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## When low level of constraint and effectiveness go hand in hand: The example of the 2005 Convention

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### Abstract

The year 2022 marks 15 years since the entry into force of the United Nations Educational, Scientific and Cultural Organization's 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Among its objectives, this treaty aims at acknowledging the specific nature – economic and cultural – of cultural activities, goods, and services, reaffirming the sovereign right of states to adopt or implement measures they deem appropriate for the protection and the promotion of the diversity of cultural expressions as well as reinforcing international cooperation for more balanced cultural exchanges. Since its adoption, this treaty has been criticized for its low level of constraint. However, data collected over the years show that parties rely extensively on the Convention to undertake diverse initiatives to achieve the treaty's objectives. Based on concrete examples, this article aims to show that the effectivity of a legal instrument does not only rely on its degree of constraint but also on other factors, including monitoring mechanisms put in place in the context of its implementation.

**Keywords:** Diversity of cultural expressions; UNESCO; treaty; effectiveness; constraint

### Introduction

The year 2022 marked the fifteenth anniversary of the entry into force of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 Convention).<sup>1</sup> After two years of intense negotiations that began in 2003, this Convention was adopted by the United Nations Educational, Scientific and Cultural Organization's (UNESCO) General Conference on 20 October 2005<sup>2</sup> and entered into force on 18 March 2007, three months after the deposit of the thirtieth instrument of ratification. Fifteen years after the beginning of its implementation, one may wonder what has happened to this legal instrument dedicated to the preservation of the diversity of cultural expressions in a context of globalization and integration of economies.

The objectives set by the parties include giving recognition to “the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning,” reaffirming “sovereign rights of States to maintain, adopt and implement policies and measures that

<sup>1</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311 (2005 Convention).

<sup>2</sup> As of 20 January 2023, the 2005 Convention had 152 parties – that is, 151 states and the European Union.

they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory” as well as strengthening “international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries” and ensuring “wider and balanced cultural exchanges.”<sup>3</sup> The commitments negotiated were, among other things, a response to the failure of the cultural exception in the 1990s.<sup>4</sup> This close relationship between the evolution of the status of culture within trade agreements and the negotiation of the 2005 Convention also influenced the assessment of this treaty in the years following its adoption. Its analysis was essentially carried out in the light of economically oriented legal instruments.<sup>5</sup> Criticized for its low level of constraint, the 2005 Convention was deemed incapable of creating a real counterweight to multilateral, regional, and bilateral trade agreements.

Practice, however, reflects a different reality. While the degree of constraint of many of the Convention’s commitments is indeed relatively low, the treaty does lead parties to modify their behavior in favor of the protection and promotion of the diversity of cultural expressions, including when they negotiate trade agreements. This article aims to reflect this by taking stock of the implementation of the 2005 Convention. It also contributes to the reflection on the dissociation between the degree of constraint of a legal instrument and its effectiveness. In international cultural law, as in other fields, more flexible instruments, often not very binding, are at the origin of important changes made by states on their territory or in the relations they maintain between them. Fifteen years after its entry into force, the 2005 Convention seems to be part of this movement.

To illustrate such assumption, this article first briefly recalls the ambitions behind the negotiation of the 2005 Convention and then presents in greater detail the various stages of its operationalization. Finally, it describes how its monitoring framework makes it possible to document, and even guide, the progress made by the parties in protecting and promoting the diversity of cultural expressions and, consequently, the effectiveness of this treaty.

### Ambitions of the 2005 Convention

From a historical perspective, the adoption of the 2005 Convention is closely linked to the evolution of the political debate concerning the interface between culture and trade.<sup>6</sup> A few years earlier, the UNESCO Universal Declaration on Cultural Diversity, adopted in 2001, addressed this issue, although its scope was much broader.<sup>7</sup> The Declaration approaches cultural diversity from the perspective of pluralism and as a factor 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.”<sup>8</sup> By unanimously adopting this Declaration, the General Conference of UNESCO also unambiguously supported the idea that the defense of cultural diversity is inseparable from respect for human

<sup>3</sup> These are the objectives set out in 2005 Convention, Art. 1(g), (h), (i), and (c).

<sup>4</sup> The expression “failure of the cultural exception” refers to the results of the Uruguay Round and the abortive attempt to create a specific regime for the liberalization of cultural services or an exception to exclude these services from the new General Agreement on Trade in Services, Annex 1B of the Agreement Establishing the WTO, 15 April 1994, 1869 UNTS 219. On this question, see, in particular, Bernier 1994; Atkinson 2000, 2001.

<sup>5</sup> This was observed by Ivan Bernier a few years after the adoption of the 2005 Convention: “Although the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is quite clearly a cultural agreement negotiated in a cultural context and pursuing cultural objectives, it is strange to find that a majority of the legal analysis of its text realized since its adoption in 2005 address the subject from a trade law perspective, as if the Convention was of interest essentially for its implication on the trade regime.” See Bernier 2008, 1.

<sup>6</sup> Bernier 2008.

<sup>7</sup> Universal Declaration on Cultural Diversity, 2 November 2001, [http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 3 May 2023).

<sup>8</sup> Universal Declaration on Cultural Diversity, Art. 3.

rights and fundamental freedoms. Moreover, the specific question of the relationship between trade and culture is explicitly addressed by the provisions on “diversity of the supply of creative work” on the understanding that “particular attention must be paid ... to the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.”<sup>9</sup> Furthermore, “cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.”<sup>10</sup> Finally, it also calls for the strengthening of “international cooperation and solidarity aimed at enabling all countries, especially developing countries and countries in transition, to establish cultural industries that are viable and competitive at national and international level.”<sup>11</sup> Article 1 of the action plan annexed to the Declaration calls for continued consideration “of the advisability of an international legal instrument on cultural diversity.”<sup>12</sup> The negotiation of this instrument on “the diversity of cultural contents and artistic expressions” – the future 2005 Convention – was launched in 2003.<sup>13</sup>

The first stage of the negotiation allowed 15 independent experts to draw up a preliminary draft Convention that was ambitious.<sup>14</sup> For one of them, the text may even have gone a little too far. For example, Article 7 of the preliminary draft created obligations of result in the promotion of the diversity of cultural expressions, a commitment that “[f]or the vast majority of States ... is practically impossible to respect.”<sup>15</sup> With respect to the protection of this diversity, Article 8 required each state to take appropriate measures to protect cultural expressions on its territory that are threatened by the possibility of extinction or serious curtailment, which constitutes a considerable burden for the parties.<sup>16</sup> The fact remains that the preliminary draft was a “completed package,” and the “quality and completeness of the work done by the experts” were underlined.<sup>17</sup> However, it was mentioned that “the possible disadvantage [of this type of text] is that it places subsequent negotiations in an essentially negative perspective insofar as, apart from the points of detail, they can only consist of deductions from the text or of modifying its balance in a less demanding direction.”<sup>18</sup>

The lowering of the level of constraint on the commitments of the parties effectively materialized during the second stage of the negotiations, which took place between the representatives of UNESCO’s member states from 2004 to 2005. The firm opposition of the United States to this draft treaty was not unrelated to this evolution of the text, especially since some of its concerns were shared by a few other states. In the end, the obligations to promote and protect the diversity of cultural expressions were considerably weakened.<sup>19</sup>

<sup>9</sup> Universal Declaration on Cultural Diversity, Art. 8.

<sup>10</sup> Universal Declaration on Cultural Diversity, Art. 9.

<sup>11</sup> Universal Declaration on Cultural Diversity, Art. 10.

<sup>12</sup> “Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity,” annexed to the Universal Declaration on Cultural Diversity, Art. 1.

<sup>13</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO), *Records of the General Conference*, 32nd Session, Paris, 29 September–17 October 2003, vol. 1: Resolutions, item 34, 64.

<sup>14</sup> UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, Doc. CLT/CPD/2004/CONF.201/1, July 2004.

<sup>15</sup> Bernier 2004.

<sup>16</sup> Bernier 2004.

<sup>17</sup> Ruiz Fabri 2004, 5 (our translation).

<sup>18</sup> Ruiz Fabri 2004, 5 (our translation).

<sup>19</sup> Regarding promotion, for example, the obligation of result disappears in favor of a more flexible commitment according to which “Parties shall endeavour to create in their territory an environment which encourages individuals and social groups ... to create, produce, disseminate, distribute and have access to their own cultural expressions.” The commitment to protection is also reformulated as it is now provided that “a Party may determine

With respect to the question of the relationship between the 2005 Convention and other treaties, a compromise solution puts all legal instruments on an equal footing by advocating a relationship of complementarity, mutual support, and non-subordination.<sup>20</sup> Finally, in the event of a dispute between the parties, the 2005 Convention provides for a conciliation procedure whose decisions are not binding.<sup>21</sup>

In the aftermath of its adoption, the question of whether the 2005 Convention was a success or a failure was based primarily on an assessment of the binding force of the provisions likely to have an impact on the free circulation of cultural goods and services – those dealing with the articulation of this Convention with other agreements<sup>22</sup> – and the dispute settlement mechanism provided for by the treaty.<sup>23</sup> Some doubted the “acceptance of the document as binding,”<sup>24</sup> described the result of the negotiation as a “failure to create ‘hard’ legal instruments,”<sup>25</sup> or felt that the text did not live up to its ambitions.<sup>26</sup> However, the provisions of the 2005 Convention reflect ambitions that go far beyond issues related to the exchange of cultural goods and services; they constitute a genuine action plan for the diversity of cultural expressions.<sup>27</sup> In addition to recognizing their sovereign right to adopt a variety of policies and measures to support the diversity of cultural expressions, as set out in an illustrative list,<sup>28</sup> the parties undertake to take action to promote the diversity of cultural expressions within their territory<sup>29</sup> and at the international level.

Cooperation commitments aim to strengthen the capacities of developing countries to create, produce, disseminate, and access their own cultural expressions.<sup>30</sup> They also aim to promote the participation of these countries in cultural exchanges. To achieve this objective, developed countries commit to offering preferential treatment to cultural goods and services from developing countries as well as to their artists and other cultural professionals.<sup>31</sup> This is one of the most binding commitments of the 2005 Convention. Beyond these commitments, the parties also have the ambition to raise the diversity of cultural expressions to the level of values promoted by the international community. The actions undertaken in this regard are being carried out despite the low degree of constraint of the

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the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.” See 2005 Convention, Arts. 7.1(a), 8.1, respectively.

<sup>20</sup> 2005 Convention, Arts. 20, 21. It should be recalled that the question of the relationship between treaties was one of the most debated topics during the negotiations. See Bernier 2005a.

<sup>21</sup> 2005 Convention, Art. 24. More specifically, the 2005 Convention provides for a mechanism that allows for the use of several methods of dispute resolution. It provides, first of all, for the search for a solution by negotiation; in the absence of an agreement, the use of the good offices or mediation by a third party, and, in the event of failure, recourse to conciliation, through a conciliation commission, the procedure for which is set out in the annex to the Convention. The article specifies that the parties may not recognize this conciliation procedure at the time of ratification of the Convention. On this subject, see Bernier and Latulippe 2007.

<sup>22</sup> See, in particular, Hahn 2006; Voon 2006; Burri 2009.

<sup>23</sup> According to Ivan Bernier, “[i]n the debate on the interface between commerce and culture that preceded the negotiation of the Convention as well as in the course of the negotiations and afterwards, in commentaries on the text of the Convention, the choice of the dispute settlement procedure has often been pictured as the real test of the compulsory character of the Convention, the ideal type of a truly compulsory mechanism being that of the WTO dispute settlement procedure.” See Bernier 2012, 602.

<sup>24</sup> Hahn 2006.

<sup>25</sup> Neuwirth 2010, 1344. The author also emphasizes the “lack of legal value” of the Convention (1355).

<sup>26</sup> Burri 2013.

<sup>27</sup> Bernier 2008.

<sup>28</sup> 2005 Convention, Art. 6.2.

<sup>29</sup> 2005 Convention, Arts. 7, 8, 10, 11.

<sup>30</sup> 2005 Convention, Arts. 12, 14, 15, 17, 18, 19.

<sup>31</sup> 2005 Convention, Art. 16.

commitments arising from the treaty. Before discussing this, the next section provides a brief overview of the various stages in the operationalization of the 2005 Convention.

## Operationalization of the 2005 Convention

The first five years of the 2005 Convention were devoted to its ratification and to building the foundations for its implementation. Its entry into force only 17 months after its adoption, which was unprecedented in UNESCO's history, marked the beginning of the process of setting up its governing bodies.<sup>32</sup> The first session of the Conference of Parties made it possible to draw up the list of work to be entrusted to the Intergovernmental Committee from 2007 to 2009, including the preparation of operational guidelines to guide the parties in the implementation of certain provisions of the Convention.<sup>33</sup> The following years marked the beginning of the operationalization of the Convention with, in particular, the establishment of its cooperation strategy and the development of its monitoring framework.

### *The launch of cooperation in 2010*

One of the main objectives of the 2005 Convention is to strengthen international cooperation and solidarity in order to increase the capacities of developing countries and ensure more balanced cultural exchanges.<sup>34</sup> As early as 2010, the parties to the Convention laid the foundations for this cooperation with the launch of the first call for applications to the International Fund for Cultural Diversity (IFCD) and the implementation of several projects led by the Secretariat. The first call led to the selection of 32 projects. The success was such that the total amounts requested exceeded the available funds.<sup>35</sup> In 10 years, 114 projects were financed in 59 developing countries.<sup>36</sup> Although the financial contributions to the IFCD, recognized as contributions to official development assistance, came initially mainly from developed countries,<sup>37</sup> more and more developing countries contributed over the years.<sup>38</sup>

<sup>32</sup> The Secretariat of the 2005 Convention was mandated to prepare the necessary documentation for these meetings and to assist in the implementation and monitoring of their decisions as well as in the coordination of the various initiatives put in place under the auspices of the Convention. See Bernier 2005b.

<sup>33</sup> Between 2011 and 2013, the parties approved operational guidelines on 12 of the 35 articles of the Convention as well as more general guidelines on the visibility and promotion of the Convention. These secondary legislation instruments can be divided into two categories. On the one hand, the guidelines related to the substantive rules of the Convention, such as Articles 7, 8, 10, 11, 14, 15, 16, and 17. On the other hand, the guidelines related to the Convention's implementation mechanisms – that is, the International Fund for Cultural Diversity (IFCD) (Art. 18) and the quadrennial periodic reports (Arts. 9, 19). These were subsequently revised by the parties in order to adapt them to new developments. During this period, the parties also decided not to adopt operational guidelines for certain articles of the Convention. This is the case for Article 5, which sets out the general rule concerning rights and obligations, and for Article 12 on the promotion of international cooperation. The same is true of Articles 20 and 21, for which the parties do not seem willing to specify their commitments through operational guidelines. Bernier 2009.

<sup>34</sup> 2005 Convention, Arts. 1(i), (c).

<sup>35</sup> UNESCO, Decision 4.IGC 10A, Doc. CE/10/4.IGC/205/Dec, 10 December 2010, item 10A, 20. All amounts are expressed in US dollars.

<sup>36</sup> For a total of \$8,324,802. See UNESCO, *IFCD: 10 Years of Creativity*, 2020, [https://fr.unesco.org/creativity/sites/creativity/files/ifcdbrochure-10years-en\\_web\\_0.pdf](https://fr.unesco.org/creativity/sites/creativity/files/ifcdbrochure-10years-en_web_0.pdf) (accessed 3 May 2023).

<sup>37</sup> The largest donors in terms of cumulative contributions between 2007 and 2020 are France, Norway, Brazil, Canada (including Quebec, which makes its own contributions), and Finland. Kamara 2022, 228.

<sup>38</sup> While none contributed in 2007, there were 21 in 2017. On this point, see Cliche and Isar 2017, 25. In addition, data published in 2022 shows that since the creation of the IFCD, developing countries have provided 17 percent of contributions. Kamara 2022, 210.

At the same time, several projects were also initiated by the Secretariat, mainly through extra-budgetary contributions from the parties to the 2005 Convention. These projects were gradually extended to more than 60 developing countries in all regions of the world.<sup>39</sup> The very first cooperation project resulting from the 2005 Convention was launched in 2010 with funding from the European Union (EU).<sup>40</sup> Its main objectives were to provide technical assistance to developing countries<sup>41</sup> and to strengthen their system of governance for culture and reinforce the role of culture as a vector for development.<sup>42</sup> To achieve this, a bank of 30 high-level experts in the fields covered by the Convention was set up. One of the particularities of the project was that the support offered was based on needs clearly identified by the requesting country and not on a “turnkey” solution. The experts – chosen by the country itself according to their expertise – worked with a national team on the ground made up of representatives of public authorities and stakeholders.

Between 2010 and 2015, 13 countries benefited from this program, which led to the development and implementation of 23 cultural policies (strategies, policies, recommendations, action plans, and legal documents for the promotion of cultural and creative industries) through 37 field missions.<sup>43</sup> The lessons learned from this first pilot project were also used to develop the Convention’s global capacity-building strategy adopted by the parties in 2013.<sup>44</sup> Finally, thanks to the renewed support of the EU, a second phase of the project was launched in 2018.<sup>45</sup> In addition, the expert facility created as part of this project was expanded and renewed three times in the following years. At the beginning of 2022, it included 42 experts from 35 countries who can be called upon at any time to provide support – in particular, for the development of training and research materials, the evaluation of funding applications to the IFCD, or, when requested by the parties, for the development of national policies.<sup>46</sup>

The second major cooperation initiative was the Enhancing Fundamental Freedoms through the Diversity of Cultural Expressions project. Created in 2014 and implemented from 2015 to 2017 by the Secretariat of the 2005 Convention with funding from the Swedish International Development Cooperation Agency (SIDA), it aimed to “support the development of systems of good governance for culture that are based on fundamental freedoms and that foster the diversity of cultural expressions.”<sup>47</sup> This project, which placed fundamental rights at the heart of the 2005 Convention, made it possible to integrate the themes of gender equality and artistic freedom into the monitoring of the

<sup>39</sup> For more information on the projects, see “Activities,” n.d., <https://en.unesco.org/creativity/activities> (accessed 3 May 2023).

<sup>40</sup> UNESCO 2013.

<sup>41</sup> Countries eligible for the program had to have ratified the Convention and be a beneficiary of the EU thematic program “Investing in People.” See UNESCO 2013; “Strengthening the System of Governance for Culture in Developing Countries,” n.d., <https://en.unesco.org/creativity/activities/strengthening-system-governance-culture> (accessed 3 May 2023).

<sup>42</sup> UNESCO 2013, 7.

<sup>43</sup> UNESCO 2016.

<sup>44</sup> *Report of the Secretariat on the Design and Future Implementation of a Global Capacity-Building Strategy*, Doc. CE/13/7. IGC/INF.4, 15 November 2013.

<sup>45</sup> “Supporting New Regulatory Frameworks to Strengthen the Cultural and Creative Industries and Promote South-South Cooperation,” n.d., <https://en.unesco.org/creativity/activities/supporting-new-regulatory-frameworks-strengthen-cultural> (accessed 3 May 2023).

<sup>46</sup> “Expert Facility,” n.d., <https://en.unesco.org/creativity/partnerships/expert-facility> (accessed 3 May 2023).

<sup>47</sup> “Enhancing Fundamental Freedoms through the Promotion of the Diversity of Cultural Expressions,” 2015, [https://en.unesco.org/creativity/sites/creativity/files/programmes/brochure\\_enhancing\\_fundamental\\_freedoms\\_through\\_the\\_promotion\\_of\\_the\\_diversity\\_of\\_cultural\\_expressions.pdf](https://en.unesco.org/creativity/sites/creativity/files/programmes/brochure_enhancing_fundamental_freedoms_through_the_promotion_of_the_diversity_of_cultural_expressions.pdf) (accessed 3 May 2023).

implementation of this treaty. In addition to a first component that aimed to accompany 12 parties in the preparation of their quadrennial periodic reports,<sup>48</sup> a second component supported the production of two Global Monitoring Reports on the Convention, published in 2015 and 2018. This project marked an important turning point for the 2005 Convention (discussed later in this article) and funding for the SIDA project was renewed for a period of four years starting in 2018, thus ensuring the publication of a third Global Report in 2022.<sup>49</sup>

### *Early monitoring of the implementation of the 2005 Convention*

Monitoring of the implementation of the 2005 Convention began with the launch of a first cycle of quadrennial periodic reports in 2012, which was extended to 2015.<sup>50</sup> These reports, which are a standard process within UNESCO's cultural conventions, require parties to provide information every four years on the measures they are taking to protect and promote the diversity of cultural expressions within their territory and at the international level.<sup>51</sup> Eventually, the policies and measures included in these reports should be used to build inventories of best practices. At the end of the first cycle of periodic reporting, it was noted that most of these reports came from countries in the global North. In response to this situation, the Secretariat set up the capacity-building projects mentioned above to support developing countries in preparing their reports (see earlier discussion).<sup>52</sup> The Convention calls for the implementation of a whole "new system of governance to support the introduction and/or elaboration of policies and measures" that have a direct effect on the value chain of cultural industries (creation, production, distribution, and access).<sup>53</sup> While some parties are already implementing several policies in this sector, others have no tools or even knowledge in this area. Their adherence to the 2005 Convention therefore encourages them to invest in a field of intervention that is still

<sup>48</sup> 2005 Convention, Art. 9, requires parties to submit a periodic report every four years. However, some countries, and, in particular, developing countries, are unable to comply with this obligation, often due to a lack of appropriate means (lack of data, lack of expertise, limited assessment and monitoring of policies dedicated to cultural industries, and so on).

<sup>49</sup> It should be noted that other contributions from the Republic of Korea, Germany, Japan (not a party to the 2005 Convention), Norway, and Denmark, among others, support the implementation of the global capacity-building strategy. The Republic of Korea, for example, through its Korea Funds-in-Trust for the Development of Creative Industries, supports the cultural and creative sectors in developing countries by building their capacities, setting up networks and supporting the development of public policies. Fifteen projects have been set up between 2008 and 2019 in nine countries, including Mongolia, Pakistan, Uzbekistan, and Uganda. See, respectively, "Creative Futures: A Decade of Cooperation between UNESCO and the Republic of Korea," 2018, [https://fr.unesco.org/creativity/sites/creativity/files/kfit-en-web\\_0.pdf](https://fr.unesco.org/creativity/sites/creativity/files/kfit-en-web_0.pdf) (accessed 3 May 2023); "La musique comme moteur du développement durable au Maroc," n.d., <https://fr.unesco.org/creativity/activities/musique-comme-moteur-du-developpement-durable-au> (accessed 3 May 2023); "Mobilizing Film Professionals for Regional Cooperation in Asia," 20 September 2019, <https://en.unesco.org/creativity/news/mobilizing-film-professionals-regional-cooperation-asia> (accessed 3 May 2023); "Promoting the Right to Arts and Culture for Sustainable Development through the 2005 UNESCO Convention," n.d., <https://en.unesco.org/creativity/activities/promoting-right-arts-culture-sustainable> (accessed 3 May 2023).

<sup>50</sup> The date of submission is determined by the Conference of Parties according to the date of deposit of the instrument of ratification. For example, it was determined by the third Conference of Parties that parties that ratified the 2005 Convention between 2005 and 2008 should submit their first periodic report to the Secretariat in April 2012, and those that ratified in 2009 in April 2013.

<sup>51</sup> 2005 Convention, Art. 9(a).

<sup>52</sup> At the end of 2015, 61 percent of parties to the 2005 Convention had submitted their first periodic report. Cliche 2015.

<sup>53</sup> UNESCO 2013.

completely unoccupied by their public policies. The first Global Report published in 2015 with the support of Sweden marked the beginning of information sharing among the parties regarding the promotion and protection of the diversity of cultural expressions in the world. This sharing is made possible through the monitoring and analysis of trends in the periodic reports<sup>54</sup> as well as through other research conducted by the Secretariat of the 2005 Convention.<sup>55</sup>

### Assessing the implementation of the 2005 Convention

The work of the Secretariat of the 2005 Convention in assessing implementation is intended to generate information and knowledge sharing among the parties to help them adopt or modify their policies to achieve the goals they have set. However, the creation of the monitoring framework in the context of the preparation of the first Global Report dedicated to the Convention enabled the Secretariat to go further, by directing the implementation of the treaty toward the pursuit of certain priority objectives, thus maximizing the flow of information regarding the results achieved in a few targeted areas.

#### Creation of a monitoring framework

From 2012 to 2015, the periodic reports submitted by the parties were analyzed annually by a group of international experts. The Secretariat of the 2005 Convention was also responsible for producing an analytical summary for consideration by the Intergovernmental Committee.<sup>56</sup> In June 2015, the Conference of the Parties asked the Secretariat to carry out this analysis in the form of a Global Report.<sup>57</sup> The publication of the first report in December of the same year marked a turning point in the work related to the implementation of this legal instrument by presenting the first trends that have emerged from a decade of collecting information from periodic reports.

To ensure systematic monitoring of the implementation of the 2005 Convention, the Secretariat developed a conceptual framework that is not provided for in the treaty nor in the operational guidelines. In this sense, the development of this framework was an important step forward. The framework is based on four major objectives that are intended to structure the entire monitoring process. For each of these objectives, expected results and distinct monitoring areas are identified. Each area is accompanied by indicators and means of verification – that is, data to be collected – to provide a system for independent experts to assess and measure progress in the implementation of the Convention and to optimize its monitoring over time.<sup>58</sup> The primary purpose of the system is to “reveal key trends in policy making, identify positive reforms and successful measures, as well as strengths and weaknesses, and indicate ways forward.”<sup>59</sup> The Global Reports also aim to put forward a “methodology to monitor [the] long-term impact” of the Convention<sup>60</sup> and to “significantly

<sup>54</sup> UNESCO 2013, 3.

<sup>55</sup> See, in particular, the publication of several thematic reports by the Secretariat of the 2005 Convention, including Guèvremont and Otašević 2017; Kulesz 2017.

<sup>56</sup> These executive summaries for the years 2012 through 2015 are available on the website, along with all periodic reports submitted since 2012. See “Periodic Reports,” n.d., <https://en.unesco.org/creativity/governance/periodic-reports> (accessed 3 May 2023).

<sup>57</sup> UNESCO, Resolution 5.CP 9a, Doc. CE/15/5.CP/Res, 12 June 2015, item 9a, 4–5.

<sup>58</sup> Anheier 2015. This framework is intended to last and is reused in the 2018 and 2022 Global Reports.

<sup>59</sup> Anheier 2015, 32.

<sup>60</sup> Cliche and Isar 2015, 204.

strengthen the international knowledge building and sharing process that is at the heart of the Convention,” as required by Articles 9 and 19 of this treaty.<sup>61</sup>

It should also be noted that the Global Reports were not the only tools developed to monitor the implementation of the 2005 Convention and promote information sharing. For example, the Policy Monitoring Platform, hosted on the Convention’s website, collects and makes accessible to the general public more than 4,300 policies and measures from periodic reports. It therefore allows for the sharing of information among the parties to the Convention and the creation of “synergies between national and international monitoring” through the compilation of these policies.<sup>62</sup> The most innovative practices are also clearly identified. The Open Roadmap developed following the adoption of the *Operational Guidelines on the Implementation of the Convention in the Digital Environment* can also be considered as a monitoring tool.<sup>63</sup>

### Guiding the implementation

While the Global Reports generate a flow of information among parties regarding their actions under the 2005 Convention, the development of a monitoring framework to collect relevant information, analyze it, and produce these Global Reports can have the effect of guiding the implementation of this treaty. In this sense, the monitoring framework developed by the Secretariat of the 2005 Convention is not entirely neutral. The four goals selected for the purposes of the monitoring framework do not derive directly from the text of Article 1 of the Convention, which is dedicated to the objectives of the treaty. They are the product of a reflection aimed at leading the parties to prioritize certain actions that should lead to the achievement of results. The four selected goals aim more specifically at supporting sustainable systems of governance for culture; achieving a balanced flow of cultural goods and services and increasing the mobility of artists and cultural professionals; integrating culture in sustainable development frameworks; and promoting human rights and fundamental freedoms. While the first and third goals of the monitoring framework overlap with several of the objectives, principles, and commitments of the 2005 Convention, the second and fourth goals are narrower in scope and therefore more directly address the achievement of certain outcomes in the identified monitoring areas. The fourth goal is perhaps surprising since “promoting human rights and fundamental freedoms” takes the form of a principle, not a commitment, in the text of the Convention. The monitoring framework thus has the effect of refocusing the Convention around human rights – in particular, artistic freedom and gender equality.

Therefore, the monitoring framework not only stimulates the exchange of information but also the implementation of specific commitments.<sup>64</sup> In addition, the publication of good practices associated with the prioritized areas provides additional pressure, which can have the effect of guiding the implementation of the treaty. Thus, while not precluding an assessment of all commitments under the Convention, the monitoring framework channels

<sup>61</sup> Cliche and Isar 2015, 204. To this end, the reports were developed to answer the following questions: “has implementation of the Convention inspired positive policy change at the country level and at the international level; how effectively are these changed policies and measures being implemented; have they led to improvements in policy making for the protection and promotion of the diversity of cultural expressions; have these policies and measures created better outcomes in terms of human development?” Cliche and Isar 2017.

<sup>62</sup> “Policy Monitoring Platform,” n.d., <https://en.unesco.org/creativity/activities/policy-monitoring-platform> (accessed 3 May 2023).

<sup>63</sup> UNESCO 2019.

<sup>64</sup> “Monitoring Framework of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions,” 2018, <https://en.unesco.org/creativity/sites/creativity/files/2018gmr-framework-en.pdf> (accessed 3 May 2023).

the efforts of the parties and the actions of the governing bodies to those priority areas where concrete results are expected.

### Results in targeted areas

The four priority goals identified in the 2005 Convention's monitoring framework are broken down into 11 areas, which are complemented by 22 indicators to measure progress by the parties. This section provides an overview of the results achieved in relation to each of the four objectives. With regard to the first goal – supporting sustainable systems of governance for culture – which underpins the entire framework,<sup>65</sup> the 2015, 2018, and 2022 Global Reports show an increase in the implementation of policies and measures aimed at strengthening the different stages of the value chain of cultural and creative industries.<sup>66</sup> The Convention and its monitoring framework provide parties with valuable sources of inspiration for revising their policies or developing new ones.<sup>67</sup> In particular, the exchange of practices has led to numerous initiatives aimed at stimulating digital creation, supporting the modernization of cultural sectors, or updating copyright legislation. The 2022 Global Report shows, for instance, that 80 percent of parties now support the digital transformation of cultural institutions and industries.<sup>68</sup> Several initiatives have been directly financed by the IFCD, such as the development of Retina Latina, a free digital streaming platform dedicated to Latin American cinema and involving ministries and cultural institutes from Bolivia, Colombia, Ecuador, Mexico, Peru, and Uruguay.<sup>69</sup>

For several parties, the 2005 Convention also led to a broader understanding of the notion of cultural policy to include “measures and mechanisms other than those normally included under the remit of ministries of culture.”<sup>70</sup> Cultural policies are no longer confined to heritage; they have been expanded to include cultural and creative industries, which is seen as a direct effect of the Convention.<sup>71</sup> Such an expansion also adds complexity to governance frameworks, which now involves a multitude of actors at multiple levels. Numerous bodies with a mandate “directly related to the Convention” were thus created. Inter-ministerial collaborations were also established to develop specific cultural policies or prepare periodic reports;<sup>72</sup> in the 2022 Global Report, 93 percent of parties reported that they have used this form of cooperation to develop regulatory frameworks, laws, policies, and strategies in the field of culture. The data showed, in particular, that parties acknowledge the role of culture and creativity not only in relation

<sup>65</sup> It refers to the sovereign right of states to adopt and implement policies and measures they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory at all stages of the production chain (creation, production, dissemination, distribution, and access).

<sup>66</sup> The last Global Report mentions, for example, that, of the periodic reports analyzed, almost all parties (97 percent) have reported revising or adopting new sector-specific laws, policies, and/or strategies to support the cultural and creative industries over the last four years. Moreno Mujica 2022, 56.

<sup>67</sup> The 2015 Global Report has been used as a basis for revising policies such as the *White Paper on Arts, Culture and Heritage* in South Africa and the drafting of the *National Arts Policy* in Tanzania. Countries such as Ethiopia and Zimbabwe claim that the 2005 Convention made them realize that “their policies had become outdated,” while others claim that the treaty “inspired debates that have informed policy changes” (Austria, Latvia, Canada). Baltà Portolés 2017, 38.

<sup>68</sup> Ochai 2022, 107.

<sup>69</sup> Ochai 2022.

<sup>70</sup> Obuljen Koržinek 2015, 50.

<sup>71</sup> Jordi Baltà Portolés (2017) cites the work of Christiaan de Beukelaer in this regard.

<sup>72</sup> For example, Oman has established a “national working team to address issues such as awareness-raising and reporting on the Convention, as well as the preparation of applications for the International Fund for Cultural Diversity,” and Austria created a Working Group and Advisory Panel on Cultural Diversity. Baltà Portolés 2017, 39.

to trade and industry but also in several other sectors such as education, environment and planning, tourism, and innovation.<sup>73</sup> Furthermore, several local and other subnational governments have undertaken work to align their policies with the objectives of the Convention's monitoring framework.<sup>74</sup>

Recognized by the 2005 Convention as a key actor in achieving its objectives, civil society also plays an important monitoring and advocacy role, as do the Coalitions for Cultural Diversity.<sup>75</sup> Civil society is thus the subject of a separate monitoring area within the first goal. Of the 70 periodic reports analyzed in 2015, 71 percent mentioned the inclusion of civil society in the implementation of the Convention, particularly in policy-making processes.<sup>76</sup> In 2020, it was rather 92 percent of the periodic reports submitted by the parties that indicated an input provided by civil society.<sup>77</sup> This shows significant progress in the implementation of Article 11 of the Convention, which not only recognizes the fundamental role of civil society in protecting and promoting the diversity of cultural expressions but also encourages parties to actively involve civil society in achieving the objectives of the treaty.<sup>78</sup> The periodic reports also reflect the role of civil society in "improving cultural governance" through various channels (convening peers, engaging in advocacy, generating and sharing knowledge, creating new networks).<sup>79</sup> In addition, they document how the parties support civil society so that it can directly contribute to the achievement of the Convention's objectives. According to these periodic reports, 90 percent of parties have implemented dialogue mechanisms with civil society organizations, 78 percent of parties have public funding schemes for civil society organizations, and 71 percent of parties support and organize training and monitoring for civil society organizations.<sup>80</sup> The Secretariat is also working to increase the inclusion of civil society in the Convention's governing bodies.<sup>81</sup>

Finally, the first Global Report identified a growing number of policies and measures specifically aimed at implementing the 2005 Convention in the digital environment. The identification of the digital environment as a monitoring area within this goal is therefore not insignificant.<sup>82</sup> It also underpins all the other areas. Since 2012, the parties have been mobilized by digital technologies and the issues associated with them. In 2017, they approved the *Operational Guidelines for the Implementation of the Convention in the Digital*

<sup>73</sup> Moreno Mujica 2022, 49.

<sup>74</sup> This is the case in Serbia and of the city of Santos in Brazil, which uses the monitoring framework to evaluate its cultural policies and development. Moreno Mujica 2022, 42.

<sup>75</sup> Coalitions played an important role in the adoption of the 2005 Convention. In 2015, they were spread across 43 countries, and a positive relationship was established between their existence and the implementation of activities by civil society. Anheier and Kononykhina 2015.

<sup>76</sup> Anheier and Kononykhina 2015, 101.

<sup>77</sup> Delfin 2022, 132.

<sup>78</sup> Historically, civil society has played an important role in mobilizing for "an international legal instrument to promote diversity and secure space for distinctive cultural goods and services" as well as in participating in its drafting. Cliche and Isar 2017, 20.

<sup>79</sup> Cliche and Isar 2017, 21, 27.

<sup>80</sup> Delfin 2022, 118.

<sup>81</sup> See "Concept Note: Second edition of the Civil Society Forum," 2019, [https://en.unesco.org/creativity/sites/creativity/files/forum\\_concept\\_note.pdf](https://en.unesco.org/creativity/sites/creativity/files/forum_concept_note.pdf) (accessed 3 May 2023). For example, the Civil Society Forum held prior to the Conference of Parties provides a "framework for exchange and cooperation" for civil society representatives to discuss various issues related to the implementation of the 2005 Convention. Proposals from this forum can be submitted to the Conference of Parties, including the identification of issues that should be added to the work program of the Convention governing bodies. See "Concept Note," 2.

<sup>82</sup> The Policy Monitoring Platform of the 2005 Convention displays 355 measures for this monitoring area from periodic reports submitted between 2012 and 2020. "Policy Monitoring Platform," 3 May 2023, <https://en.unesco.org/creativity/policy-monitoring-platform> (accessed 3 May 2023).

*Environment*,<sup>83</sup> which were supplemented in 2019 by an Open Roadmap and an inventory of good practices developed by the Secretariat at the request of the parties to guide them in the implementation of their commitments to the treaty.<sup>84</sup> These documents encourage the parties to address topics previously considered peripheral to the 2005 Convention, such as intellectual property rights.

Data collected under the second goal of the monitoring framework on the balanced flow of cultural goods and services and increased mobility of artists and cultural professionals also reflects multiple changes generated by the 2005 Convention. The most notable change is the incorporation of explicit references to the Convention in bilateral trade agreements.<sup>85</sup> Another direct development is the elaboration of a Protocol on Cultural Cooperation (PCC), which is annexed to several trade agreements negotiated by the EU and involving 51 states;<sup>86</sup> these protocols also contain explicit references to the Convention – in particular, to Article 16 on preferential treatment.<sup>87</sup> Without replicating the model of the Protocol, other parties have been inspired by these instruments in the elaboration of their own free trade agreements (FTAs), including the Republic of Korea, which signed a PCC with the EU in 2012 and subsequently concluded six new trade agreements containing cultural cooperation clauses similar to those in its PCC with the EU.<sup>88</sup> The Convention has thus generated a new impetus in the incorporation of cultural clauses in trade agreements, a phenomenon amplified by the mimicry of certain parties that reproduce the same type of cultural clauses in the new agreements to which they are party.

More generally, the 2015, 2018, and 2022 Global Reports note the proliferation of these clauses – whether in the form of general exceptions or exemptions, reservations, or

<sup>83</sup> These guidelines aim to provide a “strategic framework for understanding, interpreting and implementing the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in a digital environment where cultural goods and services are created, produced, distributed, disseminated, consumed and/or stored electronically.” UNESCO 2019, para 1.

<sup>84</sup> This roadmap aims to “[offer] a range of possibilities to promote and protect the diversity of cultural expressions in the digital environment” and “suggests clear expected results and concrete reference activities to protect the means of creation, production, dissemination, access, and exchange of cultural goods and services in the face of rapid technological changes.” “Open Roadmap for the Implementation of the 2005 Convention in the Digital Environment,” n.d., [https://en.unesco.org/creativity/sites/creativity/files/roadmap\\_digital\\_en\\_web\\_0.pdf](https://en.unesco.org/creativity/sites/creativity/files/roadmap_digital_en_web_0.pdf) (accessed 3 May 2023).

<sup>85</sup> Guèvremont and Bernier 2021. The preparation of this guide, supported by the government of Quebec to promote the implementation of Article 21 of the 2005 Convention, is further evidence of the impact of this treaty.

<sup>86</sup> Guèvremont and Bernier 2021; see also Guèvremont and Otašević 2017. These protocols have been annexed to the following agreements: Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part, signed 15 October 2008 (EU-CARIFORUM Economic Partnership Agreement) (the CARIFORUM States are Antigua and Barbuda, the Commonwealth of the Bahamas, Barbados, Belize, the Commonwealth of Dominica, the Dominican Republic, Grenada, the Republic of Guyana, the Republic of Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Republic of Suriname, the Republic of Trinidad and Tobago); Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, 6 October 2010 (EU-Korea Free Trade Agreement); Agreement Establishing an Association between the European Union and its Member States, on the One Hand, and Central America, on the Other, 29 June 2012 (the Central American states concerned are Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama).

<sup>87</sup> The implementation of the Protocol on Cultural Cooperation (PCC) signed between the EU and CARIFORUM has been analyzed by authors who have noted the lack of means invested to produce the expected effects of this agreement. See Burri and Nurse 2019. In our view, such a conclusion does not call into question the fact that the protocol implements Art. 16 of the 2005 Convention but, rather, demonstrates a lack of political will on the part of the parties to implement the rules of the PCC.

<sup>88</sup> These agreements have been concluded with Columbia (2013), Australia (2014), Canada (2014), China (2015), New Zealand (2015), and Central America (2018). Two of these agreements (with Australia and New Zealand) include, among others, a clause that qualifies co-productions as national works, as in the PCC signed with the EU.

commitments with limitations – which contribute to the recognition of the specific nature of cultural goods and services. These clauses also appear in the chapters dedicated to electronic commerce as well as in the most recent agreements entirely dedicated to this type of trade, such as the Digital Economy Partnership Agreement between Chile, New Zealand, and Singapore.<sup>89</sup> In doing so, the parties are implementing Article 21 of the 2005 Convention, which commits them to promote the objectives and principles of the treaty in other international forums as well as the operational guidelines on the digital environment.<sup>90</sup> Furthermore, the implementation of the Convention does not only concern trade forums as it is also seen in other regional and international organizations. The 2015 Global Report lists nearly 250 texts mentioning the Convention since its adoption from a dozen international, regional, or bilateral organizations.<sup>91</sup> Between 2017 and 2020, at least 40 multilateral and regional instruments mentioning the Convention were identified, of which 10 link culture and the digital environment and 10 link culture and sustainable development.<sup>92</sup>

In addition, in 2017, the UNESCO-Aschberg Programme for Artists and Cultural Professionals was redesigned to contribute more directly to a balanced flow of cultural goods and services and increase the mobility of artists. Training modules on preferential treatment under Article 16 were created to help parties understand the nature of this crucial commitment for developing countries, and a first regional workshop for Caribbean countries was held in 2019 in Barbados. On this occasion, the first impact study of cultural preferential treatment clauses integrated into trade agreements was also launched.<sup>93</sup>

With regard to the third goal – integrating culture into sustainable development frameworks<sup>94</sup> – the data shows that, since the adoption of the 2005 Convention, many countries have integrated culture into their development plans and strategies. It is estimated that of the 111 parties with such policy documents, 96 refer to culture and more than two-thirds of these are from the global South.<sup>95</sup> The increase in contributions to the IFCD is also seen as an achievement of this goal – particularly, of South-South cooperation – with a significant increase in contributions from developing countries.<sup>96</sup> In addition, the United Nations Sustainable Development Goals for 2030 are now part of the Convention's monitoring framework to demonstrate the treaty's contribution to their achievement,<sup>97</sup> which leads the parties to explore the links between the cultural and creative industries sector and the achievement of sustainable development. In the 2022 Global Report, 63 percent of parties

<sup>89</sup> Digital Economy Partnership Agreement, signed 12 June 2020; see, in particular, Art. 15.1(4).

<sup>90</sup> Under paragraph 19 of these guidelines and “[c]onsistent with their obligations in Article 21 of the Convention ... Parties are encouraged to promote ... 19.4 the consideration of introducing cultural clauses in international bilateral, regional or multilateral agreements, namely provisions that take into account the dual nature of cultural goods and services, including preferential treatment clauses, with particular attention to the status of e-commerce that shall recognize the specificity of cultural goods and services.” UNESCO 2019.

<sup>91</sup> Examples include organizations with expertise in cultural or related fields such as the Organisation internationale de la Francophonie, which has adopted several declarations that explicitly refer to the 2005 Convention. Several organizations with a shared language such as the Assemblée parlementaire de la Francophonie or the Community of Latin American and Caribbean States have also adopted similar declaratory instruments. Resolutions of the United Nations General Assembly related to culture and sustainable development mention the Convention. Guèvremont 2015; see also Guèvremont 2017.

<sup>92</sup> Guèvremont 2022, 184.

<sup>93</sup> See Burri and Nurse 2019.

<sup>94</sup> The 2005 Convention is the first normative instrument to place the link between culture and sustainable development at the heart of its commitments. Art. 13 commits parties to integrate culture in their development policies for the creation of conditions conducive to sustainable development.

<sup>95</sup> Joffe 2017.

<sup>96</sup> Cliche and Isar 2017.

<sup>97</sup> They were not included in the first edition of the Global Report in 2015.

recognize that this sector drives societal transformation, particularly in the realm of social inclusion.<sup>98</sup> Insofar as the 2030 Agenda contains little reference to culture, we can only conclude that these advances stem directly from the linkage between culture and sustainable development established by the 2005 Convention.

Finally, the fourth goal relating to the promotion of human rights and fundamental freedoms<sup>99</sup> is also particularly revealing of the impetus given by the 2005 Convention to guide parties' action in areas that, until then, had not received particular attention. For example, the 2018 Global Report notes that "progress has been made [among parties to the Convention] in understanding the importance of artistic freedom for the successful protection and promotion of artistic expression itself."<sup>100</sup> Yet artistic freedom is not a subject explicitly covered by the Convention, although it is implicitly covered by some guiding principles and commitments. Two thematic reports published by the Secretariat in 2019 and 2020 also point to progress in this area.<sup>101</sup> This includes the adoption of multilateral and regional economic agreements allowing for better employment and travel opportunities for artists, the revision of copyright laws to adapt them to the digital environment (fair and equitable remuneration), as well as the adoption of specific sectoral legislation (taxation, social benefits, and pensions).<sup>102</sup> With regard to gender equality, which is the second monitoring area of the fourth goal, the UNESCO-Sabrina Ho initiative *You Are Next: Empowering Creative Women* has led to the implementation of several initiatives, notably in Palestine and Tajikistan. This strategic partnership also supports several projects that strengthen the technical and entrepreneurial skills of young women.<sup>103</sup> Although the 2005 Convention contains a few references relating to the consideration of women's specific needs, there is no specific commitment to this subject area. This monitoring area, which is also one of UNESCO's global priorities,<sup>104</sup> further demonstrates the influence of the monitoring framework in guiding the parties' actions in areas that have not previously been a priority within the treaty. A comparison of the proportion of parties reporting gender equality measures in the culture sector in the three editions of the Global Report shows a clear progression from 5 percent in 2015, to 64 percent in 2018, and 77 percent in 2022.<sup>105</sup>

### Effectiveness of the 2005 Convention

While acknowledging that many of the commitments under the 2005 Convention are not very binding, it must be recognized that there are other factors that lead parties to behave in a way that is consistent with the rules of this treaty. It has been noted that "[m]ore important perhaps than legal constraint is the conviction of the signatory Parties that they are pursuing a worthwhile goal and their political will to realize that goal."<sup>106</sup> Monitoring mechanisms also have a role to play: "[I]t has been observed that ... while they are most often non-binding, which makes it relatively easy for states to accept them, [they] contribute

<sup>98</sup> Kamara 2022, 209.

<sup>99</sup> It should be recalled that it is the first guiding principle of the 2005 Convention (Art. 2.1) and, thus, a "precondition for the creation, distribution and enjoyment of diverse cultural expressions." In other words, failure to respect it puts the implementation of the Convention at risk. Cliche and Isar 2017, 26.

<sup>100</sup> Cliche 2017, 16.

<sup>101</sup> See Neil 2019; Cuny 2020.

<sup>102</sup> Cuny 2020.

<sup>103</sup> UNESCO, "You Are Next: Empowering Creative Women," n.d., <https://en.unesco.org/creativity/activities/you-are-next-empowering-creative-women> (accessed 3 May 2023).

<sup>104</sup> UNESCO, "What UNESCO Does for Gender Equality," 2021, <https://en.unesco.org/genderequality/actions> (accessed 3 May 2023).

<sup>105</sup> Villarroya Planas 2022, 244.

<sup>106</sup> Bernier 2008, 25.

positively to the effectiveness of the commitments contained in the agreements or recommendations that they support.”<sup>107</sup> However, while the data collected through periodic reports and other sources within the framework of the monitoring mechanism show various actions carried out by the parties in relation to the protection and promotion of the diversity of cultural expressions, it is questionable whether this data constitutes evidence of the effectiveness of the treaty.

A stream of research from international environmental law suggests three definitions of effectiveness that appear transposable to the analysis of the 2005 Convention.<sup>108</sup> The first form – legal effectiveness – assesses the compliance of the behavior with the rule. The second form – behavioral effectiveness – focuses on the role that the rule plays in causing a state to modify its behavior to achieve the regime’s objectives. The third form – problem-solving effectiveness – focuses on the degree to which the rule achieves its objectives. Still in the field of environmental law, the concept of effectiveness has also been analyzed from the perspective of three dimensions – output, outcome, and impact – which overlap with the above definitions: output has been defined as “the rules and regulation emanating from the regime”; outcome is related to “the effect of regimes in behavioral terms”; while impact deals with the “problem-solving ability of a give regime.”<sup>109</sup>

The compliance of the parties’ behavior with the 2005 Convention – legal effectiveness – can be difficult to assess given the nature of several obligations under the regime, some of which are not very binding. For example, under Article 7 on measures to promote cultural expressions, “Parties shall endeavour to create in their territory an environment which encourages individuals and social groups: 1(a) to create, produce, disseminate, distribute and have access to their own cultural expressions.” This wording makes it virtually impossible to assess the effectiveness of the treaty on the basis of the compliance of an action with the obligation to “endeavour to create ... an environment.”<sup>110</sup> However, other commitments that are more precisely formulated open the door to an assessment of effectiveness based on compliance. For example, under Article 16, “[d]eveloped countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.” This is an obligation of result that can only be met if preferential treatment is granted to facilitate trade. The PCC concluded between the EU and the states of the Caribbean Forum (CARIFORUM) and annexed to their Economic Partnership Agreement<sup>111</sup> explicitly implements Article 16 through commitments that have the legal effect of facilitating access to the European market for certain cultural services from the CARIFORUM countries.<sup>112</sup>

<sup>107</sup> Ruiz Fabri 2004, 30 (our translation).

<sup>108</sup> See, in particular, Bodansky 2011. Regarding the three definitions of effectiveness, the author refers to Young 1994.

<sup>109</sup> Andresen 2021, 990.

<sup>110</sup> See, in this respect, Bodansky 2011.

<sup>111</sup> EU-CARIFORUM Economic Partnership Agreement.

<sup>112</sup> However, it cannot be inferred that the granting of preferential treatment to developing countries by developed countries in accordance with Art. 16 of the 2005 Convention will necessarily result in a rebalancing of cultural exchanges in favor of the latter. The impact assessment of the EU-CARIFORUM Economic Partnership Agreement concluded that the commitments to facilitate access of cultural goods and services from CARIFORUM countries to the EU market did not have a significant impact due to the lack of sufficient resources deployed by the Parties to fully benefit from the PCC. On this point, see Burri and Nurse 2019. Again, the lack of results here is not a sign of the ineffectiveness of the 2005 Convention but, rather, reflects the fact that the parties have not taken the necessary actions to implement the PCC, which may be the result of a lack of political will.

Furthermore, by taking into account the information provided by the parties in their periodic reports – and assuming that this information is true and accurate – it is possible to affirm that the 2005 Convention has generated changes in the parties' behavior that are conducive to achieving the objectives of protecting and promoting the diversity of cultural expressions. This information could therefore validate the behavioral effectiveness of the treaty. As mentioned above, several parties directly link some of their actions, such as modernizing their laws or adopting new measures, to their commitments under the treaty. The same is true of the capacity-building initiatives that they have put in place since 2010 to help developing countries meet their own commitments. Between 2018 and 2020, the various international cooperation and assistance program coordinated by 2005 Convention Secretariat and UNESCO field offices have supported 126 countries, including 27 in Africa and 21 small island developing states in designing, implementing, and monitoring policies and measures to promote the diversity of cultural expressions.<sup>113</sup> This type of cooperation, aimed at the development of public policies, is likely to have long-term effects and to benefit a multitude of actors in the cultural field. Financial support from several parties, including the EU and Sweden, is also part of the implementation of the Convention. For instance, all 16 partner countries of the SIDA project have elaborated their periodic reports in a participatory manner and submitted them by the statutory deadlines, which demonstrates the relevance of this project.<sup>114</sup> The same applies to contributions to the IFCD – which has funded 140 projects in 69 developing countries since 2010<sup>115</sup> – although the 2005 Convention does not oblige parties to contribute to this fund. These initiatives are generated by the commitments – albeit not very binding – that flow from the Convention.

As to whether the 2005 Convention actually enables the parties to achieve the objectives set out in its Article 1 and, in so doing, to solve the problems they have identified (problem-solving effectiveness), the data available to date does not allow for an in-depth assessment of this type. Nevertheless, it is possible to revisit the criticisms levelled at this treaty in the aftermath of its adoption, which focused on its binding force and its relationship with trade agreements in order to examine one of the main objectives of the Convention, namely that of “reaffirm[ing] the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”<sup>116</sup> Data collected over the past 10 years shows that a large number of cultural clauses have been incorporated by parties to the 2005 Convention in their trade agreements in order to preserve their power to intervene in the cultural sector.<sup>117</sup> Between 2017 and 2020, 25 FTAs or economic partnerships involving at least one party to the Convention were signed, of which 19 recognized the specific nature of cultural goods or services through the incorporation of clauses aimed at protecting the right of parties to the 2005 Convention to adopt and implement cultural policies.<sup>118</sup> It is obviously impossible to establish a causal link between each of these clauses and the commitments arising from the 2005 Convention. The proliferation of policies aimed at supporting the creation, production, distribution, dissemination, and access to a diversity of cultural expressions, including in the digital environment, can however be more directly linked to the implementation of the 2005 Convention, as evidenced by the periodic reports produced by the parties. However, these policies – as well as the awareness of the need to protect

<sup>113</sup> UNESCO 2021a, 3.

<sup>114</sup> UNESCO 2021b, 6.

<sup>115</sup> UNESCO, “IFCD Projects,” n.d., <https://en.unesco.org/creativity/ifcd/what-is> (accessed 3 May 2023).

<sup>116</sup> Objective stated in 2005 Convention, Art. 1(h).

<sup>117</sup> In addition to the 2015, 2018, and 2022 Global Reports, see also Guèvremont and Otašević 2017; Guèvremont and Bernier 2021.

<sup>118</sup> Guèvremont 2022, 184.

cultural diversity at all levels – are incentives for parties to negotiate their trade agreements in a way that preserves their sovereign right to adopt and implement the policies and measures of their choice. On this point, it seems possible to conclude that the effectiveness of the 2005 Convention has been demonstrated.

This third dimension of effectiveness – problem-solving effectiveness – has also been examined in the literature from the perspective of the configuration of power within a regime and the identity of the parties determined to ensure that the regime produces the desired results. It has been argued that if these parties are powerful actors, “that will increase the chances of a more effective regime, especially if those actors also exert leadership by generating followers.”<sup>119</sup> In this regard, it is interesting to note that the practice developed by the EU of negotiating PCCs attached to trade agreements has influenced the behavior of other parties to the Convention. For example, the Republic of Korea, which has a FTA with the EU to which a PCC was annexed,<sup>120</sup> has subsequently incorporated similar cultural cooperation clauses into FTAs negotiated with other states. In fact, cultural cooperation clauses in FTAs have generally increased in recent years.<sup>121</sup>

Analyzing the way in which parties are involved within the works of the 2005 Convention and refer to it to achieve its objectives can be another way of measuring this third dimension of effectiveness. The growing number of projects submitted to the IFCD over the years can be interpreted as a sign that parties believe in the fund’s capacity to help developing countries achieve the objectives of the Convention.<sup>122</sup> Moreover, in the specific context of the digital environment, the leadership of some parties – some of whom have played a crucial role in the adoption of the Convention – have raised awareness on the impact of technologies on the diversity of cultural expressions. This later led to the adoption of the treaty’s digital operational guidelines in 2017, destined to helping parties implement the Convention in this environment. The commitment of parties to pursue the protection and promotion of the diversity of cultural expressions in the digital sphere can also be measured by the references to the 2005 Convention in other instruments dedicated to its regulation. The UNESCO Recommendation on the Ethics of Artificial Intelligence adopted in 2021 mentions the Convention, which shows not only that the parties are concerned about the issues related to the use of these technologies but also that they are convinced that the treaty is still relevant in this context. This is true outside of UNESCO as well. The Guiding Principles on Diversity of Content Online, which were adopted by the Multi-Stakeholder Working Group on Diversity of Content Online, also mention the Convention<sup>123</sup> and its objectives, which goes in that same direction. This initiative is led by Canada and four other parties to the Convention as well as civil society organizations, all of which are actively involved in the Convention’s work and meetings of its governing bodies. These elements can be interpreted as signs that parties see the Convention as an effective tool.

<sup>119</sup> Andresen 2021, 992.

<sup>120</sup> EU-Korea Free Trade Agreement.

<sup>121</sup> On this point, see Guèvremont 2019.

<sup>122</sup> The parties – through their UNESCO national commissions – intervene at the beginning of the process by selecting the projects to be submitted to the experts for evaluation.

<sup>123</sup> This initiative is led by Canada, Australia, Finland, France, and Germany, together with civil society organizations (including the International Federation of Coalitions for Cultural Diversity and the Coalition française pour la diversité culturelle), private companies (Google, Netflix, Deezer, and Vubble), and a parapublic institute (European Audiovisual Observatory). The guidelines adopted in 2021 aim at guiding actions and measures that foster greater exposure to diverse cultural content, information, and news online. Government of Canada, “Guiding Principles on Diversity of Content Online,” 2021, <https://www.canada.ca/en/canadian-heritage/services/diversity-content-digital-age/guiding-principles.html> (accessed 3 May 2023).

Finally, it can be argued that the obligations to share and disseminate information under Articles 9 and 19 of the 2005 Convention, as well as the monitoring framework established by the Secretariat of the Convention, generate transparency, which strengthens the effectiveness of the treaty. As stated in relation to similar commitments in other legal systems, “[t]ransparency is more than the simple provision of information, but instead connotes openness as an end in itself.”<sup>124</sup> Transparency has also been described as a tool “to monitor and encourage compliance.”<sup>125</sup> Thus, the transparency procedures instituted in the context of the implementation of the Convention – in particular, the periodic reports and the Global Monitoring Reports – not only make it possible to document the actions carried out by the parties, but these procedures also play “a central role in alternative processes which seek new and innovative ways to regulate state behaviour.”<sup>126</sup> These transparency procedures, which are at the heart of the monitoring mechanism of the 2005 Convention, thus contribute directly to its effectiveness.

## Conclusion

The 2005 Convention was born out of the deep conviction of a small group of states for the need to preserve the diversity of cultural expressions in a globalized society. Of course, the low level of constraint of the resulting commitments is a fact. But this does not mean that this is a weakness. Underneath the apparent flexibility of this treaty are various attributes that lead the parties to modify their behavior in order to achieve the objectives they have set. These attributes are forces that contribute to the effectiveness of the Convention.

This article reports on the progress made during the first 15 years of implementation of the 2005 Convention, which, in several respects, attests to its effectiveness. It is true that not all the provisions of the Convention contribute in the same way to this effectiveness. Progress still needs to be made in many areas and at different levels. Moreover, the challenges to be met are still very real given the pressure on the diversity of cultural expressions, which shows few signs of abating. The rise of digital technologies and artificial intelligence in the field of cultural and creative industries contributes significantly to this. The challenges in this area require parties not only to be determined to implement the Convention in the digital environment but also – as required by Article 21 – to coordinate their actions in international forums whose exercise of jurisdiction could interfere with the achievement of this objective. In this respect, the full effectiveness of the Convention remains to be demonstrated. The same is true of its contribution to the promotion of cultural expressions of marginalized groups, such as minorities or Indigenous peoples, or to the protection of cultural expressions at risk of extinction or under serious threat. The granting of preferential treatment by developed countries to cultural goods and services from developing countries, as well as to their artists and cultural professionals, is another area where the Convention has not yet fully demonstrated its effectiveness, with several parties having failed to adopt any measures in line with Article 16. Therefore, there is still room for improvement.

However, this article demonstrates that a strong monitoring framework, with very specific targets and indicators, can be an effective way to implement a legal instrument with a low level of constraint. This is a lesson to be learned and a practice that could be replicated in other treaties and other areas of international law. Finally, it must be remembered that the 2005 Convention remains a relatively young treaty. And it must be admitted that, beyond the advances that have been noted in the context of this article and

<sup>124</sup> Sparks and Peters 2021, 905.

<sup>125</sup> Sparks and Peters 2021, 907.

<sup>126</sup> Sparks and Peters 2021, 919.

that attest to the effectiveness of this treaty, there are important spin-offs that still seem to elude the theory of effectiveness today: the dissemination of new values – those of the diversity of cultural expressions – within the international legal order and the national orders of all regions of the world. In fact, there is now a law of the diversity of cultural expressions that continues to develop and be perfected. And beyond this, there is a “discourse”<sup>127</sup> on the diversity of cultural expressions that is influencing the actions of states on their territory and at the international level, a discourse that has become impossible to ignore.

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<sup>127</sup> The idea is borrowed from Ivan Bernier, mentioned in a speech he gave upon receiving the Société des relations internationales du Québec award in 2012.

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