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RÉPUBLIQUE FRANÇAISE

For a new European Union external cultural strategy

Communication by France

FOR A NEW EUROPEAN UNION EXTERNAL CULTURAL STRATEGY

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This Communication derives from the proposals made by a working group with a membership comprising representatives from interested French official departments and agencies and the main professional organisations from the cultural sector.

OVERVIEW

The new issues facing the cultural and audiovisual industries in the global economy entail a need for renewed reflection on their treatment by the European Union in both bilateral and multilateral contexts, taking due account of the specific character of cultural goods and services as set out in the provisions of the Lisbon Treaty. In this regard, the European Union must take advantage of the dynamic created by the entry into force of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. At the bilateral level, the purpose of the present communication is to put forward guidelines for the negotiation of specific frameworks for cultural cooperation taking the form of separate cultural cooperation agreements or protocols on cultural cooperation appended to economic or trade agreements (the solution adopted until now) and to make such agreements consistent with the existing financial and cooperation instruments in the cultural domain.

France wishes to recall at the outset that the foundation of the external policy of the EU in the area of culture is based on the exclusion of audiovisual services from liberalisation commitments entered into under trade agreements, both bilateral and multilateral.

I) In France's view, there is a need to develop a strategy of negotiation that is both comprehensive and differentiated, ensuring the autonomy of the cultural sector and the implementation of an ambitious and coherent European cultural policy:

a) **Comprehensive:** the following inviolable principles should apply in all circumstances:

- The entry into force of cultural cooperation protocols or agreements negotiated by the Commission should be made conditional upon prior ratification of the UNESCO Convention, now the 'guiding thread' of European cultural policy, while at the same time remaining vigilant as to its effective application by those countries that have already ratified it.
- The cultural policies of our partners and their cultural sectors should be subject to prior analysis in order to assess our interests and those of the countries concerned with a view to taking their needs and their requests of the EU more effectively into account.
- We should require our partners to ensure the effective respect of a minimum set of copyright and related rights and implement measures to combat piracy and copyright infringement.

b) **Differentiated:** the European Union should no longer propose 'standard' frameworks for cultural cooperation to all its partners, but rather it should adapt them to match the situation of each partner in accordance with differentiating criteria in order to determine whether it is opportune to agree on a cultural cooperation framework, and if so, whether it can or cannot include provisions for preferential treatment. Those criteria fall into three categories:

- Economic: the content of a cultural cooperation framework must take into account the level of development of the cultural industries of the third country. In accordance with Article 16 of the UNESCO Convention, preferential treatment can be granted only to countries whose cultural and audiovisual industries are still developing;
- Legal: cultural cooperation frameworks must be adapted to the situation of each country in light of its WTO commitments and especially whether or not exemptions are listed with the WTO to the Most-Favoured-Nation clause under the

GATS;

- Cultural: countries do not all have the same expectations or the same interests; for this reason, it must be possible to vary the cultural sectors covered by cultural cooperation frameworks to include for example audiovisual arts as well as music, books, the performing arts, and so on.

Ultimately, the European Union needs to develop a “toolbox” whose individual elements can be picked out for use to suit each specific case.

c) **Autonomous:** France suggests initially that the term ‘protocol’ should be replaced henceforth by that of a ‘framework’ for cultural cooperation; there are two main reasons for this:

- Firstly, negotiations of such frameworks may be conducted in parallel with those for economic and trade provisions in order to sustain a negotiating dynamic. However, it should be possible in certain cases to uncouple their conclusion from the trade aspect. This is particularly desirable where the cultural cooperation framework does not include preferential provisions or if the third country has a WTO exemption from the MFN clause covering the preferential provisions which the EU wishes to include in the framework.
- Secondly, the negotiations should be conducted according not only to their own timetable but also on their own terms, of which the main one is the participation of experts from the cultural domain.

II) France is proposing several **concrete measures** for the application of this policy, including, among others, the creation of a dispute settlement mechanism specific to disputes arising from the framework for cultural cooperation.

The method thus suggested must not be restricted to bilateral negotiations but should be an integral part of a **wider consideration of the definition of a European multilateral strategy**: firstly, within the WTO framework, regarding accession to the Organisation and the settlement of disputes raising cultural concerns and, secondly, in furtherance of active promotion of the UNESCO Convention. It must also be an integral part of a comprehensive European cultural strategy linking all frameworks for cultural cooperation with existing financial and cooperation instruments such as the *MEDIA Mundus* programme.

All in all, what France wishes very much to see is the emergence of a new European approach to cultural cooperation with third countries, one founded on the respective autonomy of trade and cultural negotiations, on the grounds of the special character of cultural goods and services as enshrined in the UNESCO Convention, of the possibilities of which there is now a need to take full advantage in order to promote cultural diversity.

France proposes that this strategy be discussed:

- at meetings of Member States Directors General for Culture;
- at a forthcoming meeting of the Education, Youth and Culture Council, General Affairs and External Relations Council or Foreign Affairs Council;
- at meetings of the parliamentary commissions on culture and education and international trade at the European Parliament, whose role in the area of trade has been strengthened by the Lisbon Treaty.

FOR A NEW EUROPEAN UNION EXTERNAL CULTURAL STRATEGY: FRENCH PROPOSALS

Since the Maastricht Treaty, the European Union has shown itself to be remarkably capable of reconciling concerns to liberalise trade with the protection of fundamental interests such as cultural diversity. The Lisbon Treaty reflects this imperative need for reconciliation. Article 167 of the Treaty on the Functioning of the European Union (EU) thus provides that *“the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures”*.

Cultural diversity is in fact included among the goals of the Union, in Article 3 of the Treaty on European Union, which declares that the Union *“shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.”*

In more general terms, the Preamble to the Treaty on European Union makes two references to culture, indicating that the Member States of the European Union draw inspiration from *“the cultural, religious and humanist heritages of Europe [...]”* and desire *“to deepen the solidarity between their peoples while respecting their history, their culture and their traditions.”*

More specifically, cultural diversity is also taken into account in the provisions on aid for culture and for heritage conservation, corresponding to Article 107 of the Treaty on the Functioning of the EU, whereby: *“The following may be considered to be compatible with the internal market: [...] d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.”*

Moreover, the importance of the diversity of cultural expressions for the EU is quite clear in Community jurisprudence. For example, the ECJ ruling of 5 March 2009, UTECA (C-222/07), refers explicitly to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹.

And finally, the influence of the UNESCO Convention on European action is clearly apparent in the definition of the strategic focuses of the EU's external relations such as those of the European Agenda for culture. **The UNESCO Convention must continue to provide the backdrop to all European strategies on cultural matters** in both bilateral and regional relations of the EU as well as at the multilateral level. The promotion of cultural diversity and the Convention at bilateral and regional level must in fact constitute an integral part of an overall action that is also conducted at multilateral level.

1. The European Union at a crossroad: renewing the European approach to cultural cooperation with third countries

In the current context, which is **shaped by five main circumstances**, France considers it necessary to reflect upon the treatment of the cultural sector in economic and trade agreements, bilateral and regional, negotiated by the European Union (EU) with third countries, and within the WTO framework for multilateral trade agreements. More generally, there must be reflection

¹ *“Since language and culture are intrinsically linked, as pointed out by, inter alia, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [...], the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty.”*

on the interlinking and consistency of these various negotiations on the one hand with, on the other, cultural cooperation instruments already in place with third countries, culture being a key dimension for the development of the EU's political influence.

1.1 The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the European Community and 25 of its Member States, which entered into force on March 2007, lays down a framework for international cultural cooperation that from two points of view is both new and ambitious:

- Firstly, it acknowledges the specific nature of activities, cultural goods and services, which "*convey identities, values and meanings*" according to the terms employed in its Preamble. From this flows the right of States to implement policies to support their cultural sector. Since that right can be compromised by commitments to liberalise trade in this sector, the traditional European position whereby the audiovisual sector is excluded from trade negotiations is thus legitimised;
- and secondly, it encourages the Parties to increase international cultural exchanges, which constitutes an opportunity for developing countries.

In light of this new framework, the Ministers of Culture of the European Union decided in November 2008² that a comprehensive European strategy should be defined for the EU's external cultural relations.

At a time when the UNESCO Convention is being implemented, it is important for the European countries that were major contributors to the negotiations of this international legal instrument and which can point to long traditions of implementing cultural policies, to retain their position as 'leaders' and make a major contribution commensurate with the issues and with the possibilities created by the Convention.

1.2 In order to promote cultural diversity, **the first Protocol on Cultural Cooperation (PCC) was drawn up in 2003** in the context of negotiations between the European Union and the countries of Africa, the Caribbean and the Pacific (ACP) at the time when the negotiations for the UNESCO Convention were also being conducted. This protocol was designed as a tool for the promotion of the policy objectives defined in the Convention.

1.2.1 The wish to place the treatment of cultural exchanges within a specific framework, while at the same time continuing to exclude audiovisual services from liberalisation of trade in services, has been seen as an opportunity for effective implementation of the UNESCO Convention and has been well received in France.

Nevertheless, experience of the negotiation of PCCs in the context of an economic partnership agreement (EPA) between the EU and the Cariforum States and a free trade agreement (FTA) between the EU and South Korea has demonstrated that **this type of protocol on cultural cooperation can lead to difficulties**, even to the point of running counter to the objectives of the UNESCO Convention. During the bilateral trade negotiations with South Korea, due to the power of cultural and audiovisual industries in that country, the coalitions for cultural diversity in Europe, which comprise professional organisations in the cultural world (film, television, the performing arts, publishing, music, the graphic and plastic arts and multimedia) were sharply critical of the generalisation of this practice, declaring their opposition to the transposition of the model of the PCC negotiated with the Cariforum States to a country with developed cultural industries. In the free trade agreement negotiated with South Korea, initialled on 15 October

² Conclusions of the Council of Ministers of Culture, 20 November 2008.

2009, the model used for the Cariforum States was ultimately amended to take the level of development of the South Korean audiovisual sector more effectively into account.

PCCs, as they have been negotiated up to the present time, do nevertheless run the risk of allowing a *de facto* reintroduction of audiovisual services into trade negotiations, which is reflected in an excessive focus on access for audiovisual coproductions to European television broadcast quotas laid down by the *Television Without Frontiers Directive* (TVWF) of 3 October 1989, as amended by the *Audiovisual Media Services Directive* (AVMSD) of 11 December 2007. This focus may lead to the fact that the content of these PCCs inadequately matches the needs of partner countries in terms of cooperation, especially in the developing world. In this respect, the Cariforum PCC, for example, did not take sufficiently into account our partners' key assets in the music sector.

As a consequence, prior to any negotiation, it is essential to identify the interests of the European cultural and audiovisual industries and the obstacles they face when exporting to the third countries involved, and to analyse the interests and needs of our partners.

1.2.2 The PCCs that have been signed contain provisions which are similar to market access. They reflect thus a largely economic approach to the cultural sector. Traditionally, the audiovisual cooperation of the Member States takes practical form in film coproduction agreements negotiated and signed by Member States. Those agreements are not seen as tools for market access or for the promotion of exports, but as a way of stimulating artistic exchanges. They are usually aimed solely at the film industry rather than audiovisual production generally and they seek to avoid destabilising the partners' respective industries³. The measures implemented by the EU should be based on the same approach.

Moreover, systematically granting access to European television broadcast quotas for works coproduced by a European producer and a producer based in a third country could in the longer term run totally counter to the very goal of those same quotas⁴:

- by harming the circulation of non-national European works within the EU;
- by creating a risk that productions may be relocated to third countries with lower cost levels, which is to say virtually everywhere.

In other words, by offering preferential treatment such as access to TV broadcast quotas to a large group of third countries, the EU has more to lose than it stands to gain in terms both of policy for defending cultural diversity and circulation of European works within the EU.

All in all, the protocols on cultural cooperation defined until now by the European Union can be seen to be too restrictive in their approach and too tightly focused on market access measures. **In this area, there is a need to adopt a strategy that is both comprehensive and differentiated:**

- Comprehensive, in order to ensure the consistency and a satisfactory interlinking of the policies applied by the European Union and its Member States, particularly cultural, external relations and development policies;

³ The exclusion of the animation sector from the Franco-Korean coproduction agreement was motivated by the risk that French production might be relocated to South Korea due to the low production costs in that country. Conversely, the PCC signed with South Korea considers audiovisual cooperation as a tool for the penetration of the market of the partner country and provides for preferential treatment measures such as access to European broadcast quotas for Euro-Korean coproductions, without having first assessed their potential impact. The animation sector is notably included, which did not fail to arouse sharply negative reactions from European professionals in this sector.

⁴ Quotas for the broadcast of European works were instituted by the TVWF Directive in order to promote the circulation of European works within the EU and the vitality of the European audiovisual industry.

- Differentiated, in order to ensure that cultural cooperation schemes match the needs of each of our partners, whether in the developed or developing world, within the limits set by the interests of the European cultural industries.

1.3 The implementation of the Lisbon Treaty will have consequences not only in the trade domain but also in the cultural sector in light of its Article 207, which stipulates that the Council shall “*act unanimously for the negotiation and conclusion of agreements [...] in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity*”. It also assigns a full role to the European Parliament, which acquires a power of co-decision for the signing of trade agreements with third countries. Article 218 of the Treaty on the Functioning of the European Union thus stipulates that “*the Council shall adopt the decision concluding the agreement [...] after obtaining the consent of the European Parliament [...]*.”

1.4 The publication in 2010 of the Green Paper on cultural industries will provide an opportunity to set out publicly the EU's positions on arrangements for the protection and promotion of the diversity of cultural expressions and on the treatment that should be given to the cultural sector in agreements between the EU and third countries.

1.5 Several trade agreements currently being negotiated provide in their mandates for specific cultural cooperation frameworks (cf. table below)⁵, although those mandates are unclear as to the precise form that the framework should take (a protocol appended to the trade agreement or not). This development makes it essential to define a strategy based on general principles and concrete proposals ahead of the commencement of negotiations, not only to channel the latter more effectively but also to renew the content of the instrument on cultural cooperation and adjust it to match more closely our partners' diversity.

Regional trade agreement	Status of negotiations and cooperation in the cultural domain
EU/Andean Community	The document currently under negotiation contains a protocol on cultural cooperation which requires only that the Parties <i>intend to promptly ratify</i> the UNESCO Convention. The conditions for access to European broadcast quotas are closer to those in the Cariforum PCC than those in the PCC concluded with South Korea but, like the latter, the PCC with the Andean Community provides for reciprocity in preferential treatment. Provisions have been added on the protection of intellectual property and technical assistance ⁶ .
EU/India	Initiated in June 2007, negotiations are still at the stage of defining the agreement's architecture, although some substantive issues have already been discussed. There is a risk that the negotiation of a framework for cultural cooperation with India will lead to the same concerns as the negotiations with South Korea.

⁵ EU/Euromed FTA, EU/South Korea FTA, EU/India FTA, EU/ASEAN FTA, EU/Andean Community FTA, EU/Central America FTA, and the deepened economic agreement between the EU and Canada. However, the negotiations with the Cooperation Council for the Arab States of the Gulf (CCASG), Iraq, Libya and Mercosur do not prescribe the addition of a protocol on cultural cooperation. Similarly, the free trade agreements concluded with Chile and Mexico contain no protocol on cultural cooperation.

⁶ Under this agreement, the provisions for access to European quotas could become problematic where Colombia is concerned due to the power of the latter's television industry.

Regional trade agreement	Status of negotiations and cooperation in the cultural domain
EU/Canada	The EU/Canada Summit in Prague in May 2009 announced the launch of negotiations for a comprehensive economic and trade agreement ⁷ to replace the 1976 Framework Agreement for Commercial and Economic Cooperation. This future “deepened economic agreement” could include a framework for cultural cooperation but this will contain no measures relating to market access.
EU/Euromed	Negotiations are at a more or less advanced stage depending on the country concerned. It is increasingly apparent that the target of concluding them by 2010 will be difficult to attain. The attachment of a protocol on cultural cooperation to this agreement has been envisaged.
EU/ASEAN	The Council gave a negotiating mandate to the Commission in April 2007. Since then, negotiations have been at a standstill due to the very limited integration of the countries in the region and the problems of governance of the organisation which result from this. The Commission is currently examining the possibility of negotiating with each of the ASEAN Member States separately. It would seem that in the short term the negotiations are able to move forward only with Singapore. The negotiation of a framework for cultural cooperation has also been envisaged in the negotiating mandate.
EU/Central America	Negotiations for an “Association Agreement” to comprise three pillars – political dialogue, cooperation and trade – were initiated in June 2007. They are currently at a standstill due to the situation in Honduras. Whether or not they are successfully concluded is also dependent on a WTO agreement on bananas. A framework for cultural cooperation was envisaged in the negotiating mandate.

2. Definition of the guiding principles for negotiations

In light of the experience of the first two PCCs that have been negotiated, it seems essential to define certain guiding principles for all future negotiations. The protocol negotiated with South Korea provides, following demands from the Member States, for adjustment mechanisms to take account of the interests of the French and European audiovisual sector. Those mechanisms must be put to good use and developed in future trade negotiations between the EU and third countries, both bilateral and regional, and adapted to fit the specific characteristics of the countries concerned, applying the categories identified below (cf. §2.5). They must also be aimed at the effective implementation of the provisions of the UNESCO Convention of 2005. The latter provides a relevant framework for the development of cultural cooperation between the European Union and third countries. Its ratification by all Member States of the EU and by the EU’s partners can be seen to be both desirable and necessary to the strengthening of such international cultural cooperation. However, it must nevertheless go hand in hand with other guarantees.

2.1 Exclusion of audiovisual services from liberalisation commitments under trade agreements.

Article 1.2 of the Protocol on Cultural Cooperation annexed to the EU/South Korea FTA lays

⁷ ‘Comprehensive Economic Trade Agreement’ or CETA.

down that this exclusion is without prejudice to the rights and obligations flowing from the Protocol on Cultural Cooperation⁸. There is a risk that such wording may confuse our trading partners, who might consider that the Protocol on Cultural Cooperation implements a *de facto* liberalisation of the European audiovisual market, or at least that it opens the door to wider liberalisation in the future (which might possibly go beyond the preferential treatment for coproductions). The risk of uncertainty on this point is all the greater for the fact that certain liberalisation commitments in the music sector were undertaken in the trade chapter of the agreement with the Cariforum countries, although only to a limited extent. It is necessary for this reason to make a firm distinction between the protocol or agreement on cultural cooperation and the economic or trade agreement, making it clear that its nature is primarily cultural, notwithstanding its effects on exchanges of cultural products and services. In the same way, any facility granted with respect to cultural exchanges with our partners must be added exclusively to the provisions of the protocol or agreement on cultural cooperation, in order to make a clear distinction between this and commitments to open up markets.

This exclusion is essential if the Member States of the EU and the EU as a whole are to retain the capacity to maintain and implement policies in support of the cultural sector.

It is also essential in order for cultural and audiovisual services not to be used as an ‘adjustment variable’ in general trade negotiations. When, for example, it is planned to negotiate a framework for cultural cooperation, care should be taken to ensure that it does not in practice lead to the reintroduction of cultural goods and services into trade negotiations between the EU and the third country. The risk would then be that the cultural sector might become a ‘bargaining counter’ in trade negotiations, as was the case in the negotiations with South Korea. A degree of assimilation of the cultural and trade spheres is unfortunately to be seen in completed and ongoing negotiations between the EU and third countries.

2.2 Putting the UNESCO Convention at the heart of cultural cooperation

This instrument must be the EU’s ‘guiding thread’ when negotiating provisions for cultural cooperation. Such centrality of the UNESCO Convention must be reflected in two categories of commitment to be given by our partners.

2.2.1 Negotiations, or at the very least the entry into force of provisions on cultural cooperation, must be made dependent on prior ratification of the Convention. It is with this in mind that the preamble of the Protocol on Cultural Cooperation concluded with South Korea states that the Parties will be able to establish cultural cooperation **only after ratifying the UNESCO Convention**. This wording should be used in the text of the PCC currently being negotiated with the countries of the Andean Community, which states that Colombia “*intends to ratify*” the Convention. The establishment of a link of conditionality between the negotiation or entry into force of a framework for cultural cooperation and the prior ratification of the UNESCO Convention might in fact inject impetus into the general movement towards ratification, given the large number of specific frameworks for cultural cooperation that are envisaged. This condition may also be a way of encouraging the maintenance and development of new cultural policies by our partners. There is a need to urge the Member States of the EU that have not yet ratified this Convention to do so.

2.2.2 A commitment must be obtained from our partners to implement the provisions of the Convention in an effective manner and to take no steps that run counter to its

⁸ “The exclusion of audio-visual services from the scope of Chapter Seven (Trade in Services, Establishment and Electronic Commerce) is without prejudice to the rights and obligations derived from this Protocol. [...]”

principles and objectives. The preamble of the Protocol on Cultural Cooperation concluded with South Korea takes this imperative into account. It states for example that both Parties are *“intending to effectively implement the UNESCO Convention”*, and to base their action on its principles: *“building upon the principles of the Convention”* and *“developing actions in line with its provisions”*. Similarly, a Commission declaration has been appended to the Protocol to make it clear that the latter *“does not compromise the policy of the European Community whereby trade negotiations in the domain of cultural and audiovisual services shall not prejudice the cultural and linguistic diversity of the Union”*. This concern must be shared equally by the European Union and its partners in the context of both ongoing and future bilateral and regional negotiations.

2.2.3 However, prior ratification and effective implementation of the UNESCO Convention are necessary but not sufficient conditions. The existence of an instrument of this kind, however ambitious it may be, will not of itself prevent the reintroduction of cultural goods and services into trade negotiations between the EU and third countries. While the UNESCO Convention provides legitimacy for governmental cultural policies and measures, it creates no obligation for the parties to adopt them. Consequently, the European Union must define new requirements to supplement the UNESCO Convention in order to assure adherence to the goal of cultural diversity.

2.3 Examination of our partners’ cultural policies and existing cooperative relations

Before negotiating provisions on cultural cooperation, it seems necessary to carry out an analysis of the cultural policies and levels of development of the cultural industries of our partners in order to arrive at an overview of the current status of legislation and supporting measures for cultural industries as applied in the countries concerned. This examination must be supplemented by a study of cooperative relations existing between the EU and those countries in order to define a comprehensive diagnostic analysis of the situation and to be able to adjust the framework for cultural cooperation to ensure the best possible match with the needs of each partner. This preliminary examination should be conducted with the involvement of specialists from the cultural sectors of the Member States and third countries.

2.4 Evaluation of the level of protection of copyright and related rights and schemes to combat piracy and counterfeiting

Counterfeiting and piracy have been developing at great speed over recent years and have led to considerable losses of revenue for the industries concerned, given the illicit sales of CDs and DVDs and illegal downloading of music and film over the Internet. This issue is particularly important for countries which enjoy an abundance of music and film production along with a dynamic industry in these fields, as it is for countries wishing to develop those cultural sectors. While awaiting a future agreement against copyright infringement (the “Anti-Counterfeiting Trade Agreement” or ACTA), governments are responsible for combating these practices. Care is needed to ensure that third countries with which the Union establishes cultural cooperation have the right instruments for this or put them in place.

It is imperative to assess the precise status of legislation and practice in the countries with which the EU proposes to develop cultural cooperation in the area of copyright and related rights in order to promote the development in those countries of effective legislation in this area, along with the right instruments to combat massive counterfeiting and piracy.

In the case of developed countries, negotiations, or at least the entry into force of provisions on cultural cooperation, must be made conditional on ratification of the treaties administered by the

World Intellectual Property Organisation (WIPO)⁹ and on the deployment of means to combat piracy. Negotiators must be assured of the existence of a satisfactory linkage between such provisions and the chapter on intellectual property in the trade agreement where applicable.

For developing countries, ratification of the WIPO treaties cannot constitute a condition for the entry into force of the framework for cultural cooperation but should be an objective to be achieved once it is implemented. Analysis will identify more precisely what is needed and enable the correct means to be envisaged to assist those countries in aligning with the best standards and practices for the protection of copyright and related rights.

2.5 Adaptation of the content and nature of frameworks for cultural cooperation to match the diversity of our partners: differentiation is essential

The negotiation of frameworks for cultural cooperation by the European Union with third countries must obey a logic of differentiation, adjusted to match each of our partners, and varying according to their level of development¹⁰, their geographical location, the scale of their cultural policies and their culture and audiovisual sector¹¹. Due consideration for the principle of differentiation must be a prerequisite for each negotiation and requires that the Commission conduct a study to identify for each country and each product the obstacles to be removed and the strategic interests of the EU before negotiating mandates possibly establish that cultural cooperation shall be enshrined in a protocol to be appended to the economic or trade agreement and determine the broad lines of its content.

While negotiations must be adapted to match each partner specifically, it is nevertheless possible to define general negotiating frameworks to match categories of third country.

2.5.1 Adaptation of the content of the framework for cultural cooperation to match the level of development of the cultural and audiovisual industries of the partner country.

An initial distinction can be made between **countries with cultural, and especially audiovisual, industries that are underdeveloped**, for which it will be necessary to have as a primary objective the implementation of Article 16 of the UNESCO Convention, and **those with developed cultural, and especially audiovisual, industries**, for which preferential treatment is not justified.

2.5.1.1 Countries with underdeveloped cultural, and especially audiovisual, industries: implementation of Article 16 of the UNESCO Convention.

Existing PCCs contain provisions on the mobility of cultural players, the performing arts, publishing, protection of cultural heritage and monuments and audiovisual works. This framework should be fleshed out and developed to match the specific interests of the partner country and

⁹ The *WIPO Copyright Treaty (WCT)*, adopted on 20 December 1996 and in force since 6 March 2002, and the *WIPO Performances and Phonograms Treaty (WPPT)*, adopted on the same date and in force since 20 May 2002.

¹⁰ The level of development of the audiovisual industries in a partner country can be assessed on the basis of the following criteria:

- What is the volume of its film and audiovisual production?
- What are its average production costs?
- What is its volume of exports of audiovisual works?
- Is the country a competitor of Member States at the international level?

¹¹ In this respect, the protocols concluded with the Cariforum States and South Korea include in their Preambles a clause that highlights the necessity of taking into account on a case-by-case basis the degree of development of the cultural industries, the level of cultural exchanges and their structural imbalances, along with the existence of mechanisms for the promotion of local or regional cultural content.

pre-existing cooperative relations. It is not appropriate to focus exclusively on the audiovisual sector. The question of access to European TV broadcast quotas for co-produced works must be assessed in terms of the preferential treatment for developing countries for which provision is made in Article 16 of the UNESCO Convention. Since those provisions improve access to the European market for coproduced works, they must be reserved for countries with developing audiovisual industries if they express an interest in such a measure and have ratified the UNESCO Convention.

2.5.1.2 Countries with developed cultural, and especially audiovisual, industries: no measures of preferential treatment such as access for coproductions to European TV broadcast quotas.

For countries with developed cultural, and especially audiovisual, industries, frameworks for cultural cooperation should also include provisions relating to a wide range of cultural sectors, such as music, publishing, the performing arts, the plastic arts, design, protection of cultural heritage and monuments. Close links of cultural cooperation already exist between countries with developed cultural and audiovisual industries that have ratified the 2005 UNESCO Convention. Consequently, the aim must be to determine in which domains a framework for cultural cooperation concluded with the European Union might add value to existing agreements concluded with Member States, without any preferential treatment, the latter being reserved for countries with cultural, and especially audiovisual, industries that are still developing.

2.5.2 A second distinction to be taken into account relates to the existence of WTO exemptions to the Most-Favoured-Nation (MFN) clause. For countries that have listed exemptions to this clause with the WTO, the possibility can be envisaged of a cultural cooperation agreement that is autonomous in relation to the trade agreement.

The granting of national treatment to coproduced works is a standard practice in the context of bilateral coproduction agreements. It is however necessary to make a distinction between developing countries that have reserved the right to sign this type of agreement in their lists of exemptions from the MFN clause under the GATS¹² (cf. Table below: *EU partners with a WTO MFN exemption for coproduction agreements*) from those that have not listed such an exemption. WTO members that have established an exemption for audiovisual coproductions can conclude preferential cooperation agreements with any other country with no obligation to extend the relevant advantages to all other members. Therefore, the existence of such an exemption substantially diminishes the advantages of the formula involving a ‘protocol’ on cultural cooperation appended to an EU trade agreement given that under WTO rules the countries concerned are authorised to conclude coproduction agreements on an autonomous basis.

The following table lists the EU partners with a WTO MFN exemption covering coproduction agreements.

Trading partner	WTO MFN exemption applicable to coproductions
Cariforum	
<i>Antigua and Barbuda</i>	No
<i>Bahamas</i>	Not applicable (country with WTO observer status)
<i>Barbados</i>	Information not available
<i>Belize</i>	Information not available

¹² The WTO General Agreement on Tariffs and Trade.

Trading partner	WTO MFN exemption applicable to coproductions
<i>Dominica</i>	Information not available
<i>Grenada</i>	Information not available
<i>Guiana</i>	Information not available
<i>Jamaica</i>	No
<i>Dominican Republic</i>	No
<i>Saint Kitts and Nevis</i>	Information not available
<i>Saint Vincent and the Grenadines</i>	Information not available
<i>Saint Lucia</i>	Information not available
<i>Suriname</i>	Information not available
<i>Trinidad and Tobago</i>	No (but exemption in all sectors for privileges granted to the signatories of bilateral investment agreements with Trinidad and Tobago)
South Korea	No
Andean Community	
<i>Colombia</i>	Yes
<i>Ecuador</i>	Yes
<i>Peru</i>	No
India	Yes
Canada	Yes
Euromed	
<i>Algeria</i>	Not applicable (country with WTO observer status)
<i>Palestinian Authority</i>	Not applicable (has requested WTO observer status)
<i>Egypt</i>	Yes
<i>Israel</i>	Yes
<i>Jordan</i>	Yes
<i>Lebanon</i>	Not applicable (country with WTO observer status)
<i>Morocco</i>	No
<i>Mauritania</i>	Information not available
<i>Syria</i>	Not applicable (not a WTO member)
<i>Tunisia</i>	Yes
<i>Turkey</i>	Information not available
ASEAN	
<i>Brunei</i>	No (yes for broadcast services)
<i>Cambodia</i>	Yes
<i>Indonesia</i>	No
<i>Lao People's Democratic Republic</i>	Not applicable (country with WTO observer status)
<i>Malaysia</i>	No
<i>Myanmar</i>	Information not available
<i>Philippines</i>	No
<i>Singapore</i>	No (yes for broadcast services)
<i>Thailand</i>	No
<i>Vietnam</i>	Yes
China	No
Brazil	Yes

Finally, once it has been determined whether or not it is appropriate to grant preferential treatment to a partner country in accordance with the level of development of its cultural and audio-

visual industries, it is necessary to define the most appropriate legal framework.

Cultural cooperation frameworks that do not include preferential treatment of quota access type could be totally autonomous in relation to the trade agreement. That would mean that the cultural cooperation agreement would be included in the cooperation chapter of the overall agreement.

Countries enjoying preferential treatment of quota access type within the specific framework established for cultural cooperation with the EU should, in order to ensure total autonomy in relation to the trade agreement, hold a WTO MFN exemption (GATS) applicable to coproduction agreements.

In the case of countries enjoying preferential treatment of quota access type within the specific framework established for cultural cooperation with the EU but which do not have an MFN exemption within the WTO for coproduction agreements, the provisions on cultural cooperation can be appended to the trade agreement (the preferential treatment will then be exempted from the MFN clause under GATS Article V), but the modalities of the negotiations and the follow-up on those provisions should be kept completely separate from the trade negotiation in accordance with the conditions set out in paragraph 3.

All in all, **whenever possible**, that is to say whenever the provisions on cultural cooperation do not include preferential treatment (such as access to quotas in PCCs already negotiated) or where the country has a WTO MFN exemption covering the preferential provision, **the framework for cultural cooperation negotiated by the European Commission should be autonomous in legal terms in relation to the trade agreement and included under the cooperation aspect of the overall agreement.** This is justified:

- on practical grounds: the negotiation of the agreement would be totally disconnected from the trade negotiation since it would be conducted according to its own timetable by cultural negotiators (exclusively or not according to the precise content of the cultural cooperation provisions), in consultation with the relevant official administrations and professionals in order to target as accurately as possible the cooperative actions best suited to the partners' interests, needs and wishes;
- for reasons of policy visibility: the aim being to show that the EU continues to consider that cultural goods and services are not like any other saleable goods and that WTO MFN exemptions can be useful.

Naturally, such a position of principle does not prejudge the advantages of appending provisions on cultural cooperation to free trade agreements where our partners' WTO MFN exemptions do not cover all the preferences that we might wish to grant to those partners within the cultural exchange framework. Moreover, it will be necessary to be particularly vigilant at the WTO with regard to possible pressure on the negotiations to water down such exemptions, and to demonstrate that they meet a major public need (cf. section 5).

2.5.3 The EU must proceed with caution with respect to countries with a history of commitments to liberalise the cultural and audiovisual sectors in their trade agreements.

The EU should predominantly negotiate cultural cooperation frameworks with countries which share its positions at international level. This means that not only must they have ratified the UNESCO Convention, but they must also have undertaken no commitments to liberalise cultural and audiovisual sectors either at the WTO or in bilateral and regional trade agreements. If such commitments have been undertaken in the past, only the implementation of

policies for the support of the cultural sector might constitute proof of a change in position by the country concerned and justify making an exception.

3. A new procedure for the negotiation of frameworks for cultural cooperation

The objective is to maintain a clear separation between trade negotiations issues and those of cultural negotiations, on the grounds set out below.

3.1 The current attachment of frameworks for cultural cooperation to economic and trade agreements between the EU and third countries in the form of protocols appended to those agreements may compromise the specific nature of cultural products and services as defended by the EU

3.1.1 The current attachment of cultural cooperation provisions to economic and trade agreements between the EU and third countries subordinates the cultural sphere to that of trade. Most of the European Union's negotiating mandates make provision for a specific cooperation framework for the treatment of audiovisual and cultural services¹³. Until now, in the trade negotiations that have been concluded (Cariforum, South Korea) or which are still in progress, this cooperation framework has taken the form of a specific instrument: the Protocol on Cultural Cooperation. Despite the specific character of this instrument referred to in the mandates and the chosen form of an appended protocol, in practice, past experience of the Cariforum and South Korean negotiations shows that in those agreements there is nothing to differentiate the cultural sphere from the trade sphere: the cultural negotiations are simply an additional aspect among others of the overall trade negotiation.

If this link is maintained in future negotiations, it is essential to guarantee the autonomy of the cultural sphere with respect to the trade domain using a range of mechanisms (cf. §4.4). This imperative notably raises the question of negotiating timetables and the respective negotiating teams for these two categories of instrument (cf. 3.2.2).

3.1.2 The attachment of frameworks for cultural cooperation to trade agreements between the EU and third countries might weaken the positions of the EU and its Member States at the WTO. This problem arises insofar as the Protocols on Cultural Cooperation already agreed include provisions similar to market access provisions in the form of access to European broadcast quotas. Indeed, when negotiations on services resume in Geneva the other members of the Organisation could criticise the EU for proposing in the context of its bilateral and regional economic and trade agreements access to its audiovisual market without at the same time liberalising trade in audiovisual services at the multilateral level. Our partners at the WTO could then consider that the EU has liberalised its audiovisual services and demand preferential treatment equivalent to that granted to its other partners.

For the reasons described at §2.5.2, cultural cooperation frameworks negotiated by the European Commission should be totally autonomous in relation to trade agreements whenever possible. Conversely, when those same reasons lead to the conclusion that the provisions on cultural cooperation should be appended to the trade agreement, it will be necessary to define a negotiating procedure capable of guaranteeing the autonomy of the cultural cooperation framework in relation to the trade agreement.

¹³ “*Audiovisual and other cultural services will be treated in a specific audiovisual and cultural co-operation framework [...].*”

3.2 The specific character of the cultural sector, and the audiovisual sector in particular, entails a need to build an autonomous framework for the negotiation of agreements or protocols on cultural cooperation

3.2.1 Negotiating teams should be formed to match the particular concerns of the cultural sector. The specific character of cultural negotiations justifies recourse to experts in cultural matters. The preamble to the UNESCO Convention declares that “*cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings.*” It acknowledges that “*they must therefore not be treated as solely having commercial value.*” It follows from this that the team charged with negotiating cultural cooperation frameworks should not be made up exclusively of specialists in trade issues, even if their presence is required where negotiations are not ‘purely’ about cultural cooperation. In this connection, the membership mix of the Commission team that conducted, along with the Member States, the negotiations of the UNESCO Convention (DG Education and Culture and DG Trade) constitutes a relevant precedent that could serve as a model for conducting the negotiation of cultural cooperation frameworks in the context of the implementation of the Convention.

Flexibility in choosing negotiators is thus essential. Where cultural cooperation frameworks mainly include provisions relating ‘purely’ to cultural cooperation, the Directorate General with responsibility for Culture at the European Commission would legitimately occupy a ‘leading’ position in the negotiation of such frameworks, in consultation with the representatives of the Ministries of Culture of the Member States in the Cultural Affairs Committee and the Audiovisual Group or through an ad-hoc working group with which the Member States are associated and in which France would be willing to participate. The recent character of the UNESCO Convention and the dynamic it has created around the diversity of cultural expressions would also justify the permanent provision of advice from experts in this field to Commission negotiators throughout the duration of the negotiations. Such a negotiation procedure should be governed by formalised rules in the strategic document presented by the Commission.

3.2.2 The specific character of the cultural sector justifies a negotiating timetable that unfolds at its own speed and is completely independent of the timetable governing the economic and trade agreements.

Experience of the free trade agreement between the EU and South Korea shows that FTAs and PCCs follow the same negotiating timetable. The fact that the Commission has obtained from its partners concessions judged to be satisfactory in the various chapters of the trade negotiations (trade in goods, services and capital), allowing it to envisage a swift conclusion to the negotiating process as a whole, can lead to pressure for a rapid conclusion of the cultural cooperation aspect.

It is certainly the case that provisions on cultural cooperation can benefit from the dynamic driving trade negotiations. However, the importance of the latter and the imbalance in their relative strengths mean that in this case the cultural sector, and especially its audiovisual segment, tends to be used as a ‘bargaining counter’ in trade negotiations. Given this observed fact, **it seems necessary to uncouple negotiations for economic and trade agreements from negotiations for cultural cooperation frameworks.** The latter must thus be seen as quite separate and governed by their own timeframe. This in turn means that the Commission negotiators mandated by the Member States must report back to the latter more frequently on the current status of the negotiations, *a fortiori* on any concession made by them to third countries. The aim must be to avoid repetition of the situation with regard to the EU/South Korea free trade agreement, in which Member States were consulted solely in the context of the Article 133 Committee (Services) responsible for EU external trade policy.

4. Improving the content of cultural cooperation frameworks

As has been previously indicated (cf. §2.5), the negotiation of cultural cooperation frameworks by the European Union with third countries must obey a logic of differentiation adjusted to match the specific characteristics of each of our partners, and its needs and desires, as well as the interests of the European cultural and audiovisual industries. It must also ensure that cultural cooperation frameworks are consistent with existing European measures and policies on cooperation with third countries. Certain mechanisms can however be indicated as a ‘toolbox’ for such differentiation.

4.1 Horizontal provisions

4.1.1 Correction of existing imbalances in exchanges of cultural products and services.

Under the protocols negotiated with the Cariforum States and South Korea, the Parties are committed to “*collaborating*” or “*endeavouring to cooperate*” in order to correct structural imbalances existing in exchanges of cultural products, services and activities. Such collaboration would benefit from greater precision and regularity and should be developed in a manner that complements existing cooperation measures.

4.1.2 Provision for measures favourable to artists and culture professionals. The following measures could be envisaged for general application to cultural cooperation agreements and protocols negotiated by the EU:

- The Commission should be invited to reflect upon arrangements whereby the common policy on visas might be adjusted to facilitate access to European territory for cultural players, taking as a model the arrangements put in place for researchers.
- Specific support for young artists, creative talent and professionals from countries with underdeveloped industries to enable them to meet with creative artists and professionals from other countries, to become part of networks and also to participate in ‘artist in residence’ programmes.

4.1.3. Promotion of the protection of copyright and related rights.

The objective of protecting copyright and related rights should in the case of developed countries lead to discussions and exchanges of good practice, especially with regard to ways of ensuring that those rights are respected, as provided in the EU-South Korea PCC (cf. Article 2). In the case of developing countries, technical assistance measures suited to their situations should be implemented to enable them to comply with international standards for protection of copyright and related rights.

4.1.4 Establishment of technical assistance measures for the benefit of our partners with underdeveloped cultural industries in cultural sectors covered by protocols or agreements on cultural cooperation. In addition to the measures covered by the protocol signed with the Cariforum countries (training, exchanges of information and experience, technology transfers, advice for the definition of public policies, cooperation between private enterprises, NGOs, public-private partnerships), a study of the cultural markets of our partners in the developing world could justify the establishment of other types of technical assistance measures. The training of young professionals in partner countries is particularly important in this regard.

4.2 Sectoral provisions

What is required is the adoption of a framework for cultural cooperation at the international level that is consistent with the level of development of the cultural and audiovisual industries of the countries concerned and with the existing status of cultural cooperation with those same countries.

4.2.1 The audiovisual sector

- Fostering the negotiation and implementation of national coproduction agreements

The European Union should, using frameworks for cultural cooperation, encourage Member States to conclude coproduction agreements that foster genuine artistic collaboration and the promotion of such works in the coproducing countries, with the coproduced works enjoying national work status in the territories concerned. Since coproduction agreements provide access to financial measures in favour of national production, they can be concluded only by authorities managing such funds, which is not the case for the European Union. The EU can therefore only encourage Member States to conclude such agreements, these being the principal, and most effective, tools for audiovisual cooperation.

- Promotion of works from partner countries

Cultural cooperation frameworks should be conducive to the promotion of works from the partner countries. National and European bodies (Unifrance, German Films, European films promotion, among others) charged with promoting the export of European works could undertake to organise promotional events for European films in the partner country, and the latter would undertake to support them, with the European Union and its Member States reciprocating for events promoting works from the partner country.

- Reservation of preferential treatment for countries with underdeveloped audiovisual industries

Under the heading of preferential treatment, two types of measure relating to film and audiovisual works could be offered to countries with underdeveloped audiovisual industries, on condition that they have ratified the UNESCO Convention:

- It might be envisaged that the EU would top up – through the *MEDIA Mundus* programme for example – national funds for the support of productions in the countries of the South (e.g. Fonds Sud, World Film Fund, Humbert Bals Fund, etc.), and earmark such resources for countries that are signatories to agreements or protocols on cultural cooperation;
- According to conditions defined on a case-by-case basis, access to European TV broadcast quotas could be granted for coproduced works, due account being taken of the situation of each partner.

- Provision for supplementary financial assistance measures for developing countries

Supplementary measures must be put in place to ensure that cultural cooperation frameworks and, when provision is made for this, the mechanism for cooperation through coproductions, can be effectively implemented for the benefit of developing countries. Failing this, there is a risk that coproduction provisions are in practice not imple-

mented. For example, financial assistance will make it possible, among other things, to help cultural industries flourish in developing countries (cf. articles 12 to 16 of the Convention) through local projects for the stimulation of creativity and the capacity for self-expression by audiovisual means. Similarly, particular attention will need to be paid to possibilities for the setting up of a common fund for Cariforum or other partner countries in the developing world with a view to pooling resources for the funding of coproductions with countries in the geographical area involved.

4.2.2 Music

Although the broad orientations defined for the audiovisual sector also cover the music sector, it would be appropriate to allow for specific measures for that sector, which would likely be of interest to a range of third countries. They could involve:

- setting up programmes to foster exchanges between music venues in Europe and outside Europe;
- setting up programmes to foster training and exchanges between professionals, with particular attention being paid to young creative artists;
- making arrangements for exhibitions by artists from partner countries as part of existing festivals or other initiatives conducive to the promotion of creative artists;
- supporting the attendance by recorded music professionals from partner countries at international industry events such as MIDEM;
- defining arrangements for ensuring improved exposure for works from partner countries in the legal digital domain.

4.2.3 Book publishing

In this sector, protocols and agreements on cultural cooperation negotiated with our partners could include the following measures:

- support for translation;
- allocation of education budgets for the supply of books to developing countries;
- increased funding for the acquisition of stock by libraries in developing countries;
- support for the development of local publishing, joint publications and assignments of rights between local and European publishers;
- support for publishers to reduce prices for books marketed in developing countries;
- encouragement of training initiatives for publishers and bookshops on the ground;
- organisation of festivals, fairs, seminars and literary events.

4.2.4 The performing arts

In this sector, protocols and agreements on cultural cooperation negotiated with our partners could include the following measures:

- organisation of encounters between professionals (exchanges and training including attendance at auditions, network development and promotion);
- development of coproductions;

- cooperation in the area of technical standards;
- promotion of works from third countries (translation and publication of theatrical works, publication of presentation brochures, organisation of public readings, etc.);
- promotion of live performances (organisation of festivals, funding of surtitles, etc.);
- financial support for tours of works produced or coproduced by third countries;
- development of artist-in-residence programmes.

4.2.5 The plastic arts

In this sector, protocols and agreements on cultural cooperation negotiated with our partners could include the following measures:

- promotion of artists and works in the context of exhibitions, festivals, fairs, etc.;
- invitations to artists and practitioners in the EU;
- creation of specific networks and sites dealing with the development of the plastic arts in the target countries.

4.2.6 Folklore and traditional arts

These are important activities put forward as such by many developing countries and specific measures could also be envisaged for them.

4.3. Ensuring that frameworks for cultural cooperation complement existing Community programmes and instruments.

What is needed is the adoption of a framework for cultural cooperation at the international level that is coherent and capable of ensuring that cultural cooperation provisions complement the various financial instruments the EU can bring to bear for culture and audiovisual activity in third countries: some of these are specifically dedicated to culture and audiovisual works, while others are more general and devoted to external aid.

4.3.1 Instruments specifically dedicated to the cultural and audiovisual sector

Full advantage should be taken of the various forms of cultural cooperation developed by the European Commission under financial instruments intended to foster the development of the cultural sector in third countries.

For example, the Culture Programme (2007-2013), which has a budget of €400 million and relates primarily to intra-Community players, is also open to cooperation with third countries that have association or cooperation agreements concluded with the Community and containing cultural clauses. Under the 'Special Measures' heading, this can support cooperation projects with third countries, with a focus on a different country each year. The projects targeted India and China in the years 2007-2009 and Brazil in 2008-2010.

The *MEDIA Mundus* programme, adopted on 21 October 2009 for the period 2011-2013 with a budget of €15 million, funds audiovisual projects implemented jointly by professionals from Europe and third countries. Its guidelines should be taken into account when drafting frameworks for cultural cooperation. Reciprocally, projects funded by the *MEDIA Mundus* programme should be directed as a priority towards countries adopting approaches conducive to

cultural diversity and which have ratified the UNESCO Convention. The guidelines of the programme should also reflect the cooperative programmes implemented under cultural cooperation frameworks.

Such frameworks could also establish links with other financial and cooperation instruments developed with various world regions. For example, in the Euro-Mediterranean region *Euromed Heritage 4 (2008-2012)* assists local populations in achieving ownership of their own cultural heritage, *Euromed Audiovisual III (2009-2012)* encourages cooperation on audiovisual activities and the *Anna Lindh Foundation*, co-financed by the EU, supports the development of dialogue between cultures.

4.3.2 Generalist external aid instruments

Cultural cooperation agreements and protocols can also be linked to cultural projects integrated into the four main external aid instruments:

- **The European Neighbourhood and Partnership Instrument (ENPI)**, with a budget of €11.6 billion for the whole of the period 2007-2013, supports measures for cooperation in domains including, among others, the promotion of multicultural dialogue (Article 2v), the preservation of historical and cultural heritage and the promotion of its development potential.
- **The 10th European Development Fund (EDF)** (2008-2013) will provide €21.3 million for culture over the period 2008-2013 out of a total of €22.7 billion;
- **The Financing Instrument for Development Cooperation (DCI)**, with a budget of €16.9 billion, includes a thematic programme under the heading *Investing in People* (2007-2013) under which culture is to benefit from €50 million;
- The **Industrialised Countries Instrument (ICI)** has a budget of €172 million.

It is important to make good use of these cooperation instruments by seeking to link them closely to the content of specific frameworks for cultural cooperation that are put in place in order to maximise the utilisation of the resources available for more coherent and effective external cultural action.

4.4 Monitoring and implementing frameworks for cultural cooperation

4.4.1 The formation of separate cultural cooperation committees independent of trade committees. With mandates to monitor the implementation of cultural cooperation instruments, they must have a membership of international experts in the cultural sphere from both official agencies and civil society, along with representatives of the States involved in the negotiations. The cultural cooperation committee must be independent from the trade committee, along the same lines adopted in the agreement with South Korea.

4.4.2 Provision for a dispute settlement mechanism specific to the cultural sector. Where a disagreement arises and if consultations fail to lead to a solution satisfactory to both parties, it should be possible to submit the dispute to an independent and impartial arbitration procedure. Moreover, 'cross-sanctions' involving obligations in sectors covered by the cultural cooperation framework and others covered by the economic partnership agreement or by the free trade

agreement must be prohibited¹⁴.

4.4.3 Regular monitoring and evaluation of the implementation of the framework for cultural cooperation. The PCC concluded between the EU and South Korea provides that the entitlement to the respective mechanisms for the promotion of local or regional cultural content is granted for a renewable period of three years. An evaluation of the effects of the protocol on cultural diversity and the mutually beneficial character of the cooperation can be conducted by the cultural cooperation committee, in response to a recommendation from the national consultative groups, six months prior to expiry of the three year period. It would be useful to stipulate that the evaluation of the results can be conducted on a more regular basis and possibly accompanied by the possibility of unilateral suspension of the entitlement to the respective audiovisual support measures at any time if certain conditions are met (e.g. if it turns out that the mechanism is harming the showing and distribution of European works in the markets of the Member States).

4.4.4 Generalisation to all cultural cooperation frameworks of the right of suspension of some of their effects and its broadening to include cases of prejudice suffered by European cultural industries. The EU-South Korea protocol provides that in the event of a change in the legislation of either party affecting the application of the entitlement of coproductions to support mechanisms, the other party is permitted to suspend entitlement to its own support measures. Prior notice of two months is required for this, along with preliminary discussions in the cultural cooperation committee. This right of suspension should be generalised to all frameworks for cultural cooperation and might deserve wider application to cover a greater number of situations likely to harm the audiovisual industry of a Member State of the European Union.

5. Integration of our bilateral and regional strategy with our multilateral strategy to ensure that they form a coherent whole

5.1 Promotion of the UNESCO Convention on the Diversity of Cultural Expressions at the WTO

Adhering to the principles of mutual supportiveness, complementarity and non-subordination governing the relationship between the Convention and other international treaties as defined by Article 20 of the Convention, equality between the latter and the trade agreements by which its Parties are bound must be promoted where the cultural sector is involved.

Moreover, Article 21 of the UNESCO Convention provides that the Parties must undertake to promote the objectives and principles of the Convention in other international fora and that they must consult each other for that purpose. Such promotion should be assured in various international fora, as well as in other international organisations such as the WTO.

5.1.1 For a European strategy on accessions to the WTO

In order to remain consistent with the above objectives and with the positioning adopted at the

¹⁴ Article 3b of the EU-Korea PCC on dispute settlement stipulates the following:

“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.”

WTO by the European Community where its own market is concerned, it is necessary that at each accession new members are fully aware of the risks associated with the acceptance of commitments in sectors where State regulatory intervention needs to be flexible and change constantly in order to adjust to the realities of local, national and international markets, as is the case for the cultural and audiovisual sectors.

The vast majority of members of the WTO have not undertaken commitments at the WTO to liberalise the audiovisual services sector. Nevertheless, the number of members who have undertaken such commitments is constantly increasing, and there is a risk that this will gradually legitimise the notion that audiovisual services can be treated like any other category of service when negotiating trade liberalisation. This notion is in total contradiction to the principle of the specific nature of cultural goods and services supported by the EU and enshrined in the UNESCO Convention on the diversity of cultural expressions. Efforts must therefore be made to raise the awareness of future WTO members to that specific character.

Those efforts can most notably be aimed at the countries covered by the European neighbourhood policy, those which have coproduction agreements with EU Member States and members of the Council of Europe, INCP, OIF and other organisations that have adopted positions in favour of cultural diversity.

5.1.2 For a European strategy in the context of WTO multilateral trade negotiations

In addition to the risk that past PCCs may be used as an argument against the EU in the context of WTO negotiations, as pointed out above (cf. §3.1.2), attention must be paid to two other aspects:

- The risk that exemptions to MFN treatment will be dismantled

During the negotiations on services, certain countries have sought the elimination or ‘clarification’ of exemptions from the MFN clause. While many members appear to wish to maintain those exemptions, ‘clarification’ could in practice reduce their scope and turn out to be dangerous in the audiovisual services sector. It is important for that reason to make use of those exemptions by concluding, wherever possible, cultural agreements separate from trade agreements.

- Certain topics within the scope of the GATS negotiations

It is worth paying particular attention in the context of the GATS negotiations to topics such as **domestic regulation** (members are free to adopt non-discriminatory regulatory measures as necessary to assure the quality of a service, but the precise meanings of the terms ‘necessity’ and ‘quality’ need defining); **telecommunications** (difficulties in classifying services since the onset of technological convergence); **subsidies** (members must be attentive to the need to avoid allowing these negotiations to further restrict the use of subsidies as a tool to support cultural expressions); and **safeguard measures** (the detailed arrangements for the application of such measures must take into account concerns of cultural nature in the audiovisual services sector).

5.1.3 For a European strategy on disputes relating to the cultural sector

The promotion of the proper application of WTO agreements when settling disputes must be balanced with other non-trade concerns, among which is the protection of the diversity of cultural expressions where the dispute relates to the cultural sector. A Community strategy could thus be defined along the following broad lines:

- No challenge to cultural measures and policies of other members where these are compliant with the principles and objectives of the UNESCO Convention (including, based on precise criteria to be defined, where they appear to be incompatible with certain rules of WTO agreements);
- Recourse to the Convention's conciliation procedure to verify the conformity of certain measures with its principles and objectives (which will contribute to recognition of the authority of the Convention);
- Affirmation in any proceeding before the WTO judge (whether as plaintiff, defendant or third party), of the specific nature of cultural products and services and the principles of the Convention, independently of the position of the Community on the compatibility of the contested measures with the Convention and WTO agreements;
- A request to be made to the WTO judge to take the UNESCO Convention into consideration where the parties to the dispute are also parties to the Convention¹⁵;
- A request to be made to the WTO judge to consult UNESCO to obtain its opinion where cultural interests are involved, relating or not to the audiovisual sector¹⁶.

5.2 Continued promotion of European action in UNESCO for the development of the implementation of the Convention and to raise its visibility

The European Union must not neglect multilateralism in the context of the implementation of the UNESCO Convention. The multilateral dimension of its external action must permit culture and diversity of cultural expressions to be promoted just as much as the bilateral and regional dimensions of that action. To choose an exclusively bilateral approach might even weaken the Convention's practical effectiveness.

At UNESCO, the European Union should thus continue to play an active role in the following areas:

- **Promotion of the ratification of the Convention.** The widest possible ratification driven by encouragement from the EU will provide a demonstration of the determination of States to see cultural and economic concerns as being on a par. In order to strengthen the European position, the Convention must imperatively be ratified by all EU Member States. Ratification by countries from various regions of the world and with differing levels of development will reinforce the credibility and legitimacy of this instrument, and help ensure that it is adhered to and taken into account in the context of other international treaties and fora;
- **Promotion of the application of the Convention.** This entails not only that the European Union should continue to participate regularly in the work done by the bod-

¹⁵ This is in accordance with the position of the Appellate Body since the *US – Gasoline* (DS2) dispute in which it stated that the GATT is not to be read “*in clinical isolation from public international law*”. In the *USA – Shrimps* (DS58) dispute, the Appellate Body took into consideration international agreements on the protection of the environment when reviewing Article XX of the GATT in order to define the meaning of the expression “exhaustible natural resources”. The position of the Panel in *EC – Biotech Products* (DS291, DS292 and DS293), whereby the application of agreements outside the WTO framework for the purposes of interpretation must be accepted only where all WTO members are bound by the relevant external rule (whether expressed in treaty form or as a customary rule), remains isolated and has been sharply criticised by the International Law Commission and many commentators.

¹⁶ Although it is not the task of the WTO judge to apply agreements concluded outside the Organisation, it is nevertheless possible for the Dispute Settlement Body (DSB) to consult other international organisations. That could open the way to consultations the WTO judge may wish to conduct with other specialist organisations. Use has already been made of this mechanism on a number of occasions to enable consultation of the secretariats of other international organisations. However, what is obtained is no more than an opinion that is binding neither on the Panel nor on the Appellate Body.

ies established by the Convention and the Secretariat of UNESCO, but also that it should contribute constantly to building a mobilisation dynamic around the Convention's provisions.

In this regard, it could encourage voluntary contributions by Member States to the International Fund for Cultural Diversity established by Article 18 of the Convention. This would testify to its commitment to the promotion of the diversity of cultural expressions, notably for the benefit of the least favoured regions and populations.

Such an initiative will thus serve to:

- strengthen the role of the European Union as a major actor in ensuring respect for the diversity of cultural expressions at the global level;
 - add to the European action in favour of the countries of the South (emerging economies and developing countries), as instituted by the ACP Agreements;
 - strengthen the position of the European Union in multilateral institutions and notably United Nations organisations and agencies;
 - and, more generally, contribute to the dialogue between civilisations and to the global peace process,
- **Raising the Convention's visibility.** The EU could enhance the promotion of the Convention's key messages. Moreover, there should be systematic reference to the spirit of the Convention in all European actions conducted in the cultural sphere. And in conclusion, the European Union could encourage encounters, colloquia and round tables on issues related to the implementation of the Convention.

ANNEX I
ACTION PLAN
FOR THE NEGOTIATION OF CULTURAL COOPERATION AGREEMENTS
AND PROTOCOLS

Minimum condition to be met for any negotiation of a trade agreement between the EU and third countries:

Audiovisual services must imperatively be excluded systematically and explicitly from trade negotiations on services and establishment.

Minimum conditions required for *all* cultural cooperation frameworks envisaged during the negotiation of trade agreements between the EU and third countries:

- Ratification of the UNESCO Convention prior to the entry into force of the cultural cooperation agreement or protocol (linkage to be established in the agreement or protocol).
- No liberalisation measures to be included in the specific framework for cultural cooperation.
- A specific cultural cooperation committee independent of the trade committee to be set up and charged with monitoring the implementation of the framework for cultural cooperation (on the same lines as in the PCC for the EU-South Korea FTA).
- Creation of a dispute settlement mechanism separate from that of the trade agreement (on the same lines as in the PCC for the EU-South Korea FTA).

EU internal arrangements (identical to those of the PCC for the EU-South Korea FTA):

- EU decisions in the cultural cooperation committee to be passed unanimously by Council members responding to a proposal from the Commission.
- Membership of the cultural cooperation committee to comprise experts in the cultural sector from the Commission and Member States.
- In the event that the framework for cultural cooperation includes provisions subject to later decisions by the Parties (e.g. renewal of preferential treatment provisions), the EU decision must be passed unanimously by the Council.

Procedure for the negotiation of *all* cultural cooperation frameworks:

- **A study of the cultural and audiovisual sectors of partner countries is necessary** prior to drafting the mandate or at least before initiating the negotiations.
- **Negotiating teams specific to the cultural cooperation framework to be set up with cultural experts.** The specific character of cultural negotiations justifies calling on the services of cultural experts from the Commission and Member States¹⁷. In addition, the Member States should be associated with the negotiations,

¹⁷ In this connection, the membership mix of the Commission team which conducted with the Member States the negotiation of the UNESCO Convention (DG Education and Culture and DG Trade) is a relevant precedent for the conduct of negotiations for cultural cooperation frameworks which relate to the implementation of the UNESCO Convention.

taking due account of the respective competencies, in the Cultural Affairs Committee and the Audiovisual Group or through an ad-hoc working group.

- **The timetable for the negotiation of a cultural cooperation framework must unfold at its own rate and independently of that for the economic and trade agreements**, in order to avoid subjecting the negotiations to ‘pressure’ deriving from the status and possible requirements of negotiations in other areas.

The content of cultural cooperation frameworks

With regard to the content of cultural cooperation frameworks, a distinction needs to be made between two categories of partner: countries to which the EU is willing to offer preferential treatment, and the others. This is so because where examination of the particular interests of partner countries and pre-existing cooperative relations justify this (see above), preferential treatment may be granted to countries with developing audiovisual and cultural industries.

From these two categories flow a number of modalities and conditions to be obtained from all negotiations, which are the following:

A. Specific additional modalities for cultural cooperation frameworks *not including* preferential treatment:

Partners concerned:

- Cultural cooperation agreements that do not include preferential treatment would be offered to countries with developed cultural and audiovisual industries. These are, to date, **Canada, India, Israel** and member countries of **ASEAN**.

Modalities:

- The cultural cooperation framework to be included in the cooperation section of the overall agreement and kept totally separate from the ‘services and establishment’ part of the trade agreement.

Content:

- Adjusted to suit each individual case.

B. Specific additional modalities for cultural cooperation frameworks *including* preferential treatment:

Partners concerned:

- Preferential treatment would be reserved exclusively for countries with developing cultural and audiovisual industries. These are, to date, the **EPAs** negotiated with the ACP countries (with restrictions on Nigeria) and the **Andean Community** (with restrictions on Colombia). Depending on the results of a study of the audiovisual and cultural sectors of **Central America, Tunisia, Morocco** and **Egypt** within the Euromed framework, the granting of preferential treatment may possibly be envisaged, on a case-by-case basis.

Modalities:

- The framework for cultural cooperation is, in legal terms, an annex to the trade agreement, but the procedure for negotiating it must remain strictly independent of the trade negotiations (see above). This linkage in law with the trade agreement is necessary where the partner country has not listed exemptions to the MFN clause in its WTO commitments.

Content:

- The scope of the application of preferential treatment must be adjusted (open to all audiovisual works or restricted to film alone) to match the level of development of the partner country's cultural and audiovisual industries (with particular vigilance where Nigeria and Colombia are concerned).
- Preferential treatment provisions are to apply for a term of three years, which may be renewed with the unanimous agreement of Member States.
- The criteria must be adjusted to match each individual case.

ANNEX II RELEVANT TEXTS

- *RECOMMENDATIONS OF THE COMMISSION*

In its **Communication to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda for Culture in a Globalising World** (COM (2007)242 final) of 10 May 2007, the Commission did not refer to any particular form of international cooperation in the audiovisual sphere, but it did emphasise that the rapid entry into force of the UNESCO Convention illustrates the new role of cultural diversity at the international level as a cultural pillar of global governance and sustainable development, notably through the enhancement of international cooperation. The promotion of culture as an essential component of the external relations of the Union is included as an objective of the European agenda for culture and corresponds to a *“more proactive role for Europe in the context of Europe's international relations”* in the cultural domain.

Similarly, the **European strategy on culture in international relations** includes as one of its objectives *“to promote market access, both to European and other markets, for cultural goods and services from developing countries through targeted actions as well as through agreements that grant preferential treatment or trade-related assistance measures”*. Cultural cooperation provisions providing for preferential treatment for products and services from developing countries appear to be effectively governed by this strategy, but might not be the only means for implementing it, nor a tool that can be transposed to all developing countries.

- *RECOMMENDATIONS OF THE COUNCIL OF THE EU*

In its **Conclusions of 20 November 2008 on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States** (2905th Education, Youth and Culture Council meeting), the Council of the Union established a series of objectives that must be pursued by the Commission and the Member States. In order to promote the UNESCO Convention on cultural diversity in the EU's external relations, it identified the following policy objectives, among others:

- **Encouragement of the ratification and implementation of the UNESCO Convention as a central element in cultural relations with third countries and as a pillar of global governance.** This requirement of ratification must be at the heart of the relations between the EU and the countries with which it intends to reinforce its cooperation in the audiovisual sector.
- **To take fully into account the specific nature of cultural activities, goods and services.** This specific character has been the ground on which the very long-standing European practice of avoiding commitments to open up the market for audiovisual services has been based. It could also justify subordinating any offensive or proactive approach on the part of the EU in the audiovisual sector to more stringent preliminary impact study procedures than those applicable to other products et services.
- **Promotion of external cultural policies that encourage dynamism and balance in exchanges of cultural goods and services between the EU and third countries, particularly emerging economies.** The aim in particular is to con-

tribute to the vitality of the European economy of culture. Balance in exchanges of goods and services presupposes that protocols or agreements on cultural cooperation should be adapted to match the realities of the market of cultural products and services in each third country.

- **An expansion of the contribution of culture to sustainable development and cooperation with developing countries, particularly in order to reinforce their capacity.** Preferential treatment based on coproductions cannot be the only way of stimulating the audiovisual industries of developing countries.

The Council has also called for the definition of a European strategy in cultural matters which would apply specific modalities such as the consistent and systematic incorporation of culture into the external relations of the Union or the establishment of specific strategies with regions and countries outside the Union. It has indicated that these strategies could be defined following **procedures of expert evaluation and consultation** with the regions and countries concerned. The definition of any strategy in the cultural domain with our partners should be the outcome of a substantive process of consultation capable of identifying the best methods for promoting cultural exchanges, including in the audiovisual sector, between the EU and those countries. Provisions taking account of the interests and needs of each of our partners in the developing world should be studied and introduced into all protocols and agreements on cultural cooperation.