

GUIDE TO THE NEGOTIATION OF CULTURAL CLAUSES IN TRADE AGREEMENTS



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Foreword

In September 2018 the UNESCO Chair on the Diversity of Cultural Expressions launched the *Study on International Cooperation with French-Speaking African Countries for the Implementation of the Convention on the Diversity of Cultural Expressions in the Digital Environment*. The study concluded with the formulation of ten recommendations to guide the actions of the Government of Quebec, recommendations that could also be of interest for other Parties to the Convention, with regard to cultural cooperation in the context of the implementation of the 2005 Convention in the digital environment.

Recommendation 2 aimed to “[p]reserve the capacity of African states to intervene in favour of the diversity of cultural expressions when negotiating trade and investment agreements.” The explanatory text accompanying this recommendation stated that “developing countries, like developed countries, have a duty to protect their cultural industries from the activities and practices of the Web giants. Considering the fact that a new generation of trade and investment agreements contains binding commitments to liberalize electronic commerce, African countries must be able to adequately assert their need to preserve their capacity to adopt the policies necessary to support their cultural industries in the digital environment. Close collaboration between them and developed countries could prove crucial.” To this end, the study recommended the development of a *Guide to Negotiating Cultural Clauses in Trade Agreements*. The Government of Quebec has made the implementation of Recommendation 2 a priority.

However, the Guide presented in the following pages is much more than the implementation of a recommendation. It is in fact the fruit of more than 30 years of observation, reflection and work on bilateral, regional and multilateral free trade agreements, as well as on the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. This Guide also reflects the progress that has been made over the past 15 years in recognizing the specific nature of cultural goods and services in trade agreements. Above all, this Guide is intended as a new tool to encourage more and more states to continue along this path of recognition and reaffirmation of their cultural sovereignty in a globalized and interconnected society.

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Overview of the approach

The primary purpose of this *Guide to Negotiating Cultural Clauses in Trade Agreements* is to make States more aware of the possible implications of trade negotiations for the cultural sector and to help them develop their capacities to make choices in the context of such negotiations. It must be understood that if states refrain from raising their own concerns in this sector and do not make specific requests in this regard, they are in fact making an irreversible choice that they may later regret. In other words, they are abdicating “their sovereign right to formulate and implement their cultural policies,” which is reaffirmed in Article 5 of the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.¹

The comparative study of 99 free trade agreements concluded since the adoption of the 2005 Convention clearly shows the great diversity of positions adopted by states with respect to the protection and promotion of the diversity of cultural expressions. Unsurprisingly, states traditionally involved in the promotion of their culture have been the most concerned about the fate of cultural industries in the context of trade negotiations. States such as the Members of the European Union, Canada, Australia, New Zealand, Switzerland and the Republic of Korea, mostly developed countries, but also developing countries such as Chile, Mexico, Peru and Costa Rica immediately come to mind in this regard. With the beginning of negotiations to reach an international agreement on cultural diversity in the early 2000s, a growing number of states became increasingly aware of the need to protect their cultural industries in a context of free trade.

States must go through two stages prior to negotiating and incorporating cultural clauses in trade agreements in order to be able to make proper and timely use of this Guide. The first stage relates to the knowledge that states should have of their own cultural economy (Stage 1); the second stage relates to the adequate knowledge that states should have of the conditions under which the envisaged negotiations will take place (Stage 2). The suggestions made in these first two stages may occasionally prove difficult to implement, given the often highly variable human and financial resources of the countries involved in these negotiations. However, they will nonetheless be useful for states wishing to use the Guide to incorporate cultural clauses in the trade agreements they negotiate (Stage 3). A final stage involves the implementation of the results of the negotiated agreements (Stage 4).

¹ Hereafter “2005 Convention”.

This *Guide to Negotiating Cultural Clauses in Trade Agreements* will hopefully help inspire new initiatives to protect and promote cultural diversity in trade agreements so as to allow cultures to “flourish and freely interact in a mutually beneficial manner” (Article 1(b) of the 2005 Convention). This is all the more important at a time when the number of free trade agreements recently negotiated or under negotiation is increasing and almost all tend to incorporate electronic commerce commitments limiting the right of states to protect their cultural industries. But before embarking on the actual negotiations, certain steps need to be taken, and these must be addressed.

Stage 1

A state's prior knowledge of its own cultural sector

Ideally, knowledge of a state's own cultural sector should be kept up to date at all times so that the state is ready when trade negotiations begin. The objective is to know what needs to be adequately protected and promoted, including in the digital environment.

1.1 Knowing its own cultural economy and its prospects for development in the digital age

This knowledge requires a careful examination not only of the active (A) and emerging (B) sectors of culture, but also of the policies to be protected or implemented (C) and the actors involved in their implementation (D).

A. Active sectors

Creators can express themselves culturally in a wide variety of ways. Although they are not present in all sectors of cultural expression, they always find ways of expressing themselves that are unique to them. In order to get a fair idea of this activity, it is first necessary to identify the sectors in which there is already creation and production of cultural expressions. Examples include film, television, sculpture, painting, music, publishing, media and broadcasting, performing arts, theatre, digital arts, or other related sectors. Regardless of the active sectors, it will in any case be necessary to be able to document this activity, both in terms of production and consumption. To the extent possible, it will also be necessary to have an idea of the share of this production that goes to domestic consumption and the share that goes to exports, as well as an idea of the share of the domestic market that is filled by domestic production. If statistics on this subject are not readily available internally, states should take advantage of existing governmental networks on the international stage, such as UNESCO, La Francophonie, the Council of Europe (more specifically its European Audiovisual Observatory²), or non-governmental organizations, such as the International Federation of Coalitions for Cultural Diversity³ to verify whether relevant data is available.

B. Emerging sectors

Once the active sectors have been identified, the question may also arise as to whether other sectors for the creation or production of cultural expressions are emerging or whether they are sectors in which it might be desirable to be more active. An example of a creative sector that is rapidly emerging is the digital arts (which leads to artistic sub-categories such as “virtual reality”, “augmented reality”, “audiovisual art”, “generative art” and “interactive art”⁴) and the video

² Online: <https://www.obs.coe.int/en/web/observatoire/home> (accessed on 30-07-2019).

³ Online: <https://ficdc.org/en/> (accessed on 30-07-2019).

⁴ Wikipédia, “Arts numériques”, online: https://fr.wikipedia.org/wiki/Art_numérique (accessed on 30-07-2019).

game sector, which is increasingly seen today as a true form of cultural expression, considering the creativity expressed in the narrative, music and image. Moreover, while a very large number of states are already present and fairly active in cultural sectors such as music and broadcasting, many remain moderately or not very active in sectors such as cinema and publishing, for example.

C. *Policies to be protected or implemented*

Once the active and emerging sectors have been identified, the question arises as to what the state is doing or would like to do to support these sectors. This stage is crucial in getting the state to take the necessary actions to preserve its leeway to protect and promote the diversity of cultural expressions within the national territory. This reflection must not only take into account existing policies and measures, but also look to the future (vulnerable or threatened cultural expressions, digital issues). Failure to act in a considered manner in this matter may be bitterly regretted in the future. An interesting example in this regard is that of New Zealand, which in 1995, at the end of the Uruguay Round negotiations,⁵ committed itself not to use quantitative restrictions in the audiovisual sector. A study carried out a few years later was to show that the proportion of local content on New Zealand television had decreased to such an extent that in a comparison with ten other countries, New Zealand was at the bottom of the scale with 24% local content.⁶ Seeking to rectify this situation, New Zealand announced its intention to use national content quotas, only to be immediately rebuffed by the United States, which reminded the latter of its 1995 commitment.

In developing their existing cultural policies or establishing new cultural policies, states wishing to protect and promote the diversity of cultural expressions within their territory may draw inspiration from the relevant provisions of the 2005 Convention (especially Articles 6, 7 and 14), as well as from their operational guidelines, including the *Operational Guidelines on the Implementation of the Convention in the Digital Environment*.⁷

D. *Actors involved*

Finally, once the active and emerging sectors have been identified and an inventory of relevant policies and measures, in force or envisaged, has been made, attention should be paid to the governmental and non-governmental actors involved in the cultural sector. It is through extensive consultation among the latter that convincing demands can be made in the context of international trade negotiations likely to commit states in the cultural field.

⁵ It should be recalled that the Uruguay Round (1986-1994) was aimed at reforming the multilateral trading system. It led to the creation of the World Trade Organization (WTO) and the conclusion of several new multilateral trade agreements.

⁶ Ivan BERNIER, "Local Content Requirements For Film, Radio, and Television as a Means of Protecting Cultural Diversity: Theory and Reality (Section II)", Ministère de la Culture et des Communications du Québec, January-March 2004, p. 16 (accessed on 30-07-2019).

⁷ For easy access to these texts, see: UNESCO, Diversity of Cultural Expressions, Basic Texts, online: <https://en.unesco.org/creativity/convention/texts> (accessed on 30-07-2019).

At the national level, the actors that immediately come to mind are those under the authority of ministries with a cultural vocation whose action can have an impact on the protection and promotion of the diversity of cultural expressions. For several states, it is a ministry specifically designated under the name of Ministry of Culture (this is the case of France), but which can also be designated otherwise (Department of Heritage in Canada). Many states, on the other hand, simply do not have a ministry with an exclusively cultural vocation (United States, Great Britain); however, this does not exclude the possibility of the cultural sector being attached to other ministries (Ministry of Communications or Ministry of the Economy, for example). Finally, in some cases, culture will be the responsibility not of one, but of several ministries acting from a perspective that is specific to each one.

At the sub-national level, it should first be pointed out that, within states with a federal constitution, there are federal states (Länder, provinces, territories, cantons, regions or states) which often have a broad competence in the field of culture. At a lower level, there are also political entities in some states to which relative autonomy in different sectors, often including culture, is granted through delegation or decentralization (French or Spanish regions for example). Finally, at the bottom of this scale, we must not forget a final level, which is that of municipal institutions. In several countries, cities – especially large metropolises – have significant powers in the field of culture.

Furthermore, although it does not have legislative or regulatory powers as such, civil society (coalitions for cultural diversity, other groups of artists or cultural professionals, private associations representing different cultural industries) plays a leading role in the protection and promotion of the diversity of cultural expressions. Strictly speaking, civil society is the voice of cultural creators themselves.

As can be seen, the governmental and non-governmental actors involved in the cultural sector are located at multiple levels and exercise a wide range of competences. This is why it seems important that one or more persons with a broad knowledge of cultural industries and their needs be identified within each state when new trade negotiations that may affect them are undertaken.

1.2 Understanding the mechanisms of free trade and their potential impact on the cultural sector

An understanding of the fundamental principles (A) and general scope (B) of free trade agreements is an essential condition for the negotiation of cultural clauses in potential trade agreements.

A. *The fundamental principles of free trade*

Free trade agreements are generally based on two fundamental principles: the principle of market access and the principle of non-discrimination. These principles are implemented by various rules applicable to trade in goods and services.

The principle of market access aims at the elimination of restrictions on the entry of a good or service into the territory of a state. In the case of goods, market access implies a reduction – or even elimination – of tariffs, as well as the prohibition of all forms of quantitative restrictions (quotas or other trade measures of equivalent effect).

In the case of a service, market access is based on the removal of various types of restrictions, often divided into six categories:⁸

- limitations on the number of service suppliers;
- limitations on the total value of service transactions;
- limitations on the total number of service operations or the total quantity of services output;
- limitations on the total number of natural persons that may be employed in a particular service sector;
- measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;
- limitations on the participation of foreign capital in a service enterprise.

The principle of non-discrimination is generally broken down into two rules: the most-favoured-nation (MFN) treatment rule and the national treatment rule. These rules are applicable to “like” goods or “like” services or service suppliers.

Under the MFN treatment rule, a state must eliminate all forms of discrimination between “like” foreign goods imported into its territory, or between “like” foreign services destined for its territory, as well as between suppliers of such “like” foreign services. In legal language, the following wording may be used, for example:

*With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*⁹

⁸ These six categories of measures are those identified in Article XVI of the WTO’s *General Agreement on Trade in Services*. They are frequently included in bilateral and regional free trade agreements.

⁹ This wording is taken from Article II.1 of the WTO *General Agreement on Trade in Services* (GATS).

Under the national treatment rule, a state must eliminate any form of discrimination between a foreign good and a “like” domestic good, or between a foreign service or service supplier and a domestic service or service supplier. In legal language, the following wording may be used, for example:

*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*¹⁰

Finally, it is important to consider the notion of “likeness,” which conditions the application of most-favoured-nation treatment and national treatment rules. In the course of trade disputes brought before the WTO Dispute Settlement Body, four likeness criteria have gradually emerged in the jurisprudence. These criteria are the physical properties of the products, their end-use, the tastes and habits of consumers, and the tariff classification of the goods concerned. These criteria already had a significant impact on the outcome of a dispute between Canada and the United States over certain Canadian cultural policies regarding periodicals. In that case, Canada had argued that Canadian periodicals and American periodicals are not like products in terms of their cultural content. However, this argument was rejected in favour of the traditional likeness criteria previously established in the jurisprudence.¹¹

All of these elements are important in understanding how the fundamental principles of free trade interact with the cultural policies of states. For example, when these policies have the effect of favouring a state’s domestic cultural goods or services (such as books, films or music), or when they aim to support artists and cultural professionals, they come up against the principle of non-discrimination, and more specifically the national treatment rule. Indeed, books, films and musical recordings from one state, or artists from that state, are still considered from a strictly commercial point of view to be “like” books, films and musical recordings from a foreign state, or artists (service suppliers) from another state. In this case, only the incorporation of appropriate cultural clauses makes it possible to maintain such cultural policies in a context of free trade.

B. The scope of free trade agreements

The vast majority of free trade agreements cover trade in goods, trade in services and investment. In addition, special rules often govern the allocation of subsidies. Agreements also tend to include a chapter on intellectual property. Finally, an increasing number of agreements contain rules specifically aimed at electronic commerce (also known as digital commerce). In all these cases, the cultural sector may be concerned.

Trade in goods focuses on tangible products. In the cultural sector, books, periodicals and

¹⁰ This wording is taken from Article III.4 of the WTO *General Agreement on Tariffs and Trade*.

¹¹ WTO, *Canada — Certain Measures Concerning Periodicals*, DS/31. See in particular the Report of the Panel, WT/DS31/R, 14 March 1997.

newspapers, and films on physical medium are covered. Also included in this category are works of art, archives and archaeological goods. It should be noted that almost all free trade agreements contain a general exception allowing states to maintain measures for the protection of “national treasures of artistic, historic or archaeological value.”¹²

Trade in services generally includes audiovisual services, as well as other cultural services. Audiovisual services include film production services, film and video distribution services, film projection services, radio and television services, radio and television broadcasting services, and sound recording services. Other cultural services covered may be those relating to live performances (including theatre, orchestras and circuses), libraries, archives and museum services. It should be noted that in the area of publishing, printing and publishing services may also be relevant. Finally, although they are not considered cultural services, telecommunications services may be of interest with respect to issues related to cultural diversity.

Investment in the cultural sector may concern any form of enterprise producing the cultural goods or cultural services covered by the previous two categories.

Subsidies include all financial contributions from public authorities that confer an advantage to a person (natural or legal) involved in one of the links in the value chain of pre-identified cultural goods or services, i.e. creators, producers, distributors, disseminators of cultural goods or services.

Electronic (or digital) commerce is about digital products. A digital product is generally defined as a computer program, text, video, image, audio recording or other digitally encoded product that is produced for commercial sale or distribution and that can be transmitted electronically. Such a definition encompasses all cultural content available in digital format, including films, series and music, but also video games and digital arts.

1.3 Having knowledge of existing cultural clauses and trade instruments

The negotiation of cultural clauses in a free trade agreement requires prior knowledge of the different types of clauses that preserve the power of states to adopt and implement the policies that they deem appropriate to protect and promote the diversity of cultural expressions in a context of trade liberalization.

In this regard, it is relevant to distinguish at least three categories of clauses, namely general cultural clauses (cultural exemption or exception) (A), limitations on specific commitments (B) and reservations (C). Parties to the 2005 Convention have also made a commitment to grant preferential treatment to developing countries, which may require the inclusion in a free trade agreement of cultural clauses specifically designed to provide such preferential treatment (D).

¹² This wording corresponds to the text of Article XX(f) of GATT 1947, which sets out one of the general exceptions provided for in that Agreement. Many free trade agreements contain a reference to the general exceptions of GATT 1947 or even directly incorporate the text of those exceptions.

Finally, Parties are also encouraged to incorporate in their free trade agreements an explicit reference to the 2005 Convention (E).

A. General cultural clauses (exception/exemption)

General clauses, referred to as cultural exception or cultural exemption clauses, allow either the exclusion of certain cultural goods and services from the scope of a free trade agreement or the recognition of the right of states to maintain policies applicable to such cultural goods or services in derogation of their commitments under the free trade agreement. These clauses have the advantage of being permanent, in the sense that once incorporated into an agreement, they are generally not subject to subsequent negotiations to remove them or diminish their scope, unlike specific commitments or reservations which may be subject to review. Moreover, the use of cultural clauses is a relatively flexible mechanism since Parties may jointly determine the scope of application of such clauses. Above all, when drafted in a clear and comprehensive manner, they have the advantage of offering great legal certainty to states that wish to have the necessary leeway to protect and promote the diversity of cultural expressions. However, only a careful examination of the wording of the clause makes it possible to accurately assess the real leeway available to Parties.

Examples include practices developed by Canada and the European Union. In most of the free trade agreements ratified by Canada, a general cultural exemption excludes “cultural industries” from their scope of application. In the European Union’s free trade agreements, it is rather “audiovisual services” that are excluded from the scope of such agreements.

B. Limitations on specific commitments

One of the methods chosen by states to institute progressive liberalization of services is the elaboration of schedules of specific commitments, also known as the “positive list” method of commitments. With respect to cultural concerns, this method has the advantage of allowing states to select the services they wish to liberalize. In other words, a state may simply decide to refrain from making commitments on cultural services. This approach thus enables the state to preserve its power to intervene in the cultural sector.

Another riskier option for states is to include cultural services in their schedules, but to modulate their commitments on these services. In this case, cultural clauses, in the form of “limitations,” can be drafted in such a way as to preserve the right of states to maintain certain types of policies. The schedules of commitments can also be drafted in such a way that liberalization of cultural services is limited to certain modes of supply or specific types of services. Specific – or positive list – commitments are formulated according to a relatively standard schedule that generally covers two obligations, a market access obligation and a national treatment obligation, and four modes of supply of services:

- cross border;

- consumption abroad;
- commercial presence;
- presence of natural persons.

For each cultural service falling within the scope of an agreement, a state may therefore choose to liberalize one or more modes of supply and maintain one or more limitations by incorporating appropriate cultural clauses. This is essentially the same approach that was taken by World Trade Organization (WTO) Members to liberalize services under the *General Agreement on Trade in Services* (GATS).

C. *Reservations*

Some trade negotiations instead favour the “negative list” of commitments approach. Under this approach, all cultural goods and services are covered by liberalization. In order to preserve its power to adopt and implement cultural policies of its choosing, a state therefore needs to formulate appropriate reservations. Reservations may exclude certain cultural goods or services from the scope of certain rules. They may also seek to maintain certain existing policies, or to preserve the right of a state to adopt new policies when it deems it appropriate. In other words, every policy and measure, cultural or non-cultural, that may affect the free trade in cultural goods or services must be subject to one or more reservations to that effect. Such an exercise thus requires a detailed analysis of all the provisions of a trade agreement and thorough knowledge of all policies and measures directly or indirectly affecting trade in cultural services. Hence, the reservation technique necessarily entails some risks, especially since certain types of reservations may have the effect of rendering the subsequent change of measures in force illegal (in trade language, this is known as the “ratchet effect” of these reservations).

D. *Preferential treatment clauses*

According to Article 16 of the 2005 Convention, “[d]eveloped countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.” Article 16 thus commits developed countries to granting preferential treatment to cultural goods and services from developing countries, as well as to their artists and other cultural professionals and practitioners. In doing so, preferential treatment recognizes “the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning” (Article 1(g) of the 2005 Convention). In the context of the negotiation of a free trade agreement between a developed and a developing country, this commitment may result in the inclusion of cultural clauses aimed at providing a particular advantage to the cultural goods and services of the developing country, or to its artists and cultural professionals. Article 16 of the 2005 Convention further assumes that such an advantage offered by the developed country must be without reciprocity requirement, meaning that no such obligation should be imposed on the developing country. The practice of recent years with regard to the conclusion of free trade agreements demonstrates that preferential treatment

for the cultural sector is generally offered through cultural cooperation clauses incorporated in such agreements.

E. References to the 2005 Convention

Insofar as Parties recognize the dual nature, economic and cultural, of cultural goods and services, as well as their right to adopt cultural policies to protect and promote the diversity of cultural expressions, it is desirable that they include one or more references to the 2005 Convention in the free trade agreements to which they accede. Ideally, the Convention should be named explicitly. If the free trade agreement is negotiated between a Party to the 2005 Convention and a state that is not a party, the incorporation of references to some of its objectives or principles is desirable. Such references may, for example, recognize the right of states to adopt cultural policies, protect cultural diversity, implement cultural cooperation initiatives or support cultural development.

Stage 2

Preparation for the negotiation of a new trade agreement that includes cultural clauses

Promoting recognition of “the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning”¹³ in the context of trade negotiations is not an easy task since it implies some form of special treatment. Without adequate preparation, it is practically impossible to achieve this. At the very least, this implies, in addition to a good knowledge of a state’s own cultural sector, setting up a negotiating team in close contact with the various cultural actors and networks operating on the national territory (2.1) and a good knowledge of the objectives pursued in the cultural field by the other states involved in the negotiation (2.2).

2.1 Setting up a negotiating team that listens to the different actors and cultural networks operating on the national territory.

Such a team should have at its disposal channels of communication between the different ministries and government agencies involved in the negotiation (culture, trade, foreign affairs) and should also take into account, where appropriate, other actors with specific competences in cultural matters, such as federal states, regions and cities. Since the negotiation is aimed at concluding a trade agreement, national economic ministries can be expected to occupy a prominent place on the negotiating team. In this context, it becomes all the more important to ensure that non-trade concerns – and more specifically here cultural concerns – are heard. But this can hardly be done if the negotiations do not proceed in a transparent manner, i.e. if, under the pretext of confidentiality, some stakeholders are not informed of the progress of the negotiations. Unfortunately, we must admit that this still happens all too often in the negotiation of free trade agreements.

This concern also applies to communications between the negotiating team and civil society. The importance of civil society in the negotiation and implementation of the 2005 Convention is highlighted in Article 11 of the Convention’s constitutive text, which reads as follows: “Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.” Indeed, throughout the process leading up to the adoption of the Convention, civil society, represented by, inter alia, a vast network of national coalitions for cultural diversity operating in Europe, America, Africa and even Asia, played a very important role. The South Korean Coalition for Cultural Diversity, for example, was very active not only during the negotiations (it organized the Third International Meeting of Cultural Professional Organizations in Seoul in 2003), but it also worked very hard to promote Korea’s ratification of the Convention. Even today, these coalitions are still actively involved in the various trade negotiations underway.

¹³ Article 1(g) of the 2005 Convention.

The implementation of an information and consultation strategy with civil society representatives can of course take many forms, but it necessarily implies open exchanges with them, both in terms of the interlocutors and the objectives of the negotiation.¹⁴ As an example of a truly open policy in this area, it is interesting to recall the experience of Canada which, for some twenty years (from 1985 to 2005), maintained a consultation structure called the “Sectoral Advisory Group on International Trade” (SAGIT) covering different sectors of the economy, including culture. It was SAGIT – Cultural Industries that launched the idea of an international agreement on cultural diversity in 1999.¹⁵

2.2 Making sure to have good knowledge of the objectives pursued in the cultural field by the other states involved in the negotiation

In a trade negotiation, it goes without saying that what one state seeks is not necessarily what another state wants. This is particularly true when the objective pursued involves special treatment of certain products, as in the case of a request for a cultural exception. In such a case, the requesting state must look into the past behaviour of the other state(s) with regard to the treatment of cultural goods and services, and consider, if there are several states involved in the negotiation, the possibility of further consultation with a view to obtaining the inclusion of cultural clauses in the future agreement.

As regards the past behaviour of the other state or states with respect to the treatment of cultural goods and services in trade agreements, the simplest way to obtain the information sought is to see how they have behaved concretely in the free trade agreements to which they are already parties. As will be seen in stage 3, many states have sought and obtained some form of special treatment for culture in the agreements in question. The scope of such treatment can vary significantly from one agreement to another, as can the legal technique used to achieve it. However, this does not prevent this behaviour from being seen as an indication of receptiveness to cultural clauses. To complete this analysis, it is possible to check which states are also members of the 2005 Convention. Article 2.2 of the 2005 Convention states as a principle that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.” It might be expected that at least a number of states that have ratified this Convention would not be reluctant to include a cultural exception clause in a trade agreement under negotiation.

¹⁴ On this subject, see Ann Weston’s excellent study entitled “The Canadian ‘model’ for public participation in trade policy formulation,” The North-South Institute, Ottawa, 2005, online: www.nsi-ins.ca (accessed on 30-07-2019).

¹⁵ See: Sectoral Advisory Group on International Trade (SAGIT) – Cultural Industries, “Canadian Culture in a Global World. New Strategies for Culture and Trade,” February 1999, online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/canculture.aspx?lang=eng> (accessed on 30-07-2019).

The information obtained on the past behaviour of other states with regard to the treatment of cultural goods and services in trade agreements makes it possible for states wishing to ensure the protection and promotion of their cultural industries to consider another very useful approach to achieve their goal, namely further consultation with these other states in order to obtain the inclusion of cultural clauses in the new agreement. For example, the Group of Francophone Countries organized several consultation meetings on the subject within the framework of UNESCO, and the International Network on Cultural Policy (INCP), established by Canada in 1998, went so far as to draft a formal agreement on cultural diversity. Article 21 of the 2005 Convention entitled “International Consultation and Coordination” provides very clear support for such behaviour. It states that “Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.”

Stage 3

The incorporation of cultural clauses in the agreement under negotiation

When negotiating a new trade agreement, states should seek to link the needs identified above with the formulation of concrete principles and commitments to protect and promote culture. This implies the elaboration of cultural clauses adapted to the different parts of the agreement under negotiation. Particular attention will be paid here to the following types of provisions:

- The preamble (3.1)
- Definitions (3.2)
- Exceptions (3.3)
- Limitations on commitments (3.4)
- Provisions on cooperation and preferential treatment (3.5)

For each of these provisions or sets of provisions, states are given a number of options from which to choose those that meet their needs. The following are relevant examples of cultural clauses from 99 existing free trade agreements.¹⁶ Several of these clauses could be replicated in future negotiations.

3.1 The preamble

The preamble contains a statement of the reasons that led to the negotiation of a trade agreement. Its statements are not legally binding. However, they may have some significance for the interpretation of the Parties' commitments. This is the case, among others, for statements that refer to non-trade concerns (sustainable development, environment, public health, etc.). It is increasingly common to find a statement in the preamble of trade agreements that refers specifically to cultural diversity.

Of the 99 trade agreement preambles examined, 21 contain one or more statements related to culture. Of these, we will first present the agreement that we believe is most relevant. We will then present other agreements that contain statements that are also of interest to us for reasons that are discussed in more detail below.

¹⁶ A complete list of these agreements can be found in Annex 1 of this Guide.

Comprehensive Economic and Trade Agreement (CETA) (Canada – European Union)

Preamble, paragraphs 6 and 7

RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;

AFFIRMING their commitments as parties to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support;

Commentary

This preamble is interesting first of all because it contains an explicit reference to the 2005 Convention. It is also interesting because the above-mentioned statements implement Article 21 of that Convention¹⁷ by reflecting two essential objectives of the Convention, namely:

(g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;

(h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.

We will see below that the Preamble of some *Protocols on Cultural Cooperation* annexed to free trade agreements may also contain references to the 2005 Convention (section 3.5 below).

¹⁷ Article 21 of the 2005 Convention reads as follows: "Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles."

— OTHER RELEVANT AGREEMENTS —

Canada-Peru Free Trade Agreement

Recognizing that states must maintain the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity, given the essential role that cultural goods and services play in the identity and diversity of societies and the lives of individuals

** It should be noted that this wording is also used in the following agreements: Canada-Colombia Free Trade Agreement; Canada-Jordan Free Trade Agreement; Canada-Panama Free Trade Agreement; Canada-Honduras Free Trade Agreement; Canada-Ukraine Free Trade Agreement.*

Canada-EFTA Free Trade Agreement

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

Canada-Korea Free Trade Agreement

Promote cultural cooperation and recognise that the Parties 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

EU-Singapore trade and investment agreements

REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity

Commentary

The first statement (Canada-Peru Free Trade Agreement) is highly relevant since it recognizes, on the one hand, the right of states to intervene in favour of cultural diversity and, on the other, the dual nature, economic and cultural, of cultural goods (or *products*) and services. The following three statements are limited to recognizing the right to intervene to protect, promote or enhance cultural diversity and/or cultural industries.

— OTHER AGREEMENTS CONTAINING A GENERAL REFERENCE TO CULTURE —

<p>Agreement on Comprehensive Economic Partnership Among Japan and Member States of the ASEAN</p>
<p>Desiring to deepen the relationship between Japan and ASEAN, which is built on mutual confidence and trust in wide-ranging fields covering not only political and economic areas, but also social and cultural areas</p>
<p>Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part</p>
<p>CONSIDERING the need to promote and expedite the economic, cultural and social development of the CARIFORUM States, with a view to contributing to peace and security and to promoting a stable and democratic political environment</p>
<p>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</p>
<p>WHEREAS the economic, cultural and social development of West African States must be promoted and expedited with a view to contributing to peace and security and to promoting a stable and democratic political environment</p>
<p>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</p>
<p>COMMITTED to enhancing people-to-people contacts, including through cooperation and exchanges in the fields of science and technology, business, youth, education and culture</p>

Commentary

Although they mention various relevant objectives (relations in the field of culture, cultural development, cultural cooperation and exchange), these statements do not really place any special emphasis on culture.

3.2 Definitions

Four concepts or expressions related to the cultural sector are defined in several trade agreements. These are “cultural industries” (also referred to as “persons engaged in a cultural industry,” and sometimes supplemented by a definition of “cultural activities”), “creative arts,” “cultural heritage,” and “broadcasting services.” The definition most often used in the agreements is that of “cultural industries” (or “persons engaged in a cultural industry”), followed at some distance by the definitions of “creative arts” and “cultural heritage.” Overall, the

definitions that emerge in several agreements are quite similar, but sometimes contain minor variations that are not without interest.

Some 50 states are involved in agreements containing such definitions. Since these definitions, in particular those on “cultural industries” and “creative arts,” describe a scope of action of States in this area, it may be assumed that they are linked to some form of special treatment reserved for culture in the free trade agreement concerned. In this sense, these definitions contribute to the recognition of the specificity of cultural goods and services.

The order of the definitions presented below is based on their frequency of occurrence in the agreements examined. Those involving a special treatment for culture are presented first. Definitions that do not involve such treatment are then discussed.

A. “Cultural industries”

Canada-EFTA Free Trade Agreement

Annex J

The expression “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; 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.

Commentary

This definition has been used in many other free trade agreements, not only those involving Canada, but other countries as well. In total, of the 99 agreements examined, 26 agreements binding 47 states contain a definition of cultural industries very broadly similar to the one presented above.

Two agreements use the same definition of “cultural industries,” but instead link it to “persons engaged in a cultural industry.” One of these is the Canada-Honduras Free Trade Agreement.

Canada-Honduras Free Trade Agreement

Article 22.1: Definitions

Person engaged in a cultural industry means a person engaged in 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) radio communications in which the transmissions are intended for direct reception by the general public; radio, television and cable broadcasting undertakings; and satellite programming and broadcast network services;

The Canada-Colombia Free Trade Agreement adopts a somewhat broader definition of cultural industries, adding performing arts, visual arts and crafts.

Canada-Colombia Free Trade Agreement

Article 2208: Definitions

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; 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;
- f) Production and presentation of performing arts;
- g) Production and exhibition of visual arts; or
- h) Design, production, distribution and sale of handicrafts.

In the Canada-Peru Free Trade Agreement, paragraphs (f), (g) and (h) are instead grouped together in another definition of “cultural activities.”

Canada-Peru Free Trade Agreement

[This agreement contains in Article 2207 a definition of “cultural industries” similar to the definition contained in the Canada-Honduras Free Trade Agreement cited above. Annex II of Peru also contains a definition of “cultural activity”.]

Annex II – Schedule of Peru

For purposes of this entry, the term “cultural related activities” means:

1. Production and presentation of theater arts;
2. Production and exhibition of visual arts; or
3. Design, production, distribution and sale of handicrafts.

Finally, it is useful to reproduce below the English and Spanish versions of the definition of “cultural industries” found in several agreements.

Agreement between Japan and the Republic of Chile for Strategic Economic Partnership

Annex 7 – Schedule of Chili

“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.

Acuerdo de Libre Comercio entre la República del Perú y la República de Corea

Annex II – Schedule of Peru

Para efectos de esta entrada, el término “industrias culturales” significa:

- (a) publicación, distribución o venta de libros, revistas, publicaciones periódicas o diarios impresos o electrónicos, excluyendo la actividad aislada de impresión y de composición tipográfica de cualquiera de las anteriores;
- (b) producción, distribución, venta o exhibición de grabaciones de películas o video;

- (c) producción, distribución, venta o exhibición de grabaciones de música en audio o video;
- (d) producción y presentación de artes escénicas ;
- (e) producción y exhibición de artes visuales;
- (f) producción, distribución o venta de música impresa o legible por medio de máquina;
- (g) diseño, producción, distribución y venta de artesanías; o
- (h) las radiodifusoras destinadas al público en general, así como todas las actividades relacionadas con la radio, televisión y transmisión por cable, servicios de programación de satélites y redes de transmisión.

B. *“Creative arts”*

A definition of “creative arts” is included in 8 free trade agreements, mainly in the Asia-Pacific region. It has the advantage of being much more inclusive than the definition of “cultural industries” presented earlier, particularly because creative arts include “arts work which uses new technologies,” “creative on-line content” and “digital interactive media and art work.”

Tratado de libre comercio entre la República de Panama y la República de Singapur

Annex II – Schedule of Panama

“Creative arts” include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film, television, video, radio, creative on-line, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid arts work which uses new technologies to transcend discrete artform divisions.

Free Trade Agreement Between New Zealand and the Republic of Korea

Article 20.1: General Exceptions (in footnote 1)

“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.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Annex II – Schedule of Australia (in footnote 16)

For the purposes of this entry, “creative arts” means: the performing arts (including live theatre, dance and music); visual arts and craft; literature (other than literary works transmitted electronically); and hybrid art works, including those which use new technologies to transcend discrete art form divisions. For live performances of the “creative arts”, as defined, this entry does not extend beyond subsidies and grants for investment in Australian cultural activity.

Commentary

The first of the three examples presented above explicitly mentions the “film, television, video, radio” sector, which is not the case with the second and third definitions.

C. Other definitions related to culture

Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation

Annex 3 – List of Reservations of Switzerland

Broadcasting services are defined as the production, processing, transmission and reception of radio and television programme services. A programme service is a sequence of programmes which are offered continuously, defined in time and transmitted using telecommunications techniques and which are intended for the public.

Tratado de libre comercio entre la República de Panamá y la República de Singapur

Annex II – Schedule of Panama

“Cultural heritage” includes: ethnological, archaeological, historical, literary, artistic, scientific or technological moveable or built heritage, including the collections which are documented, preserved and exhibited by museums, galleries, libraries, archives and other heritage collecting institutions.

Commentary

These other two definitions are mentioned only once in the listed agreements.

In closing this section, we find it useful to note that the definitions contained in free trade agreements are generally used to limit the scope of trade commitments (as we will see in the next section). In order to remain relevant, it is therefore important that these definitions take into account the rapid rise of digital technology in the field of cultural and creative industries. This becomes all the more urgent as the most recent agreements contain provisions on electronic commerce, which is defined in such a way that the specificity of cultural goods and services can hardly be recognized.

Finally, it should be noted that it may be appropriate in some cases to use definitions that explicitly incorporate the terms of the 2005 Convention, particularly when the trade negotiation takes place between two Parties to the Convention. The definitions relating to “activities, goods and services,” “cultural industries,” “cultural policies and measures” and “protection” are relevant and deserve to be recalled:¹⁸

“Cultural activities, goods and services” refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.

“Cultural industries” refers to industries producing and distributing cultural goods or services as defined [...] above.

“Cultural policies and measures” refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.

“Protection” means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions.

¹⁸ See article 4 of the 2005 Convention.

3.3 Exceptions

This section deals with clauses that have the effect of excluding the cultural sector from the scope of a free trade agreement. They are therefore in most cases of general application and are applicable to all states parties. They may occasionally appear only in the chapters most relevant to the cultural sector.

Two expressions are used to characterize this type of clause: the cultural exemption and the cultural exception. The use of the term “cultural exemption” is infrequent. The best-known example is the 1988 Canada-U.S. Free Trade Agreement, which states in its Article 2005 that “[c]ultural industries are exempt from the provisions this Agreement.” The cultural industries covered are defined in Article 2012 (in accordance with the definition of “cultural industries” generally used by Canada in its agreements, section 3.2 above). Virtually all other existing agreements use the term “cultural exception” in this context. Therefore, for the purposes of this Guide, the term “cultural exception” will be preferred.

Of the 99 agreements listed, 27 contain a cultural exception clause. These agreements involve a total of 71 parties. Notwithstanding the relatively high number of parties and agreements involved, three clauses are mainly used. They correspond to models promoted by the European Union, Canada and New Zealand. These clauses will be presented in order of frequency of use.

A. *The European Union exception*

Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part

Chapter Seven – Trade in services, establishment and electronic commerce

Article 7.4: Scope and definitions

This Section applies to measures of the Parties affecting the cross-border supply of all service sectors with the exception of:

a) audio-visual services

Chapter Seven – Trade in services, establishment and electronic commerce

Article 7.10: Scope

With a view to improving the investment environment, and in particular the conditions of establishment between the Parties, this Section applies to measures by the Parties affecting establishment in all economic activities with the exception of:

c) audio-visual services

Commentary

This exception appears in many agreements concluded by the European Union and its Member States. It is usually included in the chapter on cross-border trade in services and in the chapter on investment (also known as “establishment of a commercial presence”). In the most recent agreements concluded by the European Union, this exception on audiovisual services is also included in the chapter on electronic commerce (see section 3.4.B below). It should be noted that the agreements concerned do not contain a definition of “audiovisual services.”

B. The Canadian exception

Although less used than the European Union’s, Canada’s cultural exception (first example below) is still found in a significant number of free trade agreements. It is often applicable to the entire agreement concerned. This cultural exception is usually supplemented by another clause dealing specifically with telecommunications (second example below).

Canada-Colombia Free Trade Agreement
Chapter Twenty-Two – Exceptions Article 2206: Cultural Industries 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 203 (National Treatment and Market Access for Goods - Tariff Elimination).
Chapter Ten – Telecommunications Article 1001: Scope and Coverage This Chapter does not apply to any measure of a Party affecting the transmission by any means of telecommunications, including broadcast and cable distribution of radio or television programming intended for reception by the public.

In one particular case, Canada has moved away from the general cultural exception to a chapter-by-chapter approach. This is the case of CETA, concluded in 2016 with the European Union. In this agreement, the cultural exception, which still covers “cultural industries,” is incorporated into the chapters on subsidies, investment, cross-border trade in services, domestic regulation and telecommunications.

Comprehensive Economic and Trade Agreement

Chapter seven: Subsidies

Article 7.7 – Exclusion of subsidies and government support for audio visual services and cultural industries

Nothing in this Agreement applies to subsidies or government support with respect to audio-visual services for the European Union and to cultural industries for Canada.

Chapter eight: Investment

Article 8.2 – Scope

3. For the EU Party, Sections B and C do not apply to a measure with respect to audio-visual services. For Canada, Sections B and C do not apply to a measure with respect to cultural industries.

Chapter nine: Cross-border trade in services

Article 9.2 – Scope

2. This Chapter does not apply to a measure affecting: [...]

b) for the European Union, audio-visual services;

c) for Canada, cultural industries;

Chapter twelve: Domestic regulation

Article 9.2 – Scope

2. This Chapter does not apply to licensing requirements, licensing procedures, qualification requirements, or qualification procedures: [...]

b) relating to one of the following sectors or activities:

i) for Canada, cultural industries and, as set out in its Schedule to Annex II, social services, aboriginal affairs, minority affairs, gambling and betting services, and the collection, purification, and distribution of water; and

ii) for the EU Party, audio-visual services and, as set out in its Schedule to Annex II, health, education, and social services, gambling and betting services, and the collection, purification, and distribution of water.

Chapter fifteen: Telecommunications

Article 15.2 – Scope

2. This Chapter does not apply to a measure of a Party affecting the transmission by any means of telecommunications, including broadcast and cable distribution, of radio or television programming intended for reception by the public. For greater certainty, this Chapter applies to a contribution link.

Chapter twenty-eight: Exceptions

Article 28.9 – Exceptions applicable to culture

The Parties recall the exceptions applicable to culture as set out in the relevant provisions of Chapters Seven (Subsidies), Eight (Investment), Nine (Cross-Border Trade in Services), Twelve (Domestic Regulation) and Nineteen (Government Procurement).

Commentary

In previous agreements concluded by Canada, cultural industries (books, periodicals, music, film, television) were entirely excluded from the scope of these agreements. In the agreement between Canada and the European Union, however, the cultural exceptions relate to specific chapters and not to the Agreement as a whole: they are found in the chapters on subsidies, services, investment, domestic regulation (licensing and qualification requirements and procedures) and telecommunications. But there is no cultural exception in Chapter 2 on national treatment and market access for goods. It will be seen below that Canada, in its negotiation of the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP), succeeded in having a reservation inscribed to exempt cultural goods from national treatment.

C. *The New Zealand exception*

Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand

Chapter 17 – Exceptions

Article 200: General Exceptions

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

Commentary

This provision is fully reflected in four other agreements concluded by New Zealand, namely those involving Australia and the ASEAN countries, Hong Kong, Taiwan and the Republic of Korea. This exception is therefore mainly found in agreements involving states in the Asia-Pacific region. The clause is interesting since it covers, among other things, support measures for creative works of national value. However, it should be pointed out that recourse to this clause is limited by the formulation of conditions to be met. First, the support measures must be “necessary.” Second, the measures must not constitute arbitrary or unjustified discrimination or a disguised restriction on trade, which is reminiscent of the introductory paragraph (also known as the “chapeau”) of Article XX of the *General Agreement on Tariffs and Trade* (GATT). The question of whether all these conditions have been met has been the subject of extensive jurisprudence of the WTO Dispute Settlement Body. This jurisprudence shows that the conditions for resorting to such an exception can be particularly difficult to meet and can therefore easily be challenged.

3.4 Limitations on commitments

In the absence of a general cultural exception (see 3.3 above), states have developed approaches that take into account the particular cultural concerns of each of the parties involved in the negotiations. To preserve their ability to intervene in the cultural sector, they have developed clauses specific to certain forms of trade, which they include in the relevant chapters or in an annex.

The first chapter relevant to the culture sector is the chapter on trade in goods. However, it is common to find in this chapter an explicit reference to GATT commitments and exceptions, particularly with respect to the application of national treatment and market access rules. As regards the exceptions applicable to cultural goods, GATT provides for an exception to national treatment authorizing certain forms of screen quotas (Article IV), as well as a general exception

relating to national treasures (Article XX (f)). Except in a few special cases, practice shows that states do not include an additional cultural clause to limit market access and national treatment in the chapter on goods. A special case worth noting is found in *Chapter 2 - National Treatment and Market Access for Goods* of the CPTPP: in this agreement, Canada specifies in *Annex 2-A - National Treatment and Import and Export Restrictions* that national treatment “shall not apply [...] to a measure affecting the production, publication, exhibition or sale of goods [footnote 20] that supports the creation, development or accessibility of Canadian artistic expression or content.” According to footnote 20, “[s]uch goods include books, magazines, and media carrying video or music recordings.” This clause therefore preserves, in this agreement, Canada’s power to support its relevant cultural industries, which include, among others, the book and publishing sector.

The other chapters relevant to culture are mainly those dealing with the following subjects: commitments on trade in services and investment (A); commitments on subsidies (B); commitments on electronic commerce (C). The cultural clauses to limit commitments in these chapters are very numerous and are usually included in schedules annexed to the text of the agreement rather than in the body of the agreement itself. Examples are given below.

A. Limitations on services and investment commitments

The formulation of commitments to liberalize cross-border trade in services or investment can be done in two ways.

The first method is to inscribe commitments in “positive lists,” also known as “schedules of specific commitments.”¹⁹ Here, states inscribe the sectors that they wish to see liberalized in their schedule and it is only in these sectors that they are committed. Alternatively, they may choose to make commitments for given sectors, while entering limitations in order to preserve part of their power to intervene in favour of the services covered. This approach will be discussed in a first subsection (1).

Under a second approach, commitments take the form of “negative lists” (see above, section 1.3.C). In other words, all services and investment sectors are liberalized, but states have the option of entering reservations. These have the effect of excluding certain categories of services or certain existing or future policies. This approach will be discussed in a second subsection (2).

1. Positive lists of commitments

Of the 99 free trade agreements examined, more than 40 use positive lists of commitments. This is the approach generally favoured by China, the Republic of Korea and the European Union. Several agreements negotiated by Australia, New Zealand, ASEAN countries and some Latin American countries also use such positive lists of commitments.

¹⁹ See above, section 1.3 B.

For states wishing to preserve their freedom to intervene in the cultural sector, there are two choices in the negotiation of such schedules: they may refuse to inscribe commitments in a sector (a), or they may make commitments while formulating limitations (b).

a. Refusal to inscribe commitments

In a system of liberalization based on positive lists of commitments, states remain free not to inscribe a given sector in their schedules. Therefore, to determine whether this is the case, it is necessary to look at their schedules of commitments. It is worth recalling here that cultural services are essentially divided into two broad categories in the schedules of commitments, namely *audiovisual services* (part of the broader category of *communication services*) and *recreational, cultural and sporting services*.

A relevant example to illustrate how the system works can be found in the EU-Singapore Agreement. In its schedule, the European Union has refused to include audiovisual services (which are therefore not included in the section on *communication services*) and has chosen to enter into certain relatively limited commitments in the area of *recreational, cultural and sporting services*. However, for the sake of clarity, it indicates that audiovisual services are excluded from its commitments on *recreational, cultural and sporting services*.

Sector or sub-sector	Description of reservations
2. COMMUNICATION SERVICES	
<i>[No mention of audiovisual services]</i>	
10. RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audio-visual services)	
A. Entertainment Services (including Theatre, Live Bands, Circus and Discotheque Services) (CPC 9619)	For Mode 1 BE, BG, CY, CZ, DE, DK, ES, EE, FI, FR, EL, HR, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, SI, UK: Unbound.

b. The formulation of limitations

Of the 40 or so agreements identified, only 20 contain at least one commitment in the audiovisual sector. Moreover, these commitments are undertaken by only a few states: China (11 agreements), Malaysia (5 agreements), Peru (3 agreements), New Zealand (2 agreements) and, exceptionally, India (1 agreement), Mexico (1 agreement), Myanmar (1 agreement), the Philippines (1 agreement) and Vietnam (1 agreement). It therefore follows from the above analysis that the vast majority of the states bound by these agreements do not make any commitments in the audiovisual sector.

It should be recalled that these schedules contain market access and national treatment commitments. These commitments are made by sector (and sub-sector) and mode of supply (see section 1.3.B above). To illustrate this, we shall first give the example of a state that chooses to include audiovisual services in its schedule of commitments and places virtually no limitations on market access and national treatment. The example is taken from New Zealand's Schedule of Specific Commitments (GATS/SC/62) annexed to the GATS concluded in 1994. While it is not one of the 99 bilateral and regional agreements examined in the preparation of this Guide, the example is relevant since the schedules of commitments annexed to free trade agreements are often modelled on the GATS schedules.

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

Sector or subsector	Limitations on market access	Limitations on national treatment
D. Audiovisual services Production, distribution, exhibition and broadcasting of audiovisual works	1) None 2) None 3) None 4) The New Zealand Immigration Service policy, based on the Immigration Act 1987 and the Immigration Regulations 1991 stipulate a special procedure for the granting of visas to entertainers, performing artists and associated support personnel for work purposes. To be eligible for a work visa or work permit, such applicants must come within the policy guidelines agreed to between the Minister of Immigration, independent	1) 3) The 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. 2) None

	promoters, agents or producers and the relevant performing artists' unions. Otherwise, unbound except as indicated in the horizontal section.	4) Unbound except as indicated in the horizontal section.
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Commentary

In the above example, we see that New Zealand has liberalized audiovisual services. First, in the 1st column (sector/sub-sector), it has listed audiovisual services, which suggests that the principles of free trade have been applied, in part or in full. Then, in order to decide on the degree of liberalization offered, it is necessary to examine the entries in the 2nd and 3rd columns of the table. Taking the example of Mode 1 - Cross-border supply: in terms of market access (Column 2), New Zealand has indicated "None," meaning that it has not maintained any limitations on the cross-border supply of audiovisual services listed in Column 1; on the other hand, in terms of national treatment (Column 3), New Zealand has preserved its right to grant more favourable treatment to Maori works by indicating a limitation to that effect. In addition, New Zealand specifies that "[g]overnment assistance to the film industry through the New Zealand Film Commission is limited to New Zealand films." The same commitments and limitations are formulated for Mode 3 - Commercial presence. Finally, with regard to Mode 4 - Presence of natural persons, New Zealand makes access to its market conditional on compliance with its immigration policies, laws and regulations (2nd column). The indication "unbound" also denotes the absence of national treatment commitments for this mode of supply (column 3).

With regard to the bilateral and regional free trade agreements discussed in this Guide, another example more restrictive than the New Zealand one cited above is taken from the Chinese schedule of commitments annexed to the Free Trade Agreement between the Swiss Confederation and the People's Republic of China of 2014. An excerpt is reproduced below.

- SCHEDULE OF CHINA -

Sector or subsector	Limitations on market access	Limitations on national treatment
D. Audiovisual Services Videos, including entertainment software and (CPC 83202), distribution services	(1) None (2) None (3) Services suppliers of Switzerland are permitted to 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	(1) None (2) None (3) None (4) Unbound except as indicated in horizontal commitments.

Sound recording distribution services	examine the content of audio and video products (see footnote 2). (4) Unbound except as indicated in horizontal commitments.	
Cinema Theatre Services	(1) None (2) None (3) Services suppliers of Switzerland are permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 percent. (4) Unbound except as indicated in horizontal commitments.	(1) None (2) None (3) None (4) Unbound except as indicated in horizontal commitments.

Commentary

China has included a smaller number of audiovisual services in its schedule of commitments. The cinema sector is completely excluded and, for the sectors covered by the commitments, only distribution services are concerned. For these, China grants full market access and guarantees national treatment for modes 1 and 2. Mode 3 relating to commercial presence is subject to an express limitation on the nature of the enterprises allowed to operate in the territory of China. In addition, no commitments are undertaken with respect to mode 4, which refers to the supply of services by natural persons.

A third example is taken from Mexico's schedule of commitments annexed to the Free Trade Agreement between Mexico and Peru (*Tratado de libre comercio Peru - Mexico*).

- SCHEDULE OF MEXICO -

Sector or subsector	Limitations on market access
2. D. Servicios audiovisuales	
a) Servicios privados de producción de películas cinematográficas (CCP 96112)	1), 2) y 3) Ninguna, excepto que la exhibición de cualquier película requiere de autorización y clasificación de la Secretaría de Gobernación.
b) Servicios privados de exhibición de películas cinematográficas (CCP 96121)	4) No consolidado, excepto lo indicado en el Capítulo de Entrada y estancia temporal de personas de negocios. 1), 2) y 3) Ninguna

	4) No consolidado, excepto lo indicado en el Capítulo de Entrada y estancia temporal de personas de negocios.
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Commentary

In the particular case of this agreement, the positive list approach to commitments applies only to market access. Thus, Mexico's schedule does not include national treatment commitments since all services are automatically subject to the application of this rule under the general provisions applicable to trade in services.

Thus, in the example above, Mexico liberalizes access to its market for private film production and screening services by making commitments for modes 1, 2 and 3 with virtually no limitations. Only one limitation is maintained in order to ensure that the films screened are subject to authorization and classification by the competent Mexican authorities. Mode 4 is not liberalized.

2. Negative lists of commitments

Since, under this approach, the Parties are automatically committed in the absence of having entered one or more reservations, the states involved in the negotiations must be systematic and exhaustive in formulating the desired reservations. Formulating reservations with the broadest possible scope would appear, in this case, to be an appropriate strategy for preserving the state's power to intervene in cultural matters.

Of the 99 free trade agreements examined, some 50 agreements use negative lists of commitments. This is the approach generally favoured by Canada, the United States and Japan. This approach is also used in several agreements involving various countries in Latin America (Chile, Colombia, Costa Rica, Mexico, Panama, Peru) and Asia (China, Malaysia, India, Pakistan, Republic of Korea, Singapore). More rarely, the European Union, Australia and New Zealand have favoured such a negative list approach. Finally, this is also the approach adopted under of the CPTPP. In total, some 70 states are parties to agreements using this approach. Before presenting examples of cultural clauses formulated in these lists, it is useful to outline some of their general characteristics.

First of all, two main categories of negative lists must be distinguished. First, in the vast majority of the 50 or so agreements identified, reservations allow parties to limit the scope of their commitments, particularly with regard to market access, national treatment and most-favoured-nation (MFN) treatment. Exceptionally, some agreements use negative lists exclusively for the formulation of reservations relating to most-favoured-nation (MFN) treatment. In these few cases, the remaining commitments (market access, national treatment) are then formulated in positive lists.²⁰

²⁰ It should be recalled that this is the approach taken by WTO Members under the GATS. Indeed, Article II on MFN treatment authorizes the formulation of exemptions that Members must include in a schedule specifically provided

As regards schedules that include reservations relating to market access, national treatment and most-favoured-nation treatment, two main approaches are used to inscribe such reservations. These are generally found in Annexes I (existing measures of a party subject to obligations) and II (sectors or subsectors for which a party may maintain existing measures or adopt new or more stringent measures inconsistent with the obligations). In the following pages, we will present examples of the main categories of reservations concerning culture found in trade agreements, starting with those listed in Annexes 1 and continuing with those listed in Annexes 2. It should be noted, however, that states sometimes tend to interpret the scope of Annexes I and II differently. As a result, similar reservations are sometimes found in Annex I for some states and in Annex II for others.

In order to give an idea of the reservations contained in these annexes, we found it useful to examine Annexes I and II of the CPTPP, which bring together 11 states parties, each of which has its own reservations relating to culture. As will be seen, the majority of these cultural reservations are found in Annex II. This trend can be explained by the fact that Annex I concerns existing policies while Annex II preserves the power of state intervention for the future, thus allowing for greater adaptation to change.

For the purposes of this Guide, we have chosen to present reservations according to the type of measures envisaged by states to protect and promote their cultural sector. The focus will therefore be on control of foreign investment, subsidies, national content quotas and audiovisual co-production agreements. More exceptionally, reservations also cover measures aimed at preserving jobs in certain cultural sectors, preferences granted to minorities and indigenous peoples, and measures to support the production of local content. It should be noted that, in general, states that make reservations in the context of a given negotiation tend to reproduce the same reservations in their subsequent agreements.

a. Control of foreign investment

Measures relating to the control of foreign investment in the cultural sector tend to be subject to reservations listed in Annex I. This is the case for Australia, Canada, Chile, Malaysia, Mexico, Peru and Vietnam. Some examples of relevant reservations are given below.

CPTPP – Annex I – Schedule of Canada
<p>Measures: Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.). <i>Investment Canada Regulations</i>, SOR/85-611, as qualified by paragraphs 8 through 12 of the Description element [...]</p> <p>4. 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</p>

for this purpose and annexed to the GATS. Several WTO Members have included their co-production agreements in the audiovisual sector in such a schedule.

investment is likely to be of net benefit to Canada. This determination is made in accordance with six factors described in the Act, summarised 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;

CPTPP – Annex I – Schedule of Australia

Measures: Australia's Foreign Investment Policy, which consists of the Foreign Acquisitions and Takeovers Act 1975 (FATA) [...]

1. The following investments require notification and approval from the Australian Government: [...]

a) proposed investments by foreign persons in existing Australian businesses, or prescribed corporations, the value of whose assets exceeds \$A252 million in the following sectors:

d) proposed investments by foreign persons of five per cent or more in the media sector, regardless of the value of the investment; [...]

CPTPP – Annex I – Schedule of Peru

Measures: Law N° 28278, [...] *Ley de Radio y Television* (Radio and Television Law), Article 24

Only Peruvian nationals or juridical persons organised under Peruvian law and domiciled in Peru may be authorised or licensed to offer radio or television broadcast services.

CPTPP – Annex I – Schedule of Viet Nam

Measures: Administrative measures

Foreign investment to provide motion picture production, distribution and projection services may not be permitted except through a business cooperation contract or a joint venture with a Vietnamese partner legally authorised to provide such services, or the purchase of shares in a Vietnamese enterprise legally authorised to provide such services. In the case of a joint venture or the purchase of shares in an enterprise, foreign equity shall not exceed 51 per cent.

For motion picture projection service, foreign organisations and individuals are not permitted to engage in business cooperation contract or joint-venture with Viet Nam's houses of culture, public cinema clubs and societies, mobile projection teams, or owners or operators of temporary film-projection locations.

Commentary

Quite clearly, the control of foreign investment in culture is a concern shared by the states parties to the CPTPP. However, the content of the reservations varies substantially from one state

another. In any case, the trend that emerges is to reproduce in the reservation the conditions provided for by the relevant laws in force.

b. Maintenance of subsidies

Subsidies are generally intended to support national services and service suppliers. In this sense, they are hardly compatible with national treatment rules. Therefore, in order to be maintained, they must be subject to a reservation. This type of reservation is more often included in Annex II. Below are examples of reservations relating to subsidies listed in the schedules of Chile, Singapore and Vietnam.

CPTPP – Annex II – Schedule of Chile
<p>Sector: Arts and Cultural Industries</p> <p>For greater certainty, government supported subsidy programmes for the promotion of cultural activities are not subject to the limitations or obligations of this Agreement.</p>
CPTPP – Annex II – Schedule of Singapore
<p>Sector: Broadcasting Services</p> <p>Singapore reserves the right to adopt or maintain any measure affecting broadcasting services receivable by Singapore’s domestic audience or originating from Singapore, including but not limited to: [...] e) subsidies or grants for investment involving Singapore subjects, persons and services.</p>
CPTPP – Annex II – Schedule of Viet Nam
<p>Sector: Audio-visual Services</p> <p>Viet Nam reserves the right to adopt or maintain subsidies inconsistent with Article 9.10.2 (Performance Requirements) for audio-visual services and preferential treatment to television programmes and cinematographic works produced under co-production agreements.</p>

Commentary

Many states include reservations relating to subsidies in their schedules. In this regard, there is a growing tolerance among parties to a free trade agreement with respect to subsidies in the field of culture. The inclusion of such reservations in Annex II not only allows for the maintenance of existing subsidy programmes, but also preserves the right of states to implement new initiatives in this area.

c. National content quotas

National content quotas are among these measures which appear in both Annex I and Annex II. Reservations to either maintain existing quotas or to reserve the right to adopt new ones are frequent. They are found in particular in the audiovisual field. A recent trend is to clarify that quotas are also applicable to the digital environment. On this last point, the example of Australia is particularly interesting.

CPTPP – Annex I – Schedule of Mexico
Measures: <i>Ley Federal de Cinematografía</i> (Federal Cinematography Law), chap. III Exhibitors shall reserve 10 per cent of the total screen time to the projection of national films.
CPTPP – Annex I – Schedule of Peru
Measures: Law N° 28278, [...] <i>Ley de Radio y Televisión</i> (Radio and Television Law), Eighth Complementary and Final Provision At least 30 per cent, on average, of the total weekly programs by free-to-air television broadcasters must be produced in Peru and broadcasted between the hours of 05:00 and 24:00.
CPTPP – Annex II – Schedule of Australia
Sector: Broadcasting and Audio-visual Services Australia reserves the right to adopt or maintain any measure with respect to: a) transmission quotas for local content on free-to-air commercial television broadcasting services; [...] c) transmission quotas for local content on free-to-air radio broadcasting services; d) other audio-visual services transmitted electronically, in order to make Australian audio-visual content reasonably available to Australian consumers; [...].

CPTPP – Annex II – Schedule of New Zealand

Sector: Communication Services – Audio-visual and other Services

New Zealand reserves the right to adopt or maintain any measure with respect to the promotion of film and television production in New Zealand and the promotion of local content on public radio and television, and in films.

CPTPP – Annex II – Schedule of Peru

Sector: Audio-Visual Industry

Peru reserves the right to adopt or maintain any measure whereby a specified percentage (up to 20 per cent) of the total cinematographic works shown on an annual basis in cinemas or exhibition rooms in Peru consist of Peruvian cinematographic works. In establishing such percentage, Peru shall take into account factors including the national cinematographic production, the existing exhibition infrastructure in the country and attendance.

CPTPP – Annex II – Schedule of Singapore

Sector: Services de radiodiffusion

Singapore reserves the right to adopt or maintain any measure affecting broadcasting services receivable by Singapore's domestic audience or originating from Singapore, including but not limited to:

- a) transmission quotas for content on television broadcasting services in Singapore; [...]
- c) transmission quotas for content on radio in Singapore; [...].

Commentary

The evolution of reservations in free trade agreements demonstrates a growing concern of states regarding the preservation of a space for the dissemination of national content in a context of liberalization of their market. This echoes a concern that was expressed in the 2005 Convention, Article 6.2(b) of which stipulates that “measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services.” Mention may also be made in this regard of paragraph 16.1 of the *Guidelines on the Implementation of the Convention in the Digital Environment*, which states that parties’ measures should “encourage the diversity of digital media, including the multiplicity of digital distributors of cultural goods and services and digital actors (online platforms, Internet service providers (ISP), search engines, social networks), while also ensuring visibility and discoverability of national and local cultural content.”

d. Audiovisual co-production agreements

An audiovisual co-production agreement is usually concluded between two states, which necessarily implies the attribution of mutual benefits that are not available to states not party to the agreement. In this sense, such an agreement may contravene the most-favoured-nation rule. Reservations concerning this type of measure are rather found in Annex II, since states thereby preserve their right to maintain existing co-production agreements and to adopt new ones in the future.

CPTPP – Annex II – Schedule of Chile
<p>Sector: Arts and Cultural Industries</p> <p>Chile reserves the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreement, with respect to arts and cultural industries, such as audio-visual cooperation agreements.</p>
CPTPP – Annex II – Schedule of New Zealand
<p>Sector: Communication Services – Audio-visual and other Services</p> <p>New Zealand reserves the right to adopt or maintain preferential co-production arrangements for film and television productions. Official co-production status, which may be granted to a co-production produced under these co-production arrangements, confers national treatment on works covered by these arrangements.</p>
CPTPP – Annex II – Schedule of Peru
<p>Sector: Cultural Industries</p> <p>Peru reserves the right to adopt or maintain any measure giving preferential treatment to persons of other countries pursuant to any existing or future bilateral or multilateral international agreement regarding cultural industries, including audio-visual cooperation agreements.</p>

Commentary

According to Article 12 paragraph (e) of the 2005 Convention, “Parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, [...] notably in order to: [...] (e) encourage the conclusion of co-production and co-distribution agreements.” Although the reservations of Chile and Peru do not explicitly refer to “co-production,” the wording is such that it preserves the right of these states to conclude co-production agreements.

e. Other types of cultural reservations

Annexes I and II contain other types of cultural reservations aimed, for example, at preserving jobs in certain cultural sectors or promoting indigenous cultural expressions. There are also reservations regarding obligations to support the production of local content. In other cases, reservations relate to services associated with trade in certain cultural goods, including printing, publishing or reproduction services for certain types of publications. Finally, some reservations are formulated in such a way as to encompass several types of cultural measures described above. Examples illustrating these various cases are given below.

i. Reservations aimed at preserving jobs in certain cultural sectors

CPTPP – Annex I – Schedule of Peru

Sector: Recreational, Cultural and Sporting Services

Sub-Sector: National artistic audio-visual production services

Any domestic artistic audio-visual production must be comprised at least of 80 per cent of national artists.

Any domestic artistic live performances must be comprised at least of 80 per cent of national artists.

In any domestic artistic audio-visual production and any domestic artistic live performance, national artists shall receive no less than 60 per cent the total payroll for wages and salaries paid to artists.

The same percentages established in the preceding paragraphs shall govern the work of technical personnel involved in artistic activities.

ii. Reservations relating to indigenous cultural expressions

CPTPP – Annex II – Schedule of Australia

Existing Measures: International Co-production Program

Australia reserves the right to adopt or maintain any measure with respect to the creative arts, Indigenous traditional cultural expressions and other cultural heritage.

iii. Reservations aimed at supporting the production of local content

CPTPP – Annex II – Schedule of Australia

Sector: Broadcasting and Audio-visual Services

Australia reserves the right to adopt or maintain any measure with respect to: [...] Non-discriminatory expenditure requirements for Australian production on subscription television broadcasting services; [...]

iv. Reservations relating to services associated with certain cultural property

CPTPP – Annex II – Schedule of Brunei

Sector: Printing, publishing and reproduction of newspapers including matters relating to the collection and publication of news and the distribution of newspapers

Brunei Darussalam reserves the right to adopt or maintain any measure relating to the printing, publishing and reproduction of newspapers including matters relating to the collection and publication of news and the distribution of newspapers.

v. Reservations encompassing several types of cultural measures

CPTPP – Annex II – Schedule of Canada

Sector: Cultural Industries

Canada reserves the right to adopt or maintain a measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content, except:

- a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and
- b) measures restricting the access to on-line foreign audio-visual content.

For the purpose of this entry, “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; 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.

In concluding this section on negative lists of commitments, we present below an example of a free trade agreement whose annexes contain multiple cultural reservations. The selected agreement is the United-States-Columbia Free Trade Agreement. The reservations are mainly those made by Colombia, but the table also contains two reservations made by the United States.

United-States-Columbia Free Trade Agreement	
Annex I – Schedule of Colombia	
Journalism	The director or general manager of a newspaper published in Colombia that focuses on Colombian politics must be a Colombian national.
Cinematography	<p>The exhibition and distribution of foreign films is subject to the Cinematographic Development Fee, which is set at 8.5 per cent of the monthly net income derived from such exhibition and distribution.</p> <p>The fee applied to an exhibitor is reduced to 2.25 percent, when a foreign movie is exhibited together with a Colombian short film. Until 2013, the fee applied to a distributor is reduced to 5.5 percent if, during the preceding year, the percentage of Colombian fulllength films it distributed to cinemas and other exhibitors equaled or exceeded the target percentage set by the government.</p>
Radio Broadcasting Services	A concession to supply radio broadcasting services may be granted only to Colombian nationals or to juridical persons organized under Colombian law. The number of concessions to provide radio broadcasting services is subject to an economic needs test that applies criteria set forth by law.
Free-to-air Television & Audio-Visual Production Services	<p>Only Colombian nationals or juridical persons organized under Colombian law may be granted concessions to provide free-to-air television services.</p> <p>To hold a concession for a privately operated national television channel that provides free-to-air television services, a juridical person must be organized as a corporation (“sociedad anónima”).</p>

	<p>The number of concessions to provide free-to-air national and local for-profit television services is subject to an economic needs test in accordance with the criteria set forth by law.</p> <p>Foreign equity in any enterprise holding a free-to-air television concession is limited to 40 percent.</p>
National Television	<p>National Television Suppliers (operators and/or persons granted the right to use programming slots) of free-to-air national television services must broadcast nationally produced programming on each channel as follows:</p> <ul style="list-style-type: none"> (a) a minimum of 70 per cent between 19:00 hours and 22:30 hours, (b) a minimum of 50 per cent between 22:30 hours and 24:00 hours, (c) a minimum of 50 per cent between 10:00 hours and 19:00 hours, (d) a minimum of 50 per cent for Saturdays, Sundays, and holidays during the hours described in subparagraphs 1, 2, and 3 until January 31, 2009, after which date the minimum for those days and hours will be reduced to 30 per cent.
Regional and Local Television	<p>Regional television may be supplied only by state-owned entities. Suppliers of regional and local free-to-air television services must broadcast a minimum of 50 percent nationally produced programming on each channel.</p>
Subscription Television & Audio-visual Production Services	<p>Only juridical persons organized under Colombian law may supply subscription television services. Such juridical persons must make available to subscribers, at no additional cost, those free-to-air Colombian national, regional, and municipal television channels available in the authorized area of coverage. The transmission of regional and municipal channels will be subject to the technical capacity of the subscription television operator.</p> <p>Suppliers of satellite subscription television only have the obligation of including in their basic programming the transmission of the public interest channels of the Colombian State. When rebroadcasting free-to-air programming subject to a domestic content quota, a subscription television provider may not modify the content of the original signal.</p>
Community Television	<p>Community television services may only be supplied by communities organized and legally constituted under Colombian law as foundations, cooperatives, associations, or corporations governed by civil law.</p>

	For greater certainty, such services are restricted with respect to area of coverage and number and type of channels; may be offered to no more than 6000 associates, or community members; and must be offered under the modality of a closed network local access channels.
Annex I – Schedule of the United States	
Communications – Radiocommunications	The United States reserves the right to restrict ownership of radio licenses in accordance with the above statutory and regulatory provisions. Radiocommunications consists of all communications by radio, including broadcasting.
Annex II – Schedule of Colombia	
Cultural Industries and Activities	Colombia reserves the right to adopt or maintain any measure according preferential treatment to persons of any other country pursuant to any agreement between Colombia and such other country containing specific commitments regarding cultural cooperation or co-production in cultural industries and activities.
Jewelry Design, Performing Arts, Music, Visual Arts & Publishing	Colombia reserves the right to adopt or maintain any measure conditioning the receipt or continued receipt of government support for the development and production of jewelry design, performing arts, music, visual arts, and publishing on the achievement by the recipient of a given level or percentage of domestic creative content.
Handicraft Industries	Colombia reserves the right to adopt or maintain any measure relating to the design, distribution, retailing, or exhibition of handicrafts that are identified as handicrafts of Colombia.
Cinematographic Works	Colombia reserves the right to adopt or maintain any measure requiring that a specified percentage (not to exceed 15 per cent) of the total cinematographic works shown on an annual basis in cinemas or exhibition rooms in Colombia consist of Colombian cinematographic works. In establishing such a percentage, Colombia shall take into account national cinematographic production conditions, the existing exhibition infrastructure in the country, and attendance averages.
Cinematographic Works over Free-to-Air Television	Colombia reserves the right to adopt or maintain any measure requiring that a specified percentage (not to exceed 10 per cent) of the total cinematographic works shown on an annual basis on free-to-air television channels consist of Colombian cinematographic works. In establishing such a percentage, Colombia shall take into

	account the availability of national cinematographic works for free-to-air television. Such works will count towards the domestic content requirements applied to the channel as described in the entry on free-to-air television and audiovisual production services on pages 20 and 21, paragraph 5, of Annex I.
Community Television	Colombia reserves the right to adopt or maintain any measure requiring that a specified portion of weekly programming for community television (not to exceed 56 hours per week) consist of national programming produced by the community television operator.
Multichannel Free-to-Air Commercial Television	Colombia reserves the right to impose the minimum programming requirements appearing in the entry on free-to-air television and audio-visual production services on pages 20 and 21, paragraph 5, of Annex I on multichannel free-to-air commercial television, except that such requirements may not be imposed on more than two channels or 25 per cent of the total number of channels (whichever is greater) made available by an individual service provider.
Advertising	Colombia reserves the right to adopt or maintain any measure requiring that a specific percentage (not to exceed 20 per cent) of total advertising orders placed annually with media services companies established in Colombia, other than newspapers, daily newspapers, and subscription services with headquarters outside Colombia, be produced and created in Colombia. Any such measure shall not apply to: (i) the advertisement in cinemas and exhibition rooms of upcoming movies; and, (ii) any media where the programming or content originates outside Colombia or to the rebroadcast or retransmission of such programming within Colombia.
Traditional Expressions	Colombia reserves the right to adopt or maintain any measure according rights or preferences to local communities with respect to the support and development of expressions relating to intangible cultural patrimony declared pursuant to Resolución No. 0168 de 2005
Interactive Audio and Video Services	Subject to paragraphs 2 and 3, Colombia reserves the right to adopt or maintain measures to ensure that, upon a finding by the Government of Colombia that Colombian audiovisual content is not readily available to Colombian consumers, access to Colombian audiovisual programming through interactive audio and/or video services is not unreasonably denied to Colombian consumers.

Annex II – Schedule of the United States	
Communications	The United States reserves the right to adopt or maintain any measure that accords differential treatment to persons of other countries due to application of reciprocity measures or through 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.

Commentary

This agreement demonstrates the seriousness and determination with which some states, particularly the states of Latin America, but also those of other continents, are negotiating reservations with a view to preserving their power to intervene in the cultural sector and thereby responding to their concerns regarding the protection and promotion of the diversity of cultural expressions.

f. Changes to reservations in the cultural sector

Reservations are part of the agreement to which they are annexed and, as such, are subject to changes. Although there are few practical examples of such changes, a notable example is the changes that occurred between the first version of the Trans-Pacific Partnership (TPP) and its second version, the PTTP.

Following the disengagement of the United States in 2017 from the TPP signed the previous year, the other states that took part in the negotiation of this agreement decided to go ahead with the ratification of this Partnership, while allowing themselves certain changes to the text negotiated beforehand, which led to the adoption of the CPTPP. One technique used to make a number of changes was that of the side letters annexed to the agreement concluded in 2016.

Canada has signed a number of side letters in various sectors, including culture. The example of the side letter signed by Canada and Australia in the cultural sector is presented below.

Side letters agreements

Canada - Australia

March 8 2018

The Hon Steven Ciobo, MP
Minister for Trade, Tourism and Investment
Australia

Dear Minister,

In connection with the signing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the "Agreement"), I have the honour to confirm the following agreement reached by the Government of Canada (Canada) and the Government of Australia (Australia):

Canada and Australia agree that, in continuing to give effect to the Agreement, notwithstanding the following language in Annex II – Canada – 16 and 17 – under the Cultural Industries Sector, first paragraph under the subheading "Description," that states "except: (a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and (b) measures restricting the access to on-line foreign audio-visual content", Canada may adopt or maintain discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development and may adopt or maintain measures that restrict access to on-line foreign audio-visual content.

I have the honour to propose that this letter, equally valid in English and in French, and your letter in reply shall constitute an agreement between our two Governments, which shall enter into force on the date of entry into force of the Agreement as between Canada and Australia.

Yours sincerely,

The Honourable François-Philippe Champagne
Minister of International Trade

Reply from the Honourable Steven Ciobo

March 8 2018

The Honourable François-Philippe Champagne
Minister of International Trade

Canada

Dear Minister,

I am pleased to acknowledge receipt of your letter of 8 March 2018, which reads as follows:

"In connection with the signing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the "Agreement"), I have the honour to confirm the following agreement reached by the Government of Canada (Canada) and the Government of Australia (Australia):

Canada and Australia agree that, in continuing to give effect to the Agreement, notwithstanding the following language in Annex II – Canada – 16 and 17 – under the Cultural Industries Sector, first paragraph under the subheading “Description,” that states “except: (a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and (b) measures restricting the access to on-line foreign audio-visual content,” Canada may adopt or maintain discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development and may adopt or maintain measures that restrict access to on-line foreign audio-visual content.

I have the honour to propose that this letter, equally valid in English and French, and your letter in reply shall constitute an agreement between our two Governments, which shall enter into force on the date of entry into force of the Agreement as between Canada and Australia.”

I have the honour to confirm that the above reflects the agreement reached between our Governments, and that your letter, equally valid in English and French, and this letter in reply shall constitute an agreement between our Governments, which shall enter into force on the date of entry into force of the Agreement as between Australia and Canada.

Sincerely,

Steven Ciobo

Commentary

It should first be noted that all parties to the CPTPP (Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam) have concluded an identical agreement with Canada. This agreement actually eliminates two important limitations on a Canadian reservation on cultural industries made during the negotiation of the TPP. In doing so, the agreement effectively broadens the scope of a Canadian reservation on investment and cross-border trade in services.

B. Limitations on subsidies

We saw in the previous section that subsidies relating to trade in services and investment can be subject to limitations in positive lists of commitments, or reservations in negative lists of commitments. However, subsidies may also be subject to commitments in other chapters of an FTA (including a chapter on electronic commerce as discussed in the next section). In addition, some agreements, such as CETA discussed below, may contain a chapter exclusively on subsidies. It is therefore useful to present this example.

CETA
Chapter seven: Subsidies
<p>Article 7.7 – Exclusion of subsidies and government support for audio visual services and cultural industries</p> <p>Nothing in this Agreement applies to subsidies or government support with respect to audio-visual services for the European Union and to cultural industries for Canada.</p>

C. *Limitations on electronic commerce*

The rules applicable to trade in services may apply to electronic commerce where services are supplied across borders (Mode 1). However, it is increasingly common for a free trade agreement to contain a specific chapter on electronic commerce (referred to as digital commerce in some agreements). This raises questions about the relationship between commitments under the chapter on trade in services and commitments under the chapter on electronic commerce. It is important to clarify this relationship given the cultural clauses that may vary from one chapter to another.

First, it may be useful to specify that the commitments regarding electronic commerce apply to “digital products,” which are generally defined as follows:

digital product means a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. For greater certainty, digital product does not include a digitized representation of a financial instrument, including money.

Understandably, such a definition encompasses virtually all cultural products (books, film, video, music, video games, digital art, etc.) in digital format.

Second, it should be mentioned that most chapters on electronic commerce contain a non-discrimination commitment (cumulative application of national treatment and most-favoured-nation treatment). This commitment affects the right of states to adopt cultural policies applicable to the digital environment. Below are two examples of a non-discrimination clause on electronic commerce incorporated in a free trade agreement.

Canada – United States – Mexico Free Trade Agreement

Chapter 19 – Digital trade

Article 19.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.

2. This Article does not apply to a subsidy or grant provided by a Party, including a government-supported loan, guarantee, or insurance.

United States – Singapore Free Trade Agreement

Chapter 14: Electronic commerce

Article 14.3: Digital Products

3. A Party shall not accord less favorable treatment to some digital products than it accords to other like digital products:

(a) on the basis that

(i) the digital products receiving less favorable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, outside its territory; or

(ii) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party,

or

(b) so as otherwise to afford protection to the other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, in its territory.

Parties wishing to preserve their capacity to intervene to protect and promote the diversity of cultural expressions in the digital environment should therefore seek to incorporate appropriate cultural clauses in such a chapter on electronic commerce. This is precisely what the European Union has done in three recent agreements with Japan, Mexico and Tunisia. These clauses are presented below.

Deep and Comprehensive Free Trade Agreement (DCFTA) (European Union-Tunisia)
<p>Chapter 1 – Digital trade</p> <p>Art. 1 §2: This Title shall not apply to audio-visual services.</p>
Mexico-European Union Free Trade Agreement
<p>Chapter 16 – Digital trade</p> <p>Art. 1 §4: The provisions in this Title shall not apply to:</p> <p>(b) broadcasting services</p> <p>(c) audio-visual services</p>
European Union-Japan Economic Partnership Agreement
<p>Chapter 8 – Trade in services, investment liberalisation and electronic commerce</p> <p>Art. 8.70 §5: This Section does not apply to [...] broadcasting services, audio-visual services, [...].</p>

Finally, it is important to note that the chapters on electronic commerce generally contain a cross-reference clause to the reservations and limitations formulated in the chapters on trade in services and investment to indicate that they remain applicable notwithstanding the electronic commerce commitments. This cross-reference may seem reassuring where parties have made cultural limitations or reservations applicable to trade in services. However, one may wonder about the legal effects of such a cross-reference, given that the commitments in the chapter on electronic commerce refer to “digital goods,” which are very broadly defined, whereas the reservations and limitations relating to cultural services do not systematically refer to “digital goods” and, more importantly, do not define them.

3.5 Provisions on cultural cooperation and preferential treatment

An increasing number of free trade agreements contain provisions to encourage states to cooperate in various fields, including in the cultural field. A major development since the adoption of the 2005 Convention is the appearance of *Protocols on Cultural Cooperation* (PCC) annexed to trade agreements negotiated by the European Union with various countries.

The first of these agreements is the one concluded in October 2008 between the European Union and the Caribbean countries (*CARIFORUM-EU Economic Partnership Agreement*), to which a PCC is annexed. This was followed in 2011 by another EU trade agreement, this time with Korea. The latter’s PCC largely reproduces the first one, but its adoption has not been without its problems, as we shall see below. These first two PCCs are now in force. Two other cultural cooperation instruments were subsequently negotiated by the European Union but have not yet entered into

force. The first one is particular since, exceptionally, it is not annexed to a free trade agreement. This is the *Agreement on Cultural Cooperation between the EU and Peru and Colombia*, concluded in 2011, which was negotiated separately from a trade agreement. Finally, the fourth instrument is a PCC annexed to the *European Union - Central American Association Agreement* concluded in 2012. We shall present these instruments in turn, introducing a few comments to highlight the contribution of each to the implementation of the provisions of the 2005 Convention on cultural cooperation (in particular Articles 14, 15 and 16). We will also highlight some of the difficulties encountered in the implementation of the Protocols in force. We consider these developments concerning the Protocols on Cultural Cooperation to be important as they presage to a certain extent the future of the relationship between culture and trade in international relations.

We will reproduce in full the first PCC that paved the way for the other three instruments. We will comment on the other three instruments, highlighting similarities and differences with the first Protocol.

A. *The EU – CARIFORUM Protocol on Cultural Cooperation (2008)*

Preamble

The Parties and the Signatory CARIFORUM States,

Having ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted in Paris on 20 October 2005, which entered into force on 18 March 2007, or intending to do so promptly;

Intending to effectively implement the UNESCO Convention and to cooperate within the framework of its implementation, building upon the principles of the Convention and developing actions in line with its provisions, notably its Articles 14, 15 and 16;

Recognizing the importance of the cultural industries and the multi-faceted nature of cultural goods and services as activities of cultural, economic and social value;

Recognizing that the regional integration process supported by this Agreement forms part of a global strategy aimed at promoting equitable growth and the reinforcement of economic, trade and cultural cooperation between the Parties;

Recalling that the objectives of this Protocol are complemented and supported by existing and future policy instruments managed in other frameworks, with a view to:

- a) integrating the cultural dimension at all levels of development cooperation and, in particular, in the field of education;
- b) reinforcing the capacities and independence of the Parties' cultural industries;
- c) promoting local and regional cultural content;

Recognising, protecting and promoting cultural diversity as a condition for a successful dialogue between cultures;

Recognising, protecting and promoting cultural heritage, as well as promoting its recognition by local populations and recognising its value as a means for expressing cultural identities;

Stressing the importance of facilitating cultural cooperation between the Parties and for that purpose to take into account, on a case by case basis, inter alia, the degree of development of their cultural industries, the level and structural imbalances of cultural exchanges and the existence of preferential schemes for the promotion of local and regional cultural content,

AGREE AS FOLLOWS:

Article 1 – Scope, objectives and definitions

1. Without prejudice to the other provisions of this Agreement, this Protocol sets up the framework within which the Parties shall cooperate for facilitating exchanges of cultural activities, goods and services, including inter alia, in the audiovisual sector.

2. 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 shall collaborate with the aim of improving the conditions governing their exchanges of cultural activities, goods and services and redressing the structural imbalances and asymmetrical patterns which may exist in such exchanges.

3. The definitions and concepts used in this Protocol are those of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions adopted in Paris on 20 October 2005.

4. In addition, for the purpose of this Protocol, “artists and other cultural professionals and practitioners” means natural persons that perform cultural activities, produce cultural goods or participate in the direct supply of cultural services.

SECTION 1 – HORIZONTAL PROVISIONS

Article 2 – Cultural exchanges and dialogue

1. The Parties shall aim at fostering their capacities to determine and develop their cultural policies, developing their cultural industries and enhancing exchange opportunities for cultural goods and services of the Parties, including through preferential treatment.

2. The Parties shall co-operate to foster the development of a common understanding and enhanced exchange of information on cultural and audiovisual matters through an EC-CARIFORUM dialogue, as well as on good practices in the field of Intellectual Property Rights protection. This dialogue will take place within the mechanisms established in this Agreement as well as in other relevant fora as and when appropriate.

Article 3 – Artists and other cultural professionals and practitioners

1. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate, in conformity with their respective legislation, the entry into and temporary stay in their territories of artists and other cultural professionals and practitioners from the other Party, or, as the case may be, the Signatory CARIFORUM States, who cannot avail themselves of commitments undertaken on the basis of Title II of the Agreement and who are either:

(a) artists, actors, technicians and other cultural professionals and practitioners from the other Party involved in the shooting of cinematographic films or television programmes, or

(b) artists and other cultural professionals and practitioners such as visual, plastic and performing artists and instructors, composers, authors, providers of entertainment services and other similar professionals and practitioners from the other Party involved in cultural activities such as, for example, the recording of music or contributing an active part to cultural events such as literary fairs, festivals, among other activities,

provided that they are not engaged in selling their services to the general public or in supplying their services themselves, do not on their own behalf receive any remuneration from a source located within the Party where they are staying temporarily, and are not engaged in the supply of a service in the framework of a contract concluded between a legal person who has no commercial presence in the Party where the artist or other cultural professional or practitioner is staying temporarily and a consumer in this Party.

2. This entry into and temporary stay in the territories of the EC Party or of the Signatory CARIFORUM States, when allowed, shall be for a period of up to 90 days in any twelve month period.

3. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate, in conformity with their respective legislation, the training of, and increased contacts between artists and other cultural professionals and practitioners such as:

a) Theatrical producers, singer groups, band and orchestra members;

b) Authors, poets, composers, sculptors, entertainers and other individual artists;

c) Artists and other cultural professionals and practitioners participating in the direct supply of circus, amusement park and similar attraction services, as well as in festivals and carnivals;

d) Artists and other cultural professionals and practitioners participating in the direct supply of ballroom, discotheque services and dance instructors;

e) Mas performers and designers.

Article 4 – Technical assistance

1. CARIFORUM States with the aim of assisting in the development of their cultural industries, development and implementation of cultural policies, and in promoting the production and exchange of cultural goods and services.
2. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, including by facilitating support, through different measures, inter alia, training, exchange of information, expertise and experiences, and counselling in elaboration of policies and legislation as well as in usage and transfer of technologies and know-how. Technical assistance may also facilitate the cooperation between private companies, non-governmental organisations as well as public-private partnerships.

SECTION 2 – SECTORAL PROVISIONS

Article 5 – Audio-visual, including cinematographic, cooperation

1. The Parties shall encourage the negotiation of new and implementation of existing co-production agreements between one or several Member States of the European Union and one or several Signatory CARIFORUM States.
2. The Parties and the Signatory CARIFORUM States, in conformity with their respective legislation, shall facilitate the access of co-productions between one or several producers of the EC Party and one or several producers of Signatory Cariforum States to their respective markets, including through the granting of preferential treatment, and subject to the provisions of Article 7 of this Agreement, including by facilitating support through the organisation of festivals, seminars and similar initiatives.
 - a) Co-produced audiovisual works shall benefit from the preferential market access referred to in paragraph 2 within the EC Party in the form of qualification as European works in accordance with Article 1 n) (i) of Directive 89/552/EEC as amended by Directive 2007/65/EC for the purposes of the requirements for the promotion of audiovisual works as provided for by Articles 4.1 and 3i.1 of Directive 89/552/EEC as amended by Directive 2007/65/EC. Such preferential treatment shall be granted on the following conditions:
 - the co-produced audiovisual works are realised between undertakings which are owned and continue to be owned, whether directly or by majority participation, by a Member State of the European Union or a Signatory CARIFORUM State and/or by nationals of a Member State of the European Community or nationals of a Signatory CARIFORUM State;
 - the representative director(s) or manager(s) of the co-producing undertakings have the nationality of a Member State of the European Community and/or of a Signatory CARIFORUM State;
 - both (a) the total financial contributions of one or several producers of the EC Party (taken together), and (b) the total financial contributions of one or several producers of

Signatory CARIFORUM States (taken together) shall not be less than 20 percent and not more than 80 percent of the total production cost.

b) The Parties will regularly monitor the implementation of paragraph (a) and report any problem that may arise in this respect to the CARIFORUM-EC Trade and Development Committee established under this Agreement.

c) Where preferential schemes for the promotion of local or regional cultural content are established by one or more Signatory CARIFORUM States, the Signatory CARIFORUM States concerned will extend to the works co-produced between producers of the EC party and of Signatory CARIFORUM States the preferential market access benefits of such schemes under the conditions laid down in paragraph (a).

3. The Parties and the Signatory CARIFORUM States reaffirm their commitment to the use of international and regional standards in order to ensure compatibility and interoperability of audio-visual technologies, contributing therefore to strengthen cultural exchanges. They shall cooperate towards this objective.

4. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate rental and leasing of the technical material and equipment necessary such as radio and television equipment, musical instruments and studio recording equipment to create and record audio-visual works.

5. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate the digitalisation of audio-visual archives in Signatory CARIFORUM States.

Article 6 – Temporary importation of material and equipment for the purpose of shooting cinematographic films and television programmes

1. Each Party shall encourage as appropriate the promotion of its territory as a location for the purpose of shooting cinematographic films and television programmes.

2. Notwithstanding the provisions contained in Title I of the Agreement, the Parties and the Signatory CARIFORUM States shall, in conformity with their respective legislation, consider and allow the temporary importation from the territory of one Party into the territory of the other Party of the technical material and equipment necessary to carry out the shooting of cinematographic films and television programmes by cultural professionals and practitioners.

Article 7 – Performing arts

1. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, in conformity with their respective legislation, including by facilitating increased contacts between practitioners of performing arts in areas such as professional exchanges and training, inter alia participation in auditions, development of networks and promotion of networking.

2. The Parties and the Signatory CARIFORUM States shall encourage joint productions in the fields of performing arts between producers of one or several Member States of the European Community and one or several Signatory CARIFORUM States.

3. The Parties and the Signatory CARIFORUM States shall encourage the development of international theatre technology standards and the use of theatre stage signs, including through appropriate standardisation bodies. They shall facilitate co- operation towards this objective.

Article 8 – Publications

Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, in conformity with their respective legislation, including by facilitating exchange with and dissemination of publications of the other Party in areas such as:

- a) organisation of fairs, seminars, literary events and other similar events related to publications, including public reading mobile structures;
- b) facilitating co-publishing and translations;
- c) facilitating professional exchanges and training for librarians, writers, translators, booksellers and publishers.

Article 9 – Protection of sites and historic monuments

Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, including by facilitating support to encourage exchanges of expertise and best practices regarding the protection of sites and historic monuments, bearing in mind the UNESCO World Heritage mission, including through facilitating the exchange of experts, collaboration on professional training, increasing awareness of the local public and counselling on the protection of the historic monuments, protected spaces, as well as on the legislation and implementation of measures related to heritage, in particular its integration into local life. Such cooperation shall conform with the Parties and the Signatory CARIFORUM States respective legislation and is without prejudice to the reservations included in their commitments contained in Annex 4 of this Agreement.

Commentary

The first element that catches our attention in this PCC is the reference that is made at the outset to the 2005 Convention, including an explicit reference in the preamble to Articles 14 (Cooperation for development), 15 (Collaborative arrangements) and 16 (Preferential treatment for developing countries). Article 1, paragraph 3, goes on to specify that “the definitions and concepts used in this Protocol are those of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions adopted in Paris on 20 October 2005.” Another point worth highlighting is Article 3, paragraph 1, under which parties “shall endeavour to facilitate, in conformity with their respective legislation, the entry into and temporary stay in their territories of artists and other cultural professionals and practitioners from the other Party.” This provision addresses for the first time an issue of the trade-culture interface of particular importance to developing countries, namely the entry and movement of natural persons providing cultural services into the territory of developed countries. This is clearly a sensitive

issue, but one that is the subject of a binding commitment under Article 16 of the 2005 Convention, which we reproduce below.

Article 16 - Preferential treatment for developing countries

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

The commitment under Article 16 of the 2005 Convention is also reflected in Article 5 of the PCC dedicated to “Audio-visual, including cinematographic, cooperation.” Article 5(2)(a) states that “[c]o-produced audiovisual works shall benefit from the preferential market access [...] within the EC Party in the form of qualification as European works” when certain conditions are met. This paragraph thus grants preferential treatment to specific cultural products. This is an unprecedented commitment in a legal instrument annexed to a trade agreement.

In the end, it should be noted that this PCC contains several relevant provisions. In practice, however, it does not yet appear to have produced the desired results. As concluded by Mira Burri and Keith Nurse, two experts who examined the implementation of this Protocol and the cultural clauses of the Economic Partnership Agreement (EPA) to which it is annexed, “[t]he challenges range from institutional and capacity constraints to legal complications, a lack of transparency in the conditions set out by individual States and failing links between implementing agencies, creative industry organizations and individual artists.”²¹ According to the two experts, “CARIFORUM States have struggled to make the best of opportunities created by the EPA. Overall and despite some exceptions, cultural policy reform and strategic industrial development have not been a priority for the region’s cultural ministries/agencies.”²²

B. The EU-Korea Protocol on Cultural Cooperation (2011)

This second PCC is similar to the previous one but differs from it in at least two respects: firstly, it creates in Article 3 a Committee on “Cultural Cooperation;” secondly, it provides in Article 3 bis for a dispute settlement mechanism. Both articles are reproduced below.

Article 3 – Committee on “Cultural Cooperation”

1. No later than six months after this Protocol is applied, a Committee on Cultural Cooperation shall be established. The Committee on Cultural Cooperation shall comprise senior officials

²¹ See on this subject: M. Burri, K. Nurse, *Culture in the CARIFORUM - European Union Economic Partnership Agreement: rebalancing trade flows between Europe and the Caribbean?* Coll. Policies & Research, UNESCO, Paris, 2019, p. 69.

²² *Id.*

from within the administration of each Party who have expertise and experience in cultural matters and practices.

2. The Committee on Cultural Cooperation shall meet within the first year after this Protocol is applied, and thereafter as necessary and at least once a year, to oversee the implementation of this Protocol.

3. By derogation from the institutional provisions of Chapter Fifteen (Institutional, General and Final Provisions), the Trade Committee shall have no jurisdiction over this Protocol and the Committee on Cultural Cooperation shall exercise all functions of the Trade Committee as regards this Protocol, where such functions are relevant for the purposes of implementing this Protocol.

4. Each Party shall designate an office within its administration that shall serve as a Domestic Contact Point with the other Party for the purposes of implementing this Protocol.

5. Each Party shall establish a Domestic Advisory Group(s) on cultural cooperation, comprised of cultural and audiovisual representatives active in the fields covered by this Protocol, to be consulted on issues related to the implementation of this Protocol.

6. A Party may request consultations with the other Party in the Committee on Cultural Cooperation regarding any matter of mutual interest arising under this Protocol. The Committee on Cultural Cooperation shall thereafter promptly convene and make every attempt to arrive at a mutually satisfactory resolution of the matter. In doing so the Committee on Cultural Cooperation may seek the advice of either or both Parties' Domestic Advisory Group(s) and each Party may seek the advice of its own Domestic Advisory Group(s).

Article 3 *bis* – Dispute settlement

Unless the Parties agree otherwise, and only in case the matter referred to in Article 3.6 of this Protocol has not been satisfactorily addressed through the consultation procedure set out therein, Chapter Fourteen (Dispute Settlement) shall apply to this Protocol subject to the following modifications:

a) All the references in Chapter Fourteen (Dispute Settlement) to the Trade Committee shall be understood as referring to the Committee on Cultural Cooperation;

b) For the purposes of Article 14.5 (Establishment of the Arbitration Panel), the Parties shall endeavour to agree on arbitrators having necessary knowledge and experience on the subject matters of this Protocol. In the event that the Parties are unable to agree on the composition of the arbitration panel, the selection by the lot, as set out in Article 14.5.3, will take place from the list established under subparagraph (c) and not from the list established under Article 14.18 (List of Arbitrators);

c) The Committee on Cultural Cooperation shall, promptly after its establishment, establish a list of 15 individuals who are willing and able to serve as arbitrators. Each Party shall propose five individuals to serve as arbitrators. The Parties shall also select five individuals who are not nationals of either Party and who shall act as chairperson to the arbitration panel. The Committee on Cultural Cooperation will ensure that the list is always maintained at this level.

Arbitrators shall have knowledge and experience on the subject matter of this Protocol. In serving as arbitrators, they shall be independent, serve in their individual capacity and not take instructions from any organisation or government with regard to matters related to the dispute, and shall comply with Annex 14-C (Code of Conduct for Members of Arbitration Panels and Mediators);

d) In selecting obligations to suspend pursuant to Article 14.11.2 (Temporary Remedies in case of Non- compliance) in a dispute arising under this Protocol, the complaining Party may only suspend obligations arising from this Protocol; and

e) Notwithstanding Article 14.11.2, in selecting obligations to suspend in disputes other than those arising under this Protocol, the complaining Party may not suspend obligations arising from this Protocol.

Commentary

This PCC is of particular interest for the Committee on Cultural Cooperation it sets up, which allows for a dynamic implementation of the commitments provided for in the Protocol, including dispute settlement where necessary.

On another level, it should be noted that the adoption of this PCC has been strongly criticized by some on the grounds, among other things, that the granting of preferential treatment to a state that is not truly considered a developing country is not justified.

C. The EU-Peru and Colombia Agreement on Cultural Cooperation (2011)

This third instrument, which takes the form of an “agreement on cultural cooperation,” remains similar to the first PCC examined, but no longer contains a clause on the qualification of co-productions as European works. It also incorporates the new elements of the second PCC as it provides for a Committee on “Cultural Cooperation.”

The main distinction with the two previous PCCs is that this third instrument for cultural cooperation is not annexed to a trade agreement. In other words, it is completely autonomous. For this reason, it includes provisions on entry into force, duration, withdrawal, accession of new members, reservations and amendments, i.e. final clauses that are usually found in an international legal instrument.

This agreement is therefore not particularly innovative. Above all, it does not grant preferential treatment to the parties’ cultural goods and services, merely providing certain entry facilities for artists, creators and other cultural professionals (Article 5).

D. The EU-Central America Protocol on Cultural Cooperation (2012)

This latest PCC, developed by the European Union, is significantly less comprehensive than the other three and contains few binding commitments. It does not create a committee or a dispute settlement mechanism. However, it explicitly refers to Articles 14, 15 and 16 of the 2005 Convention, as well as to its definitions and concepts.

E. Other clauses on cultural cooperation and preferential treatment

The study of the 99 trade agreements listed shows a recent tendency for states to include commitments on audiovisual co-production directly in the text of the agreements, which are sometimes supplemented by an Annex.

A relatively simple approach is essentially to incorporate a clause stipulating that co-productions will be entitled to all the benefits normally reserved for domestic productions. An example is given below.

India-Korea Comprehensive Economic Partnership Agreement
Chapter 9 – Audio-Visual Co-production
Article 9.3 – Benefits Co-produced projects in compliance with the co-production agreement shall be deemed to be national productions in the territory of each Party and shall thus be fully entitled to all the benefits including government support which are accorded under the applicable laws and regulations of each Party.

A much more elaborate approach is that adopted by Australia and the Republic of Korea. First, the Chapter on Cross-Border Trade in Services contains an article on audiovisual co-production with a reference to an Annex on this subject. Second, the Annex in question contains 22 articles dealing with a variety of topics, including approval of audiovisual co-productions, co-producer status, the entitlement to benefits normally reserved for domestic works, immigration facilitation, the monitoring mechanism and dispute settlement. Although this is an agreement between two developed countries, we reproduce below some relevant clauses since this model of agreement is certainly worthy of interest.

Korea-Australia Free Trade Agreement
Chapter 7 - Cross-Border Trade in Services
Article 7.12: Audiovisual Co-production

Recognising that audiovisual, including film, animation and broadcasting program co-productions can significantly contribute to the development of the audiovisual industry and to the intensification of cultural and economic exchange between them, the Parties hereby agree on Annex 7-B.

Annex 7-B: Audiovisual Co-Production

Article 5 – Entitlement to Benefits

1. An audiovisual co-production shall be entitled to:
 - a) the full enjoyment of all the benefits which are accorded to national audiovisual works of either Party; and
 - b) any benefits which may be granted to national audiovisual works of either Party, subject to that Party's laws as in force from time to time.
2. Any subsidies, tax incentives, or other financial incentives which may be granted by either Party in relation to an audiovisual co-production shall accrue to the co-producer who is permitted to claim those benefits in accordance with the existing measures of that Party.
3. Such subsidies, tax incentives or other financial benefits shall not be assigned or disposed of except to or for the benefit of an enterprise or national of that Party, or in the case of a third country co-production under Article 4 (Third Country Co-Productions) of this Annex, any individual or enterprise that falls within the relevant scope of the audiovisual agreement or arrangement of less-than-treaty status referred to in that Article.
4. An audiovisual work made in accordance with an approval by the competent authorities under this Annex but completed after the termination of this Annex shall be treated as an audiovisual co-production and its co-producers shall accordingly be entitled to all the benefits of this Annex.

Article 7 – Immigration Facilitation

Each Party shall permit nationals of the other Party, and in the case of a third country co-production under Article 4 (Third Country Co-Productions) of this Annex, any individual that falls within the relevant scope of the audiovisual agreement or arrangement of less-than-treaty status referred to in that Article, to travel to, enter and remain in its territory for the purpose of making or exploiting an audiovisual co-production, subject to the requirement that such individuals comply with the laws, regulations and procedures relating to entry into and temporary stay in its territory.

Article 16 – Institutional Mechanism

Each Party may request the establishment of an ad hoc Committee to discuss any matter related to the implementation of this Annex by delivering a written request to the competent authority of the other Party and the other Party shall give due consideration to the request. The ad hoc committee shall comprise appropriate senior officials from appropriate ministries

and agencies of each Party. The ad hoc committee shall discuss the matter at a time and place agreed to by the Parties.

Article 17 – Dispute Settlement

1. A Party may request consultations with the other Party regarding any matter arising under this Annex by delivering a written request to the competent authority of the other Party. consultations shall commence promptly after a Party delivers a request for consultations to the competent authority of the other Party. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter.

2. If the consultations under paragraph 1 fail to resolve the matter within 60 days after the date of receipt of a request for consultations, either Party may request good offices, conciliation, mediation or non-binding arbitration. The ad hoc committee shall decide the processes for resolution of the matter.

3. Chapter 20 (Dispute Settlement) of the FTA between Australia and Korea shall not apply to any matter or dispute arising under this Annex.

Commentary

The approach taken by Australia and the Republic of Korea in this annex on audiovisual co-production highlights what can be achieved by parties in a trade negotiation to give effect to provisions aimed at stimulating cultural exchanges.

It should be noted that a somewhat similar approach was adopted in the Free Trade Agreement between China and the Republic of Korea.

Stage 4

The monitoring of the negotiated free trade agreement and the implementation of cultural clauses

The implementation of cultural clauses incorporated in trade agreements is first and foremost the responsibility of states. Whatever form these clauses take (exceptions or exemptions, specific commitments with limitations, reservations, preferential treatment clauses, cooperation provisions), it is the responsibility of states to ensure compliance by actively monitoring their implementation.

If a problem arises between two parties regarding the interpretation or implementation of these cultural clauses, there is always the possibility of activating the monitoring or dispute settlement mechanisms provided for in these trade agreements. However, not all trade agreements include such mechanisms and where they exist, cultural clauses may be interpreted and applied from a purely economic perspective.

It is certainly worth recalling in this regard that Article 20 of the 2005 Convention encourages mutual supportiveness, complementarity and non-subordination between trade agreements and this Convention. Thus, in accordance with paragraph 1(b) of that article:

when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

It follows from this paragraph that, in the context of a trade dispute, parties to the 2005 Convention must take into account their cultural commitments when interpreting the provisions in dispute submitted to the dispute settlement body provided for in the trade agreement. Nevertheless, the outcome of such a dispute may not take cultural considerations into account, as was the case in the famous dispute between Canada and the United States over Canadian periodicals before the WTO Dispute Settlement Body in the late 1990s.²³

The case did not go unnoticed and states have since been trying to limit the risks involved. As noted above, some trade agreements contain provisions that establish monitoring and dispute settlement mechanisms for the specific interpretation of cultural clauses. We can distinguish two main approaches. The first is the PCC approach and the second is the approach of incorporating clauses on cultural cooperation directly into the trade agreement. These two approaches, which are quite different, have both advantages and disadvantages that need to be briefly discussed.

Regarding the PCC approach, the PCC annexed to the EU-Republic of Korea Agreement puts in place a very elaborate set of rules concerning both monitoring and dispute settlement

²³ WTO, *Canada – Measures Concerning Periodicals*, DS/31.

mechanisms²⁴ (section 3.5.B above). These meet expectations fairly well, but their practical application initially encountered difficulties in the monitoring of commitments. These difficulties could in particular be linked to the very limited resources invested by the parties to the PCC to help cultural sector actors to derive all the benefits that could be derived from the negotiated Protocol.

In any case, the European Union subsequently decided to significantly change its approach to PCCs. For instance, the Protocol annexed to the *Agreement Establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other* not only no longer includes provisions on monitoring of the agreement and dispute settlement, but a note attached to the Protocol even excludes any possibility of the dispute settlement mechanism of the Association Agreement applying to the clauses of the Protocol in question.²⁵ Continuing the exercise even further, in the *Agreement on Cultural Cooperation between the European Union and its Member States of the one part and Colombia and Peru, of the other part*, the European Union completely severed the link between the free trade agreement and the cultural cooperation mechanism in order to establish an autonomous agreement. However, the content of the latter remains substantially identical to that of the Protocol annexed to the *Association Agreement between the European Union and Central America* with the difference that the agreement with Colombia and Peru includes a fairly elaborate article entitled “Committee on Cultural Cooperation” (Article 4). The Committee’s functions include supervising the implementation of the Agreement and its subsequent development, evaluating the results obtained from the application of the Agreement, in particular the evolution of economic relations between the parties, considering issues submitted by a party, the most appropriate way to forestall or solve problems that may arise in relation to the issues covered by the Agreement. In other words, Article 4, under the cover of cultural cooperation, introduces in a watered-down form provisions on the monitoring and settlement of disputes that are totally absent from the *Association Agreement between the European Union and Central America*.

As for the second approach to incorporating cultural cooperation clauses directly into the trade agreement, the *Korea-Australia Free Trade Agreement* is a noteworthy example. Indeed, the provisions of Chapter 7 and Annex 7-B offer a quite different approach from the PCC approach since the cultural cooperation clauses are an integral part of the free trade agreement. These clauses are specifically aimed at audiovisual co-productions and are therefore much narrower in scope than the approaches previously explored. But they go further in the implementation of Article 12(e) of the 2005 Convention which calls on parties to encourage the conclusion of co-production and co-distribution agreements. With regard to monitoring and dispute settlement, Articles 16 and 17 of the Annex propose approaches similar to those found in the *Agreement on Cultural Cooperation between the European Union and Colombia and Peru*. First, Article 16 contains a provision that allows parties to request the establishment of an *ad hoc* Committee to discuss any matter related to the Annex on audiovisual co-productions. This Committee,

²⁴ See the analysis of this Protocol on Cultural Cooperation in section 3.5 B.

²⁵ Note 1015 attached to the title “Protocol on cultural cooperation” in fact stipulates that “[n]othing in this Protocol shall be subject to Title X (Dispute Settlement) of Part IV of this Agreement.”

composed of senior government officials from each of the parties, deals with the matter at a time agreed to by the parties. Article 17, on the other hand, deals with the settlement of disputes in the same way as is often done by first requesting that any party which has a problem with the Annex on audiovisual co-productions enter into consultations with the other parties with a view to reaching a satisfactory settlement of the problem. If these consultations do not lead to a satisfactory outcome, the parties concerned may request good offices, conciliation, mediation or non-binding arbitration. It is for the ad hoc Committee to determine which dispute settlement mechanism will be used. Lastly, a final provision in Article 17 specifies that Chapter 20 of the *Korea-Australia Free Trade Agreement*, which deals with dispute settlement, shall not apply to any matter or dispute arising under the Annex on audiovisual co-productions. This clarification is not without interest in that it excludes the scenario in which audiovisual co-production clauses would be interpreted from an essentially commercial perspective.

The preceding analysis shows that the monitoring and dispute settlement mechanisms applicable to cultural clauses have evolved. This is particularly true where cultural cooperation commitments are provided for. This being said, we have mentioned that cultural cooperation clauses may be incorporated into a trade agreement, be set out in a separate protocol annexed to such a trade agreement, or exceptionally be the subject of a stand-alone cultural cooperation agreement. It should be noted, however, that the approach of a PCC annexed to a free trade agreement now appears to have been abandoned by the European Union.

Abandoning PCCs is not necessarily negative, as it allows for a refocusing of the monitoring and dispute resolution provided for in a stand-alone agreement on cultural considerations. On the other hand, we might consider that this dissociation is detrimental to the inclusion of cultural considerations in the trade dispute settlement mechanism. The *Agreement on Cultural Cooperation between the European Union of the one part and Colombia and Peru, of the other part*, is perhaps an inspiring model in that, although it is separate from the trade agreement, it refers to the international circulation of cultural goods and services. In that sense, it recognizes the dual nature, economic and cultural, of these goods and services.

Finally, it is important to stress that, over the years, the priorities of states appear to have changed, as they now seem to be more concerned with the monitoring and implementation of cultural clauses than with the possible settlement of disputes in this regard.

Conclusion

This *Guide to Negotiating Cultural Clauses in Trade Agreements* is a practical tool to assist states committed to the recognition of the special status of culture in the trade agreements in which they participate. In this sense, this Guide promotes the implementation of the 2005 Convention, and more specifically of its Article 21, which commits Parties “promote the objectives and principles of this Convention in other international forums.” The Guide also encourages states to implement Article 16, under which “[d]eveloped countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.”

To achieve these objectives, the Guide defines four stages: 1. A state’s prior knowledge of its cultural sector; 2. Preparation for the negotiation of a new trade agreement; 3. The incorporation of cultural clauses into the agreement under negotiation; 4. The monitoring of the negotiated free trade agreement and the implementation of cultural clauses. While each of these stages is important and essential to the achievement of the desired result, the third stage is particularly crucial since, failing to achieve the incorporation of cultural clauses, the other three stages become meaningless. In developing this third stage, we therefore critically reviewed 99 trade agreements concluded since 2005 and containing cultural clauses in order to select the most relevant examples of clauses that could be used by states in new trade negotiations. This approach, based on state practice, is therefore particularly realistic since it refers future negotiators to clauses that already exist in other agreements and that have often been developed by states with extensive experience in incorporating cultural clauses into trade agreements.

By way of conclusion, a few additional remarks deserve to be made. First, it is important to bear in mind that several approaches presented in this Guide can be combined to give greater force to the recognition of the special status of culture in a trade agreement. It would also be desirable that cultural clauses be cumulated; an negotiated agreement could, for example, include a reference to the 2005 Convention, a cultural exception of general scope, a cultural clause specific to electronic commerce and commitments to strengthen cultural cooperation and offer preferential treatment when a developing country is involved in the negotiation. Cumulative cultural clauses make it possible, in particular, to take into account the particular concerns and interests of each state involved in the negotiations.

Second, it is important to recall that the incorporation of cultural clauses in a trade agreement is consistent with the objectives of the 2005 Convention. As such, for states, this incorporation is an affirmation of “their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions” set out in Article 5. At the same time, it is a way of meeting their responsibilities in this area. Each state taking part in trade negotiations must adopt a proactive attitude and take appropriate measures to ensure that culture is expressly identified as a sector whose specific characteristics deserve to be taken into account through the incorporation of appropriate cultural clauses.

The negotiation of preferential treatment clauses specifically dedicated to the cultural sector is also part of this logic. However, although the granting of such treatment constitutes a binding commitment for developed countries under Article 16 of the 2005 Convention, it is more specifically the developing countries that must be able to formulate clear and precise requests in order to achieve concrete results in this respect.

Finally, it must be stressed that it is not sufficient to incorporate cultural clauses in a trade agreement to ensure the protection and promotion of the diversity of cultural expressions at the national and international levels. In other words, these clauses are not an end, but rather a means for states to preserve their right to adopt the best cultural policies and measures to support the creation, production, dissemination and access to a rich and diversified range of cultural expressions, including in the digital environment. In a vast majority of states, such policies and measures are essential for the maintenance and development of dynamic cultural sectors. And it is only through such dynamism that cultural exchanges and intercultural dialogue can be sustained.

Annexes

Annex 1 – List of the 99 bilateral and regional agreements reviewed that were taken into account in the preparation of the Negotiation Guide

Note: The agreements presented below were all signed after the adoption of the Convention in 2005. These agreements are listed in chronological order of signature. The table reflects the different types of cultural causes included in these agreements.

	Title of the agreement	State Parties	Date of signature	Date of entry into force	Ref. to 2005 Conv. (✓/X)	Treat. cult. G and S (CE, PCC, SC, R, X)²⁶	Pref. treat. (✓/X)	Elec. comm. (✓/X)	Other cult. prov. (✓/X)
	* Agreements concluded by states that are not Parties to the 2005 Convention								
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	X	X	X	X	✓
2	Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership*	Japan Malaysia	13-12-2005	13-07-2006	X	SC; R	X	X	✓
3	The United States-Oman Free Trade Agreement	United States Oman	19-01-2006	01-01-2009	X	R	X	✓	✓
4	Tratado de libre comercio entre la República de Panama y la República de Singapur*	Singapore Panama	01-03-2006	24-07-2006	X	R	X	✓	✓
5	Preferential Trade Agreement between the Republic of India and the Republic of Chile	Chile India	08-03-2006	17-08-2007	X	X	X	X	X
6	The United States-Peru Trade Promotion Agreement	United States Peru	12-04-2006	01-02-2009	X	R	X	✓	✓
7	EFTA-SACU Free Trade Agreement	Iceland Liechtenstein Norway Switzerland Botswana Lesotho Namibia South Africa Eswatini	26-06-2006	01-05-2008	X	X	X	X	✓

²⁶ Legend: Cultural exemption (CE), Protocol on cultural cooperation (PCC), Specific commitments (SC), Reservations (R), No specific provision (X).

8	Tratado de Libre Comercio Chile-Panamá	Chile Panamá	27-06-2006	07-03-2008	X	R	X	X	✓
9	Acuerdo de Libre Comercio entre el Gobierno de la República de Chile y el Gobierno de la República del Perú	Peru Chile	22-08-2006	01-03-2009	X	R	X	X	✓
10	Agreement Between Japan and the Republic of the Philippines for an Economic Partnership*	Japan Philippines	09-09-2006	11-12-2008	X	SC; R	X	X	✓
11	The United States-Colombia Trade Agreement	United States Colombia	22-11-2006	15-05-2012	X	R	X	✓	✓
12	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	X	R	X	✓	✓
13	Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN	China ASEAN ²⁷	14-01-2007	01-07-2007	X	SC	X	X	X
14	EFTA-Egypt Free Trade Agreement	Iceland Liechtenstein Norway Switzerland Egypt	27-01-2007	01-08-2007	X	X	X	X	✓
15	Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership*	Chile Japan	27-03-2007	03-09-2007	X	R	X	X	✓
16	Agreement between Japan and the Kingdom of Thailand for Economic Partnership*	Japan Thailand	03-04-2007	01-11-2007	X	SC	X	X	✓
17	Agreement Between Japan and Brunei Darussalam for Economic Partnership*	Brunei Darussalam Japan	18-06-2007	31-07-2008	X	SC; R	X	X	✓
18	The United States-Panamá Trade Promotion Agreement	United States Panamá	28-06-2007	31-10-2012	X	R	X	✓	✓
19	The United States-Korea Trade Agreement	United States Rep. of Korea	30-06-2007	15-03-2012	X	R	X	✓	✓
20	Agreement Between Japan and the Republic of Indonesia for an Economic Partnership*	Japan Indonesia	20-08-2007	01-07-2008	X	SC; R	X	X	✓

²⁷ The Member States of the Association of Southeast Asian Nations are: Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.

21	Agreement Between the Government of Islamic Republic of Pakistan and the Government of Malaysia for a Closer Economic Partnership*	Malaysia Pakistan	08-11-2007	01-01-2008	X	SC; R	X	X	✓
22	Canada-EFTA Free Trade Agreement	Canada Iceland Liechtenstein Norway Switzerland	26-01-2008	01-07-2009	X	CE	X	X	X
23	Agreement on Comprehensive Economic Partnership Among Japan and Member States of the ASEAN*	ASEAN Japan	26-03-2008	01-12-2008	X	X	X	X	X
24	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	X	CE; SC	X	X	✓
25	Agreement on Trade in Services of the Free Trade Agreement between China and Chile	China Chile	13-04-2008	01-08-2010	X	SC	X	X	✓
26	Canada-Peru Free Trade Agreement	Canada Peru	28-05-2008	01-08-2009	X	CE; R	X	✓	✓
27	Tratado de Libre Comercio entre el Gobierno de la República del Perú y el Gobierno de la República de Singapur*	Peru Singapore	29-05-2008	01-08-2009	X	R	X	✓	✓
28	Stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part	EU Ghana	28-07-2016	15-12-2016	X	X	X	X	X
29	Australia-Chile Free Trade Agreement	Chile Australia	30-07-2008	06-03-2009	X	R	X	✓	✓
30	Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore*	Singapore China	23-10-2008	01-01-2009	X	SC	X	✓	✓
31	Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part	EU CARIFORUM ²⁸	15-10-2008	01-11-2008	✓	CE; SC; PCC	✓	✓	✓

²⁸ The CARIFORUM states are as follows: Antigua and Barbuda, the Commonwealth of the Bahamas, Barbados, Belize, the Commonwealth of Dominica, the Dominican Republic, Grenada, the Republic of Guyana, the Republic of Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Republic of Suriname, the Republic of Trinidad and Tobago.

32	Canada-Colombia Free Trade Agreement	Canada Colombia	21-11-2008	15-11-2011	X	CE; R	X	✓	✓
33	Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the ASEAN and the Republic of Korea	ASEAN Rep. of Korea	21-11-2008	01-05-2009	X	SC; R	X	✓	✓
34	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	EU Côte d'Ivoire	26-11-2008	01-01-2009	X	X	X	X	X
35	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 Eswatini	15-12-2008 (MERCOSUR); 03-04-2009 (SACU)	01-04-2016	X	X	X	X	X
36	Gulf Cooperation Council – Singapore Free Trade Agreement*	Singapore Gulf Cooperation Council	15-12-2008	01-09-2013	X	SC	X	✓	X
37	Agreement Between Japan and the Socialist Republic of Viet Nam for an Economic Partnership*	Japan Vietnam	25-12-2008	01-10-2009	X	SC; R	X	X	✓
38	Stepping stone Economic Partnership Agreement between the European Community and its Member States, of the one part, and Central Africa, of the other part	EU Cameroon	15-01-2009	01-10-2009	X	X	X	X	✓
39	Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation*	Japan Switzerland	19-02-2009	01-09-2009	X	R	X	✓	✓
40	Agreement establishing the ASEAN-Australia New Zealand Free Trade Area (AANZFTA)	ASEAN Australia New Zealand	27-02-2009	01-01-2010	X	CE; SC	X	✓	✓
41	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	X	SC	X	X	✓

42	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	EU Botswana Lesotho Mozambique Namibia Eswatini	10-06-2009	10-10-2016	X	X	X	X	X
43	Canada-Jordan Free Trade Agreement	Canada Jordan	28-06-2009	01-10-2012	X	CE	X	✓	X
44	Free Trade Agreement Between the Republic of Chile and the Republic of Turkey*	Chile Turkey	14-07-2009	01-03-2011	X	X	X	X	✓
45	India-Korea Comprehensive Economic Partnership Agreement	Rep. of Korea India	07-08-2009	01-01-2010	X	SC; R	✓	X	✓
46	Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part	EU Comoros Madagascar Mauritius Seychelles Zambia Zimbabwe	29-08-2009	14-05-2012	X	X	X	X	✓
47	New Zealand – Malaysia Free Trade Agreement*	New Zealand Malaysia	26-09-2009	01-08-2010	X	SC	X	X	✓
48	EFTA-Serbia Free Trade Agreement	Iceland Liechtenstein Norway Switzerland Serbia	17-12-2009	01-10-2010	X	X	X	X	✓
49	New Zealand-Hong Kong, China Closer Economic Partnership Agreement	New Zealand Hong Kong (China)	29-03-2010	01-01-2011	X	CE; R	X	✓	✓
50	Tratado de Libre Comercio entre el Gobierno de la República de Costa Rica y el Gobierno de la República Popular China	China Costa Rica	08-04-2010	01-08-2011	X	SC	X	X	✓
51	Canada–Panama Free Trade Agreement	Canada Panama	14-05-2010	01-04-2013	X	CE; R	X	✓	✓
52	Ukraine-EFTA Free Trade Agreement	Iceland Liechtenstein Norway Switzerland Ukraine	24-06-2010	01-06-2012	X	SC	X	X	✓

53	Peru-EFTA Free Trade Agreement	Peru Iceland Liechtenstein Norway Switzerland	24-06-2010	01-07-2011	X	R	X	✓	✓
54	Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part	EU Rep. of Korea	06-10-2010	01-07-2011	✓	CE; SC; PCC	✓	✓	✓
55	Chile – Malaysia Free Trade Agreement*	Chile Malaysia	13-11-2010	25-02-2012	X	X	X	X	X
56	Comprehensive Economic Cooperation Agreement Between Malaysia and the Government of the Republic of India*	Malaysia India	18-02-2011	01-07-2011	X	SC	X	X	✓
57	Acuerdo de Libre Comercio entre la República del Perú y la República de Corea	Peru Rep. of Korea	21-03-2011	01-08-2011	X	R	X	✓	✓
58	Acuerdo de Integración Comercial Peru-Mexico	Peru Mexico	06-04-2011	01-02-2012	X	SC; R	X	X	✓
59	Tratado de Libre Comercio Perú-Panamá	Peru Panama	25-05-2011	01-05-2012	X	R	X	X	✓
60	Tratado de Libre Comercio entre la República del Perú y la República de Costa Rica	Costa Rica Peru	26-05-2011	01-06-2013	X	R	X	X	✓
61	Agreement Between Japan and the Republic of Peru for an Economic Partnership*	Japan Peru	31-05-2011	01-03-2012	X	R	X	X	✓
62	Acuerdo de Alcance Parcial entre la República de El Salvador y la Republica de Cuba	El Salvador Cuba	19-09-2011	01-08-2012	X	X	X	X	X
63	Tratado de Libre Comercio Chile-Vietnam	Chile Vietnam	11-11-2011	01-01-2014	X	X	X	X	X
64	EFTA-Montenegro Free Trade Agreement	Iceland Liechtenstein Norway Switzerland Montenegro	14-11-2011	01-09-2012	X	X	X	X	✓
65	Tratado de Libre Comercio entre México y Costa Rica, El Salvador, Guatemala, Honduras y Nicaragua	Mexico Costa Rica El Salvador Guatemala Honduras Nicaragua	22-11-2011	01-09-2012	X	R	X	✓	✓

66	Malaysia-Australia Free Trade Agreement*	Australia Malaysia	22-05-2012	01-01-2013	X	SC	X	✓	✓
67	Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part	EU Colombia Peru	26-06-2012	01-03-2013	X	CE; SC	X	✓	✓
68	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	✓	CE; SC; PCC	✓	✓	✓
69	Free Trade Agreement Between Hong Kong, China and Chile	Chile Hong Kong (China)	07-12-2012	09-10-2014	X	SC	X	X	✓
70	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	X	SC	X	X	✓
71	EFTA-Central America Free Trade Agreement	Costa Rica Iceland Liechtenstein Norway Switzerland Panama	24-06-2013	19-08-2014	X	SC; R	X	✓	✓
72	Free Trade Agreement between the Swiss Confederation and the People's Republic of China	China Switzerland	06-07-2013	01-07-2014	X	SC; R	X	X	✓
73	Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation	New Zealand Taiwan	10-07-2013	01-12-2013	X	CE; R	✓	✓	✓
74	Canada-Honduras Free Trade Agreement	Canada Honduras	05-11-2013	10-01-2014	X	CE; R	X	✓	✓
75	Agreement Between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership*	Singapore Taiwan	07-11-2013	19-04-2014	X	R	X	✓	✓
76	Korea-Australia Free Trade Agreement	Rep. of Korea Australia	08-04-2014	12-12-2014	X	R	✓	✓	✓

77	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	✓	CE; SC	✓	✓	✓
78	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	✓	CE; SC	✓	✓	✓
79	EU-Ukraine Association Agreement	UE Ukraine	27-06-2014	23-04-2014	✓	CE; SC	✓	✓	✓
80	Agreement Between Japan and Australia for an Economic Partnership*	Australia Japan	08-07-2014	15-01-2015	X	R	X	✓	✓
81	Canada-Korea Free Trade Agreement	Canada Rep. of Korea	22-09-2014	01-01-2015	X	CE; R	✓	✓	✓
82	Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations	ASEAN India	13-08-2009	01-01-2010	X	X	X	✓	✓
83	Agreement on Trade in Services Under the Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations	ASEAN India	13-11-2014	01-07-2015	X	X	X	✓	✓
84	Free Trade Agreement Between New Zealand and the Republic of Korea	New Zealand Rep. of Korea	23-03-2015	20-12-2015	X	CE; R	X	X	✓
85	Korea-Vietnam Free Trade Agreement	Rep. of Korea Vietnam	05-05-2015	20-12-2015	X	SC; R	X	✓	✓
86	Tratado de Libre Comercio Perú-Honduras	Peru Honduras	29-05-2015	01-01-2017	X	R	X	X	✓
87	Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea	China Rep. of Korea	01-06-2015	20-12-2015	X	SC	✓	✓	✓
88	Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China	Australia China	17-06-2015	20-12-2015	X	SC; R	X	✓	✓

89	Free Trade Agreement between the European Union and the Socialist Republic of Vietnam	EU Vietnam	30-06-2019	---	X	CE; SC	X	✓	✓
90	Deep and Comprehensive Free Trade Agreement ²⁹	EU Tunisia	---	---	X	CE; SC; R	X	✓	X
91	Canada-Ukraine Free Trade Agreement (CUFTA)	Canada Ukraine	11-07-2016	01-08-2017	X	CE	X	✓	✓
92	Canada-European Union Comprehensive Economic and Trade Agreement (CETA)	EU Canada	30-10-2016	21-09-2017	✓	CE; R	X	✓	✓
93	Trans-Pacific Partnership (CPTPP)	Australia Brunei Canada Chile Japan Malaysia Mexico New Zealand Peru Singapore Vietnam	08-03-2018	30-12-2018	X	CE; SC; R	X	✓	✓
94	Free Trade Agreement Between the Government of the People's Republic of China and the Government of Georgia	China Georgia	13-05-2017	01-01-2018	X	SC	X	✓	✓
95	Pacific Agreement on Closer Economic Relations (PACER) Plus	Australia New Zealand Cook Island Kiribati Nauru Niue Samoa Salomon Islands Tonga Tuvalu Vanuatu	14-06-2017	---	X	CE; SC; R	X	X	✓
96	EU-Japan Economic Partnership Agreement*	EU Japan	17-07-2018	01-02-2019	X	CE; R	X	✓	✓

²⁹ This new Agreement between the EU and Tunisia will replace the old Agreement between the two Parties, namely: Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, 1995).

97	New EU-Mexico Trade Agreement ³⁰	EU Mexico	Announced on 21-04-2018	---	X	CE; SC; R	X	✓	✓
98	Singapore-European Union Free Trade Agreement*	EU Singapore	19-10-2018	---	X	CE; SC	X	✓	✓
99	Canada-United States-Mexico Agreement (CUSMA) ³¹ *	Canada United States Mexico	30-11-2018	---	X	CE; SC; R	X	✓	✓

³⁰ This Agreement replaces the former EU-Mexico Agreement of 2000 (Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and the United Mexican States).

³¹ The new Canada-United States-Mexico Agreement (CUSMA) replaced the 1992 North American Free Trade Agreement (NAFTA).

Annex 2 – Biographical notes of the authors

Ivan BERNIER



Ivan Bernier holds a Ph.D. in Law from the London School of Economics (1969) and is an honorary Doctor of International Economic Law from McGill University. He is Professor Emeritus at the Faculty of Law of Université Laval. He was Dean of this Faculty from 1981 to 1985 and Executive Director of the Quebec Center for International Relations from 1986 to 1993. He is author, co-author and editor of numerous articles and books in the field of International Economic Law and has been particularly interested, for the past twenty years, in the issue of the relationship between trade and culture. In November 2003, he was invited by the Director-General of UNESCO to be part of a group of independent experts for the preparation of a preliminary draft International Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions. In 2012, he was awarded the Prix d'honneur of the Société des relations internationales du Québec for his entire career in the field of International Relations.

Véronique GUÈVREMONT



Véronique Guèvremont is a full professor at the Faculty of Law and the Quebec Institute for Advanced International Studies at Université Laval. A graduate of the Université Paris 1 Panthéon-Sorbonne, she has been teaching World Trade Organization Law and International Cultural Law since 2006. From 2003 to 2005, she acted as Associate Expert to UNESCO's Division of Cultural Policies during the negotiation of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. In 2008, she co-founded the International Network of Jurists for the Diversity of Cultural Expressions (RIJDEC) and has since directed several studies conducted by its members. Her most recent research and publications focus on the integration of non-market values into World Trade Organization Law, the treatment of cultural goods and services in trade agreements, the cultural dimension of sustainable development and the preservation of the diversity of cultural expressions in the digital age. Véronique Guèvremont is a member of the UNESCO Bank of Experts on the 2005 Convention and holds the UNESCO Chair on the Diversity of Cultural Expressions.

