered into force on 1 July 2011.

⁴⁶ Signed on 29 June 2012; entered into force on 1 August 2013. The States of Central America are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

The FTA-Korea states that this exclusion is without prejudice to the rights and obligations flowing from the PCC. The FTA-Korea also excludes subsidies from the scope of the entire chapter on trade in services, establishment and electronic commerce. In addition, a provision of the EPA-CARIFORUM specific to commercial presence states that the Parties “shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity”.

Lastly, the three agreements call on the Parties to draw up lists of specific commitments through the registration of sectors, sub-sectors and activities that will be subject to a certain degree of liberalization (market access and national treatment commitments), but for which restrictions are maintained. The Parties have used these lists to enumerate certain cultural sectors other than the audiovisual (this sector is excluded from the scope of the agreement) and limit the scope of their commitments. The *Lists of commitments relating to commercial presence* and *Lists of commitments relating to the cross-border supply of services* therefore contain commitments relating to *Entertainment services, Libraries, archives, museums and other cultural services, and News and press agencies services*. Given the diversity of commitments, it is difficult to provide a comprehensive summary.

However, it is possible to cite a few examples: in the case of the first list, certain Member States of the EU and certain CARIFORUM States have undertaken commitments relating to *Entertainment services*. In addition, all members of the EU refrained from making commitments relating to *Libraries, archives, and museums*, whereas some CARIFORUM States have completely liberalized this sector. Finally, almost all CARIFORUM States have made commitments relating to *Press agency services*. In the case of the second list, almost all EU States refrained from making commitments in the *Entertainment services and Libraries, archives, and museums* sectors.

3. Clauses on preferential treatment relating to culture (PCC)

The PCCs pursue a number of objectives, in particular capacity building and ensuring the independence of the cultural industries of the Parties, the promotion of regional and local cultural content, and the recognition, protection, and promotion of cultural diversity. PCCs also take various factors into account, such as the degree of development of cultural industries, as well as the level and structural imbalances of cultural exchanges.

In all cases, and without prejudice to other provisions in the main agreements (EPA-CARIFORUM, FTA-Republic of Korea and AA-EUCA), the PCCs define a framework with a view to facilitating the exchange of cultural activities, goods, and services, in particular in the audiovisual sector. The Parties endeavour to cooperate in order to improve the conditions governing their exchange of cultural activities, goods, and services, and to correct structural imbalances and asymmetries that might exist in these exchanges, while at the same time preserving and developing their capacities to design and implement their cultural policies in order to protect and promote cultural diversity.

The PCCs attached to the EPA-CARIFORUM and the AA-EUCA contain clauses relating to technical assistance that are designed to contribute to the development of the cultural industries of the Parties, the development of their cultural policies and measures, or the exchange of cultural goods and services. In addition, the three PCCs provide for preferential treatment for each of the Parties. This preferential treatment comprises a first element regarding the temporary entry and stay of artists and other cultural professionals. A second element deals with the negotiation of new co-production agreements and the implementation of existing agreements between one or more Parties to the agreements. Finally, the PCCs annexed to the FTA-Republic of Korea and to the EPA-CARIFORUM include a third element concerning preferential trade access for audiovisual works. Under these provisions, co-produced works are eligible for the regime laid down by the EU Party to promote regional or local cultural content by obtaining the status of “European works” under Article 1(n) (i) of Directive 89/552/EEC.

Conversely, co-produced audiovisual works can be eligible for the regime of the other Party (Republic of Korea or CARIFORUM States) on the promotion of regional or local cultural content. In the case of the PCC annexed to the FTA-Republic of Korea, cooperation between the Parties in the audiovisual sector is also encouraged through the organization of festivals, seminars, and similar initiatives, and through cooperation in the field of broadcasting. PCCs also contain additional provisions for cooperation in the audiovisual sector, for example, for the temporary import of material and equipment for the purpose of shooting audiovisual works.

In addition, cultural cooperation promoted through the PCCs also refers to sectors other than the audiovisual sector, in particular the live performing arts, publications and the protection of cultural heritage sites and historical monuments.

Finally, the PCC annexed to the FTA-Republic of Korea establishes a “cultural cooperation” committee to monitor the implementation of the protocol, as well as settle disputes. Moreover, the PCC provides for the creation of several internal advisory groups on cultural cooperation, to be made up of representatives from the cultural and audiovisual sectors, and who can be consulted on issues relating to the implementation of the PCC. The two other PCCs do not include any equivalent mechanism. However, in the case of the PCC annexed to the AA-EUCA, the Preamble indicates that the Cooperation Sub-Committee set up under the main agreement could include officials who have competence in cultural matters and practices to address any issues relating to the implementation of this protocol. Moreover, no element of that PCC may be subject to the general dispute settlement mechanism put in place by the AA-EUCA.

4. *Status of electronic commerce*

The three agreements that are supplemented by PCCs also contain a few provisions that relate specifically to electronic commerce. In general, the Parties agree to encourage the development of electronic commerce amongst themselves, in particular through cooperation on issues linked to this type of commerce. The EPA-CARIFORUM and the FTA-Republic of Korea go further, binding the Parties not to impose customs duties on deliveries by electronic means. Considering that Parties to these agreements have excluded audiovisual services from the scope of the rules relating to the cross-border supply of services those services will therefore not be affected by the commitments flowing from these provisions on electronic commerce. The notion of “deliveries by electronic means”, however, is not defined. For this reason, it is unclear whether the term “deliveries” refers solely to services that could be described as “conventional”, in which case audiovisual services would effectively be excluded, or whether the transmission of digital cultural products, which might not fall under the exclusion of “audiovisual services”, could be affected by the commitment not to impose customs duties on deliveries by electronic means.

5. *Other provisions relating to culture*

There are no other provisions relating to culture to report.

Case study 2

Agreements concluded by the European Union without a Protocol on Cultural Cooperation

This case study is based on the analysis of 10 free trade or economic partnership agreements (not accompanied by a PCC) concluded by the EU since the adoption of the Convention. The first five are economic partnership agreements that include a few rules pertaining to trade in goods as well as a cooperation framework that aims to meet various objectives regarding, among other things, services, investment, electronic commerce and intellectual property. These five agreements are as follows:

- 1) The *Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part*⁴⁷, hereinafter the "EPA-Ghana"
- 2) The *Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part*⁴⁸, hereinafter the "EPA-CI"
- 3) The *Stepping Stone Economic Partnership Agreements between the European Community and its Member States, of the one part, and Central Africa, of the other part*⁴⁹, hereinafter the "EPA-CAf"
- 4) The *Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part*⁵⁰, hereinafter the "EPA-SADC"
- 5) The *Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern Africa States, of the one part, and the European Community and its Member States, of the other part*⁵¹, hereinafter the "EPA-ESAf".

The five other, more recent, agreements liberalize trade in goods and services, establishment and electronic commerce. These are:

- 6) The *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part*⁵², hereinafter the "FTA-Colombia-Peru"
- 7) The *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part*⁵³, hereinafter the "FTA-Georgia"
- 8) The *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part*⁵⁴, hereinafter the "FTA-Republic of Moldova"
- 9) The *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part*⁵⁵, hereinafter the "FTA-Ukraine"
- 10) The *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*⁵⁶, hereinafter "CETA".

47 Signed on 10 July 2008; not in force.

48 Signed on 26 November 2008; entered into force on 1 January 2009.

49 Signed on 15 January 2009; entered into force on 1 October 2009.

50 Signed during June 2009. Final agreement signed on 10 June 2016.

51 Signed on 29 August 2009; entered into force on 14 May 2012.

52 Signed on 26 June 2012; entered into force on 1 March 2013.

53 Signed on 27 June 2014; entered into force on 1 September 2014.

54 Signed on 27 September 2014; entered into force on 1 September 2014.

55 Signed on 27 June 2014; not in force.

56 Signed on 30 October 2016, not in force.

1. *References to the Convention*

The four most recent agreements concluded by the European Union include explicit references to the Convention. The Preamble of CETA specifically refers to the Convention, as well as several of its objectives and principles. The FTA-Georgia, the FTA-Republic of Moldova and the FTA-Ukraine specifically refer to the Convention in two articles of a chapter on cooperation on culture, audio-visual policy and media. Moreover, a more general reference to culture is included in the Preamble of these agreements. The six remaining agreements, concluded before the four already mentioned, do not include any explicit references to the Convention. The Preambles of certain agreements however refer to the notions of "cultural development" (EPA-Ghana, EPA-CI, EPA-ESAf) or "cultural diversity" (EPA-CAf).

2. *Treatment of cultural goods and services*

Five agreements (FTA-Colombia-Peru, CETA, FTA-Georgia, FTA-Republic of Moldova and FTA-Ukraine) include a cultural clause that aims to exclude "audiovisual services" from the scope of the chapters pertaining to commercial presence and to the cross-border supply of services. However, the cultural clause in CETA differs from the four other agreements as its application is asymmetrical; in other words, its scope varies depending on the Party. Indeed, the Canadian cultural clause covers "cultural industries", whereas the EU's is limited to "audiovisual services"⁵⁷. Moreover, this asymmetrical clause applies to five chapters of the agreement (rather than to the agreement in its entirety), namely the chapters on subsidies, investment, cross-border trade in services, domestic regulation and government procurement.

Concerning the commitments related to cultural goods and services under the agreements concluded by the EU, the five agreements concluded with African States do not grant any special treatment for these goods and services. The five other agreements, which include a cultural exemption clause excluding, at a minimum, audiovisual services from their scope, recognize the specific nature of the other cultural services that are covered. This recognition takes the form either of limited commitments made in positive lists, the inclusion of reservations in negative lists, or a method combining both approaches. For example, the FTA-Colombia-Peru, which uses positive lists of commitments, includes commitments from several European States mainly referring to the *Entertainment services (including theatre, live Bands, circus and discotheque services)* and *News and press agencies services* sectors⁵⁸. In the case of CETA, certain European States (Latvia, Poland and Sweden) have entered reservations with regard to investment in the *Publishing and printing* sector. Moreover, all EU Member States entered a reservation on *Recreation, cultural and sporting services* providing for non-application of the market access provisions for cross-border trade in services and investment. France and Hungary have also entered reservations concerning market access for *Press agency* services. Finally, Germany has recorded several reservations (non-application of the provisions regarding market access, national treatment, most favoured nation treatment (hereinafter "MFN treatment"), performance requirements, senior management and boards of directors) pertaining to *Entertainment services, including theatre, live bands and circus services* and *Library, archives and museums and other cultural services*.

⁵⁷ Cultural industries "means a person engaged in: (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, except when printing or typesetting any of the foregoing is the only activity; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution or sale of music in print or machine-readable form; or (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services". Moreover, the audiovisual services referred to by the European cultural clause are not defined.

⁵⁸ The commitments made by Colombia and Peru are examined in the case studies on these two States. See case studies 10 and 13 (Part II).

The FTA-Georgia, the FTA-Republic of Moldova and the FTA-Ukraine opted for the "mixed" system of commitments, in which the liberalization of services is achieved by way of positive lists, whereas investment liberalization is achieved through negative lists and the introduction of reservations. With regard to the liberalization of cross-border trade in services, only *Press agency services* were subject to significant commitments on the part of EU Member States. As for investment, Belgium, France, Croatia and Italy entered reservations regarding the non-application of national treatment and MFN treatment to *Libraries, archives, museums and other cultural services*. France has also entered reservations with regard to *Press agency services*. Other reservations with limited scope directly refer to the people involved in the supply of certain cultural services, several European States having retained the right to demand specific professional qualifications or to carry out an economic needs test.

3. Clauses on preferential treatment relating to culture

Of the ten agreements analysed in this case study, three (FTA-Georgia, FTA-Republic of Moldova and FTA-Ukraine) include one or two chapters on cultural cooperation and cooperation in the audiovisual sector. These chapters do not grant preferential treatment to cultural goods and services, or to the Parties' artists and cultural professionals, but they invite the Parties to cooperate to that end and encourage co-productions in the film and television sectors. In addition, these chapters explicitly refer to the Convention, as well as to certain of its objectives and principles. The other seven agreements do not include any provisions that specifically grants preferential treatment to the cultural goods and services of other Parties or their artists or cultural professionals, nor do they include provisions that encourage the Parties to cooperate to that end.

4. Status of electronic commerce

Four of the ten agreements analysed in this case study do not include any provisions that create obligations pertaining to electronic commerce (EPA-Ghana, EPA-CI, EPA-CAf and EPA-SADC). The EPA-ESAf includes an article that aims to promote cooperation in the field of information and communications technology (ICT). The FTA-Colombia-Peru, the FTA-Georgia, the FTA-Republic of Moldova and the FTA-Ukraine also include provisions on cooperation with regard to electronic commerce, while specifying that electronic transmissions must be treated as a form of provision of services and therefore cannot be subject to customs duties. Nevertheless, it should be borne in mind that audiovisual services are excluded from the scope of the provisions on trade in services in these agreements. Similarly, CETA applies to electronic commerce and the Parties acknowledge that deliveries made electronically should not be subject to customs duties, fees or charges. The cultural exemption clauses in the agreement, however, serve to exclude cultural industries (for Canada) and audiovisual services (for the EU) from the scope of certain chapters. On the other hand, the chosen definition of "cultural industries" makes it impossible to state with certainty that all digital cultural products are automatically covered by this exemption clause. Similarly, without a definition, the concept of "audiovisual services" could be subject to diverging interpretations and might not cover all cultural products that could be traded electronically.

5. Other provisions relating to culture

The EPA-ESAf includes several provisions pertaining to heritage protection and the protection of the traditional knowledge of indigenous communities. The EPA-CAf, the FTA-Colombia-Peru, CETA, the FTA-Georgia, the FTA-Republic of Moldova and the FTA-Ukraine include some provisions related to intellectual property.

Case study 3

Agreements concluded by EFTA

This case study is based on the analysis of seven free trade agreements concluded by the European Free Trade Association (hereinafter "EFTA")⁵⁹ since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between the EFTA States and the South African Customs Union (SACU) States*⁶⁰, hereinafter the "FTA-SACU"
- 2) The *Free Trade Agreement between the Arab Republic of Egypt and the EFTA States*⁶¹, hereinafter the "FTA-Egypt"
- 3) The *Free Trade Agreement between Canada and the EFTA States*⁶² hereinafter the "FTA-Canada"
- 4) The *Free Trade Agreement between the EFTA States and the Republic of Serbia*⁶³, hereinafter the "FTA-Serbia"
- 5) The *Free Trade Agreement between the EFTA States and Ukraine*⁶⁴, hereinafter the "FTA-Ukraine"
- 6) The *Free Trade Agreement between the EFTA States and Montenegro*⁶⁵, hereinafter the "FTA-Montenegro"
- 7) The *Free Trade Agreement between the EFTA States and the Central American States*⁶⁶, hereinafter the "FTA-CA".

The FTA-Egypt, the FTA-SACU, the FTA-Serbia and the FTA-Montenegro only cover trade in goods. The FTA-Canada includes a chapter on services and investment, but this chapter essentially establishes general cooperation rules and sets out the principles for future negotiations founded on non-discrimination and transparency. The FTA-Ukraine and the FTA-CA not only cover goods, but also services and investment. The FTA-CA also includes certain provisions regarding electronic commerce.

1. References to the Convention

None of the agreements listed above explicitly mention the Convention. The Preamble of the FTA-Canada does, however, refer to cultural policies and cultural diversity. The States Parties indicate, for example, that they are "committed to co-operate in promoting recognition that States must maintain the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity".

2. Treatment of cultural goods and services

The FTA-Canada includes a cultural exemption clause by virtue of which "nothing in this Agreement shall be construed to apply to measures adopted or maintained by a Party with respect to cultural industries as defined in paragraph 2, except as provided in Article 10 [Customs Duties], sub-paragraph 2(e) of Article 26 [Joint Committee], and Article 37 [Transparency] of this Agreement". The agreement defines the concept of "cultural industry", as any of the following activities: "a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing; b) the production, distribution, sale or exhibition of

59 The parties to the European Free Trade Association (EFTA) are Iceland, Liechtenstein, Norway and Switzerland.

60 Signed on 26 June 2006, entered into force on 1 May 2008.

61 Signed on 27 January 2007, entered into force on 1 August 2007.

62 Signed on 26 January 2008, entered into force on 1 July 2009.

63 Signed on 17 December 2009, entered into force on 1 October 2010.

64 Signed on 24 June 2010, entered into force on 1 June 2012.

65 Signed on 14 November 2011, entered into force on 1 September 2012.

66 Signed on 24 June 2013, entered into force on 19 August 2014.

film or video recordings; c) the production, distribution, sale or exhibition of audio or video music recordings; d) the publication, distribution or sale of music in print or machine-readable form; or e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcast undertakings and all satellite programming and broadcast network services."

The agreement specifies that the cultural exemption clause "is without prejudice to co-production agreements on cinematographic and audiovisual relationships to which Canada and one or more EFTA States are parties."

Where the commitments made by the Parties are concerned, the FTA-Ukraine and the FTA-CA invite States Parties to liberalize trade in services and investment through the creation of positive lists of commitments. These lists include the sectors, sub-sectors or activities that are subject to a certain degree of liberalization (market access and national treatment commitments), but for which restrictions are maintained. Several commitments have been made by the EFTA States. Of these States, Iceland has made the most commitments. They span several categories of cultural services, with the exception of audiovisual services. More specifically, Iceland has liberalized market access for *Entertainment services (including theatre, live bands and circus services)*, *Libraries, archives and museums and other cultural services*, as well as *News agency services*. Iceland has committed to granting all these services market access for modes of supply 1, 2, and 3, as well as national treatment, subject to the financial support that may be allocated specifically for local, regional or national activities. Liechtenstein, Norway and Switzerland have made commitments concerning market access and national treatment for modes of supply 1, 2 and 3 for *News agency services* only.

The Parties to the FTA-Ukraine and the FTA-CA also included measures in the lists of exemptions from most favoured nation (MFN) treatment. Iceland, Liechtenstein, Norway and Switzerland have entered several measures pertaining to audiovisual services. These measures are, for example, those adopted pursuant to the European Directive on Audiovisual Media Services, or as part of the MEDIA, EURIMAGES, NORDIC FILM or TV FUND programmes, or measures that arise from the implementation of co-production agreements.

3. Clauses on preferential treatment relating to culture

None of the agreements concluded by EFTA includes provisions that specifically grant preferential treatment to the cultural goods and services of the other Party, or to its artists or cultural professionals.

4. Status of electronic commerce

Six of the seven agreements concluded by EFTA are silent regarding electronic commerce. Only the FTA-CA includes provisions relating to this type of trade, essentially focusing on the establishment of a cooperation framework in order to stimulate the development of electronic commerce and thus reduce obstacles to it.

5. Other provisions relating to culture

Finally, all the agreements with the exception of the FTA-Canada include provisions related to intellectual property. It should be noted that Norway has entered a reservation regarding the "[c]ollective copyright and neighbouring rights' management systems; royalties, levies, grants and funds", the objective being "[t]o preserve and promote linguistic and cultural diversity in Norway".

Case study 4

Agreements concluded by Canada

This case study is based on the analysis of eight free trade agreements concluded by Canada since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between Canada and the EFTA States*⁶⁷ hereinafter the "FTA-EFTA"
- 2) The *Canada-Peru Free Trade Agreement*⁶⁸, hereinafter the "FTA-Peru"
- 3) The *Canada-Colombia Free Trade Agreement*⁶⁹, hereinafter the "FTA-Colombia"
- 4) The *Canada-Jordan Free Trade Agreement*⁷⁰ hereinafter the "FTA-Jordan"
- 5) The *Free Trade Agreement Between Canada and the Republic of Panama*⁷¹, hereinafter the "FTA-Panama"
- 6) The *Canada-Honduras Free Trade Agreement*⁷², hereinafter the "FTA-Honduras"
- 7) The *Free Trade Agreement between the Republic of Korea and Canada*⁷³, hereinafter the "FTA-Republic of Korea"
- 8) The *Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part*⁷⁴, hereinafter "CETA".

The scope of these agreements varies: the FTA-Jordan covers neither services nor investment; the agreement concluded with the EFTA States includes a chapter on services and investment, but it essentially establishes general cooperation rules and sets out the principles for future negotiations founded on non-discrimination and transparency. The six other agreements include commitments regarding services and investment, but lists of reservations are generally found in the annexes. Several agreements include a chapter on electronic commerce.

1. References to the Convention

Of the eight agreements listed above, only one explicitly refers to the Convention: CETA. In this agreement, the Parties affirm "their commitments as Parties to the UNESCO Convention" and recognize "that states have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support".

The seven other agreements do not include any such reference. Their Preambles do, however, refer to cultural policies and cultural diversity. The Parties state, for example, that they are "committed to co-operate in promoting recognition that States must maintain the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity". These provisions are based on certain of the Convention's objectives and principles.

2. Treatment of cultural goods and services

The agreements concluded by Canada all include a cultural exemption clause, with nearly identical wording. The classic wording is as follows: "nothing in this Agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article [xxx] (National Treatment and Market Access for Goods - Tariff Elimination)". The Agreement concluded with Honduras uses slightly distinct wording, as it concerns "a measure adopted or maintained by a Party with respect to a person engaged in a cultural industry".

67 Signed on 26 January 2008, entered into force on 1 July 2009.

68 Signed on 28 May 2008, entered into force on 1 August 2009.

69 Signed on 21 November 2008, entered into force on 15 November 2011.

70 Signed on 28 June 2009, entered into force on 1 October 2012.

71 Signed on 14 May 2010, entered into force on 1 April 2013.

72 Signed on 5 November 2013, entered into force on 1 November 2014.

73 Signed on 22 September 2014, entered into force on 1 January 2015.

74 Signed on 30 October 2016, not in force.

In addition, the agreements include a definition of the term "cultural industries", which:

"means persons engaged in any of the following activities: a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing; b) the production, distribution, sale or exhibition of film or video recordings; c) the production, distribution, sale or exhibition of audio or video music recordings; d) the publication, distribution or sale of music in print or machine-readable form; e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services."

The exemption therefore covers both cultural goods and cultural services. The FTA-Colombia features a much more extensive definition of "cultural industries", which also includes "f) production and presentation of performing arts; g) production and exhibition of visual arts; h) design, production, distribution and sale of handicrafts".

The FTA-EFTA includes an additional provision stating that the cultural exemption "[is] without prejudice to co-production agreements on cinematographic and audiovisual relationships to which Canada and one or more EFTA States are parties".

CETA warrants a number of additional comments. Although this agreement also includes a cultural exemption, this exemption differs from the classic cultural exemption in the other Canadian agreements in two ways. Firstly, the exemption does not apply to the whole agreement, but only to five chapters: chapters 9 (Subsidies), 10 (Investment), 11 (Cross-border Trade in Services), 14 (Domestic Regulation) and 21 (Government Procurement). Secondly, the impact of the cultural exemption clause is asymmetrical since its scope varies depending on the Party that invokes it. Whereas the Canadian cultural exemption covers "cultural industries" as previously defined, the European cultural exemption only covers "audiovisual services", a concept that is not defined in the agreement.

Moreover, several agreements concluded by Canada also authorize the use of the reservation method to allow Parties to maintain or adopt measures inconsistent with their commitments under these agreements. Certain States (Canada, Colombia, Honduras, Peru, Republic of Korea and the EU Member States) have used this technique to maintain certain measures pertaining to culture. Canada has entered reservations concerning three types of measures.

Firstly, and in most cases, the reservations refer to cultural goods or services that are not covered by the cultural exemption clause. For example, in the agreements concluded with Colombia, Honduras, Panama and the EU, Canada entered a reservation with regard to "examination services relating to the export and import of cultural property " and "museum services" (except for historical sites and buildings), to which the obligations relating to local presence are not applicable.

Secondly, some reservations refer to cultural goods and/or services that could be considered covered by the cultural exemption. It is difficult to find a logical explanation for this type of reservation, other than that the States Parties probably wanted to ensure that their ability to maintain or adopt certain non-conforming measures would not be dependent upon the interpretation of the "generic" or "ambiguous" terms of the definition of the "cultural industries" covered by the cultural exemption clause.

For example, the FTA-Panama includes reservations for the radiocommunications, telecommunications and publishing sectors, limiting the application to them of the commitments concerning national treatment and most favoured nation treatment, as well as the obligations pertaining to senior management and boards of directors.

Thirdly, several reservations are transversal in nature and therefore apply, in certain respects, to cultural goods and services, regardless of whether or not they are covered by the cultural exemption clause. As an example, Canada has indicated in several agreements that

"an investment subject to review under the Investment Canada Act may not be implemented unless the Minister responsible for the Investment Canada Act advises the applicant that the investment is likely to be of net benefit to Canada. Such a determination is made in accordance with six factors described in the Act, summarized as follows: [...] e. the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment" (see, for example, the FTA-Peru, the FTA-Colombia and the FTA-Republic of Korea).

3. Clauses on preferential treatment relating to culture

Seven of the eight agreements concluded by Canada do not include any provision that specifically grants preferential treatment to the cultural goods and services of the other Party, or to its artists or cultural professionals. However, the FTA-Republic of Korea differs by providing for the possible negotiation of an audiovisual co-production agreement between the two Parties. Indeed, it includes a clause on "cultural cooperation", the object of which is to "promote cultural exchanges and carry out joint initiatives in various cultural spheres, such as audiovisual coproductions". In this perspective, "the Parties agree to consider the negotiation of an audiovisual coproduction agreement", which would form "an integral part" of this FTA. Therefore, this agreement does not yet grant preferential treatment to certain cultural goods or services, but it could lead the Parties to consider such an option.

4. Status of electronic commerce

Seven of the eight agreements concluded by Canada include a chapter on electronic commerce, the provisions of which could have an impact on trade in cultural goods and services. In the FTA-Jordan, this chapter includes just one article that prohibits the application of customs duties on products delivered electronically. The chapter on electronic commerce in the FTA-Honduras requires the Parties not to impose customs duties on digital products transmitted electronically. Other provisions encourage cooperation between the Parties and transparency regarding electronic commerce.

Moreover, five agreements (FTA-Colombia, FTA-Panama, FTA-Peru, FTA-Republic of Korea and CETA) include a more substantial chapter on electronic commerce. Other than a few general statements about cooperation on various aspects relating to electronic commerce, this chapter includes a provision indicating that the chapters on cross-border trade in services, national treatment and market access for goods, investment, government procurement, financial services, telecommunications and exceptions and all the reservations made by the Parties, apply to trade conducted by electronic means. One provision indicates that "neither Party may apply customs duties, fees or charges on or in connection with the import or export of products by electronic means". It should be borne in mind, however, that the cultural industries covered by the cultural exemption (incorporated in all of the Canadian agreements, apart from the special case of the CETA, which instead includes an asymmetrical cultural exemption applicable to only five chapters – see above) are excluded from the application of the rules on electronic commerce. Nevertheless, caution is advised as the definition of "cultural industries" could be subject to diverging interpretations and might not cover all cultural products that could be traded electronically. Only after careful analysis of each of the cultural industries covered by the cultural exemption clause might the conclusion be reached that all digital cultural products have been completely excluded from the scope of these agreements.

5. Other provisions relating to culture

Canada, Colombia, the Republic of Korea, Honduras, Panama and Peru have entered reservations with regard to other aspects of culture. These reservations mainly cover measures related to persons belonging to minorities and indigenous communities.

Case study 5

Agreements concluded by the United States of America

This case study is based upon the analysis of five free trade agreements concluded by the United States of America since the adoption of the October 2005 Convention:

- 1) The *Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area*⁷⁵, hereinafter the "FTA-Oman"
- 2) The *United States-Peru Trade Promotion Agreement*⁷⁶, hereinafter the "FTA-Peru"
- 3) The *United States-Colombia Trade Promotion Agreement*⁷⁷, hereinafter the "FTA-Colombia"
- 4) The *United States-Panama Trade Promotion Agreement*⁷⁸, hereinafter the "FTA-Panama"
- 5) The *Free Trade Agreement between the United States of America and the Republic of Korea*⁷⁹, hereinafter the "FTA-Republic of Korea".

These agreements adopt a similar structure and incorporate the same kind of rules. Their form and content have not changed in over ten years, as the agreements concluded before 2005 are comparable to those concluded after 2005 (see, for example: *The United States-Australia Free Trade Agreement* and *The United States-Singapore Free Trade Agreement*). The agreements all adopt the negative list approach. As such, their provisions apply to all goods and services, unless expressly stated otherwise. They include approximately twenty chapters on trade in goods, trade in services, investment, electronic commerce and intellectual property, among other things. Lists of reservations are annexed to the agreements.

1. References to the Convention

As the United States of America is not a Party to the Convention, it is logical that the agreements concluded after the adoption of the Convention do not include any references to it, even where the agreements were negotiated with Parties to the Convention.

2. Treatment of cultural goods and services

These agreements authorize the use of the reservation method to allow Parties to maintain or adopt measures inconsistent with their commitments regarding the trade in services and investment. The Parties have used this technique to protect certain non-conforming measures regarding cultural goods or services. The list of existing measures of either Party that are not subject to certain obligations imposed by the rules in the agreement is found in Annex I. Annex II lists the different sectors, sub-sectors or specific activities for which the Parties can maintain existing measures, adopt new measures, or adopt more restrictive ones that are not subject to certain obligations imposed by the rules in the agreement. The measures found in these two annexes generally relate to commitments for national treatment, most favoured nation (MFN) treatment, local presence, performance requirements and senior management and boards of directors. In general, the United States of America has listed fewer measures and cultural sectors than the other Party to each agreement.

75 Signed on 19 January 2006, entered into force on 1 January 2009.

76 Signed on 12 April 2006, entered into force on 1 February 2009.

77 Signed on 22 November 2006, entered into force on 15 May 2012.

78 Signed on 28 June 2007, entered into force on 31 October 2012.

79 Signed on 30 June 2007, entered into force on 15 March 2012.

In Annex I of each agreement, the United States of America has reserved the right to restrict ownership of radio licences, thus limiting the application of its national treatment commitments regarding investment in the radiocommunications sector. In Annex II, it has generally reserved the right to adopt or maintain any measure granting differential treatment to nationals of other States due to the application of reciprocity measures or international agreements involving sharing of the radio spectrum, guaranteeing market access, or national treatment with respect to the one-way satellite transmission of direct-to-home (DTH) and direct broadcasting satellite (DBS) television services and digital audio services. In the case of the FTA-Oman, the United States of America has also indicated that it reserves the right to adopt or maintain any measure that accords equivalent treatment to persons of any country that limits ownership by persons of the United States in an enterprise engaged in the operation of a cable television system in that country. Finally, it should be borne in mind that the FTA-Republic of Korea includes an Annex II-A that incorporates the United States of America's obligations under Article XVI of the General Agreement on Trade in Services (hereinafter "GATS")⁸⁰ and improves market access for several audiovisual services by eliminating all restrictions regarding cross-border supply, consumption abroad and commercial presence.

The other Parties to these agreements have entered more reservations in a wider variety of sectors. Oman has recorded the fewest number of reservations pertaining to culture (only three in Annex I, namely for *Printing and publishing services*, *Retail photographic services*, and *Radio and television transmission services*; no reservations have been recorded in Annex II).

On the contrary, in Annexes I and II of the FTA-Republic of Korea, the Republic of Korea has included a large number of measures and sectors related to culture, notably in the fields of *Publishing*, *Audiovisual* (including imposing quotas in the radiocommunications and film projection sector, as well as the right to adopt or maintain any preferential coproduction arrangement for film or television productions) and cultural events. The Republic of Korea is also the only State to have recorded reservations regarding certain digital cultural services (in this case, digital audio and video services) in order to preserve its right to adopt any measure promoting the availability of Korean content.

As for the Latin American countries, Panama has only recorded reservations in Annex I (*Publishing*, *Telecommunication services*, *Transmission of radio and television programmes*). Peru has reserved the right not to grant MFN treatment with regard to all cultural industries. It also excluded government support for the promotion of cultural industries from the scope of the agreement and reserved its right to adopt or maintain screen quotas. Colombia has reserved similar rights⁸¹.

3. Clauses on preferential treatment relating to culture

The agreements concluded by the United States of America do not include any provision that specifically grants preferential treatment to the cultural goods and services of the other Party, its artists or cultural professionals. Moreover, Colombia and Peru have reserved the right to adopt or maintain any measure that grants preferential treatment to persons of any other country, pursuant to an agreement containing specific commitments regarding cultural cooperation or co-production in cultural industries and activities. The Republic of Korea has reserved the same type of right.

4. Status of electronic commerce

The agreements concluded by the United States of America include a chapter on electronic commerce, the provisions of which could have an impact on trade in cultural goods and services.

⁸⁰ Commitments recorded in the United States of America's Schedule of Specific Commitments, GATS/SC/90, GATS/SC/90/Suppl.1, GATS/SC/90/Suppl.2, GATS/SC/90/Suppl.3.

⁸¹ The reservations made by Colombia and Peru as part of Annexes I and II will be analysed in more detail in practical case studies 10 and 13 (part II).

In all the agreements, a provision at the beginning of the chapter indicates that services supplied electronically are still subject to the rules of the chapters on investment and services, as well as to the exceptions and non-conforming measures pertaining to those chapters. The provisions that follow include commitments specifically relating to digital products (prohibition of customs duties or other fees, and application of national treatment and MFN treatment rules). The distinction between a digital product and a traditional service provided electronically (covered by the chapters on investment and services, including all applicable exceptions and reservations) is, however, not clearly established. Indeed, the definition of digital products generally refers to products that have long been associated with the notion of "service".

As an example, for the purposes of the FTA-Republic of Korea, "digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically". Moreover, all five agreements concluded by the United States of America contain an additional provision specifying that the rules applicable to digital products do not apply to non-conforming measures on investment and services included in Annexes I and II. But once again, the distinction between a traditional service provided electronically and a digital product, and therefore the relationship between the chapter on electronic commerce and the non-conforming measures relating to the chapters on investment and services, remains ambiguous and could be subject to diverging interpretations. Finally, the FTA-Republic of Korea includes two other articles that could be of interest for the flow of digital cultural products, namely an article defining the principles of access to and use of the Internet and an article on cross-border information flows. The agreement concluded with Panama includes an article on cooperation regarding electronic commerce.

5. Other provisions relating to culture

The agreements concluded by the United States of America include other reservations linked to culture.

With the United States of America, all the agreements include the same reservation concerning "minorities" with regard to the cross-border supply of services and investment, pursuant to which the country "reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities, including corporations organized under the laws of the State of Alaska in accordance with the *Alaska Native Claims Settlement Act*". Peru, Panama, Colombia and the Republic of Korea have entered a similar reservation. The Republic of Korea has also recorded a reservation relating to the protection of its cultural heritage ("the right to adopt or maintain any measure with respect to the conservation and restoration of cultural heritage and properties, including the excavation, appraisal, or dealing of cultural heritage and properties") and Peru has entered a reservation relating to archaeological activities ("archaeological research projects headed by foreign archaeologists must employ a Peruvian archaeologist registered with the National Registry of Archaeologists as scientific co-director or sub-director of the project. The co-director and sub-director shall participate in all aspects of the project in the field and in the office").

Finally, the five agreements concluded by the United States of America include a chapter on intellectual property.

Case study 6

Agreements concluded by China

This case study is based on the analysis of the eight free trade agreements concluded by China since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between the Government of the People's Rep. of China and the Government of the Rep. of Chile*⁸², hereinafter the "FTA-Chile (goods)"
- 2) The *Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN*⁸³, hereinafter the "FTA-ASEAN"
- 3) The *Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand*⁸⁴, hereinafter the "FTA-NZ"
- 4) The *Supplementary Agreement on Trade in Services of the Free Trade Agreement between the Government of the Republic of Chile and the Government of the People's Republic of China*⁸⁵, hereinafter the "FTA-Chile (services)"
- 5) The *Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru*⁸⁶, hereinafter the "FTA-Peru"
- 6) The *Tratado de Libre Comercio entre el Gobierno de la República de Costa Rica y el Gobierno de la República Popular China*⁸⁷, hereinafter the "FTA-CR"
- 7) The *Free Trade Agreement between the Government of Iceland and the Government of the People's Republic of China*⁸⁸, hereinafter the "FTA-Iceland"
- 8) The *Free Trade Agreement between the Swiss Confederation and the People's Republic of China*⁸⁹, hereinafter the "FTA-Switzerland".

All the agreements cover all goods in general, subject to specific exclusions. In terms of services, the agreements adopt the same approach as the General Agreement on Trade in Services (GATS) and use positive lists of commitments for market access and national treatment. Several agreements also cover intellectual property.

1. References to the Convention

None of the agreements concluded by China since 2005 contains any explicit reference to the Convention.

2. Treatment of cultural goods and services

The FTA-NZ contains a cultural exemption clause allowing the Parties to exclude several categories of cultural goods or services from the scope of application of the agreement, including digital cultural products⁹⁰.

Concerning the liberalization of services, the agreements adopt the same approach as the one used by GATS. In addition, all the agreements invite Parties to create lists of specific commitments for the cross-border supply of services and the establishment of a commercial presence on their territory, with the exception of the FTA-Chile (goods), which only covers trade in goods. These lists specify which sectors, sub-sectors or activities are subject to liberalization (market access and national treatment commitments) and describe any restrictions that are maintained. The Parties have included certain cultural sectors in these lists and, as necessary,

⁸² Signed on 18 November 2005, entered into force on 1 October 2006.

⁸³ Signed on 14 January 2007, entered into force on 1 July 2007.

⁸⁴ Signed on 7 April 2008, entered into force on 1 October 2008.

⁸⁵ Signed on 13 April 2008, entered into force on 1 August 2010.

⁸⁶ Signed on 28 April 2009, entered into force on 1 March 2010.

⁸⁷ Signed on 8 April 2010, entered into force on 1 August 2011.

⁸⁸ Signed on 15 April 2013, entered into force on 1 July 2014.

⁸⁹ Signed on 6 July 2013, entered into force on 1 July 2014.

⁹⁰ This cultural exemption will be presented in more detail in case study 8 (part II).

limited the scope of their commitments. For the purposes of this case study, only China's commitments are analysed.

China's commitments are relatively similar from one agreement to the next. Firstly, several agreements include a limitation entered by China on national treatment as part of its horizontal commitments with regard to the establishment of a commercial presence (mode 3). This limitation aims to exclude from all China's commitments any subsidy programme that benefits domestic suppliers of audiovisual services (FTA-ASEAN, FTA-NZ, FTA-Chile (services) and FTA-CR).

In terms of specific commitments, some agreements do not contain any commitment by China with regard to cultural services. In other cases (FTA-NZ, FTA-Peru, FTA-CR, FTA-Iceland and FTA-Switzerland), China makes limited commitments in certain sectors of cultural services. They involve *Videos, including entertainment software and distribution services, sound recording distribution services*, for which China liberalizes modes 1 (cross-border supply) and 2 (consumption abroad). China nevertheless maintains restrictions with regard to mode 3 (commercial presence), specifying that foreign services suppliers may establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of cultural products. For this same sector, China commits to apply national treatment for modes 1, 2 and 3.

Under its additional commitments, China allows the import of motion pictures for theatrical release on a revenue-sharing basis, up to a maximum number of 20 per year. Lastly, concerning *Cinema theatre services*, China liberalizes modes 1 and 2 but restricts supply by mode 3, indicating that foreign investment cannot exceed 49%. National treatment is also granted for modes 1, 2 and 3. For all these services, no commitment is undertaken regarding mode 4 (presence of natural persons).

Under the FTA-CR, China has also made commitments regarding *Recreational, cultural and sporting services*. Market access and national treatment have been liberalized for modes 1, 2 and 3, however, no commitment is made regarding mode 4.

3. Clauses on preferential treatment relating to culture

None of the agreements concluded by China includes provisions that specifically grant preferential treatment to the cultural goods and services of the other Party, or to its artists or cultural professionals.

4. Status of electronic commerce

None of the agreements concluded by China includes provisions that specifically apply to electronic commerce.

5. Other provisions relating to culture

The FTA-Chile (goods) and the FTA-Peru contain one or more provisions relating to cultural cooperation, aiming in particular to encourage a dialogue on cultural policies and the promotion of local culture, and to encourage cooperation in the audiovisual sector, including through the conclusion of co-production agreements. The FTA-Peru also specifies, in its chapter on investment, that Parties have the right to adopt or maintain any measure that grants differential treatment to "socially or economically disadvantaged minorities and ethnic groups". This provision could affect the supply of certain cultural services. The FTA-NZ contains an exception allowing Parties to take any measure necessary to restrict the illicit import of cultural property. The FTA-CR incorporates several references to culture, for example in its general aims and in the specific objectives and provisions on cooperation, promotion and enhancement of trade relations.

Lastly, several agreements contain references or provisions relating to the protection of intellectual property (FTA-Chile (goods), FTA-CR, FTA-Switzerland, FTA-NZ, FTA-Peru and FTA-Iceland).

Case study 7

Agreements concluded by the Republic of Korea

This case study is based on the analysis of the five free trade agreements concluded by the Republic of Korea since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*⁹¹, hereinafter the "FTA-EU", which is supplemented by a protocol on cultural cooperation (hereinafter "PCC")
- 2) The *Free Trade Agreement between the United States of America and the Republic of Korea*⁹², hereinafter the "FTA-USA"
- 3) The *Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India*⁹³, hereinafter the "FTA-India"
- 4) The *Free Trade Agreement between the Government of the Republic of Korea and the Government of Australia*⁹⁴, hereinafter the "FTA-Australia"
- 5) The *Free Trade Agreement between the Republic of Korea and Canada*⁹⁵, hereinafter the "FTA-Canada".

These agreements adopt very different approaches. Firstly, "cultural industries" are excluded in the FTA-Canada but are covered in the FTA-USA, the FTA-India and the FTA-Australia. The FTA-EU excludes "audiovisual services" rather than "cultural industries" from its scope of application. Through its PCC, this last agreement also grants its Parties preferential treatment. More specifically, the PCC allows the Parties to establish a cooperation framework in the field of culture. The other agreements do not contain any PCC, but the FTA-India, the FTA-Australia and the FTA-Canada devote certain provisions to audiovisual co-production. Lastly, regarding the liberalization of trade in services, investment and electronic commerce, the Parties to the FTA-EU and the FTA-India have chosen the positive lists of commitments method (the same approach used in the General Agreement on Trade in Services (GATS)), whereas the Parties to the FTA-USA and the FTA-Canada have opted to use negative lists and reservations. Adopting a more atypical model, the FTA-India uses the positive list approach regarding trade in services and the negative list approach for its commitments relating to investment.

1. References to the Convention

The EU agreements that are supplemented by a PCC, including the FTA-EU, have the particular feature of containing one or more explicit references to the Convention⁹⁶. The FTA-EU PCC mentions the will of the Parties to implement the Convention and to cooperate within the framework of its implementation, building upon its principles and taking actions in line with its provisions. The other agreements do not expressly refer to the Convention, its objectives or its principles, with the exception of the Preamble to the FTA-Canada, which includes a reference to cultural cooperation, cultural policies and the diversity of cultural expressions.

2. Treatment of cultural goods and services

The FTA-EU excludes audiovisual services from the scope of the sections devoted to the cross-border supply of services and the establishment of a commercial presence on a State's territory. The concept of "audiovisual services", however, is not defined. The FTA-EU specifies that this exclusion is without prejudice to the rights and obligations derived from the PCC. It also excludes subsidies from the scope of the chapter on trade in services, establishment and electronic commerce.

⁹¹ Signed on 6 October 2010, entered into force on 1 July 2011.

⁹² Signed on 30 June 2007, entered into force on 15 March 2012.

⁹³ Signed on 7 August 2009, entered into force on 1 January 2010.

⁹⁴ Signed on 8 April 2014, entered into force on 12 December 2014.

⁹⁵ Signed on 22 September 2014, entered into force on 1 January 2015.

⁹⁶ See case study 1 (part II).

As for the FTA-Canada, it contains a cultural exemption clause excluding measures relating to cultural industries from its scope of application, except as specifically provided in two articles on cultural cooperation and the elimination of customs duties. The term "cultural industries" means

"persons engaged in any of the following activities: (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution, or sale of music in print or machine-readable form; (e) radio communications in which the transmissions are intended for direct reception by the general public; (f) radio, television and cable broadcasting undertakings; or (g) satellite programming and broadcast network services".

For its commitments regarding cross-border trade in services and investment, the Republic of Korea uses two types of approach. Under the first approach, the Parties are invited to draw up positive lists of specific commitments through the registration of sectors, sub-sectors and activities that will be subject to a certain degree of liberalization (market access and national treatment commitments), as well as specifying the restrictions that are maintained. The FTA-EU and the FTA-India use this approach, but the actual commitments undertaken in the field of culture differ from one agreement to the other. In the case of the FTA-EU, and given that audiovisual services are excluded, the Republic of Korea uses these lists to make commitments with regard to *Entertainment services* only (musical, theatre, live bands, opera, etc.). Although no market access commitment is made for modes 1 (cross-border supply) and 4 (presence of natural persons), modes 2 (consumption abroad) and 3 (commercial presence) are entirely liberalized. Concerning national treatment, the Republic of Korea does not include any commitments for modes 1, 2 and 4, but entirely liberalizes mode 3. It should also be emphasized that in the sector of *Motion picture promotion, advertising or post-production services*, the Republic of Korea uses a list of exemptions from most-favoured nation (MFN) treatment in order to reserve "the right to adopt or maintain any measure that accords differential treatment to persons of other countries" concerning the supply of such services.

With the FTA-India, the Republic of Korea has committed to the same degree of liberalization for *Entertainment services* as in the FTA-EU. It also liberalizes market access for *Motion picture and video tape production and distribution services* via modes 2 and 3, and national treatment is guaranteed for modes 1, 2 and 3. Concerning its commitments with regard to investment, the negative commitments lists method led the Republic of Korea to enter several reservations related to culture. They primarily concern the *Publishing of periodicals and newspapers*, the *Production, distribution and projection of motion pictures and video tapes*, as well as *Library and museum services*. These reservations generally relate to the application of rules on national treatment and performance requirements.

Concerning the three other agreements (FTA-USA, FTA-Australia and FTA-Canada), the Republic of Korea has used reservations to preserve its right to maintain or adopt non-conforming measures in relation to certain obligations (generally obligations on national treatment, MFN treatment, local presence, performance requirements and senior management and boards of directors) arising from these agreements with regard to the cross-border supply of services and investment. In terms of culture, the Republic of Korea has included numerous reservations that are difficult to summarize in this case study.

In particular, they relate to:

- *Publication distribution services* (non-application of national treatment),
- *Newspaper publishing services* (non-application of provisions relating to national treatment, senior management and boards of directors, and local presence),
- *Performance services* (non-application of national treatment),

- *Periodical publishing services* (non-application of provisions relating to national treatment, market access, senior management and boards of directors and local presence),
- *Broadcasting services*, which are subject to quotas (non-application of provisions relating to national treatment, MFN treatment, performance requirements, market access, senior management and boards of directors and local presence),
- *Motion picture projection services*, which are also subject to quotas (non-application of provisions relating to performance requirements and market access),
- *Motion picture promotion, advertising or post-production services* (non-application of provisions relating to national treatment, MFN treatment, performance requirements and local presence).

Furthermore, the Republic of Korea has entered certain reservations for *Audiovisual services* in general, as well as for *Digital audio and video services* (non-application of rules relating to national treatment, MFN treatment, performance requirements and local presence). These reservations aim in particular to preserve the Republic of Korea's right to adopt any measures to promote local content.

3. Clauses on preferential treatment relating to culture (PCC)

With the FTA-USA, no provision specifically grants preferential treatment to Korean cultural goods and services, or to Korean artists and cultural professionals.

As a PCC is annexed to the FTA-EU, this agreement uses a different approach to preferential treatment. Indeed, the FTA-EU PCC pursues several objectives, including reinforcing the capacities and independence of the Parties' cultural industries, promoting local/regional cultural content, and recognizing, protecting and promoting cultural diversity. Without prejudice to the other provisions of the FTA-EU, the PCC also defines a framework to facilitate exchanges of cultural goods and services, including in the audiovisual sector. While preserving and further developing their capacity to elaborate and implement their cultural policies with a view to protecting and promoting cultural diversity, the Parties endeavour to cooperate with the aim of improving the conditions governing their exchanges of cultural activities, goods and services. The PCC also provides for preferential treatment to be granted for the benefit of each of the Parties. This preferential treatment includes a first component on the entry and temporary stay of artists and other cultural professionals. A second component covers the negotiation of new co-production agreements and the implementation of existing agreements. Lastly, a third component concerns preferential trade access for audiovisual works. In this respect, co-produced audiovisual works are entitled to benefit from the EU's scheme for the promotion of local/regional cultural content by qualifying as "European works" in accordance with Article 1 n) i) of Directive 89/552/EEC, "Television without Frontiers". Conversely, co-produced audiovisual works are entitled to benefit from Korean schemes for the promotion of local/regional cultural content. Cooperation between the Parties in the audiovisual sector is also encouraged through the organization of festivals, seminars or similar initiatives, as well as through cooperation in the field of broadcasting. The PCC also includes additional provisions relative to cooperation in the audiovisual sector, such as the temporary import of material and equipment for the purpose of shooting audiovisual works. Furthermore, the cultural cooperation established by the PCC also concerns sectors other than the audiovisual sector, notably the performing arts and publications. Lastly, the PCC establishes a Committee on Cultural Cooperation that is responsible for overseeing the implementation of the protocol and settling any disputes.

Although no PCC is attached to the FTA-India, the FTA-Australia or the FTA-Canada, these agreements nevertheless contain provisions on cultural cooperation and audiovisual co-production that are directly incorporated into the main agreement. The FTA-Canada simply states that the Parties agree to promote cultural cooperation and to consider the negotiation of an audiovisual co-production agreement. It therefore does not currently grant preferential treatment.

The two other agreements mentioned go further. Firstly, the FTA-India contains an entire chapter devoted to audiovisual co-production, which provides for the negotiation of an audiovisual co-production agreement and allows preferential treatment to be granted to works co-produced by the Parties under any co-production agreement. The works thus co-produced will then be considered as equivalent to national works and may benefit from the same advantages (for example, in terms of public funding). In a chapter devoted to bilateral cooperation, the FTA-India also mentions the Parties' intention to develop other forms of cooperation in the audiovisual sector.

As for the FTA-Australia, one provision in the chapter on the cross-border supply of services covers audiovisual co-production and refers to an annex containing 22 articles entirely devoted to this question. This annex is in practice a co-production agreement and allows preferential treatment to be granted to co-produced works, which thus benefit from the same advantages that are normally accorded to works of national origin. The agreement also provides for more flexible immigration rules for artists and cultural professionals involved in co-productions, as well as more flexible import rules for the equipment required for these projects.

4. Status of electronic commerce

With the exception of FTA-India, all the agreements concluded by the Republic of Korea incorporate provisions that specifically deal with electronic commerce. Their content, however, varies. Furthermore, if the cultural exemption clauses incorporated in the FTA-EU and the FTA-Canada are taken into account, it becomes difficult to draw general conclusions about the effect the Korean provisions on electronic commerce might have on the Parties' cultural goods and services. Two examples are selected here to illustrate various scenarios.

In the case of the FTA-EU, the Parties agree to promote the development of electronic commerce between them, in particular by cooperating on the issues raised by this type of trade. Furthermore, the Parties agree not to impose customs duties on deliveries by electronic means. Bearing in mind that the Parties have excluded audiovisual services from the scope of application of the sections on the cross-border supply of services and the establishment of a commercial presence, those services will therefore not be covered under the Parties' commitments regarding electronic commerce. The concept of "deliveries by electronic means", however, is not defined. It therefore remains unclear whether the term "delivery" applies only to services that can be qualified as "traditional", in which case the exclusion of audiovisual services would apply to electronic commerce, or whether the transmission of digital cultural products, which may not be covered by the exclusion of "audiovisual services", might be subject to the commitment not to impose customs duties on electronic deliveries.

The provisions of the FTA-USA relating to electronic commerce, more binding than those of the FTA-EU, are also characterized by ambiguities. A first provision indicates that services delivered electronically remain subject to the obligations set out in the chapters on the cross-border supply of services and the establishment of a commercial presence, and to the related exceptions and non-conforming measures. Another provision then establishes more binding commitments for digital products. The distinction between a service delivered electronically, under the first provision, and a "digital product", under the second, is however not clearly defined. Indeed, the definition of digital products refers to products that are traditionally associated with the concept of "service" ("digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically"). Concerning the commitments relating to digital products, the agreement prohibits the imposition of customs duties or other charges and requires the Parties to grant them national treatment and MFN treatment. Lastly, the agreement specifies that these commitments regarding digital products do not apply to measures adopted or maintained in conformity with the chapters on the cross-border supply of services and the establishment of a commercial presence. The chapters on electronic commerce included in the FTA-Australia and

the FTA-Canada adopt a similar model. The FTA-Canada nevertheless includes a cultural exemption that applies to cultural industries and significantly reduces the scope of that chapter with respect to the Parties' cultural goods and services.

5. Other provisions relating to culture

In the FTA-USA, the FTA-Australia, the FTA-India and the FTA-Canada, the Republic of Korea has reserved the right to adopt or maintain any measure that accords rights or preferences to socially or economically disadvantaged groups, such as the disabled, persons who have rendered distinguished services to the State, and ethnic minorities. It also reserves the right to adopt or maintain any measures with respect to the conservation and restoration of cultural heritage. The FTA-EU does not contain other references to considerations of a cultural nature.

Lastly, all five agreements include a chapter on intellectual property.

Case study 8

Agreements concluded by ASEAN

This case study is based on the analysis of four free trade agreements concluded by the Association of Southeast Asian Nations (hereinafter "ASEAN")⁹⁷ since the adoption of the Convention in October 2005. Three of these agreements were concluded between ASEAN and China and are grouped under a single title for the purposes of this case study. The other agreement was concluded between ASEAN, Australia and New Zealand. As such, the agreements covered by this case are:

- 1) *The Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN* and two other agreements⁹⁸, hereinafter the "FTA-China"
- 2) *The Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area*⁹⁹, hereinafter the "FTA-AANZ".

These agreements cover not only goods, but also services and certain aspects relating to investment. Liberalization of the services and investment sectors is achieved through the positive list of commitments method (thus adopting the same approach as the General Agreement on Trade in Services (GATS)). The FTA-AANZ also includes a cultural exemption clause whose scope is relatively broad and which includes digital products.

1. References to the Convention

The agreements do not contain any explicit reference to the Convention, cultural diversity or cultural cooperation.

2. Treatment of cultural goods and services

The FTA-AANZ contains a cultural exemption clause, which excludes a vast category of cultural goods and services from the scope of the agreement. This exemption can be found in the chapter on general exceptions and therefore applies to all chapters of the agreement. The cultural exemption reads as follows:

"[...] subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services or investment, nothing in these Chapters shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value".

A footnote specifies that the

“creative arts” include the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital

⁹⁷ The member States of the Association of Southeast Asian Nations are: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

⁹⁸ Signed on 14 January 2007, entered force on 1 July 2007. Other than this agreement, two other agreements are taken into account in this case study: the *Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the People's Republic of China and the Association of Southeast Asian Nations*, signed on 29 November 2004 and entered into force on 1 January 2005; and the *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations*, signed on 18 August 2009.

⁹⁹ Signed on 27 February 2009, entered into force on 1 January 2010.

interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities".

The scope of this cultural exemption is therefore relatively broad and even extends to digital cultural products.

Concerning the Parties' commitments on the cross-border supply of services and the establishment of a commercial presence on their territory, the two agreements call upon the Parties to establish lists of specific commitments by noting the sectors, sub-sectors and activities that will be subject to a certain degree of liberalization (market access and national treatment commitments), but for which restrictions may be maintained.

In the case of FTA-AANZ, it is interesting to note that despite the cultural exemption described above, certain ASEAN countries have made commitments in the cultural sector. Among them are a number of States that are not Parties to the Convention and that have undertaken limited commitments, including for *Film, video or sound recordings production, distribution and/or projection/broadcasting services* (Myanmar, Malaysia, Singapore and Thailand). Of the Parties to the Convention (Cambodia, Indonesia, Lao People's Democratic Republic and Viet Nam), only Viet Nam and Cambodia have made commitments. For Viet Nam, these concern *Motion picture production, distribution and projection services*. Only mode 3 is liberalized, subject to restrictions for market access but not for national treatment. Viet Nam has also made commitments for *Entertainment services (including theatre, live bands and circus services)*, also for mode 3, with restrictions for market access but not for national treatment. Moreover, Viet Nam has excluded its subsidy programmes, including those related to audiovisual services, from all commitments relating to mode 3. Lastly, it is worth noting that Viet Nam's commitments under the FTA-China are nearly identical. As for Cambodia, its commitments are limited to *Cinema theatre services, including cinema projection services*, for which it has liberalized market access and national treatment for modes 1, 2 and 3.

3. Clauses on preferential treatment relating to culture

None of the agreements analysed includes provisions that specifically grant preferential treatment to the cultural goods and services of the Parties, their artists or cultural professionals.

4. Status of electronic commerce

Only the FTA-AANZ contains a chapter on electronic commerce. The commitments it creates are not really binding. Article 1 (*Objectives*) specifies that: "The objectives of this Chapter are to: a. promote electronic commerce among the Parties; b. enhance co-operation among the Parties regarding development of electronic commerce; and c. promote the wider use of electronic commerce globally". Articles 2 to 9 then cover various areas of cooperation, particularly with regard to transparency, regulatory frameworks, consumer protection and data protection. Article 10 specifies that the agreement's general dispute settlement mechanism cannot apply to disputes arising under this chapter. It should also be noted that the notion of "creative arts", as defined in the context of the cultural exemption described above, includes, among other things, "creative on-line content, digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions". These digital cultural expressions are therefore excluded from the scope of the agreement.

5. Other provisions relating to culture

The FTA-AANZ contains a chapter on intellectual property.

Case study 9

Agreements concluded by New Zealand

This case study is based on the analysis of the three free trade agreements concluded by New Zealand since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand*¹⁰⁰, hereinafter the "FTA-China"
- 2) The *Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area*¹⁰¹, hereinafter the "FTA-AANZ"
- 3) The *New Zealand – Hong Kong, China Closer Economic Partnership Agreement*¹⁰², hereinafter the "FTA-HK".

These agreements use varying approaches. They all cover not only goods, but also services and investment. However, under the FTA-China and the FTA-AANZ, liberalization is achieved through the positive lists of commitments method (adopting the same approach as the General Agreement on Trade in Services (GATS)), whereas Parties to the FTA-HK have preferred the reservations method (negative lists of commitments). The three agreements also include cultural exemption clauses that are similar in scope and include digital products.

1. References to the Convention

The three agreements do not contain any explicit reference to the Convention, cultural diversity or cultural cooperation.

2. Treatment of cultural goods and services

The three agreements contain a cultural exemption clause drafted in similar terms, which excludes a vast category of cultural goods and services. In all the agreements, the exemption can be found in the chapter on general exceptions and therefore applies to all chapters of the agreements. The FTA-AANZ also states that this exemption specifically applies to the chapters on trade in services and investment. For example, one of the exemptions reads as follows:

"[...] subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services or investment, nothing in these Chapters shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value".

A footnote specifies that:

"“Creative arts” include the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities".

¹⁰⁰ Signed on 7 April 2008, entered into force on 10 January 2008.

¹⁰¹ Signed on 27 February 2009, entered into force on 1 January 2010.

¹⁰² Signed on 29 March 2010, entered into force on 1 January 2011.

The scope of this cultural exemption is therefore relatively broad and even extends to digital cultural products.

Concerning the Parties' commitments on the cross-border supply of services and the establishment of a commercial presence on their territory, the FTA-China and the FTA-AANZ call upon the Parties to establish lists of specific commitments by noting the sectors, sub-sectors and activities that will be subject to a certain degree of liberalization (market access and national treatment commitments), but for which restrictions may be maintained. It is interesting to note that despite the cultural exemption described above, New Zealand has made a few commitments with regard to culture in both of these agreements.

These commitments concern *Audiovisual Services – Production, distribution, exhibition and broadcasting of audiovisual works*. For these services, New Zealand has fully liberalized market access for modes 1, 2 and 3. Regarding the application of national treatment for modes 1 and 3, New Zealand specified that

"[t]he Broadcasting Commission is directed by the Government, pursuant to the Broadcasting Act 1989, to allocate a minimum of 6 per cent of its budget to Maori programming. From 1995 all public funding for Maori broadcasting will be controlled by Te Reo Whakapuaki Iirangi (Maori Broadcasting Funding Agency). Government assistance to the film industry through the New Zealand Film Commission is limited to New Zealand films as defined in Section 18 of the New Zealand Film Commission Act 1978".

Therefore, the relationship between these commitments and the cultural exemption remains ambiguous and could be subject to diverging interpretations regarding New Zealand's right, on the basis of the exemption, to adopt measures that are contrary to the cultural commitments it has included in its list of commitments.

The FTA-HK uses the opposite approach to liberalize trade in services and investment. All sectors are thus subject to liberalization, and the Parties can enter reservations to maintain non-conforming measures regarding trade in services and investment. New Zealand has entered reservations with a relatively broad scope that cover several audiovisual services (film, television and radio). These reservations effectively exclude this sector from the application of market access and national treatment commitments. One of the aims was to preserve the ability to promote local content. It also preserved New Zealand's right to adopt and implement co-production agreements.

3. Clauses on preferential treatment relating to culture

The FTA-China, the FTA-AANZ and the FTA-HK do not contain any provisions that specifically grant preferential treatment to the cultural goods and services of the Parties, or to their artists and cultural professionals.

4. Status of electronic commerce

The FTA-China does not contain any provision that specifically deals with electronic commerce. Each of the other two agreements includes a chapter that covers this type of trade, but their commitments are not really binding. For example, one article sets out the objectives of the chapter, such as the promotion of electronic commerce, cooperation between the Parties concerning the development of this type of commerce, and the maintenance of an open digital commercial environment. It should also be noted that the notion of "creative arts", as defined in the context of the cultural exemption described above, includes, among other things, "creative on-line content, digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions". These digital cultural expressions are therefore excluded from the scope of the agreements.

5. Other provisions relating to culture

The three agreements contain provisions relating to intellectual property or references to this subject. Under the FTA-HK, New Zealand made a reservation relative to *Libraries, archives and museums*, making national treatment, MFN treatment and market access rules inapplicable. Under this agreement, New Zealand also reserved the right to adopt measures that grant more favourable treatment to the Maori. Lastly, the FTA-China contains an exception for measures necessary to restrict the illicit import of cultural property, which refers to the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970.

Case study 10

Agreements concluded by Australia

This case study is based on the analysis of three free trade agreements concluded by Australia since the adoption of the Convention in October 2005:

- 1) The *Australia-Chile Free Trade Agreement*¹⁰³, hereinafter the "FTA-Chile"
- 2) The *Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area*¹⁰⁴, hereinafter the "FTA-AANZ"
- 3) The *Free Trade Agreement between the Government of the Republic of Korea and the Government of Australia*¹⁰⁵, hereinafter the "FTA-Republic of Korea".

These agreements cover not only goods, but also services, investment and electronic commerce. In the case of the FTA-Chile and the FTA-Republic of Korea, the Parties have opted to use negative lists of commitments (or reservations). Consequently, all services are subject to liberalisation, unless explicitly excluded. Conversely, the FTA-AANZ uses the positive lists of commitments method, thus adopting the same approach as that of the General Agreement on Trade in Services (GATS). The FTA-AANZ also includes a cultural exemption clause whose scope is relatively broad and includes digital products.

1. References to the Convention

The three agreements concluded by Australia do not contain any explicit reference to the Convention, cultural diversity or cultural cooperation.

2. Treatment of cultural goods and services

The FTA-AANZ contains a cultural exemption clause that excludes a vast category of cultural goods and services. The exemption can be found in the chapter on general exceptions and therefore applies to all chapters of the agreement. The cultural exemption reads as follows:

"[...] subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services or investment, nothing in these Chapters shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value".

A footnote specifies that:

"“creative arts” include the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities".

The scope of this cultural exemption is therefore relatively broad and even extends to digital cultural products.

¹⁰³ Signed on 30 July 2008, entered into force on 3 June 2009.

¹⁰⁴ Signed on 27 February 2009, entered into force on 1 January 2010.

¹⁰⁵ Signed on 8 April 2014, entered into force on 12 December 2014.

As to commitments on the cross-border supply of services and the establishment of a commercial presence on a State's territory, the FTA-AANZ calls upon the Parties to establish lists of specific commitments noting the sectors, sub-sectors and activities that will be subject to a certain degree of liberalization (market access and national treatment commitments), but for which restrictions may be maintained. It is interesting to note that despite the cultural exemption in this agreement, certain Parties to the agreement have still made a number of commitments with regard to culture. In comparison, Australia has made relatively few commitments, liberalizing only *News agency services*, in respect to which market access and national treatment are guaranteed for modes of supply 1, 2 and 3.

In the case of the FTA-Chile and the FTA-Republic of Korea, Australia was able to enter reservations in order to maintain measures not in conformity with its commitments on trade in services and investment. These reservations may cover existing measures or new, more restrictive measures that are inconsistent with the trade obligations included in the relevant chapters of the agreement. The reservations generally attach to obligations on national treatment, most favoured nation (MFN) treatment, market access, local presence, performance requirements and senior management and boards of directors.

In this regard, it is interesting to note that although Australia has not made any reservations with regard to existing measures, it has entered relatively broad reservations concerning the potential adoption of new measures. In both the FTA-Chile and the FTA-Republic of Korea, these reservations cover *Audiovisual and other cultural services* (such as *Museums, archives and libraries and entertainment services*), for which national treatment, MFN treatment, market access, local presence and performance requirements rules are not applicable. Australia therefore reserves the right to adopt any type of measure with respect to these services. In the case of the FTA-Republic of Korea, Australia's reservations affirm the country's right to adopt quotas for local content, to award subsidies designed to support investment in Australian cultural sectors and to conclude preferential co-production agreements in the audiovisual sector.

A vast range of categories of audiovisual and other cultural services is therefore excluded from the scope of application of the three Australian agreements examined in this study.

3. Clauses on preferential treatment relating to culture

The FTA-Chile and the FTA-AANZ do not contain any provisions that specifically grant preferential treatment to the cultural goods and services of the Parties, or to their artists and cultural professionals.

The FTA-Republic of Korea is different in that one article in the chapter on cross-border trade in services refers to an annex comprising 22 articles entirely devoted to audiovisual co-production. Audiovisual works that are co-produced in accordance with the provisions of this annex are not subject to the rules on national treatment, MFN treatment and market access that normally apply to trade in services. Moreover, co-produced works are granted preferential treatment and benefit from the same advantages that are normally accorded to works of national origin, including subsidies, tax incentives and other forms of financial benefits. The annex also provides for more flexible immigration rules for artists and cultural professionals of the Parties involved in co-productions, as well as more flexible import rules for the equipment required for these projects. Other articles cover various procedural aspects as well as the Parties' financial contribution to co-produced works. For the purposes of this annex, an "audiovisual co-production" is

"an audiovisual work including films, animations, broadcasting programmes and digital format productions made by one or more co-producers of one Party in cooperation with one or more co-producers of the other Party (or in the case of a third country co-production, with a third country co-producer) which is approved by the competent authorities of each Party, in consultation".

4. Status of electronic commerce

The FTA-AANZ and the FTA-Chile include a chapter on electronic commerce. The commitments in it have little binding force, and the objectives are essentially the promotion of electronic commerce, and cooperation between the Parties in this area. Cooperation may cover various aspects of electronic commerce, such as transparency, the development of regulatory frameworks, consumer protection and data privacy.

Although it also contains a few provisions regarding cooperation, the FTA-Chile goes further. The agreement specifies that the measures affecting the electronic supply of a service are subject to the rules of the chapters on cross-border trade in services and investment, subject to the exceptions and limitations specified in the Parties' lists of commitments. Furthermore, the Parties commit not to impose customs duties on electronic transmissions.

It should also be noted that the annex on audiovisual co-production found in the FTA-Republic of Korea contains several references to digital technologies. Firstly, the Parties recognize the evolving nature of the audiovisual sector, especially concerning the role of technology. As such, they agree that "[t]he competent authorities shall review the operation of this Annex as required and make any proposals considered necessary for any modification thereof". Secondly, the audiovisual co-productions covered by this annex include, among other things, "digital format productions made by one or more co-producers of one Party in cooperation with one or more co-producers of the other Party".

5. Other provisions relating to culture

The FTA-Chile and the FTA-Republic of Korea contain Australian reservations that exclude any measure according rights or preferences to indigenous peoples from its national treatment commitments. As the FTA-AANZ is based instead on the positive lists of commitments system, the inclusion of such reservations probably did not appear to be necessary.

Lastly, the three agreements contain a chapter on intellectual property.

Case study 11

Agreements concluded by Chile

This case study is based on the analysis of six free trade agreements concluded by Chile since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between the Government of the People's Rep. of China and the Government of the Rep. of Chile*¹⁰⁶, hereinafter the "FTA-China (goods)"
- 2) The *Preferential Trade Agreement between the Republic of India and the Republic of Chile*¹⁰⁷, hereinafter the "FTA-India"
- 3) The *Acuerdo de Libre Comercio entre el Gobierno de la República de Chile y el Gobierno de la República del Perú*¹⁰⁸, hereinafter the "FTA-Peru"
- 4) The *Acuerdo de Libre Comercio entre Chile y Colombia, el cual constituye un protocolo adicional al ACE 24*¹⁰⁹, hereinafter the "FTA-Colombia"
- 5) The *Supplementary Agreement on Trade in Services of the Free Trade Agreement between the Government of the Republic of Chile and the Government of the People's Republic of China*¹¹⁰, hereinafter the "FTA-China (services)"
- 6) The *Australia-Chile Free Trade Agreement*¹¹¹, hereinafter the "FTA-Australia".

The scope of application of these agreements varies. The first two, namely the FTA-China (goods) and the FTA-India, only cover trade in goods. The four others cover not only trade in goods, but also trade in services and certain aspects of investment. The approaches used in the agreements also differ: the FTA-China (services) adopts the same approach as the General Agreement on Trade in Services (GATS), using positive lists of commitments for market access and national treatment. The three other agreements (FTA-Peru, FTA-Colombia and FTA-Australia) have opted for negative lists of commitments. Consequently, all services are subject to liberalisation, unless explicitly excluded. Lastly, only two agreements contain provisions relating to electronic commerce, namely the FTA-Colombia and the FTA-Australia.

1. References to the Convention

None of the agreements listed above contain any reference to the Convention.

2. Treatment of cultural goods and services

None of the agreements contains a cultural exemption clause allowing Parties to exclude certain categories of cultural goods and services from the scope of the agreement.

Concerning the four agreements providing for the liberalization of services, a distinction should be made between the FTA-China (services), which adopts the positive lists of commitments approach, and the three other agreements (FTA-Peru, FTA-Colombia and FTA-Australia), which are based on the negative lists of commitments approach. The FTA-China (services) allows the Parties to draw up lists of specific commitments regarding the cross-border supply of services and the establishment of a commercial presence on their territory. The lists include the sectors, sub-sectors and activities that will be subject to a certain degree of liberalization (market access and national treatment commitments), and specify which restrictions, if any, they wish to maintain. For the purposes of this case study, only Chile's commitments are analysed. However, Chile has not made any commitments relative to audiovisual services or other cultural services. Its freedom of action regarding cultural matters is therefore fully intact. Furthermore, that agreement excludes from its scope of application any subsidies or other grants provided by one of the Parties.

¹⁰⁶ Signed on 18 November 2005, entered into force on 1 October 2006.

¹⁰⁷ Signed on 8 March 2006, entered into force on 17 August 2007.

¹⁰⁸ Signed on 2 August 2006, entered into force on 1 March 2009.

¹⁰⁹ Signed on 27 November 2006, entered into force on 8 May 2009.

¹¹⁰ Signed on 13 April 2008, entered into force on 1 August 2010.

¹¹¹ Signed on 30 July 2008, entered into force on 3 June 2009.

In the other cases (FTA-Peru, FTA-Colombia and FTA-Australia), Chile entered reservations in order to maintain certain measures not in conformity with its commitments on trade in services and investment. These reservations may cover existing measures or new, more restrictive measures that are inconsistent with the trade obligations included in the relevant chapters. The reservations generally concern obligations relating to national treatment, most favoured nation (MFN) treatment, market access, local presence, performance requirements and senior management and boards of directors. It is interesting to note that although some of Chile's reservations are common to the three agreements, others feature in certain texts only.

Concerning Chile's reservations that are common to the three agreements, a first reservation covers *Communication services* and related restrictions that are maintained with respect to national treatment, MFN treatment, performance requirements, local presence and senior management and boards of directors. Several restrictions are set out. For example: on radio broadcasting concessions, a maximum participation of 10% is fixed for foreign investment; on television broadcasting, the Chilean National Television Council reserves the right to require that programmes broadcast through public television channels include a minimum of 40% of national content (Chilean productions). Another reservation covers *Cultural industries* and the maintenance of restrictions concerning MFN treatment. In this regard, Chile reserves the right to adopt or maintain any measure granting differential treatment to certain States in accordance with any bilateral or multilateral agreement, existing or future, relating to cultural industries. The reservation then gives a definition of cultural industries:

“Cultural industries” means persons engaged in any of the following activities: (a) publication, distribution, or sale of books, magazines, periodical publications, or printed or electronic newspapers, excluding the printing and typesetting of any of the foregoing; (b) production, distribution, sale, or display of recordings of movies or videos; (c) production, distribution, sale, or display of music recordings in audio or video format; (d) production, distribution, or sale of printed music scores or scores readable by machines; or (e) radiobroadcasts aimed at the public in general, as well as all radio, television and cable television-related activities, satellite programming services and broadcasting networks.”

Other reservations are found in only two of the three agreements using the negative lists of commitments method. In particular, there is a reservation concerning *Printing, publishing and other associated services*, which includes restrictions relating to national treatment, MFN treatment, local presence and senior management and boards of directors. This reservation, entered by Chile to both the FTA-Colombia and the FTA-Peru, requires the local presence of owners and suppliers of such services (relating to newspapers, magazines and articles published regularly in Chile, or to national press agencies).

The FTA-Colombia and the FTA-Australia include two other Chilean reservations that are relatively broad with regard to *Communication services*, not only in their traditional form but also in digital form. The reservations relating to the cross-border supply of such services concern national treatment, MFN treatment and local presence. As for the reservations relating to the establishment of a commercial presence, they apply to national treatment, MFN treatment, performance requirements and senior management and boards of directors. These reservations are meant to preserve Chile's power of intervention with regard to all those services.

3. *Clauses on preferential treatment relating to culture*

The agreements listed above do not contain any provisions that specifically grant preferential treatment to the cultural goods and services of the other Parties, or to their artists and cultural professionals.

4. Status of electronic commerce

Four of the six agreements listed above do not contain any provisions that apply specifically to electronic commerce. The two others, namely the FTA-Colombia and the FTA-Australia, have taken different approaches with regard to this type of trade.

In the FTA-Australia, the provisions are general and not particularly binding. It is moreover specified that the chapter on electronic commerce does not create any obligation with regard to the electronic supply of a service or the electronic transmission of content associated with those services, except in accordance with the chapters on cross-border trade in services and investment, including the associated exceptions and non-conforming measures.

The FTA-Colombia contains more extensive provisions. While specifying that services provided by electronic means remain subject to the rules of the chapters on cross-border trade in services and investment, including the associated exceptions and non-conforming measures, digital products are subject to more binding commitments. The distinction between a service provided by electronic means and a "digital product", however, is not clearly established. Indeed, the definition of *productos digitales* refers to products that are traditionally associated with the concept of a "service" ("*productos digitales significa programas computacionales, texto, video, imágenes, grabaciones de sonido, y otros productos que sean codificados digitalmente y transmitidos electrónicamente, independientemente de si una Parte trata a dichos productos como una mercancía o como un servicio de conformidad con su legislación interna*"). Lastly, as to the commitments relative to digital products, the agreement prohibits the imposition of customs duties or other charges and requires the Parties to grant national treatment and MFN treatment. Chile has nevertheless made certain reservations covering digital cultural services.

5. Other provisions relating to culture

For the purposes of this case study, only the provisions and reservations relating to culture that specifically concern Chile are analysed.

The FTA-China (goods) includes provisions on cooperation in the cultural field, and aims to encourage a dialogue on cultural policies and the promotion of local cultures as well as to encourage cooperation in the audiovisual sector, including through the conclusion of co-production agreements.

Four other agreements contain reservations related to culture. The FTA-China (services) includes a reservation relating to market access and national treatment and reserves the right for Chile to adopt any measures granting rights or preferences for the benefit of "ethnic groups". The FTA-Peru, the FTA-Colombia and the FTA-Australia include reservations of the same nature, but even broader in scope because they apply to the rules on national treatment, MFN treatment, performance requirements, senior management and boards of directors. These reservations cover measures granting rights or preferences for the benefit of "socially and economically disadvantaged minorities" and "indigenous peoples".

Lastly, several agreements contain references or provisions relating to the protection of intellectual property (FTA-China (goods), FTA-Peru and FTA-Australia).

Case study 12

Agreements concluded by Colombia

This case study is based on the analysis of four free trade agreements concluded by Colombia since the adoption of the Convention in October 2005:

- 1) *The United States-Colombia Trade Promotion Agreement*¹¹², hereinafter the "FTA-USA"
- 2) *The Acuerdo de Libre Comercio entre Chile y Colombia, el cual constituye un protocolo adicional al ACE 24*¹¹³, hereinafter the FTA-Chile
- 3) *The Canada-Colombia Free Trade Agreement*¹¹⁴, hereinafter the "FTA-Canada"
- 4) *The Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part*¹¹⁵, hereinafter the "FTA-EU-Peru".

The agreements cover goods, services and certain aspects relating to investment. Two of them include cultural exemption clauses of variable scope: the cultural exemption in the FTA-Canada covers cultural industries, while the cultural exemption in the FTA-EU-Peru only covers audiovisual services. The approach with regard to the liberalization of services is just as variable: the FTA-USA, the FTA-Canada and the FTA-Chile adopt the negative lists of commitments approach and consequently, all services are covered unless explicitly excluded. Conversely, the FTA-EU-Peru uses the same approach as the General Agreement on Trade in Services (GATS) and proceeds via positive lists of commitments for market access and national treatment. Lastly, all four agreements contain provisions relating to electronic commerce.

1. References to the Convention

None of the agreements listed above contains any reference to the Convention. The Preamble to the FTA-Canada nevertheless refers explicitly to cultural policies, cultural diversity and cultural goods and services.

2. Treatment of cultural goods and services

The FTA-Canada and the FTA-EU-Peru contain a cultural exemption clause. The FTA-Canada clause applies to all provisions of the agreement and covers "cultural industries", a concept that includes:

"persons engaged in any of the following activities: a. The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form, but not including the sole activity of printing or typesetting any of the foregoing; b. The production, distribution, sale or exhibition of film or video recordings; c. The production, distribution, sale or exhibition of audio or video music recordings; d. The publication, distribution or sale of music in print or machine-readable form; e. Radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services; f. Production and presentation of performing arts; g. Production and exhibition of visual arts; h. Design, production, distribution and sale of handicrafts".

The cultural exemption in the FTA-EU-Peru covers audiovisual services and applies to the chapters on the cross-border supply of services and the establishment of a commercial presence on a State's territory. The notion of audiovisual services, however, is not defined.

¹¹² Signed on 22 November 2006, entered into force on 15 May 2012.

¹¹³ Signed on 27 November 2006, entered into force on 8 May 2009.

¹¹⁴ Signed on 21 November 2008, entered into force on 15 November 2011.

¹¹⁵ Signed on 26 June 2012, entered into force on 1 March 2013.

Where the liberalization of services is concerned, a distinction should be made between the FTA-EU-Peru, which uses the positive lists of commitments approach, and the three other agreements (FTA-Canada, FTA-USA and FTA-Chile), which instead opt for negative lists. In the case of the FTA-EU-Peru, the Parties may draw up specific lists of commitments regarding the cross-border supply of services and the establishment of a commercial presence. These list the sectors, sub-sectors or activities that are subject to liberalization (market access and national treatment commitments), while specifying which restrictions, if any, they wish to maintain. For the purposes of this case study, only Colombia's commitments are analysed. However, since audiovisual services are excluded from the scope of the FTA-EU-Peru, Colombia has only made limited commitments with regard to cultural services. Its commitments cover *News and press agencies services*, for which modes 1 (cross-border supply), 2 (consumption abroad) and 3 (commercial presence) are liberalized, both for market access and national treatment. Its commitments also cover *Libraries, archives, museums and other cultural services*. In this case, however, no market access commitment is made, and Colombia's commitments are limited to the application of national treatment for modes 1, 2 and 3.

In the other three agreements (FTA-Canada, FTA-USA and FTA-Chile), Colombia was able to enter reservations to maintain certain non-conforming measures. These reservations may cover existing measures or new, more restrictive measures that are inconsistent with the obligations found in the relevant chapters of each agreement. In the case of the FTA-Canada, however, Colombia has made no cultural reservation, which can doubtless be explained by the presence of a cultural exemption clause that already covers cultural industries. The FTA-USA and the FTA-Chile apply to all services, including cultural services, and Colombia has made several reservations to those agreements.

In the FTA-USA, the reservations cover numerous sectors, including *Newspapers, Radio broadcasting, Television, Audiovisual production, Handicrafts, Jewellery, Performing arts, Music, Visual arts, Advertising, Traditional expressions and Interactive audio and video services*. Certain reservations more broadly cover *Cultural industries and activities and Audiovisual services*. The reservations allow Colombia to limit the scope of various commitments, particularly those related to national treatment, market access, local presence, performance requirements and senior management and boards of directors.

In the case of the FTA-Chile, too, there are many reservations. Some of them cover specific sectors, such as *Newspapers, Projection and distribution of motion pictures, Radio broadcasting, Television and Interactive audio or video services*. Others are more general and cover all *Cultural activities and industries* (for which a definition is offered in the agreement) and *Audiovisual advertising*, two large categories of cultural services that are thus not subject to the rules on national treatment and MFN treatment.

3. Clauses on preferential treatment relating to culture

The agreements listed above do not contain any provisions that specifically grant preferential treatment to the cultural goods and services of the other Parties, or to their artists and cultural professionals.

4. Status of electronic commerce

All the agreements listed above contain provisions that specifically apply to electronic commerce, but their scope is variable. In the case of FTA-Canada, it is specified that the provisions of several chapters, notably those concerning cross-border trade in services, national treatment and market access for goods, investment and exceptions, as well as the associated reservations, apply to trade conducted by electronic means. It must not be forgotten, however, that cultural industries are excluded from the scope of this agreement. Moreover, the definition of cultural industries contains certain ambiguities, and only after a highly detailed analysis of each of the cultural industries covered could it be affirmed with certainty that all digital cultural goods and services are completely excluded from the scope of the agreement. There could thus be diverging interpretations.

The FTA-EU-Peru sets out several objectives and principles with regard to electronic commerce. Furthermore, it specifies that "a delivery by electronic means shall be considered as a provision of services [...] and shall not be subject to customs duties". However, as previously mentioned, the Parties have excluded audiovisual services from the scope of the chapters relating to the cross-border supply of services and the establishment of a commercial presence.

The FTA-Chile and the FTA-USA contain provisions that are more binding. While specifying that services delivered electronically remain subject to the rules of the chapters relating to cross-border trade in services and investment, including the associated exceptions and non-conforming measures, more binding commitments are laid down for digital products. The distinction between a service provided electronically and a "digital product", however, is not clearly established. Indeed, the definition of digital products refers to products that are traditionally associated with the concept of a "service". For example, for the purposes of the FTA-USA, "digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically". Lastly, both the FTA-Chile and the FTA-USA prohibit the imposition of customs duties or other charges on digital products. They also require the application of national treatment and MFN treatment. Particular attention should also be paid to the relationship between the reservations made by Colombia concerning certain cultural services and the commitments arising from the provisions on electronic commerce.

5. *Other provisions relating to culture*

For the purposes of this case study, only the provisions and reservations relative to culture that specifically concern Colombia are analysed.

No relevant provision or commitment can be found in the FTA-Canada. The other agreements contain reservations designed to protect Colombia's right to adopt any measures granting rights or preferences to "ethnic groups, minorities and/or indigenous peoples". These reservations apply to national treatment, MFN treatment, local presence, performance requirements and/or senior management and boards of directors.

Case study 13

Agreements concluded by Costa Rica

This case study is based on the analysis of four free trade agreements concluded by Costa Rica since the adoption of the Convention in October 2005:

- 1) The *Tratado de Libre Comercio entre el Gobierno de la República de Costa Rica y el Gobierno de la República Popular China*¹¹⁶, hereinafter the "FTA-China"
- 2) The *Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America, on the other*¹¹⁷, hereinafter the "AA-EUCA"
- 3) The *Tratado de Libre Comercio entre la Republica del Peru y la Republica de Costa Rica*¹¹⁸, hereinafter the "FTA-Peru"
- 4) The *Free Trade Agreement between the EFTA States and the Central American States*¹¹⁹, hereinafter the "FTA-EFTA".

These agreements take very different approaches. Firstly, audiovisual services are excluded from the FTA-EUCA, but covered by the FTA-China, the FTA-Peru and the FTA-EFTA. Moreover, the FTA-EUCA has a protocol on cultural cooperation (PCC) that allows Parties to benefit from preferential treatment for their cultural goods, cultural services and suppliers of cultural services. The three other agreements do not mention any such treatment. Furthermore, the PCC provides for the establishment of a cooperation framework in the cultural field. Lastly, concerning the liberalization of trade in services, investment and electronic commerce, the Parties to the FTA-EUCA, the FTA-China and the FTA-EFTA have opted for the positive list method to record their commitments (thus adopting the same approach as the General Agreement on Trade in Services (GATS)), while the FTA-Peru uses the negative list method instead. Consequently, all cultural services are subject to liberalization commitments under the FTA-Peru, unless explicitly excluded.

1. References to the Convention

The FTA-China, the FTA-Peru and the FTA-EFTA contain no reference to the Convention. Conversely, the AA-EUCA includes an explicit reference to it, stating that:

"[t]he Parties shall encourage coordination in the context of UNESCO, with a view to promoting cultural diversity, inter alia via consultations on the ratification and implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions by the EU Party and the Republics of the CA Party".

Additionally, the Preamble to the PCC specifies that, as signatories of the Convention, "the Parties intend to effectively implement the UNESCO Convention and to co-operate 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". Other articles of the PCC also refer to the Convention or to certain of its provisions.

¹¹⁶ Signed on 8 April 2010, entered into force on 1 August 2011.

¹¹⁷ Signed on 29 June 2012, entered into force on 1 August 2013. The Central American States are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

¹¹⁸ Signed on 26 June 2011, entered into force on 1 June 2013.

¹¹⁹ Signed on 24 June 2013, entered into force on 19 August 2014. The Central American States are: Costa Rica and Panama. The States Parties to the European Free Trade Association (EFTA) are: Iceland, Liechtenstein, Norway and Switzerland.

2. Treatment of cultural goods and services

The AA-EUCA excludes audiovisual services from the scope of the chapters on establishment and cross-border supply of services. The concept of "audiovisual services", however, is not defined.

Concerning the liberalization of services, the FTA-China, the AA-EUCA and the FTA-EFTA adopt the same approach used in the GATS, according to which the Parties may draw up specific lists of commitments regarding the cross-border supply of services and the establishment of a commercial presence on their territory. These list sectors, sub-sectors or activities that are subject to liberalization (market access and national treatment commitments), and specify which restrictions, if any, they wish to maintain. The Parties used these lists to include certain cultural sectors and limit the scope of their commitments.

For the purposes of this case study, only the commitments of Costa Rica are analysed. However, in the case of the FTA-China and the FTA-EFTA, Costa Rica has not made any commitments on cultural services. Furthermore, Costa Rica has specified that the measures referred to in the most favoured nation (MFN) treatment exemptions in the GATS also constituted exemptions to that same rule under the FTA-EFTA. With the AA-EUCA, as audiovisual services were excluded from the scope of the relevant chapters, Costa Rica has made commitments in only a few sectors. Regarding establishment, it has entirely liberalized *Entertainment services*. It has also made limited commitments for *News and press agencies services*, but did not liberalize *Libraries, archives, museums and other cultural services* at all. Regarding the cross-border supply of services, Costa Rica has made no commitments relating to cultural services.

In the FTA-Peru, the Parties proceeded by means of negative lists and therefore used the reservation method to maintain existing or future measures not in conformity with their commitments on trade in services and investment. The reservations made by Costa Rica are relatively broad. For example, certain reservations cover *Advertising, Audiovisual, Cinema, Radio, Television and Other entertainment services*, and limit the application of rules on national treatment and MFN treatment (notably by imposing quotas), performance requirements, market access and local presence. Other reservations concern *Cultural industries* in general and limit the application of MFN treatment. In this respect, Costa Rica reserves the right to adopt bilateral or multilateral agreements granting differential treatment to cultural industries, such as cooperation agreements in the audiovisual sector. A definition of "cultural industries" is included in the reservation. Another reservation covers *Radio and television (broadcasting) services* and preserves Costa Rica's right to adopt or maintain any measure related to these services.

3. Clauses on preferential treatment relating to culture

The FTA-China, the FTA-Peru and the FTA-EFTA do not contain any provisions that specifically grant preferential treatment to the cultural goods and services of the Parties, or to their artists and cultural professionals.

The AA-EUCA however provides for such preferential treatment through its PCC. The PCC implements the Convention, particularly its provisions relating to international cooperation. It pursues various aims such as the facilitation of exchanges in cultural goods and services, including in the audiovisual sector. The PCC also recognizes the importance of developing and implementing cultural policies, with a view to preserving cultural diversity, strengthening cultural industries and increasing opportunities for exchanges in cultural goods and services. Several other provisions grant preferential treatment to both Parties with regard, for instance, to the entry and temporary stay of artists and cultural professionals. Furthermore, the PCC encourages the negotiation and implementation of co-production agreements between the Parties. The PCC also contains provisions on technical assistance in order to develop the Parties' cultural industries, implement cultural policies and promote the production and exchange of cultural goods and services. It also contains other provisions that aim to facilitate trade in various cultural sectors, including the performing arts and publications, as well as to encourage the protection of sites and historic monuments.

4. Status of electronic commerce

The FTA-China and the FTA-Peru do not contain any provisions that specifically apply to electronic commerce. As for the AA-EUCA and the FTA-EFTA, several general provisions deal with this type of commerce. For example, the Parties recognize that electronic commerce increases trade opportunities in many sectors, and agree to encourage the development of electronic commerce between them. Other provisions deal in similarly general terms with the information society and information and communication technologies. These provisions do not create any binding commitments that apply to the Parties' cultural goods or services. Nevertheless, a provision of the FTA-EFTA recalls a WTO decision confirming their current practice of not imposing customs duties on electronic transmissions.

5. Other provisions relating to culture

For the purposes of this case study, only the provisions related to other aspects of culture relevant to Costa Rica are analysed.

The FTA-China incorporates several references to culture, for example in its general aims and its objectives and provisions on cooperation and promotion and enhancement of trade relations. Costa Rica has also entered a general reservation to protect its right to adopt or maintain any measures that grant rights or preferences to economically or socially disadvantaged groups, which could include cultural measures. A similar reservation was incorporated by Costa Rica in the FTA-Peru and the FTA-EFTA and explicitly covers "minority affairs and native groups". As for the AA-EUCA, several provisions other than those mentioned above refer to native groups and various aspects of cultural diversity (in particular, see the provisions on "political dialogue", "social cohesion", "education and training", "gender equality" and "fair and sustainable tourism", which should integrate cultural considerations, among other things).

Lastly, the four agreements contain provisions on the protection of intellectual property.

Case study 14

Agreements concluded by Panama

This case study is based on the analysis of the four free trade agreements concluded by Panama since the adoption of the Convention in October 2005:

- 1) *The United States-Panama Trade Promotion Agreement*¹²⁰, hereinafter the "FTA-USA"
- 2) *The Free Trade Agreement between Canada and the Republic of Panama*¹²¹, hereinafter the "FTA-Canada"
- 3) *The Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America, on the other*¹²², hereinafter the "AA-EUCA"
- 4) *The Free Trade Agreement between the EFTA States and the Central American States*¹²³, hereinafter the "FTA-EFTA".

These agreements use very different approaches. Firstly, audiovisual services are excluded from the AA-EUCA, whereas the FTA-Canada instead excludes cultural industries. Neither the FTA-USA nor the FTA-EFTA includes such a cultural exemption clause. Moreover, the AA-EUCA has a protocol on cultural cooperation (PCC) that allows preferential treatment to be granted to the Parties with regard to their cultural goods, cultural services and suppliers of cultural services, while no such treatment is included in the three other agreements. Furthermore, the PCC provides for the establishment of a cooperation framework in the field of culture. Lastly, for trade in services, investment and electronic commerce, the Parties to the AA-EUCA and the FTA-EFTA use positive lists of commitments (thus adopting the same approach as the General Agreement on Trade in Services (GATS)), while the FTA-Canada and the FTA-USA instead use negative lists. Consequently, all cultural services are subject to liberalization commitments under these two agreements, unless explicitly excluded. The FTA-Canada also contains a cultural exemption clause that excludes cultural industries from its scope.

1. References to the Convention

Neither the FTA-USA, the FTA-Canada, or the FTA-EFTA contains any specific reference to the Convention. However, the Preamble to the FTA-Canada does include a reference to cultural policies, cultural diversity and cultural products and services. The AA-EUCA is the only one of the four agreements to explicitly refer to the Convention. The main agreement first mentions the Convention in a provision on audiovisual and cultural cooperation. The Preamble to the PCC also includes a reference to the Convention, and more specifically to the implementation of its Articles 14, 15 and 16. Other references also appear in the text of the PCC.

2. Treatment of cultural goods and services

The AA-EUCA and the FTA-Canada each contain a cultural exemption clause, different in scope. The AA-EUCA excludes audiovisual services from the scope of the chapters on establishment and the cross-border supply of services. The FTA-Canada excludes cultural industries from the agreement in its entirety. Furthermore, it offers a definition of "cultural industry" which:

"means a person engaged in the following activities: 1. The publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing; 2. The

¹²⁰ Signed on 28 June 2007, entered into force on 31 October 2012.

¹²¹ Adopted on 14 May 2010, entered into force on 1 April 2013.

¹²² Signed on 29 June 2012, entered into force on 1 August 2013. The Central American States Parties are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

¹²³ Signed on 24 June 2013, entered into force on 19 August 2014. The Central American States Parties are: Costa Rica and Panama. The States Parties to the European Free Trade Association (EFTA) are: Iceland, Liechtenstein, Norway and Switzerland.

production, distribution, sale or exhibition of film or video recordings; 3. The production, distribution, sale or exhibition of audio or video music recordings; 4. The publication, distribution or sale of music in print or machine readable form; 5. Radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcast undertakings and all satellite programming and broadcast network services".

Concerning the liberalization of services, the AA-EUCA and the FTA-EFTA adopt the same approach as GATS, according to which the Parties may draw up specific lists of commitments regarding the cross-border supply of services and the establishment of a commercial presence on their territory. These list the sectors, sub-sectors or activities that are subject to liberalization (market access and national treatment commitments), and specify which restrictions, if any, the Parties wish to maintain. The Parties have used these lists to include certain cultural services (other than audiovisual services, which are excluded from the agreement), thus limiting the scope of their commitments.

For the purposes of this case study, only the commitments of Panama are analysed. Concerning the AA-EUCA, Panama made limited commitments concerning establishment for *Entertainment services*, stating that "an employer who hires a foreign orchestra or musical group is required to hire a Panamanian orchestra or musical group to perform at each one of the locations where the foreign orchestra or musical group performs". Concerning *News and press agencies services*, Panama also made a limited commitment, stating that "a company producing a printed publication that is part of the Panamanian communications mass media, such as a newspaper or magazine, must be one hundred per cent owned (directly or indirectly) by a Panamanian national and its managers (including its publishers, editors-in-chief, deputy directors and assistant managers) must be Panamanian nationals". On the cross-border supply of services, Panama fully liberalized *News and press agencies services*, but did not make any commitments in other sectors. Though there are similar commitments in the FTA-EFTA, that agreement also contains commitments by Panama on market access and national treatment for services related to the *Production, distribution, projection and broadcasting of audiovisual works*. Panama also made a reservation concerning most favoured nation (MFN) treatment in order to exclude certain agreements previously concluded in the field of cinema from the scope of this rule.

Concerning the FTA-Canada, even though it includes a cultural exemption for cultural industries, Panama entered reservations with regard to services that might be covered by the cultural exemption. For example, a reservation regarding *Services of transmission of radio and television programmes* limits the application of national treatment and MFN treatment. Another reservation relates to *Publishing*, which is however already covered by the cultural exemption. Other reservations relate to services that are not covered by the exemption, such as *Advertising services* and *Artistic activities, musicians and artists*, for which Panama reserves the right not to apply national treatment.

Lastly, the FTA-USA, whose provisions apply to all services, allows the Parties to use reservations in order to maintain or adopt measures not in conformity with their commitments on trade in services and investment. The Parties have used this technique to protect certain non-conforming measures relating to cultural goods and services. These measures generally concern obligations on national treatment, MFN treatment, local presence, performance requirements and senior management and boards of directors. Panama's reservations are few and essentially cover the *Transmission of radio and television programmes*, for which Panama reserves the right not to apply national treatment, MFN treatment and the rules relative to senior management and boards of directors. Other reservations cover *Communications services* and *Advertising services*.

3. *Clauses on preferential treatment relating to culture*

The FTA-USA, the FTA-Canada and the FTA-EFTA contain no provisions that specifically grant preferential treatment to the cultural goods and services of the Parties, or to their artists and cultural professionals.

The AA-EUCA provides for such preferential treatment through its PCC. The PCC implements the Convention, particularly its provisions on international cooperation. It pursues various objectives, including the facilitation of exchanges in cultural goods and services, including in the audiovisual sector. The PCC also recognizes the importance of developing and implementing cultural policies, with a view to preserving cultural diversity, strengthening cultural industries and increasing opportunities for exchanges in cultural goods and services. Several other provisions grant preferential treatment to both Parties with regard, for instance, to the entry and temporary stay of artists and cultural professionals. Furthermore, the PCC encourages the negotiation and implementation of co-production agreements between the Parties. The PCC also contains provisions relative to technical assistance in order to develop the Parties' cultural industries, implement cultural policies and promote the production and exchange of cultural goods and services. It also contains other provisions that aim to facilitate trade in various cultural sectors, including the performing arts and publications, as well as the protection of sites and historic monuments.

4. *Status of electronic commerce*

The four agreements adopt different approaches to electronic commerce. The AA-EUCA and the FTA-EFTA include several general provisions covering this type of commerce. For example, the Parties recognize that electronic commerce increases trade possibilities in many sectors and agree to promote the development of electronic commerce between them. Other provisions cover the information society and information and communication technologies. These provisions do not create any binding commitments that apply to the Parties' cultural goods or services. Nevertheless, one provision in the FTA-EFTA confirms the Parties' current practice of not imposing customs duties on electronic transmissions, in accordance with a WTO decision.

The FTA-Canada also contains a chapter devoted to electronic commerce, which states that the agreement, including the chapters on national treatment and market access for goods, investment, cross-border trade in services, and exceptions, applies to electronic commerce. Furthermore, it is specified that the reservations entered by a Party to these chapters apply to electronic commerce. The chapter also contains a few general provisions on cooperation in electronic commerce. One, more binding, provision also states that "a Party shall not apply a customs duty, fee or charge on a digital product delivered electronically". For the purposes of this chapter, "digital product means means a computer program, text, video, image, sound recording or other product that is digitally encoded". It should be recalled, however, that cultural industries are excluded from the scope of the agreement. The relationship between the provisions of the chapter on electronic commerce and the cultural exemption clause could be subject to diverging interpretations concerning the scope of the latter, particularly with regard to the digital cultural products that might be traded between the Parties.

Finally, the FTA-USA contains a chapter on electronic commerce, the provisions of which might affect trade in cultural goods and services. A first provision states that measures affecting the supply of a service using electronic means are subject to the obligations contained in the chapters on investment and services, as well as to the exceptions and non-conforming measures applicable to those chapters.

Other provisions include commitments that specifically cover digital products (a ban on the imposition of customs duties or other charges, and application of national treatment and MFN treatment rules). The distinction between a digital product and a traditional service supplied electronically (covered by the chapters on investment and services, including all related exceptions and reservations), however, is not clearly established. The definition of digital

products generally refers to products that have long been associated with the concept of "service". For the purposes of this agreement, "digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically".

Lastly, the agreement contains an additional provision stating that the rules applicable to digital products do not apply to the non-conforming measures on investment and services recorded in Annexes I and II. But once again, the distinction between a traditional service provided electronically and a digital product, and therefore the relationship between the chapter on electronic commerce and the non-conforming measures relating to the chapters on investment and services, remains ambiguous and could be subject to diverging interpretations.

5. Other provisions relating to culture

For the purposes of this case study, only the specific provisions, reservations or commitments relating to other aspects of culture relevant to Panama are analysed.

The AA-EUCA contains several provisions relating to native groups and various aspects of cultural diversity, particularly provisions related to "political dialogue", "social cohesion", "education and training", "gender equality" and "sustainable and fair tourism". In the FTA-USA, the FTA-Canada and the FTA-EFTA, Panama has recorded a reservation on "native populations and minorities" under which, with regard to the cross-border supply of services and investment, it reserves the right to adopt or maintain any measures or preferences concerning such socially or economically disadvantaged groups.

Lastly, the AA-EUCA, the FTA-USA and the FTA-EFTA contain a chapter on intellectual property.

Case study 15

Agreements concluded by Peru

This case study is based on the analysis of seven free trade agreements concluded by Peru since the adoption of the Convention in October 2005:

- 1) The *United States-Peru Trade Promotion Agreement*¹²⁴, hereinafter the "FTA-USA"
- 2) *l'Acuerdo de Libre Comercio entre el Gobierno de la República de Chile y el Gobierno de la República del Perú*¹²⁵, hereinafter the "FTA-Chile"
- 3) The *Canada-Peru Free Trade Agreement*¹²⁶, hereinafter the "FTA-Canada"
- 4) The *Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru*¹²⁷, hereinafter the "FTA-China"
- 5) The *Acuerdo de Integración Comercial Perú-México*¹²⁸, hereinafter the "FTA-Mexico"
- 6) The *Tratado de Libre Comercio entre la Republica del Perú y la Republica de Costa Rica*¹²⁹, hereinafter the "FTA-CR"
- 7) The *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part*¹³⁰, hereinafter the "FTA-EU-Colombia".

The agreements cover goods, services and certain aspects relative to investment. Two of them include cultural exemption clauses of variable scope: the FTA-Canada cultural exemption covers cultural industries, while the FTA-EU-Colombia cultural exemption covers only audiovisual services. The approach to the liberalization of services is just as variable: five agreements (FTA-USA, FTA-Chile, FTA-Canada, FTA-Mexico and FTA-Costa Rica) adopt the negative lists of commitments approach and consequently, all services are covered unless explicitly excluded. Conversely, the FTA-China and the FTA-EU-Colombia use the same approach as the General Agreement on Trade in Services (GATS) and proceed via positive lists of commitments for the market access and national treatment applicable to services and investment. Lastly, only the FTA-USA, the FTA-Canada and the FTA-EU-Colombia contain provisions on electronic commerce.

1. References to the Convention

None of the agreements listed above contains any explicit reference to the Convention. The Preamble to the FTA-Canada however refers to cultural policies, cultural diversity and cultural goods and services.

2. Treatment of cultural goods and services

The FTA-Canada and the FTA-EU-Colombia contain a cultural exemption clause. The FTA-Canada clause applies to all provisions of the agreement and covers the "cultural industries", a concept meaning:

"persons engaged in any of the following activities: a) The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing; b) The production, distribution, sale or exhibition of film or video recordings; c) The production, distribution, sale or exhibition of audio or video music recordings; d) The publication, distribution or sale of music in print or machine-readable form; or e)

¹²⁴ Signed on 12 April 2006, entered into force on 1 February 2009.

¹²⁵ Signed on 22 August 2006, entered into force on 1 March 2009.

¹²⁶ Signed on 28 May 2008, entered into force on 1 August 2009.

¹²⁷ Signed on 28 April 2009, entered into force on 1 March 2010.

¹²⁸ Signed on 6 April 2011, entered into force on 1 February 2012.

¹²⁹ Signed on 26 May 2011, entered into force on 1 June 2013.

¹³⁰ Signed on 26 June 2012, entered into force on 1 March 2013.

Radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services".

The cultural exemption in the FTA-EU-Colombia covers audiovisual services and applies to the chapters on the cross-border supply of services and the establishment of a commercial presence on a State's territory. The notion of audiovisual services, however, is not defined.

On the liberalization of services, a distinction should be made between the FTA-China and the FTA-EU-Colombia, which adopt the positive lists of commitments approach, and the five other agreements, which are instead based on negative lists of commitments. In the case of the FTA-China and the FTA-EU-Colombia, the Parties may draw up specific lists of commitments on the cross-border supply of services and the establishment of a commercial presence. These list the sectors, sub-sectors or activities that are subject to liberalization (market access and national treatment commitments), and specify which restrictions they are maintaining.

For the purposes of this case study, only Peru's commitments are analysed. However, as audiovisual services are excluded from the scope of the FTA-EU-Colombia, Peru has made only limited commitments with regard to cultural services. Its commitments concerning establishment have led to the liberalization of *News and press agencies services* and *Libraries, archives, museums and other cultural services*, both for market access and national treatment. Peru's commitments also cover *Theatre arts, visual arts, music and publishing*, but certain restrictions were maintained with regard to national treatment, with Peru reserving the right to impose performance requirements. Lastly, for *Audio-visual industry, publishing and music*, Peru reserved the right to limit market access and national treatment in such a way as to afford to a natural person or juridical person of the other Party the treatment that is afforded by that other Party to Peruvian suppliers of such services. The same commitments and restrictions are made for the cross-border supply of services, except for *Libraries, archives, museums and other cultural services*, for which no commitments are made.

The commitments of Peru under the FTA-China are similar, essentially covering *News and press agencies services* and *Libraries, archives, museums and other cultural services*, for which modes 1 (cross-border supply), 2 (consumption abroad) and 3 (establishment) are liberalized. Peru also made commitments under mode 3 for *Entertainment services*, which seem here to be understood as services related to artistic performances. However, market access is subject to restrictions concerning the use of domestic artists. Lastly, it should be noted that in terms of investment generally, the FTA-China allows the Parties to limit the application of most favoured nation (MFN) treatment for any measures involving cultural industries whose activities involve the production of books, magazines, periodical publications, printed or electronic newspapers and music scores.

Also, in the five other agreements (FTA-USA, FTA-Chile, FTA-Canada, FTA-Mexico and FTA-Costa Rica), the Parties have used reservations to preserve their right to maintain or adopt measures not in conformity with their commitments on the cross-border supply of services and investment. Annex I is made up of each Party's list of existing measures, which are thus not subject to certain of the obligations created by the rules of the agreement. Annex II lists the various sectors, sub-sectors or specific activities for which the Parties may maintain existing measures, adopt new measures or adopt more restrictive measures, which are similarly not subject to certain obligations created by the rules of the agreement. The measures included in these two annexes generally relate to obligations on national treatment, MFN treatment, local presence, performance requirements and senior management and boards of directors.

Some of Peru's reservations appear almost systematically in the agreements that it concludes. They include, for instance, restrictions on foreign investment in radio broadcasting companies, restrictions on the application of national treatment and rules on performance requirements for *Motion pictures, television broadcasting and radio broadcasting services* (in order to preserve Peru's right to impose various types of quotas) and restrictions on the application of MFN

treatment in order to preserve Peru's right to conclude and implement cultural cooperation and co-production agreements. Other frequent reservations cover *Jewellery design, theatre arts, visual arts, music, publishing, recreational, cultural and sporting services and handicrafts*. Lastly, given the exclusion of cultural industries from the FTA-Canada, the reservations made by Peru under this agreement are more limited. However, cultural goods and services not covered by the exemption, such as *Artistic production services, Circus services, Commercial advertising services, Handicraft industries, Jewellery design, theatre arts, visual arts and music*, are made subject to reservations.

3. Clauses on preferential treatment relating to culture

None of the agreements listed above contains any provisions that specifically grant preferential treatment to the cultural goods and services of the other Parties, or to their artists and cultural professionals.

4. Status of electronic commerce

Three of the seven agreements listed above contain provisions that specifically apply to electronic commerce, but their scope is variable. In the case of FTA-Canada, it is specified that the provisions of several chapters, notably those on cross-border trade in services, national treatment and market access for goods, investment and exceptions, as well as the related reservations, apply to trade conducted by electronic means. Furthermore, one provision specifies that "neither Party may apply customs duties, fees, or charges on or in connection with the import or export of digital products by electronic means". It should be recalled, however, that cultural industries are excluded from the scope of this agreement. However, the definition of cultural industries involves certain ambiguities, and only after a highly detailed analysis of each of the cultural industries covered would it be possible to affirm with certainty that all digital cultural products are completely excluded from the scope of the agreement. Diverging interpretations could thus occur.

The FTA-EU-Colombia includes a number of aims and principles regarding electronic commerce. Furthermore, it is specified that "a delivery by electronic means shall be considered as a provision of services [...] and shall not be subject to customs duties". However, it should be recalled that the Parties have excluded audiovisual services from the scope of the chapters on establishment and the cross-border supply of services.

The FTA-USA, for its part, contains more binding provisions. While specifying that the supply of services by electronic means remains subject to the rules of the chapters on cross-border trade in services and investment, including the related exceptions and non-conforming measures, more binding commitments are laid down for digital products. The distinction between a service provided by electronic means and a "digital product", however, is not clearly established. In fact, the definition of digital products refers to products that have long been associated with the concept of "service". For example, for the purposes of the FTA-USA, "digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically".

Finally, concerning the commitments relative to digital products, these two last agreements prohibit the imposition of customs duties or other charges. They also require Parties to apply national treatment and MFN treatment.

5. Other provisions relating to culture

The agreements concluded by Peru have prompted other reservations related to culture. For instance, in several agreements, Peru has made a reservation to the provisions on national treatment, MFN treatment, local presence, performance requirements and senior management and boards of directors, aimed at preserving its right to adopt or maintain any measures

granting rights or preferences to “socially or economically disadvantaged minorities and ethnic groups”. Similar reservations also explicitly mention “indigenous and peasant communities”.

The FTA-EU-Colombia also contains provisions on biodiversity and sustainable development, which may be relevant to culture. Lastly, the FTA-China contains several general provisions on cooperation, and cultural cooperation in particular.

Finally, all the agreements, apart from the FTA-Canada and the FTA-China, contain provisions on intellectual property.

Case study 16

Agreements concluded by African States

This case study is based on the analysis of seven free trade or economic partnership agreements concluded by African States since the adoption of the Convention in October 2005:

- 1) The *Free Trade Agreement between the EFTA States and the SACU States*¹³¹, hereinafter the FTA EFTA-SACU"
- 2) The *Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part*¹³², hereinafter the "EPA-Ghana"
- 3) The *Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part*¹³³, hereinafter the EPA-CI
- 4) The *Preferential Trade Agreement between the Common Market of the South (MERCOSUR) and the Southern African Customs Union (SACU)*¹³⁴, hereinafter the "FTA MERCOSUR-SACU"
- 5) The *Stepping Stone Economic Partnership Agreement between the European Community and its Member States, of the one part, and Central Africa, of the other part*¹³⁵, hereinafter the "EPA-CAf"
- 6) The *Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part*¹³⁶, hereinafter the "EPA-SADC "
- 7) The *Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern Africa States, of the one part, and the European Community and its Member States, of the other part*¹³⁷, hereinafter the "EPA-ESAf".

The five agreements concluded between African countries and the European Union (EU) are economic partnership agreements that include a few rules on trade in goods, as well as laying down a cooperation framework with a view to achieving various objectives relating to services, investment, electronic commerce and intellectual property, among others. The FTA EFTA-SACU and the FTA MERCOSUR-SACU cover only goods.

1. References to the Convention

None of the agreements listed above explicitly mention the Convention. The Preambles to certain agreements concluded between African States and the EU nevertheless refer to the concepts of "cultural development" (EPA-Ghana, EPA-CI and EPA-ESAf) or "cultural diversity" (the EPA-CAf states, for example, that "the Parties shall not encourage foreign direct investment [...] by relaxing their [...] regulations or regulations designed to protect and promote cultural diversity").

2. Treatment of cultural goods and services

None of the agreements concluded by African States contains a cultural exemption clause.

¹³¹ Signed on 26 June 2006, entered into force on 1 May 2008.

¹³² Signed on 10 July 2008, not in force.

¹³³ Signed on 26 November 2008, entered into force on 1 January 2009.

¹³⁴ Signed on 15 December 2008, not in force.

¹³⁵ Signed on 15 January 2009, entered into force on 1 October 2009.

¹³⁶ Signed during June 2009. Final agreement signed on 10 June 2016.

¹³⁷ Signed on 29 August 2009, entered into force on 14 May 2012.

3. *Clauses on preferential treatment relating to culture*

The agreements listed above contain no provisions specifically granting preferential treatment to the cultural goods and services of the other Parties, or to their artists and cultural professionals.

4. *Status of electronic commerce*

Six of the seven agreements listed above do not contain any provisions concerning electronic commerce. The EPA-ESAf contains an article aiming to promote cooperation in the area of Information and Communication Technologies (ICT), notably to facilitate connectivity at the national, regional and global levels, disseminate new information and communication technologies, support the development of legal and regulatory frameworks on ICT, ensure the development, transfer and applications of technologies, research and development, innovation, information exchange, the setting up of networks and marketing, and to build capacities in human resources and improve service standards and institutional structures.

5. *Other provisions relating to culture*

The EPA-ESAf contains a few provisions on the protection of heritage and indigenous traditional knowledge. The other agreements do not contain any provisions on culture.

Lastly, the EPA-CAf and the FTA EFTA-SACU contain a few provisions relating to intellectual property.

Case study 17

Agreements concluded by Arab States

This case study is based on the analysis of three free trade agreements concluded by three Arab States (Egypt, Jordan, Oman) since the adoption of the Convention in October 2005:

- 1) The *Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area*¹³⁸, hereinafter the "FTA USA-Oman"
- 2) The *Free Trade Agreement between the Arab Republic of Egypt and the EFTA States*¹³⁹, hereinafter the "FTA Egypt-EFTA"
- 3) The *Canada-Jordan Free Trade Agreement*¹⁴⁰, hereinafter the "FTA Canada-Jordan".

The FTA Egypt-EFTA and the FTA Canada-Jordan cover only trade in goods. The FTA USA-Oman also covers services, certain aspects relating to investment, and electronic commerce. It uses the negative lists of commitments approach and consequently, all services are covered unless expressly excluded. Lastly, the FTA Canada-Jordan includes a cultural exemption clause that covers cultural industries.

1. References to the Convention

None of the agreements listed above contains any explicit reference to the Convention. The Preamble to the FTA Canada-Jordan refers to cultural policies, cultural diversity and cultural goods and services.

2. Treatment of cultural goods and services

The FTA USA-Oman allows the Parties to use reservations in order to maintain or adopt measures not in conformity with their commitments on trade in services and investment. The Parties have used this technique to protect certain non-conforming measures relating to cultural goods or services. Annex I is made up of each Party's list of existing measures, which are thus not subject to some of the obligations created by the rules of the agreement. Annex II lists the various sectors, sub-sectors or specific activities for which the Parties may maintain existing measures, adopt new measures or adopt more restrictive measures, which are similarly not subject to some of the obligations created by the rules of the agreement. The measures included in these two annexes generally relate to the obligations on national treatment, most favoured nation (MFN) treatment, local presence, performance requirements and senior management and boards of directors.

Oman has made few reservations relating to culture: only three reservations under Annex I, namely a restriction on the application of national treatment to *Printing and publishing services*, *Retail photographic services* and *Radio and television transmission services*; no reservations relating to culture were made in Annex II.

Lastly, the FTA Canada-Jordan contains a cultural exemption clause excluding the measures relating to cultural industries. For the purposes of this agreement, the concept of cultural industries:

"means persons engaged in any of the following activities: (i) The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing; (ii) The

¹³⁸ Signed on 19 January 2006, entered into force on 1 January 2009.

¹³⁹ Signed on 27 January 2007, entered into force on 1 August 2007. The EFTA Parties are Iceland, Liechtenstein, Norway and Switzerland.

¹⁴⁰ Signed on 28 June 2009, entered into force on 1 October 2012.

production, distribution, sale or exhibition of film or video recordings; (iii) The production, distribution, sale or exhibition of audio or video music recordings; (iv) The publication, distribution or sale of music in print or machine-readable form; (v) Radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services."

3. *Clauses on preferential treatment relating to culture*

The three agreements mentioned above contain no provisions that specifically grant preferential treatment to the cultural goods and services of the other Parties, or to their artists and cultural professionals.

4. *Status of electronic commerce*

The FTA USA-Oman contains a chapter devoted to electronic commerce, the provisions of which might affect trade in cultural goods and services. One provision states that services supplied electronically remain subject to the rules of the chapters on investment and services, and to the relevant exceptions and non-conforming measures.

Other provisions contain commitments that specifically concern digital products (a ban on the imposition of customs duties or other charges, and application of national treatment and MFN treatment rules). The distinction between a digital product and a traditional service supplied electronically (covered by the chapters on investment and services, including the related exceptions and reservations), however, is not clearly established. The definition of digital products thus generally refers to products that have long been associated with the concept of "service". In fact, for the purposes of the agreement, "digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically".

The agreement also contains an additional provision stating that the rules applicable to digital products do not apply to the non-conforming measures on investment and services set out in Annexes I and II. The distinction between a traditional service provided electronically and a digital product, and therefore the relationship between the chapter on electronic commerce and the measures not conforming with the chapters on investment and services, remains ambiguous and could be subject to diverging interpretations.

The FTA Canada-Jordan also contains a chapter devoted to electronic commerce, but it consists of a single article that prohibits Parties from applying customs duties to products delivered electronically. However, this provision does not apply to cultural industries as they are covered by the cultural exemption described above. The relationship between the provisions of the chapter on electronic commerce and the cultural exemption clause could give rise to diverging interpretations of whether digital cultural products are included in the definition of cultural industries covered by the exemption.

5. *Other provisions relating to culture*

The FTA USA-Oman and the FTA EFTA-Egypt contain a few provisions relating to intellectual property.

ANNEX A

Table 1. List of the 51 bilateral and regional agreements concluded after the adoption of the Convention referred to in the study

Agreements listed in chronological order of signature date

	Name of the Agreement	States and economic organizations concerned	Date signed	Date of entry into force
1	Free Trade Agreement between the Government of the People's Rep. of China and the Government of the Rep. of Chile	China Chile	18-11-2005	01-10-2006
2	The United States-Oman Free Trade Agreement	The United States of America Oman	19-01-2006	01-01-2009
3	Preferential Trade Agreement between the Republic of India and the Republic of Chile	Chile India	08-03-2006	17-08-2007
4	The United States of America -Peru Trade Promotion Agreement	The United States of America Peru	12-04-2006	01-02-2009
5	Free Trade Agreement between the EFTA States and the SACU States	Iceland Liechtenstein Norway Switzerland Botswana Lesotho Namibia South Africa Swaziland	26-06-2006	01-05-2008
6	Free Trade Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru	Peru Chile	22-08-2006	01-03-2009
7	The United States of America-Colombia Trade Promotion Agreement	The United States of America Colombia	22-11-2006	15-05-2012
8	Acuerdo de Libre Comercio entre Chile y Colombia, el cual constituye un protocolo adicional al ACE 24	Colombia Chile	27-11-2006	08-05-2009
9	Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN	China ASEAN: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam	14-01-2007	01-07-2007

10	EFTA-Egypt Free Trade Agreement	Iceland Liechtenstein Norway Switzerland Egypt	27-01-2007	01-08-2007
11	The United States of America -Panama Trade Promotion Agreement	The United States of America Panama	28-06-2007	31-10-2012
12	The United States of America -Korea Trade Agreement	The United States of America Republic of Korea	30-06-2007	15-03-2012
13	Free Trade Agreement between Canada and the EFTA States	Canada Iceland Liechtenstein Norway Switzerland	26-01-2008	01-07-2009
14	Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand	China New Zealand	07-04-2008	01-10-2008
15	Supplementary Agreement on Trade in Services of the Free Trade Agreement between the Government of the Republic of Chile and the Government of the People's Republic of China	China Chile	13-04-2008	01-08-2010
16	Canada-Peru Free Trade Agreement	Canada Peru	28-05-2008	01-08-2009
17	Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other	EC Ghana	10-07-2008	---
18	Australia-Chile Free Trade Agreement	Chile Australia	30-07-2008	06-03-2009
19	Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part	EC CARIFORUM: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis Saint Lucia, Saint Vincent and the Grenadines, Suriname,	15-10-2008	01-11-2008

		Trinidad and Tobago		
20	Canada-Colombia Free Trade Agreement	Canada Colombia	21-11-2008	15-11-2011
21	Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part	EC Côte d'Ivoire	26-11-2008	01-01-2009
22	Preferential Trade Agreement between the Common Market of the South (MERCOSUR) and the Southern African Customs Union (SACU)	Argentina Brazil Paraguay Uruguay Botswana Lesotho Namibia South Africa Swaziland	15-12-2008	01-04-2016
23	Stepping Stone agreement with a view to an Economic Partnership Agreement between the European Community and its Member States of the one part and central Africa of the other	EC Cameroon	15-01-2009	01-10-2009
24	Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)	ASEAN Australia New Zealand	27-02-2009	01-01-2010
25	Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru	China Peru	28-04-2009	01-03-2010
26	Stepping Stone Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other	EC Botswana Lesotho Mozambique Namibia Swaziland	06-2009	10-06-2016
27	Canada-Jordan Free Trade Agreement	Canada Jordan	28-06-2009	01-10-2012
28	Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India	Republic of Korea India	07-08-2009	01-01-2010
29	Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern Africa States, of the one part, and the European Community and its Member States, of the other part	EC Comoros Madagascar Mauritius Seychelles Zambia Zimbabwe	29-08-2009	14-05-2012
30	Free Trade Agreement between the EFTA States and the Republic of Serbia	Iceland Liechtenstein Norway Switzerland Serbia	17-12-2009	01-10-2010
31	New Zealand-Hong Kong, China Closer Economic Partnership Agreement	New Zealand Hong Kong (China)	29-03-2010	01-01-2011

32	Free Trade Agreement between the Government of the Republic of Costa Rica and the Government of the People's Rep. of China	China Costa Rica	08-04-2010	01-08-2011
33	Free Trade Agreement between Canada and the Republic of Panama	Canada Panama	14-05-2010	01-04-2013
34	Free Trade Agreement between the EFTA States and Ukraine	Iceland Liechtenstein Norway Switzerland Ukraine	24-06-2010	01-06-2012
35	Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part	EC Republic of Korea	06-10-2010	01-07-2011
36	Peru-Mexico Trade Integration Agreement	Peru Mexico	06-04-2011	01-02-2012
37	Free Trade Treaty between the Republic of Peru and the Republic of Costa Rica	Costa Rica Peru	26-05-2011	01-06-2013
38	Partial Scope Agreement between the Republic of El Salvador and the Republic of Cuba	El Salvador Cuba	19-09-2011	01-08-2012
39	Free Trade Agreement between the EFTA States and Montenegro	Iceland Liechtenstein Norway Switzerland Montenegro	14-11-2011	01-09-2012
40	Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other	EC Colombia Peru	26-06-2012	01-03-2013
41	Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America, on the other	EU Costa Rica El Salvador Guatemala Honduras Nicaragua Panama	29-06-2012	01-08-2013
42	Free Trade Agreement between the Government of Iceland and the Government of the People's Republic of China	China Iceland	15-04-2013	01-07-2014
43	Free Trade Agreement between the EFTA States and the Central American States	Costa Rica Iceland Liechtenstein Norway Switzerland Panama	24-06-2013	19-08-2014
44	Free Trade Agreement between the Swiss Confederation and the People's Republic of China	China Switzerland	06-07-2013	01-07-2014

45	Free Trade Agreement between Canada and Honduras	Canada Honduras	05-11-2013	01-11-2014
46	Free Trade Agreement between the Government of the Republic of Korea and the Government of Australia	Republic of Korea Australia	08-04-2014	12-12-2014
47	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part*	EU Georgia	27-06-2014	01-09-2014
48	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part	EU Republic of Moldova	27-06-2014	01-09-2014
49	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part	EU Ukraine	27-06-2014	---
50	Free Trade Agreement between Canada and the Republic of Korea	Canada Republic of Korea	22-09-2014	01-01-2015
51	Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part	EU Canada	30-10-2016	---

ANNEX B

Table 2. States involved in the 51 bilateral and regional agreements covered by the study and their status regarding the Convention

	States involved in the bilateral and regional agreements covered by the study (and groupings where relevant to certain agreements)	Parties to the Convention
1	Antigua and Barbuda (CARIFORUM)	•
2	Argentina	•
3	Australia	•
4	Austria (European Union)	•
5	Bahamas (CARIFORUM)	•
6	Barbados (CARIFORUM)	•
7	Belgium (European Union)	•
8	Belize (CARIFORUM)	•
9	Botswana	
10	Brazil	•
11	Brunei Darussalam (ASEAN)	
12	Bulgaria (European Union)	•
13	Cambodia (ASEAN)	•
14	Cameroon	•
15	Canada	•
16	Chile	•
17	China	•
18	Colombia	•
19	Comoros (CARIFORUM)	•
20	Costa Rica	•
21	Côte d'Ivoire	•
22	Croatia (European Union)	•
23	Cuba	•
24	Cyprus (European Union)	•
25	Czech Republic (European Union)	•
26	Denmark (European Union)	•
27	Dominica (CARIFORUM)	•
28	Dominican Republic (CARIFORUM)	•
29	Egypt	•
30	El Salvador	•
31	Estonia (European Union)	•
32	Finland (European Union)	•

33	France (European Union)	•
34	Georgia	•
35	Germany (European Union)	•
36	Ghana	•
37	Greece (European Union)	•
38	Grenada (CARIFORUM)	•
39	Guatemala	•
40	Guyana (CARIFORUM)	•
41	Haiti (CARIFORUM)	•
42	Honduras	•
43	Hungary (European Union)	•
44	Iceland	•
45	India	•
46	Indonesia (ASEAN)	•
47	Ireland (European Union)	•
48	Italy (European Union)	•
49	Jamaica (CARIFORUM)	•
50	Jordan	•
51	Lao People's Democratic Republic (ASEAN)	•
52	Latvia (European Union)	•
53	Lesotho	•
54	Liechtenstein	
55	Lithuania (European Union)	•
56	Luxembourg (European Union)	•
57	Madagascar	•
58	Malaysia (ASEAN)	
59	Malta (European Union)	•
60	Mauritius	•
61	Mexico	•
62	Montenegro	•
63	Mozambique	•
64	Myanmar (ASEAN)	
65	Namibia	•
66	Netherlands (European Union)	•
67	New Zealand	•
68	Nicaragua	•
69	Norway	•
70	Oman	•

71	Panama	•
72	Paraguay	•
73	Peru	•
74	Philippines (ASEAN)	
75	Poland (European Union)	•
76	Portugal (European Union)	•
77	Republic of Korea	•
78	Republic of Moldova	•
79	Romania (European Union)	•
80	Saint Kitts and Nevis (CARIFORUM)	•
81	Saint Lucia (CARIFORUM)	•
82	Saint Vincent and the Grenadines (CARIFORUM)	•
83	Serbia	•
84	Seychelles	•
85	Singapore (ASEAN)	
86	Slovakia (European Union)	•
87	Slovenia (European Union)	•
88	South Africa	•
89	Spain (European Union)	•
90	Suriname (CARIFORUM)	
91	Swaziland	•
92	Sweden (European Union)	•
93	Switzerland	•
94	Thailand (ASEAN)	
95	Trinidad and Tobago	•
96	Ukraine	•
97	United Kingdom of Great Britain and Northern Ireland (European Union)	•
98	United States of America	
99	Uruguay	•
100	Viet Nam (ASEAN)	•
101	Zambia	
102	Zimbabwe	•
103	European Union	•
TOTAL	102 States and the European Union, making a total of 103 Parties	92 Parties