

Cultural Heritage in the EU Trade Agreements: Current Trends in a Controversial Relationship

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1 Balancing Trade and Culture in the EU's Common Commercial Policy

This Chapter offers another example of the transversal character and instrumental use of the notion of 'cultural heritage' within the variety of policies and actions of the EU, a feature which clearly emerges from diverse angles in this volume.¹ The task here is to explore the meaning and role of cultural heritage in EU Trade Agreements (TAs) with third countries from two perspectives: The institutional setting of the EU's Common Commercial Policy (CCP); and its operative practice over the decades. TAs are only one of the technical instruments used within the CCP of the EU.² They are intended to create better trading opportunities for both the EU and its partner countries, by overcoming or reducing trade barriers such as customs and tariffs.³ The importance of TAs for the EU's external action—and for its CCP in particular—can already be deduced from economic data: It is estimated that 90% of future global growth will take place outside the EU borders and more than 30 million jobs already depend on export outside the EU. Trade outside the EU is clearly a growth vector and a key priority for the EU.⁴

1 See, e.g., the Chapters by Andrzej Jakubowski, Evangelia Psychogiopoulou, Ewa Manikowska, and Cynthia Scott in this volume.

2 Trade agreements are classified as conventional measures. Other instruments are unilateral measures, such as anti-dumping measures: Paul Craig and Grainne de Burca, *EU Law: Text, Cases, Materials* (6th edn, OUP 2015) 337.

3 Technically, the term 'Trade Agreements', as used by the EU institutions, includes different types of agreements having different names, depending on their content and goals. Usually they either liberalize or regulate purely trade aspects, or they have primarily development and cooperation aims, sometimes also including trade aspects. For more details, see <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements>> accessed 31 January 2019.

4 Data from the European Council and CEU, see <www.consilium.europa.eu/en/policies/trade-policy> accessed 31 January 2019; European Commission, *Trade for All. Towards a More*

Analysing the role of cultural heritage when dealing with TAs with third countries is a relatively new exercise, and needs to be performed together with the analysis of other wider and interconnected notions like those of ‘culture’ and ‘cultural diversity’. What is not new is the conceptual framework in which the topic of this Chapter is placed, i.e. the traditional clash existing between ‘trade’ and ‘culture’.⁵ Free trade can facilitate the spreading and mutual understanding of cultures, but it also carries dangers for the less viable cultures, which risk losing genuine cultural choices.⁶

From the EU institutional point of view, the problem of finding a balance between the two poles has been dealt with since 1992. While the Community competence in the CCP was among the earliest exclusive competences of the European Economic Community (EEC), the EU complementary competence in culture, based on respect for national cultural diversities, was added only with the Treaty of Maastricht establishing the EU in 1992.⁷ Ever since, the EU’s trade strategy has had to balance trade liberalization with the need to respect Member States’ competences in defining and implementing cultural policies.

While the place of culture, cultural diversity, and cultural heritage in the EU’s constitutional framework, and in particular in the EU’s external relations, is considered in other contributions to this volume,⁸ this Chapter explores whether, to what extent, and for what purpose(s) cultural heritage (through the mediation of the notions of culture and cultural diversity) has a place in the CCP and, if so, what is the effect of this ‘unexpected’ inclusion in TAs. In order to approach these key questions, first a brief account of the role of trade with third countries under (E)EC and EU law is needed, taking into consideration the institutional architecture for the CCP over time. Secondly, the relationship between the CCP with the *forum* of the World Trade Organization (WTO) will be examined, as well as the change over time of the European

Responsible Trade and Investment Policy (EU Publ Office 2014) 8ff <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 31 January 2019.

- 5 The literature on this topic is vast. See at least Mira Burri, ‘The Trade Versus Culture Discourse: Tracing its Evolution in Global Law’ in Valentina Vadi and Bruno de Witte (eds), *Culture and International Economic Law* (Routledge 2015) 104ff; Tania Voon, *Cultural Products and the World Trade Organization* (CUP 2007) 3ff.
- 6 See the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311 (CPPDCE), 16th recital.
- 7 Treaty on European Union, signed at Maastricht on 7 February 1992 [1992] OJ C191/1. See arts 3, 128, and subsequently arts 2(5), 6, and 167 of the Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C326/47 (TFEU).
- 8 See, respectively, the Chapters by Andrzej Jakubowski, Cynthia Scott, Evangelia Psychogiopoulou, and Kristin Hausler in this volume.

Commission's trade strategy, especially after the entry into force of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CPPDCE). Next, and against this background, a summary of the outcomes of a textual analysis of a vast group of EU TAs with third countries follows. This will allow for some concluding remarks on the meaning of the notion of cultural heritage within the practice of the CCP and on the effective function and use of this notion at the level of the implementation of EU TAs, as well as suggestions to better implement the said notion in the context of current EU global trade policy.

2 The Institutional Structure of the CCP over Time

The original institutional structure of the CCP and the manner in which it developed over the past six decades somehow mirror the establishment of the internal common market. This is due to the close link existing between the two sectors for the coherent achievement of the institutional objectives. It is a link which must be borne in mind in order to understand the theme of this Chapter. The story of this link is characterized by a constant struggle to find a balance between (E)EC/EU competences and those of the Member States. It is apparent that whereas 'central' exclusive competences reinforce the role of the (E)EC/EU as a global actor in world trade, the splitting of competences with the Member States makes it much more difficult for the supranational organization to play that role.

Under the Treaty of Rome of 1957 (EEC),⁹ the CCP was regulated in Articles 110–16. These provisions limited the CCP's scope to trading in goods and progressively eliminating customs tariffs, whereas services, as well as other matters of national competence of the Member States, such as intellectual property or foreign investment, were not included.¹⁰ Basically, the institutional actors involved in the CCP were the Commission and the Council, with the former submitting proposals or recommendations to negotiate agreements, and the

9 Treaty Establishing the European Economic Community (Treaty of Rome) 298 UNTS 11.

10 Art 113(1): 'The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies'. Roberto Bendini, 'The Future of EU Trade Policy' (July 2015) DG EXPO/B/PolDep/Note/2015_227, July 2015-PE549.054, 4.

latter issuing the relevant authorizations.¹¹ No involvement whatsoever of the European Parliament was established at that time.

Moreover, the competence for the CCP was an exclusive competence of the Community, i.e. excluding concurrent actions by Member States. The European Court of Justice (ECJ or the Court), particularly in 1970s, has been very active in determining and expanding the doctrine of the exclusive competence of the Community in this field, including attaching implied powers to it.¹² This was justified by the need for unity in the Community's external action and by the argument that the proper functioning of the customs union required a wide interpretation of the powers conferred by the Treaty in this field.¹³ In the same way, and using the same arguments, the ECJ established the exclusive nature of EC/EU competence as far as the conclusion of international agreements is concerned.¹⁴ This reasoning of the ECJ has been described as 'a characteristic mixture of pragmatism and the link between external and internal trade policy'.¹⁵ In accordance with this case law, if a particular issue is deemed to fall within the scope of the CCP, the Community competence will be exclusive: Member States will be left out of negotiations and the conclusion of international agreements, which will remain in the sole hands of the Commission and the Council.

In the 1970s and 1980s the ECJ also took a position on the growing phenomenon of agreements and other measures aimed at regulating (more than merely liberalizing) trade, which were concluded with third developing countries also with a view toward generating aid and development. The Court affirmed that

11 With respect to these competences, the Council acted by qualified majority (art 113(4)). Trade agreements had to be concluded by the Council on behalf of the Community, acting unanimously during the first two stages, and by a qualified majority thereafter (art 114).

12 Thomas Cottier, 'Towards a Common External Economic Policy of the European Union' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy After Lisbon*, Special Issue of European Yearbook on International Economic Law (Springer 2013) 3ff, 8.

13 Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] ECR 897, 4. For a detailed account of this case, see Craig and de Burca (n 2) 337–39.

14 *Opinion 1/75 of the Court (Understanding on a Local Cost Standard)* [1975] ECR 1355, and similarly in Case 41/76 *Donckerwolke and Others v Procureur de la République and Others* [1976] ECR 1921 as far as the adoption of autonomous or unilateral legislative acts is concerned. Piet Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (Oxford EC Law Library 2004) 15.

15 Marise Cremona, 'External Relations and External Competence of the European Union. The Emergence of an Integrated Policy' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 217–68.

the objectives of such agreements were complex and that, if certain activities prescribed in the agreements were within the competence of the Member States and if they were of crucial importance for the achievement of the agreements' objectives, the competence could be deemed to be shared between the Community and the Member States.¹⁶ This view was affirmed despite the Court's trend to keep the scope of the CCP (and of the EC's exclusive competence therein) broad, in a way that could well cover development measures necessary for trade purposes.¹⁷

From this time onwards, and also on the basis of the experience of the WTO 'mixed agreement' in 1994,¹⁸ a new era for the CCP began, in which trade measures would not necessarily be perceived as commercial policy measures (hence subject to exclusive competence) if they also pursued other objectives, such as, e.g., environmental protection (traditionally included in the competencies of the Member States).¹⁹ In such cases, competence could be shared with the Member States and the ensuing agreements were deemed to be 'mixed agreements' requiring the consent and ratification of the Member States—a procedure which clearly makes it more difficult to conduct and successfully close trade negotiations with third countries.

Whereas no substantial institutional changes to the CCP provisions were brought about by the Treaty of Maastricht in 1992, the Treaty of Amsterdam (1997)²⁰ and the Treaty of Nice (2001)²¹ both marked a further step in the evolution of the Community's CCP, though the system arising out of these Treaties still deserved improvement: they widened the scope of the CCP to include services and intellectual property but—this time—still in a regime of shared competence with Member States.²²

16 For instance, in the *Opinion 1/78 of the Court (International Agreement on Natural Rubber)* [1979] ECR 2871 concerning the case of an Agreement in which the Member States were committed to finance developing, the ECJ considered the competence shared.

17 Case 45/86 *Commission of the European Communities v Council of the European Communities* [1987] ECR 1493.

18 Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 3; see *Opinion 1/94 of the Court (WTO Agreement: GATS and TRIPS)* [1994] ECR I-5267, 36–41 and Michael Hahn and Livia Danieli, 'You'll Never Walk Alone: The European Union and Its Member States in the WTO' in Bungenberg and Herrmann (eds) (n 12) 49ff.

19 *Opinion 2/00 of the Court* [2001] ECR I-9713, in a case regarding the Cartagena Protocol of Biosafety.

20 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1.

21 Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C80/1.

22 Marise Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' (2001) 4 Cambridge Yearbook of European Legal Studies 61.

These modifications were further elaborated under the Treaty of Lisbon (2007),²³ which established the current institutional framework for the CCP, a framework which is very different from the original one at least in three respects.²⁴

Firstly, the CCP now covers trade in services as a whole,²⁵ commercial aspects of intellectual property, and foreign investment, giving a much broader scope to the EU's exclusive external competence in this field. Since the adoption of the Treaty of Lisbon, the EU's exclusive competence for all services, including audio-visual services, takes this cultural sector out of the hands of the Member States, which will no longer be parties to the agreements covering these topics, and the Member State parliaments will no longer need to ratify the ensuing instruments. Negotiations on audio-visual services are now in the exclusive hands of DG-Trade, thereby emphasizing the commercial component of this sector and diminishing its cultural component. While DG-Education and Culture has a secondary role in these negotiations, it is argued that these two DGs do not cooperate much.²⁶ This novelty under the Treaty of Lisbon regarding the exclusive competence to negotiate agreements on audio-visuals is debatable.

Secondly, despite the subsumption of trade in all services under exclusive EU competence, Article 207(4)(3) TFEU exceptionally recognizes a stronger role for the Member States' interests, as it provides for unanimity by the Council in the field of: 'trade in cultural and audio-visual services, where these

23 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1. Part V of the TFEU is now devoted to the Union's external action; Title I of this Part is devoted to General Provisions on the Union's external action, and contains only art 205: 'The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union'. Title II is devoted to CCP, and is made up of only arts 206 and 207 (respectively ex arts 131 and 133 TEC). Art 206 establishes the objectives of CCP: 'By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. Art 206 is more complex, establishing the scope, measures to be taken and institutional procedures for the CCP and its implementation, with the involvement of the European Parliament.

24 Craig and de Burca (n 2) 336ff.

25 As regard services, transport policy, which is a competence shared between the EU and the Member States under art 4(2)(g) TFEU, remains outside the scope of the CCP.

26 Jan Loisen and Ferdi De Ville, 'The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit?' (2011) 5 *International Journal of Communication* 254, 260.

agreements risk prejudicing the Union's cultural and linguistic diversity'. This rule clearly recognizes 'the high level of national sensitivity concerning the effects of the EU common commercial policy in the field of culture in general and audio-visual services in particular';²⁷ but it is difficult to interpret and, so far, no decision has been issued by the Court of Justice of the European Union on this rule.

Thirdly, the European Parliament is finally accorded a full legislative role within the CCP. Now it is up to the Parliament and the Council, adopting regulations in accordance with the ordinary legislative procedure, to define the implementation framework for the CCP (Article 207(2)). Moreover, the Parliament's consent is now required for the conclusion of an international agreement related to the CCP (Article 207(3), referring to the procedure in Article 218).

The broadening of the scope of the EU's CCP in the post-Lisbon era facilitated the negotiation of agreements covering not only classical trade topics. Despite the new rules in the Treaty of Lisbon, the difficult problem of balancing the interests of the EU as a whole with those of the individual Member States, as well as the question of taking into account other civil society interests in the negotiations over 'mixed agreements' remains open and may limit the efficiency of the current CCP—as demonstrated by the negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada and by the difficulties surrounding the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the USA.²⁸

3 Trade in Cultural and Audiovisual Services: The Relationship between the WTO and the CCP under the Treaty of Lisbon

It is worth noting that the rule set out in Article 207(4)(3) TFEU establishing unanimity by the Council for the negotiation and conclusion of agreements with third countries in the field of 'trade in cultural and audio-visual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity' clearly mirrors the 'cultural exception' codified in the WTO regime with respect to the liberalization of trade in cultural goods and

²⁷ Evangelia Psychogiopoulou, 'The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface' (2014) 41(1) *Legal Issues of Economic Integration* 65, 68.

²⁸ See below Section 6. With respect to CETA, see <www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng>, and on the state of TTIP negotiations, see <http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm> both accessed 31 January 2019.

services—particularly audio-visual products, which is certainly the most profitable cultural sector for global trade.²⁹ In relation to the trade in cultural goods, the ‘cultural [goods] exception’ of the General Agreement on Tariffs and Trade (GATT) applies (Article XX(f)),³⁰ an exception which was strongly advocated by the EU and France during the 1994 GATT negotiations against the US approach, which sought to extend liberalization to those particular goods. By virtue of this exception, EU Member States have traditionally excluded liberalization in audio-visual goods in order to promote national cultures and identities. The same practical result has been achieved within the General Agreement on Trade in Services (GATS) with reference to audio-visual services, where the EU Member States notified exemptions from the most favourable nation (MFN) treatment³¹ established for services in general. The EU Member States’ approach, oriented toward excluding the liberalization of audio-visuals in the multilateral trade system of the WTO, has made it possible for the EU to preserve this topic for further—and maybe more tailor-made—negotiations in bi- or plurilateral contexts within the CCP, and in a manner allowing more room for manoeuvre vis-à-vis the US and other global competitors. This happened certainly thanks to the institutional novelties of the Treaty of Lisbon, which made this shift of *forum* legally possible, but also by virtue of a change in the paradigm of the EU’s global trade strategy that was imposed by the needs of emerging markets, as is explained below.

4 The Globalization of Trade and Its Impact on the EU’s Common Commercial Policy

The institutional changes in the CCP illustrated above, which culminated in the Treaty of Lisbon, have been largely determined by the bottom-up impact that the globalization of trade has produced.

29 Burri (n 5) 104ff. Data (in millions of dollars) on the economic value of global trade in audio-visual services: in 2016 the import of those services within the EU (28 Member States) amounted to 177,849, and the import outside the EU (28) to 109,353 and in the USA to 42,743. The export in the same services in the same year amounted to 122,226 for the USA, 108,120 within the EU (28) and 66,471 for the EU export outside the EU (28): World Trade Organization, ‘World Trade Statistical Review 2017’, Table A43 <www.wto.org/english/res_e/statis_e/wts2017_e/wts2017_e.pdf> accessed 31 January 2019.

30 This rule allows restrictions on the free trade of goods if they are ‘imposed for the protection of national treasures of artistic, historic or archaeological value’. Yet the derogation is subject to compliance with the non-discrimination principle, reciprocity between States, and non-disguised restrictions on international trade.

31 The Most Favoured Nation clause is set out in art II GATS. See Voon (n 5) 109ff.

At the time of the Treaty of Rome and in the following decades—at least till the beginning of the 1990s and the ratification of the GATS within the WTO in 1994—global trade was largely based on trade in goods. The service markets were split in a *nuance* of varying national dimensions that hindered the formation of a cross-border market. The technological revolution and digitization, which started after that period and bloomed only in the 21st century, completely altered the way the trade in services had so far been conducted. It opened the gates to a global trade in services and advanced the growth of global trade in general. The phenomenon may well be referred to as the ‘servicification of trade’ in goods,³² meaning that nearly every type of cross-border flow—including in goods—now has a services-based ‘digital format’ that accompanies the transaction and provides essential product information.³³

This revolution in the global trade market altered the previous world balance between the powers of developed economies. Also, as a consequence of the persistent financial crisis, the EU lost its key role in world trade—a key role it enjoyed for centuries. The winners of this revolution include most of the emerging economies, such as China, India, and Brazil. The stalemate of the TTIP negotiations between the US and the EU shows that this trend is unlikely to be stopped. Consequently, the multilateral trade system within the WTO, previously jointly managed by the US and the EU, has come to a standstill. Another factor pushing towards a paradigm shift in the EU trade policy was the proactive US trade policy of competitive liberalism, pursued since the beginning of the 2000s through the negotiation of bilateral agreements.³⁴

As a result of the impasse in multilateral negotiations, the EU has gradually modified its world trade strategy. While the previous privileged *forum* of negotiation was the WTO, it has now shifted to a system of bilateral or plurilateral negotiations, tailored to the needs and interests of, respectively, the EU and selected countries or regions in the global arena.³⁵ The European Commission—External Trade launched its new and ambitious world trade

32 Rupa Chanda, ‘Trade in Services’ in Kenneth A Reinert (ed), *Handbook of Globalisation and Development* (Edward Elgar Publishing 2017) 36ff, 45.

33 James Manyika and others, ‘Global Flows in a Digital Age: How Trade, Finance, People, and Data Connect the World Economy’ (April 2014) <www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/global-flows-in-a-digital-age> accessed 31 January 2019.

34 Simon J Evenett and Michael Meier, ‘An Interim Assessment of the U.S. Trade Policy of “Competitive Liberalisation”’ (February 2007) <<http://lux-tauri.unisg.ch/RePEc/usg/dp2007/DP-18-Ev.pdf>> accessed 31 January 2019.

35 Bendini (n 10) 5; Stephen Woolcock, ‘EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims’ (2014) 20(6) *European Law Journal* 718.

strategy in 2006 (in the Communication ‘Global Europe’³⁶), convinced that maintaining a leading (if not supreme) role in global trade and the new markets is essential to sustain the EU project as well as the European way of life.³⁷ What this strategy aims at is not only combating barriers abroad and lowering tariffs, but also creating markets where EU actors may find the best conditions to operate: fair deals, free competition, and legal protection. Also, new areas of interest are indicated, such as intellectual property rights (IPRs), services, investments, public procurements, and competition—areas that can all be better addressed by TAs.³⁸ The European Commission’s policy statement of October 2010 on ‘Trade, Growth and World Affairs’ confirmed this trend.³⁹

This strategy has been further elaborated by the DG-Trade in its new strategy document: *Trade for All. Towards a More Responsible Trade and Investment Policy* of 2015.⁴⁰ Making trade and investment policy more transparent (to gain more democratic consensus) and making the same policy more adherent to EU values—such as social justice, respect for human rights, social and labour rights, the environmental aspects of value chains, and health and safety protection, are crucial points in this strategy.⁴¹ Moreover, this document clearly declares a change of paradigm in trade negotiations: Whereas they formerly focused on pure economic aspects and regulatory negotiations aimed at exchanging the best conditions for each party in a game of give and take, now negotiations about regulatory standards will be included in a cooperation framework. This will allow the promotion of high standards for each party. In this context, trade agreements will be destined to be a *forum* for political dialogue.⁴²

36 Commission of the European Communities, ‘Global Europe: Competing in the world’ (Communication) COM (2006) 567 final.

37 Ibid 6.

38 Ibid 7. Sieglinde Gstöhl and Dominik Hanf, ‘The EU’s Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context’ (2014) 20(6) *European Law Journal* 733. For an economic assessment of this phenomenon see Georg Koopmann and Marco Wilhelm, ‘EU Trade Policy in the Age of Bilateralism’ (2000) 45(5) *Intereconomics* 305. For the further trend towards mega-regional trade agreements currently under negotiation (Trans-Pacific Partnership among Australia, Canada, Japan, Mexico, and seven other countries, TTIP between the EU and the United States, and China’s Regional Comprehensive Economic Partnership): Chad P Bown, ‘Mega-Regional Trade Agreements and the Future of the WTO’ (2017) 8(1) *Global Policy* 107.

39 European Commission, ‘Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU’s 2020 Strategy’ <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/trade-growth-and-world-affairs-trade-policy-core-component-eus-2020-strategy> accessed 31 January 2019.

40 European Commission, *Trade for All* (n 4).

41 Ibid, respectively 18ff, 20ff.

42 Ibid 20.

It is evident that the two strategic documents of the Commission further implement the new institutional setting of the CCP, which is bound by the Treaty of Lisbon to be coherent with the EU's external action as a whole and with the general values of the EU project,⁴³ the latter aspect now being possible also thanks to the role accorded to the European Parliament in the CCP. Within this new context, trade policy will be an instrument for the promotion of sustainable development globally.⁴⁴ In this vein, Free Trade Agreements (FTAs) will have to systematically include and combine provisions on trade and sustainable development.⁴⁵

5 The CPPDCE and the CCP: Protocols on Cultural Cooperation

Strange as it may seem, another crucial step in the development of a new global trade strategy for the EU has certainly been the 2005 CPPDCE⁴⁶ and its adoption by the EU in 2006.⁴⁷ According to Article 216(2) TFEU, the CPPDCE has automatically become EU law, therefore the EU is directly obliged to comply with it and implement its provisions. This made the CPPDCE a landmark in the process of reviving the idea of cultural diversity⁴⁸ (a concept which reflects multiculturalism more adequately than the traditional notion of 'culture') in the EU's internal and external policies.⁴⁹

Among the many relevant aspects of this Convention, the following bear the greatest impact on the EU's CCP. The Guiding Principles, under Article 2(5) establish the 'Principle of the complementarity of economic and cultural

43 Ibid 22.

44 The importance of the potential contribution of trade policy to sustainable development has recently been reaffirmed in the UNGA resolution: Transforming our World: The 2030 Agenda for Sustainable Development, UNGA Res A/RES/70/1 (25 September 2015). In para 8 of this document cultural diversity is among the values that shall guide sustainable development.

45 European Commission, *Trade for All* (n 4) 23.

46 (n 6).

47 Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2006] OJ L201/15.

48 The catch-all term 'cultural diversity' is described in the UNESCO Universal Declaration on Cultural Diversity, UNESCO Doc 31C/Res (2 November 2001). See also its definition in art 4 of the CPPDCE.

49 For more on the legal operationalization of cultural diversity, see inter alia: Lilian Richieri Hanania (ed), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Routledge 2014); for more on the impact of the CPPDCE on the EU, see Chapter 13 by Hanna Schreiber in this volume.

aspects of development'. The principle reads as follows: 'Since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and people have the fundamental right to participate in and enjoy'. This guiding principle is of fundamental importance since it puts culture and economy on an equal footing.⁵⁰

Then, the CPPDCE commits its parties to integrating cultural diversity considerations in cooperation and development policies. This is on the basis of Guiding Principle no 6, 'Principle of sustainable development', and by virtue of Article 16 requiring developed countries to facilitate cultural exchanges with developing countries, by providing preferential treatment to their artists and other cultural professionals and practitioners, as well as to their cultural goods and services. Under Article 20, the parties undertake to foster mutual supportiveness between the CPPDCE and other treaties to which they are party, and to take into account the provisions of this treaty when interpreting and applying existing international obligations or when entering into new ones. The rules of the CPPDCE, together with the actions envisaged by the Cultural Agenda of 2007,⁵¹ require the integration of culture and cultural diversity promotion and considerations in all of the EU's external policies, including the CCP.

This will have to happen in the following four directions, drawn up by the same Cultural Agenda: Developing political dialogue on culture and cultural exchanges; promoting market access for the cultural goods and services of developing countries; promoting financial and technical support for preservation and access to cultural heritage and the promotion of cultural diversity; and reinforcing EU participation to international organizations dealing with culture. As the empirical analysis shows,⁵² these directions perfectly mirror the recurring content of TAs with third countries, with particular clarity in the period after Lisbon. Following the Cultural Agenda, in 2008 the 'Cannes Declaration' acknowledged 'the utility of reinforcing audio-visual cooperation measures in the cooperation and trade agreements concluded between the EU and third countries';⁵³ and was in turn followed by the Commission's Working Staff

50 According to the UNESCO Universal Declaration on Cultural Diversity (art 3) cultural diversity helps implement the possibilities of development: 'Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence'.

51 Commission of the European Communities, 'European agenda for culture in a globalizing world' (Communication) COM (2007) 242 final.

52 See below, Section 6.

53 'Declaration of European Audiovisual Affairs Ministers and of the European Commission Member responsible for the Information Society and Media' (19 May 2008) 2 <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/cannes_2008_en.pdf> accessed 31 January 2019.

Document on the ‘External Dimension of Audiovisual Policy’ of 19 July 2009.⁵⁴ It cannot go unnoticed that these declaratory principles clearly go against the traditional trend of FTAs to leave cultural content outside their scope, in particular of the audio-visual kind.

On these premises, the CPPDCE has created momentum for the elaboration of a new instrument of CCP to be attached to TAs with third countries: the Cultural Cooperation Protocol.⁵⁵ It is intended to implement the CPPDCE and, in particular, to ensure a specific place for the regulation of audio-visual services,⁵⁶ distinct from the title on Services and Establishment contained within the usual text of the TAs. This is consistent with the EU’s intention,⁵⁷ aimed at negotiating the liberalization in audio-visuals not at a multilateral level, but at a bi- or plurilateral level.⁵⁸ So far, Cultural Cooperation Protocols have been negotiated and attached to three TAs: With the CARIFORUM countries⁵⁹ (2008); with South Korea (2011); and with Central America countries (2012). Moreover, the negotiation of a Cultural Cooperation Agreement (CCA) with Colombia and Peru, independent from the TA signed by the EU with the same parties in 2012, was concluded in 2011.⁶⁰ A survey of the content and meaning of these Protocols follows below.⁶¹

Following the description of the institutional setting of the EU’s CCP and its underpinning declaratory principles, it is now time to look at the evolution

54 Commission of the European Communities, ‘Commission Staff Working Document on the External Dimension of Audiovisual Policy’ SEC (2009) 1033 final.

55 Its draft model is elaborated in: European Commission Argumentaire, ‘On the Title on Cultural Cooperation in Future EU Trade Agreements’ (11 May 2007) 1 <http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134655.pdf> accessed 31 January 2019.

56 For more on the focus of this Protocol on audio-visuals, see Evangelia Psychogiopoulou, ‘The Convention on the Diversity of Cultural Expressions and the European Union. The Quest for Competence and Implementation’ in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions. A Tale of Fragmentation in International Law* (Intersentia 2012) 365, 390–93.

57 See above, Sections 3 and 4; Christoph Beat Graber, ‘The New UNESCO Convention on Cultural Diversity: A Counterbalance to WTO?’ (2016) 9(3) *Journal of International Economic Law* 553.

58 Antonios Vlassis, ‘European Commission, Trade Agreements and Diversity of Cultural Expressions: Between Autonomy and Influence’ (2016) 31 *European Journal of Communication* 446, 449.

59 This is a subgroup of the African, Caribbean, and Pacific Group of States established in 1992 and serving as the basis for dialogue with the EU. It comprises Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, Trinidad and Tobago, and the Dominican Republic.

60 This Agreement is not yet in force.

61 See below, Subsection 6.5.

over time of the practice of the EU TAs with third countries at the operative level.

6 Cultural Heritage in the Operative Practice of EU TAs: Objectives and Scope of the Analysis

What follows is an empirical analysis of the TAs with third countries so far concluded by the (E)EC/EU. First, the analysis considers the content of each agreement in order to assess whether it refers to cultural heritage (and/or to culture and cultural diversity) and, if so, in what terms/meaning(s) and with what objectives and—possibly—results. Furthermore, in more general terms it makes it possible to measure whether the EU's 'global trade strategy'—as designed in the constitutional framework of the EU treaties and declared in the institutional strategic documents—truly corresponds to the empirical use of TAs within the CCP over the past decades and at present. In this analysis, the time factor is important as it allows to make a key distinction between agreements pre- and post-Lisbon. Putting these data together allows for a general assessment of common trends regarding the (geo)political role and use of the notion of cultural heritage (together with those of culture and cultural diversity) in these fundamental instruments of the EU's external action, as well as to identify the possible differences between the 'first' and the 'new generation' of TAs, as explained above.

The scope of the analysis covers the (E)EC/EU TAs so far concluded with third countries or group of countries and which are currently in force, i.e. 44 agreements that were publicly available at the time of this writing.⁶² The study focuses on all agreements that, regardless of their formal name, have some sort of economic content, in order to evaluate the connection between their economic content and their cultural heritage- or culture-related content. It does not cover those agreements which are not yet in force,⁶³ nor those signed by the EC/EU within the WTO.⁶⁴ The analysed agreements are divided into five

62 See <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements>> accessed 31 January 2019.

63 There is a group of agreements which have been concluded but are not yet in force: the Interim Economic Partnership Agreement with the East African Countries (EAC: Burundi, Kenya, Rwanda, Tanzania, and Uganda) (end of negotiations: 16 October 2014); the FTA with Singapore, initialled on 17 October 2014; and the FTA with Vietnam, concluded on 1 February 2016.

64 These are about 60 agreements and decisions, see <www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed 31 January 2019.

groups, according to geographical location of the countries involved and the time of their conclusion, whether before or post-Lisbon Treaty, namely: (1) Agreements within Europe; (2) Agreements with Mediterranean Countries; (3) Agreements with Other Countries pre-Lisbon; (4) Agreements with Other Countries post-Lisbon; and (5) and according to the presence (or not) of annexed Cultural Cooperation Protocols.

The full study based on the textual analysis of each agreement within each group is published together with Annexes containing relevant culture-related rules in a larger Report on Cultural Heritage in EU's Trade Agreements, available on the webpage of the Heuright¹⁴ project.⁶⁵ Here the relevant agreements in above-mentioned groups are only briefly presented, with more attention being paid to the Cultural Cooperation Protocols.⁶⁶

6.1 *Agreements with Third Countries within the European Region*

In the early 1970s, the Community began concluding agreements within the European region. In 1973, agreements were concluded with Switzerland,⁶⁷ Iceland,⁶⁸ and Norway,⁶⁹ followed in the 1990s with Andorra (1991),⁷⁰ San Marino (1992),⁷¹ Turkey (1995),⁷² the Faroe Islands (1997),⁷³ and Russia (1997).⁷⁴

65 <<https://heuright.eu>>.

66 See below, Subsection 6.5.

67 Accord entre la Communauté économique européenne et la Confédération suisse [1972] OJ L300/189 (signed 22 July 1972, entered into force 1 January 1973).

68 Agreement between the European Economic Community and the Republic of Iceland [1972] OJ L301/2 (signed 22 July 1972, entered into force 1 April 1973).

69 Agreement between the European Economic Community and the Kingdom of Norway [1973] OJ L171/2 (signed 14 May 1973, entered into force 1 July 1973).

70 Agreement between the European Economic Community and the Principality of Andorra [1990] OJ L374/16 (signed 28 June 1990, entered into force 1 January 1991).

71 Interim Agreement on trade and customs union between the European Economic Community and the Republic of San Marino [1992] OJ L359/14 (signed 16 December 1991, entered into force 1 December 1992), now substituted by Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino [2002] OJ L84/43 (entered into force 1 April 2002).

72 Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1 (signed 22 December 1995, entered into force 31 December 1995).

73 Council Decision 97/126/EC of 6 December 1996 concerning the conclusion of an agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part [1997] OJ L53/1 (signed 6 December 1996, entered into force 1 January 1997).

74 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3 (signed 24 June 1994, entered into force 1 December 1997).

All these agreements were either Customs Unions or FTAs, except the agreement with Russia, which was a Partnership and Cooperation Agreement.

Then, from the beginning of the 21st century, and mostly in the post-Lisbon and post-CPPDCE era, Stabilization and Association Agreements (SAAs) were concluded with the Western Balkan countries: The Former Yugoslav Republic of Macedonia (2004),⁷⁵ Albania (2006),⁷⁶ Montenegro (2010),⁷⁷ Serbia (2013),⁷⁸ Ukraine (2014 and 2016),⁷⁹ Bosnia and Herzegovina (2015),⁸⁰ Kosovo (2016),⁸¹ Georgia (2016),⁸² and Moldova (2016).⁸³

6.2 *Agreements with Mediterranean Countries*

The agreements with Mediterranean countries all pre-date the Treaty of Lisbon and the CPPDCE. Like with the Eastern Europe-Western Balkan area, the technical instrument used by the Community is the AA with commercial measures for market regulation, as well as for broader cooperation in the social and cultural fields. These AAs are gathered under the Euro-Mediterranean Partnership, aimed at creating a free trade area between the EU and the

75 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13 (signed 9 April 2001, entered into force 1 April 2004).

76 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/166 (signed 12 June 2006, entered into force 1 April 2009).

77 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3 (signed 15 October 2007, entered into force 1 May 2010).

78 Stabilization and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/16 (signed 29 April 2008, entered into force 1 September 2013).

79 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3 (signed 21 March 2014, entered into force 1 November 2014; 1 September 2017).

80 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2 (signed 16 June 2008, entered into force 1 June 2015).

81 Stabilization and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2016] OJ L71/3 (signed 27 October 2015, entered into force 1 April 2016).

82 Council Decision (EU) 2016/838 of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2016] OJ L141/26 (signed 27 June 2014, entered into force 1 July 2016).

83 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 [2014] OJ L 260/4 (signed 27 June 2014, entered into force 1 July 2016).

Mediterranean countries.⁸⁴ Instruments are in force with the following countries/authorities: The Palestinian Authority (1997),⁸⁵ Tunisia (1998),⁸⁶ Morocco (2000),⁸⁷ Israel (2000),⁸⁸ Jordan (2002),⁸⁹ Lebanon (2003),⁹⁰ Egypt (2004),⁹¹ and Algeria (2005).⁹²

6.3 *Agreements with Other Countries: Pre-Lisbon Agreements*

Within this category, there are 19 agreements currently in force. Only five out of the 19 are dated before the Lisbon- and CPPDCE-era, namely those with

84 See the related European Commission web page: <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>> accessed 31 January 2019. The European Neighbourhood Policy applies to the Southern Mediterranean partners. For an economic assessment, see Dimitris Kallioras and Anna Maria Pinna, 'Trade Activity Between the EU and Its Neighbouring Countries: Trends and Potential' (2017) 108(1) *Tijdschrift voor economische en sociale geografie* 36.

85 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3 (signed 24 February 1997, entered into force 1 July 1997).

86 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 [1998] OJ L97/2 (signed 17 July 1995, entered into force 1 March 1998).

87 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2 (signed 26 February 1996, entered into force 1 March 2000).

88 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3 (signed 20 November 1995, entered into force 1 June 2000).

89 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3 (signed 24 November 1997, entered into force 1 May 2002).

90 Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2 (signed 17 June 2002, entered into force 1 April 2006).

91 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39 (signed 25 June 2001, entered into force 1 June 2004).

92 Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2 (signed 22 April 2002, entered into force 1 September 2005). The Agreements with Morocco and Tunisia are being updated. See details at <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-updated>, accessed 31 January 2019.

Armenia,⁹³ Azerbaijan,⁹⁴ Chile,⁹⁵ Mexico,⁹⁶ and South Africa.⁹⁷ This highlights the rapid increase of agreed FTAs after the EU's change of paradigm from multilateral to bi- or plurilateral negotiations in the post 2007–09 period.

6.4 *Agreements with Other Countries: Post-Lisbon Agreements without Cultural Protocols*

As regards this group of agreements, the analysis focuses on the most representative agreements only, i.e. those with Iraq (2012),⁹⁸ Kazakhstan (2015),⁹⁹ the Southern African Development Community (2016),¹⁰⁰ as well as the Comprehensive Economic and Trade Agreement with Canada (CETA) (2016).¹⁰¹

93 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part [1999] OJ L239/3 (signed 22 April 1996, entered into force 9 September 1999).

94 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L246/3 (signed 22 April 1996, entered into force 17 September 1999).

95 Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ L352/3 (signed 18 November 2002, entered into force 1 March 2005).

96 Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L276/45 (signed 8 December 1997, entered into force 1 October 2000).

97 Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/3 (signed 11 October 1999, entered into force 1 January 2000; 1 May 2004). The Agreements with Azerbaijan and Mexico are being updated. See details at <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-updated> accessed 31 January 2019.

98 Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part [2012] OJ L204/20 (signed 11 May 2012, entered into force 11 May 2012).

99 Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/3 (signed 21 December 2015, provisional application 1 May 2016).

100 Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part [2016] OJ L250/3 (signed 10 June 2016, provisional application 10 October 2016).

101 [2017] OJ L11/23 (signed 30 October 2016, provisional application 21 September 2017). See Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/1080. See European Commission, 'EU and Canada agree to set a date for the provisional application of the Comprehensive Economic and Trade Agreement. Statement by Mr Jean-Claude Juncker, President of the European Commission and Mr Justin Trudeau, Prime

In particular, CETA is the broader and most ambitious FTA concluded so far, made up of 30 Chapters covering not only tariffs and customs matters, but also trade in goods and services, technical standards, investment, IPRs, government procurement, trade and sustainable development, trade and labour, trade and the environment, regulatory cooperation, administrative cooperation, transparency, and dispute settlement. It aims at removing basically all tariffs on goods and services exchanged between the partners and creating important new market opportunities in, among others, financial services, telecommunications, energy, and maritime transport, while reserving the parties' right to regulate their internal public affairs. This FTA recognizes in its Preamble that the parties preserve the right 'to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity' and affirms 'their commitments as parties to the CPPDCE, done at Paris on 20 October 2005'. Furthermore, it recognizes 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'. On this basis, culture is expressly excluded from the agreement (Article 28(9)). Thus, the old approach to the topic 'trade and culture' appears, as contained in the first-generation agreements, replicating the substance of the 'cultural exception' of GATT 1994 (Article XX(f)), or that of Article 36 TFEU, i.e. that cultural matters are national competences, despite all of the declaratory commitments of the parties with regard to the implementation of the CPPDCE.

6.5 *Agreements with Other Countries: Post-Lisbon Agreements with Cultural Cooperation Protocols*

As mentioned above in connection with the entry into force of the CPPDCE, so far Cultural Cooperation Protocols have been negotiated and attached to three agreements: the Economic Partnership Agreement (EPA) with the CARIFORUM countries (2008),¹⁰² the FTA with South Korea (2010),¹⁰³ and the AA, with

Minister of Canada' (8 July 2017) Statement/17/1959 on the date of the instrument's provisional application.

102 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/3 (signed 15 October 2008, entered into force 1 November 2008). Protocol III on Cultural Cooperation [2008] OJ L289/1938.

103 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2010] OJ L127/6 (signed 6 October 2010,

its strong trade component, between the EU and Central America (2012).¹⁰⁴ Moreover, the negotiation of a CCA with Colombia and Peru, independent from the trade agreement signed by the EU with the same parties in 2012, has been concluded in 2011, although it is not yet in force.¹⁰⁵

The analysis of the Cultural Cooperation Protocols shows that they all follow the same model,¹⁰⁶ more or less replicating the same provisions in form and content, although adaptations to the specific situations of the individual third countries or regions result in some differences. Importantly, their explicit aim, as set out in the Preamble, is to implement the CPPDCE and connect trade with culture in order to promote an equitable growth in global commerce.¹⁰⁷ This shows that they are intended as an implementation instrument of the new global trade strategy of the axis UNESCO–EU.¹⁰⁸

The Cultural Cooperation Protocols have three main common features. First, they are based on the principles and definitions of the CPPDCE, highlighting the dual nature of cultural goods and services; which are tradable, but not equal to normal goods and services due to their cultural value.¹⁰⁹ Second, they contain horizontal provisions, meaning that they cover issues relevant to the promotion of cooperation in all cultural fields. These rules regard the exchange of best practices, the creation of a relevant dialogue, the training of professionals, and the efforts by each party to facilitate the entry and temporary

provisional application 1 January 2011, entered into force 1 May 2015). Protocol on Cultural Cooperation [2011] OJ L127/1418.

104 Agreement establishing an association between the European Union and its Member States, on the one hand, and Central America on the other [2012] OJ L346/3 (signed 29 June 2006, provisional application 1 August 2013). Protocol on Cultural Cooperation [2012] OJ L346/2622.

105 Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/3 (signed 26 June 2012, entered into force 1 August 2013). Agreement on Cultural Cooperation between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part <http://ec.europa.eu/assets/eac/culture/policy/strategic-framework/documents/agreement-cultural-colombia-peru_en.pdf> accessed 31 January 2019.

106 Basically, structure and content of their texts is articulated as follows: scope, objective, definitions; Section A: Horizontal provisions: (i) Cultural exchanges and dialogue; (ii) Artists and other Cultural Professionals and Practitioners; (iii) Technical Assistance; Section B: Sectoral Provisions: (i) Audio-visual, including Cinematographic, cooperation; (ii) Performing arts; (iii) Publications; (iv) Protection of Sites and Historic Monuments; Section C: Final provisions (entry into force).

107 EPA CARIFORUM (n 102) Recital no 4; AA Central America (n 104) Recital no 2, less strongly; FTA South Korea (n 103) Recital no 3; TA Colombia and Peru (n 105) Recital no 5.

108 On which see above, Sections 4 and 5.

109 EPA CARIFORUM (n 102) Recital no 3; AA Central America (n 104) Recital no 2; FTA South Korea (n 103) Recital no 2; TA Colombia and Peru (n 105) Recital no 3.

stay in their territories of artists, cultural professionals, and practitioners from the other State party.¹¹⁰ Third, Cultural Cooperation Protocols contain sectoral provisions addressing the specificity of some individual cultural sectors: audio-visual cooperation and co-production, cooperation in publications, performing arts, and the protection of heritage sites. In the area of sectoral provisions, the differences among the texts of the Protocols are greater with regard to audio-visual cooperation and co-production regulation, whereas on the other matters the wording of the provisions is rather similar. This shows that no detailed negotiations have really been conducted on sectoral topics other than audio-visual products, because the true interest was in the latter only.¹¹¹ For instance, the EU-CARIFORUM, the EU–Central America Protocols, and the EU–Colombia and Peru CCA contain the parties’ commitment to foster negotiations of new, and the implementation of existing, co-production agreements between Member States and other third countries. They establish that the parties shall facilitate access to co-produced works into their respective markets. To do so, only the EU-CARIFORUM Protocol grants preferential access to the EU market to co-productions, under specific conditions.¹¹² Unlike the other Protocols and the CCA, the EU–South Korea Protocol follows the criterion of reciprocity, due to the stronger audio-visual industry that South Korea has developed in comparison to the other countries involved in the above cultural instruments.

Accordingly, EU–South Korea co-productions shall enjoy reciprocal access to the parties’ audio-visual support schemes by qualifying both as ‘European works’ within the meaning of the Audiovisual Media Services Directive,¹¹³ and as ‘Korean works’ within the meaning of existing regulations in Korea. The conditions for access to these benefits, however, are stricter than those established in the EU-CARIFORUM Protocol.¹¹⁴

110 EPA CARIFORUM (n 102) art 3; AA Central America (n 104) art 3; FTA South Korea (n 103) art 4; TA Colombia and Peru (n 105) art 5.

111 Psychogiopoulou, ‘The External Dimension’ (n 27) 77f.

112 Arts 13 and 16.

113 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1. This Directive is currently open for review: see European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities’ COM (2016) 287 final.

114 FTA South Korea (n 103) art 5(6).

The other sectoral provisions of interest are those regarding cultural heritage protection. There is normally only one provision devoted to this topic, which states that:

The Parties, in conformity with their respective legislation and without prejudice to the reservations included in their commitments in the other provisions of this Agreement, shall encourage, in the framework of appropriate programmes, exchanges of expertise and best practices regarding the protection of cultural heritage sites and historic monuments bearing in mind the UNESCO world heritage mission, including through facilitating the exchange of experts, collaboration on professional training, awareness of the local public and counselling on the protection of the historic monuments and protected spaces and on the legislation and implementation of measures related to heritage, in particular its integration into local life.¹¹⁵

Only the EU–Colombia and Peru CCA addresses the issue of illegal trafficking in cultural objects, establishing the commitment of the parties to combat this phenomenon and facilitate the return of illegally exported cultural goods. In order to fulfil this goal, the parties shall promote cooperation between their respective agencies and may support the conclusion of specific agreements.¹¹⁶ It cannot go unnoticed that the wording of this provision devoted to cultural heritage is even poorer than the one found in other agreements without Cultural Cooperation Protocols, because the concept of heritage appears here to be limited to sites, i.e. to its immovable component, whereas the movable component is considered only in one Protocol, and its immaterial component does not seem to be taken into account at all, nor is the possibility of digitizing cultural heritage.¹¹⁷

115 FTA South Korea (n 103) art 10; TA Colombia and Peru (n 105) art 10; EPA CARIFORUM (n 102) art 9; AA Central America (n 104) art 8.

116 Art 10(3).

117 For more on digitization, see AA Moldova (n 83) art 99. For the immaterial component of cultural heritage see, e.g. EMA Palestinian Authority (n 85) art 57; EMA Israel (n 88) art 60; EMA Lebanon (n 90) art 67; EMA Algeria (n 92) art 77. With respect to the dimension of Indigenous traditional knowledge, see the 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 [2012] OJ L111/2 and, for biodiversity and traditional knowledge, see TA Colombia and Peru (n 105) art 202.

Textual analysis shows that Cultural Cooperation Protocols are aimed at specific tailor-made regulations for audio-visual services and products, rather than being focused on other cultural aspects. Proof of this is the lack of proper coordination in dealing with cultural aspects between the texts of the agreements and their Cultural Cooperation Protocols, together with the high standardization of the other rules of the Protocol, which are largely based on generic provisions and are weakly-binding in their wording,¹¹⁸ similar to those that can be found in the agreements without Cultural Cooperation Protocols and in the agreements stipulated with other regions of the world even before the proclamation of the new global trade strategy uniting trade and culture.

A final critical issue regards the mechanisms adopted (or not) to guarantee the effectiveness of these Protocols. As instruments for the implementation of a new global trade strategy, they should entail dispute-resolution procedures and a system of periodic assessment of their implementation. Both these aspects have been properly dealt with only in the South Korea Protocol and the Columbia and Peru CCA. The South Korea instrument provides for a strict separation between the dispute resolution procedures deriving from the TA and those pertaining to the Cultural Cooperation Protocol. A Committee on cultural cooperation, made up of senior officials from the administration of both parties with experience in cultural matters, will oversee the implementation of the Protocol and operate as a dispute resolution body for cultural disputes.¹¹⁹ The same mode of dispute resolution has been adopted by the CCA with Colombia and Peru, which sets up a Committee on cultural cooperation with competences regarding implementation, monitoring, and dispute resolution.¹²⁰ Unlike these instruments, the Protocol with Central America submits the supervision of its implementation to the Cooperation Subcommittee of the TA, which shall include officials who have competence in cultural matters and practices,¹²¹ but is silent on the issue of cultural dispute resolution. Finally, the CARIFORUM Protocol is silent on the aspects of both implementation and dispute resolution.

Beyond the formal solutions crystallized in the texts of the Protocols, the actual output of these instruments so far is poor. The Proposal for a Council decision on the extension of the entitlement to co-productions, as provided for in the Cultural Cooperation Protocol between the EU and South Korea of

118 They contain recurring expressions like: 'the Parties shall aim at fostering'; 'shall endeavour to facilitate'; 'endeavour to provide', etc.

119 South Korea Protocol (n 103) arts 3 and 3bis.

120 Art 4.

121 Recital no 6 of the Preamble.

11 April 2017, contains no ex-post evaluations, but presents the results of stakeholder consultations: '[T]he EU Domestic Advisory Board noted the lack of EU–Korea audio-visual co-productions under the conditions mentioned in the Protocol, but agreed that the Protocol has nonetheless the potential of being a useful tool'.¹²² In the same vein, a 2014 document examining the impact of the Economic Partnership Agreement with the CARIFORUM countries states that modalities for dialogue have been established, and there have been initial efforts at discussion on cultural cooperation at the first Trade and Development Committee in 2011, but no follow-up efforts since 2011. Implementation of key provisions (movement of artists and co-productions) is still at a very early stage. There have been no requests by EU MSs to start negotiations for new co-productions, due to the lack of visibility of this industry in the Cariforum countries, leading to the lack of interest by the same industry in the MSs.¹²³

It must be underlined that the scant involvement of the relevant cultural industries—which is conducive to a weak implementation of these Protocols—may derive from the scant involvement of the relevant stakeholders (culture organizations, professionals, etc.) in the negotiations of these Protocols. This results in a top-down action by the European Commission,¹²⁴ disconnected from civil society, whereby any effort to create an effective foreign cultural policy may amount to wishful, and uninfluential, thinking. In addition, even the scant attention paid by the drafters of the Protocols to the implementation and effectiveness of the Protocols regards only the audio-visual sector, and does not refer to cultural heritage at all.

7 Concluding Remarks

On the surface, the textual analysis of the TAs with third countries reflects the institutional and strategic evolution over time of the EC/EU CCP vis-à-vis its relationship with cultural heritage (and culture). Yet a closer look at the analysis reveals an overall weakness in the implementation of cultural heritage considerations by the EU via its CCP, mostly because cultural heritage provisions are not aimed at cultural heritage *per se* but are used as instruments to reach other goals. This discrepancy, and this conclusion, can be articulated as follows:

122 COM (2017) 182 final, 4. This is a decision on the second extension until 2020.

123 'Monitoring the Implementation & Results of the CARIFORUM-EU EPA Agreement: Final Report' (September 2014) 49f.

124 Vlassis (n 58) 456.

First, up until the 1990s customs unions with third countries (especially those within Europe, Subsection 6.1) never mentioned culture or cultural heritage and were based on pure trade aspects. This was in line with the absence of institutional competences for culture in the primary sources of EEC law up until 1992, and with the traditional strict separation between trade and culture.¹²⁵

Second, in the 1990s, i.e. after the Maastricht Treaty attributed complementary competences in culture to the EU, efforts to find a balance between trade liberalization and culture, including cultural diversity and cultural heritage considerations, began to emerge from the texts of the agreements, but in a weak fashion. For example, the Customs Union with Turkey (1995) allows state aid to promote culture and cultural heritage conservation where such aid does not adversely affect trading conditions between the two parties to an extent contrary to the common interest (the same is true of Ukraine 2014). The agreements with Georgia (2016), Ukraine (2014), and Moldova (2016), in the chapters devoted to establishment and trade in services, include rules on conditions for licensing, which state that, in establishing the rules on selection procedures, the parties may take into account legitimate public policy objectives including considerations of the preservation of cultural heritage. These state aid and licensing exceptions to protect culture and cultural heritage are in line with the pure FTAs after Maastricht, including the most recent CETA with Canada (2016), all of which only minimally try to balance trade liberalization with the EU and Member States' competences on cultural policies by leaving the liberalization of cultural goods and services out of the picture.

This is nothing other than the replication—in the EU's external commercial action—of the rules of the internal market (e.g. Article 36 TFEU and WTO–GATT Article XX lit (f)), which establish (even broad) exceptions to free trade when requested by national cultural interests (exceptions for the so-called 'national treasures').¹²⁶ This paradigm shows the weakness of the EU's approach in the implementation of cultural considerations via TAs. Despite the new EU competences at the institutional level, culture and cultural heritage considerations seem to remain, at the practical level, a matter for Member States to decide, this being true within the internal market in the same way as it is in the external relations, in the context of the EU's CCP.

125 See above, Section 1.

126 Francesca Fiorentini, 'New Challenges for the Global Art Market: The Enforcement of Cultural Property Law in International Trade' in Ann Appers and others (eds), *Property Law Perspectives*, vol 3 (Intersentia 2014) 189ff, 197. For more on the 'national treasures' exception within the internal market, see also Chapter 4 by Michele Graziadei and Barbara Pasa in this volume.

Third, the analysis also shows that even after Lisbon and the CPPDCE (2007–09), when cultural services have been included within the exclusive competence of the EU CCP, FTAs with strong market economies still refrain from addressing cultural (audio-visual) matters, as is the case in the CETA with Canada, which expressly excludes culture (this meaning audio-visual services) from its scope (Article 28(9)). This leaves the impression that a resilient path dependency is still governing the EU approach to trade and culture insofar as the relationships with strong economies are concerned.

Fourthly, especially after the Lisbon era (but in some cases even before), through a combination of Action Plans by the European Commission emanating from both DG-Culture and DG-Trade, whenever the EC/EU stipulated an agreement with a non-Western, less developed country or a country in transition from an ex-communist past, it needed to introduce considerations on sustainable development that could help prepare the political, social, and legal context of a market economy in the third countries involved. This happened particularly in the context of the European Neighbourhood Policy and Enlargement Negotiations with the Eastern European and Western Balkan countries (Subsection 1), and within the Euro-Mediterranean Partnership (Subsection 2). This triggered recurring provisions on cultural cooperation aimed at: (i) developing political dialogue on culture for the mutual understanding between peoples and cultural exchanges between institutions, artists, and persons working in the area of culture; (ii) promoting market access for cultural goods and services of developing countries, and—if needed—declaring the need to combat illicit trafficking in cultural objects, including through the ratification by the partner-country of the relevant international instruments; (iii) providing for cultural cooperation in audio-visual services, depending on the degree of development reached by this sector in the partner-country; (iv) promoting financial and technical support for the preservation of and access to cultural heritage, sometimes including also the promotion of digitization of cultural heritage and the promotion of cultural diversity, and sometimes stressing the link between sustainable tourism, environmental protection, and cultural heritage; and (v) reinforcing the EU's and partner-country's participation in international organizations dealing with culture (mainly UNESCO).

In these agreements, cultural heritage seems to have a stronger role to play. However, the standardized formulas, coupled with the absence of any impact assessment of these provisions, induce one to think that this notion is used as an instrument functional to the needs of the EU trade strategy (like preparing the context of a market economy for EU actors outside the EU borders and maintaining peace and stability at the geopolitical level). Here, again

emerges—in the sphere of the CCP¹²⁷—the use of culture, cultural heritage, and cultural diversity as a transversal conceptual (or even rhetoric) tool used by the EU institutions to reach other purposes or to better implement a variety of foreign policies.

Fifthly, the functional—rather than operational—character of the references to culture, cultural heritage, or cultural diversity in the EU TAs is substantially confirmed by the general character of their provisions, as happens even in the ‘last generation’ agreements. If one searches for the meaning of the expression ‘cultural heritage’, one must read through the lines of the short provisions which mention it. The result is that most of the time it is intended in an old-fashioned way as immovable heritage, this showing a complete lack of consideration of the many different types of cultural assets that international cultural heritage law has addressed over the last decades. This shows that cultural heritage within the CCP is not considered *per se*, but as a *locution valise* used to reach other goals of the EU in the (geo)political trade competition with other strong global economic actors.

Sixthly, the analysis shows that the Cultural Cooperation Protocols, as the new flagship instruments for the EU’s CCP and which are (theoretically) aimed at potentiating cultural diversity in TAs, may not be as innovative as they seem. They basically replicate—though in a more structured way—the old contents and even the wording of previous cultural cooperation provisions inserted in the pre-Lisbon and pre-CPDCE agreements. The true focus of these Protocols, at the operative level, is only on the sectoral provisions on cooperation in audio-visual services. This has always been the main component of the meaning of culture in the EU’s trade policy and this feature has not undergone any substantial changes so far. These rules are almost the only ones to be truly negotiated, based on the degree of development of the audio-visual industry and the reciprocal economic interests of the contracting parties. In a symmetrical fashion, another clear proof of the true interests promoted by the Cultural Cooperation Protocols is given by the sectoral provision regarding cultural heritage protection. It is replicated in all the protocols, almost always using the same—poor—wording, which is rather generic in tone and content.¹²⁸ These provisions, if compared with the pre-existing provisions of TAs with developing countries or countries in transition, provide no innovation or deepening of the level of cultural heritage protection.

127 As well as in other areas of the EU policy: see, e.g., the Chapters by Evangelia Psychogiou and Ewa Manikowska in this volume.

128 See the text of these provisions above, Subsection 6.5.

The last, final proof of the functional character of cultural heritage protection within the CCP is certainly the lack of impact assessments of the Cultural Cooperation Protocols¹²⁹ which, in the same way as the periodic impact assessments of the TAs, make no mention at all of cultural heritage or cultural diversity issues. The most recent example of this can be found in the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements, 1 January 2016–31 December 2016.¹³⁰ This document reports on, *inter alia*, the implementation of sustainable development provisions—mainly focusing on labour conditions and environmental protection aspects—whereas any reference to cultural heritage is completely neglected. The report concludes that:

The Agreements seek to provide a useful framework for addressing issues that may arise regarding the interaction between trade, social and environmental objectives. But the work on Trade and Sustainable Development has yet to realize its full potential. (...) The implementation of TSD commitments depends on long-term engagement with trade partners and close coordination between different levels of authority responsible for policies in areas such as labour and the environment. These do not always perceive or understand the link between those policies and international trade. Engagement with civil societies organizations, including workers' and employee's representatives, is an important part of this process. They should play an ever greater role in monitoring implementation.¹³¹

Against this background, the Commission is currently engaged in comprehensive discussions with the European Parliament, the Council, and stakeholders with a view to improving the effectiveness of the implementation and enforcement of Trade and Sustainable Development provisions in TAs. There is a Non-paper of the Commission services of 11 July 2017 entitled 'Trade and Sustainable Development chapters in EU Free Trade Agreements'¹³² which

129 See above, Subsection 6.5.

130 COM (2017) 654 final. See also the accompanying Commission Staff Working Document: European Commission, 'Country reports and info sheets on implementation of EU Free Trade Agreements' SWD (2017) 364 final <<http://data.consilium.europa.eu/doc/document/ST-14111-2017-ADD-1/en/pdf>> accessed 31 January 2019.

131 COM (2017) 654 final (n 130) 28.

132 Available at <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf> accessed 31 January 2019.

serves as basis for discussion. It declares that it is time to revise the provisions on trade and sustainable development, but this document too lacks any reference to cultural heritage issues in this process.

Maybe this weak presence of cultural heritage in the implementation of trade and sustainable development in the EU's CCP via TAs is best reflected—at a more global level—in the UN 2030 Agenda for Sustainable Development,¹³³ where it can be noted that cultural heritage still plays a marginal role, being mentioned only once under Goal 11.4 aimed at 'strengthen[ing] efforts to protect and safeguard the world's cultural and natural heritage', which falls within the Goal 11 devoted to 'Mak[ing] cities and human settlements inclusive, safe, resilient and sustainable'.

It can be argued that the process of revision of the text of the FTAs, and especially of their implementation mechanisms, should include a proper consideration of the cultural heritage provisions contained in the Cultural Cooperation Chapters or Protocols, if not simply because of the intrinsic value of cultural heritage as a crucial component of the cultural life of any society, then at least because of their potential to help implement—instrumentally—the wider comprehensive goals contained in the puzzle of sustainable development. Yet in order to follow this path at least two operational requirements need to be fulfilled, i.e. improving coordination between the relevant DGs of the European Commission, Trade and Culture,¹³⁴ and more systematically engaging stakeholders and civil society in this process, together with the involvement of the European Parliament.

133 (n 44).

134 See above, Section 2 and n 28.