Toward a Coordinate Framework for Cultural-Creative Tax Incentives

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Submitted in accordance with the requirements for the degree of
PhD

The University of Leeds
School of Law

January, 2026

Acknowledgements

I would like to express my deepest gratitude and appreciation to all those who have supported and contributed to the completion of this PhD thesis.

First and foremost, I am immensely grateful to my supervisors, Peter Whelan, Federica Casano, Or Brook, for their invaluable guidance, unwavering support, and insightful feedback throughout this research journey. Their expertise, patience, and encouragement have been instrumental in shaping the direction and quality of this thesis.

I would like to acknowledge the University of Leeds and the School of Law for providing the resources, facilities, and opportunities that have facilitated the research process and enabled the pursuit of higher learning.

I am grateful to my colleagues and friends who have provided valuable discussions, insights, and moral support throughout this journey. Your camaraderie and encouragement have made the challenges more manageable and the successes more enjoyable.

A special thanks to my husband, Ney Venceslau Ribas, and our son, Joao Guimaraes Carvalho Ribas, whose unwavering love, encouragement, and understanding have been a constant source of strength and motivation throughout this entire journey. Your presence and love have made every step of this process meaningful and fulfilling. I also want to extend my gratitude to my parents and siblings for being my pillars of strength. Your belief in me and this endeavour has made all the difference. I want to express my profound gratitude to my mum, Marli Terezinha Carvalho, who sadly passed away during this research. Her memory lives on in this work, and I dedicate this thesis to her loving memory.

Even though there were no empirical research, my extensive experience and contact with artists and creative entrepreneurs involved in cultural and creative ecosystems over the past two-three decades have made me feel deeply indebted to all of them. Your insights have provoked a need to understand the tax incentives and barriers for cultural-creative activities. I extend my heartfelt gratitude for your willingness to share your experiences throughout my professional journey.

This work would not have been possible without the collective contributions and support of all those mentioned above. Thank you for being part of this journey, and for helping me fulfil this dream of contributing to the field of cultural-creative taxation.

Abstract

This doctoral thesis examines how national, bilateral, EU, and UNESCO legal frameworks govern cross-border access to cultural-creative tax incentives. Although states retain primary fiscal authority, that authority is increasingly conditioned by a dense network of external legal commitments. The thesis advances the claim that exclusionary outcomes in cross-border cultural access arise from systemic dysfunctions conceptualised as Structural Fiscal Access Constraints (SFACs): a composite of legal, administrative, and institutional impediments that shape how cultural-creative tax incentives operate in practice.

The thesis offers both a structural diagnosis and a coordinated reform proposal. It shows that SFACs crystallise through three interdependent mechanisms: legal constraints generated by restrictive or exclusionary eligibility criteria, inconsistent definitions, and misalignment between domestic provisions and treaty-based obligations; administrative constraints sustained by opacity, discretionary interpretation, unpredictable decisions, and the absence of coordinated procedures or even access to procedures; and institutional constraints produced by the misalignment of multi-relational governance regimes, insufficient interpretive coordination, and unintegrated administrative channels. Together, these deficits create a persistent gap between normative commitments—such as cultural rights, preferential treatment, and international cultural cooperation for sustainable development—and their procedural realisation. As a result, cultural-creative operators encounter rights that are textually affirmed yet functionally inaccessible. To interrogate these dynamics, the thesis develops and applies five analytical variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—to assess both the potential and the limitations of the legal frameworks studied.

While existing reforms at national, bilateral, EU, and UNESCO levels address parts of the problem, they operate in isolation and lack coordination. In response, the thesis develops the Cultural-Creative Tax Incentive Model (CCTIM): a soft-governance architecture designed to reduce SFACs through procedural convergence, interpretive alignment, and inter-institutional cooperation. The CCTIM does not require doctrinal harmonisation or sovereign cession. Instead, it enhances coherence by introducing shared definitions, equivalency principles, procedural safeguards, and cross-jurisdictional interpretive tools. Embedded within the normative ecosystem of the UNESCO 2005 Convention and compatible with EU proportionality, non-discrimination, free movement, and cultural rights, the Model operationalises commitments to interpretive coordination, institutional redistribution of responsibility, and infrastructure-building across legal orders.

Ultimately, the thesis advances a new legal approach to transnational cultural-fiscal governance—one that measures the effectiveness of cultural cooperation not by the number of commitments undertaken, but by their accessibility, predictability, and enforceability across jurisdictions. It reconceptualises cultural-creative tax incentives as shared transnational legal objects whose effectiveness depends on the alignment of rights, procedures, and institutions. By embedding cultural rights and cooperation duties into the procedural architecture of fiscal measures, the thesis offers a coherent and equitable governance model capable of supporting financial relief for artists, sustaining cultural philanthropy, strengthening audiovisual production, and enabling cross-border cultural cooperation through tax incentives that function effectively across legal systems.

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List of Abbreviations

ACNC	Australian Charities and Not-for-Profits Commission (Australia)
ATO	Australian Tax Office (Australia)
ATR	Animation Programme Tax Relief (England and Wales)
AVEC	Audiovisual Expenditure Credit (UK)
AVMSD	Audiovisual Media Services Directive (Germany)
AWR	General Tax Act (Netherlands)
BCCA	Code of Companies and Associations (Belgium)
BEPS	Base Erosion and Profit Shifting (OECD)
BFI	British Film Institute
BT	Bilateral Treaty or Bilateral Co-Production Treaty
BTT	Bilateral Tax Treaty
CAVCO	Canadian Audio-Visual Certification Office (Canada)
CCA	Capital Cost Allowance (Canada)
CC	Cultural and Creative
CCI	Cultural and Creative Industry
CCTIM	Cultural and Creative Tax Incentive Model
CITR	Creative Industry Tax Reliefs (England and Wales)
CPTC	Canadian Film or Video Production Tax Credit (Canada)
DGR	Deductible Gift Recipient
DRD	Dispute Resolution Directive (European)
CJEU	Court of Justice European Union
EC	European Commission
EEA	European Economic Area
EFICINE	Fiscal Stimulus for National Film Production and Distribution (Mexico)
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
FISA	Film Industry Support Austria (Austria)
FTR	Film Tax Relief
GATS	General Agreement on Tariffs and Service
GATT	General Agreement on Tariffs and Trade
GBER	General Block Exemption Regulation
GST	Goods and Services Tax
HETR	High-End Television Tax Relief (England and Wales)
HMRC	His Majesty’s Revenue & Customs (England and Wales)
IBFD	International Bureau of Fiscal Documentation
IMF	International Monetary Fund
IRS	Internal Revenue Service (U.S.)
ITAA	Income Tax Assessment Act 1997 (Australia)
ITR	Income Tax Regulation (Canada)
LDC	Least Developed Country
LISR	Law del Impuesto sobre la Renta (Mexico)
LOB	Limitation on Benefits
MAP	Mutual Agreement Procedure
MGETR	Museums and Galleries Exhibition Tax Relief (England and Wales)
MLA	Museums, Libraries and Archives Council (England and Wales)
MNE	Multinational Enterprises
NGO	Non-Governmental Organization
NPO	Non-Profit Organization
OECD	Organisation for Economic Co-operation and Development

ORSI	Organisation Representing Social Interests
OTR	Orchestra Tax Relief (England and Wales)
PAF	Private Ancillary Funds (Australia)
PBE	Public Benefit Entities
PBO	Public Benefit Organization
PE	Permanent Establishment
Philea	Philanthropy Europe Association
QAPE	Qualifying Australian Production Expenditure (Australia)
SAC	Significant Australian Content (Australia)
SFAC	Structural Fiscal Access Constraint
SPBO	Semi-Public Benefit Organization
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TGE	Transnational Giving Europe
TNC	Private Transnational Corporations
TTR	Theatre Tax Relief (England and Wales)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
USAID	United States Agency for International Development
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Chapter 1

Introduction

1.1 Cultural and Creative Tax Incentives: Structural Fiscal Access Constraints

This thesis proceeds from the hypothesis that the restrictive or exclusionary operation of cultural-creative tax incentives in cross-border contexts cannot be adequately explained by reference to domestic fiscal discretion alone. Rather, such exclusion reflects deeper structural dysfunctions inherent in multi-level governance systems. While the foundational literature on global administrative law, legal pluralism, and polycentric regulatory orders—associated with scholars such as Drahos[1]; Cassese[2]; Zürn[3]; Qureshi[4]; Christian[5]; Teubner[6]; Fischer-Lescano[7]; Ostrom[8]; Krisch[9]; Abbott & Snidal[10]; Walker[11]—does not address cultural-creative tax incentives as such, its analytical diagnoses are directly applicable. This body of scholarship demonstrates how overlapping and partially autonomous legal orders generate misalignments between norm creation and operational implementation, producing internal inconsistencies, cross-system incoherences, and institutional fragmentation. Cultural-creative tax incentives, particularly when applied across borders, operate within precisely these conditions and reproduce the same governance pathologies identified in the broader literature.

The interaction between national tax legislation, bilateral treaties, European Union legal framework, and international cultural law—most notably the UNESCO Convention on the

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[1] John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2020) Part III.
[2] Sabino Cassese, *The Global Polity: Global Dimensions of Democracy and the Rule of Law* (Global Law Press 2012); Sabino Cassese, *A World Government?* (Global Law Press 2018).
[3] Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018).
[4] Asif H Qureshi, 'International Tax Administration and the Administrative State: Some Institutional Criteria for Evaluating Procedural Consistency' (2005) International Tax and Public Finance 11(6) 947.
[5] Allison Christians, 'International Tax Cooperation: Administrative Assistance and Exchange of Information' (2013) 38 Brooklyn Journal of International Law 1053.
[6] Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004).
[7] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions? The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 1013.
[8] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 2015).
[9] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010).
[10] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421.
[11] Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317.

Protection and Promotion of the Diversity of Cultural Expressions—constitutes a dense configuration of interdependent yet insufficiently coordinated legal orders. Their combined operation frequently lacks the normative coherence, procedural alignment, and institutional coordination necessary to ensure legal certainty, rights-based accessibility, compliance with international obligations, and systemic integration. This claim is not asserted axiomatically but is developed and substantiated through the doctrinal, administrative, and institutional analyses undertaken across Chapters 2 to 6. From this analysis emerges the central conceptual contribution of the thesis: the identification and theorisation of Structural Fiscal Access Constraints.

Structural Fiscal Access Constraints, or SFACs, are defined as systemic barriers embedded in the legal, administrative, and institutional design of fiscal incentive regimes that prevent legitimate access to tax incentives. The structural character of these constraints is essential. They arise not from isolated administrative mistakes, exceptional cases, or unlawful decision-making, but from the way incentive regimes are designed, interpreted, and governed across multiple levels of authority. Fiscal access, in this sense, refers not merely to the formal possibility of applying for a benefit, but to the practical and predictable ability to obtain it. Constraints, finally, emphasise that exclusion results from the cumulative interaction of legal norms, administrative processes, and institutional arrangements. SFACs are therefore not anomalies or marginal policy failures; they are predictable, repeatable, and diagnosable.

Analytically, SFACs emerge through the interaction of three interdependent structural layers: the normative, the administrative, and the institutional. At the normative level, SFACs originate in the design of statutes, regulations, and formal legal definitions. Constraints arise where legal concepts are indeterminate or outdated, where eligibility criteria rely on proxies ill-suited to contemporary cultural practices, or where statutory objectives conflict with other domestic or international legal obligations. At this level, exclusion is embedded in law itself, often in ways that are not immediately visible but become decisive in cross-border situations. At the administrative level, SFACs materialise through procedures, evidentiary standards, and decision-making practices. Even where normative frameworks are formally inclusive, constraints arise when administrative procedures lack transparency, when evidentiary expectations are informal, inconsistent, or inaccessible to non-domestic actors, or when decisions are poorly reasoned, unpublished, or insulated from review. Legal ambiguity at the normative level thus translates into operational exclusion at the point of application. This transformation of uncertainty into denial of access is well recognised in administrative-law scholarship as a threat to legality, procedural fairness, and legal certainty, particularly in its interpretive and procedural dimensions[12]. The institutional layer concerns the distribution and coordination of authority across public bodies and governance levels. SFACs arise here where cultural and fiscal authorities operate in parallel rather than in cooperation, where mandates overlap or conflict, or where accountability and interpretive responsibility are fragmented across institutions. Such institutional constraints are often the most resistant to resolution through litigation or administrative challenge, as they reflect structural features of governance rather than identifiable legal breaches. Multi-level governance theory helps to explain why these constraints persist, even in systems formally committed to coordination and cooperation[13].

Drawing on public-law and tax-law scholarship on fiscal governance, as well as cultural-rights and human-rights scholarship associated with Kälin and Künzli[14]; Stamatopoulou[15]; Asbjorn[16]; Meyer-Bisch[17], the thesis examines SFACs across these three interdependent dimensions. Legal constraints manifest through restrictive eligibility criteria, inconsistent statutory definitions, and misalignment between domestic provisions and treaty-based obligations. Administrative constraints emerge through opacity, discretionary interpretation, unpredictable classification practices—such as determinations of who qualifies, what constitutes eligible expenditure, or which organisations fall within cultural categories—and asymmetrical access to procedures. Institutional constraints reflect fragmented governance, insufficient interpretive

[12] See, for example, Hans Gribnau, 'Legal Certainty: A Matter of Principle' (January 2013) and 'Retroactivity of Tax Legislation' (May 2013) Tilburg Law School Research Paper 12/2014; Takis Tridimas, 'Legal Certainty and Protection of Legitimate Expectations', in *The General Principles of EU Law* (OUP 2006); Okasana Shcherbanyuk, Vitalii Gordieiev, Laura Bzova, 'Legal Nature of the Principle of Legal Certainty as a Component Element of the Rule of Law' (2023) 13(1) Juridical Tribune 21; Yannis Papadopoulos, 'Accountability and Multi-Level Governance', in Mark Bovens, Robert Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) ch 17, 273; Peter L Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010) 251; Qureshi (n 4); Christians (n 5).

[13] See, for example, Braithwaite & Drahos (n 1); Ostrom (n 8); Abbott and Snidal (n 10); Reuven S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) 113 Harvard Law Review 1573; Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (CUP 2009); Peter B Musgrave, 'Sovereignty, Entitlement, and Cooperation in International Taxation' (2001) Brooklyn Journal of International Law 24, 777; Tsilly Dagan, 'Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty – Refining the Challenges' (2022) IBFD Bulletin for International Taxation 318; Tsilly Dagan, 'Substantive Tax Sovereignty Under Globalization' (2024) 29(3) Tilburg Law Review 1.

[14] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019).

[15] Elsa Stamatopoulou, *Cultural Rights in International Law* (Brill Leiden 2007).

[16] Eide Asbjorn, 'Cultural Rights as Individual Human Rights' in Eide A, Krause C and Rosas A (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2001).

[17] Patrice Meyer-Bisch, 'Cultural Rights within the Development Grammar' (Agenda 21 for Culture 2004–2014, research commissioned by United Cities and Local Governments (UCLG)).

coordination, and the absence of cooperative mechanisms across national, bilateral, European, and UNESCO frameworks.

Because cultural and creative ecosystems are intrinsically transnational, encompassing creation, production, circulation, and participation across borders, these structural misalignments generate material disparities in access to tax incentives. In doing so, they impair both the rights and the obligations assumed under international instruments and undermine the policy objectives of the incentives themselves. To illustrate the concrete operation of SFACs, the chapter introduces three stylised examples that recur throughout the thesis: tax-in-lieu schemes for visual artists (§ 1.1.1), tax-deductions for cultural philanthropy (§ 1.1.2), and expenditure tax-credits for audiovisual production (§ 1.1.3). Each example corresponds to a distinct mode of cultural-creative activity and reveals a different configuration of constraints. Taken together, they demonstrate how legal, administrative, and institutional filters function as structural barriers that systematically disadvantage cross-border cultural participation.

The normative stakes of this analysis are significant. Cultural-creative tax incentives are not merely fiscal tools but mechanisms through which states shape cultural participation, diversity, and economic development. Their legitimacy therefore depends on accessibility, predictability, and compatibility with cultural rights and international commitments. Where SFACs remain unaddressed, these regimes risk becoming internally inconsistent and externally incompatible with the very objectives they purport to advance. This research is therefore grounded in the conviction that a comprehensive, legally rigorous, and normatively oriented analysis of cultural-creative tax incentives is both necessary and timely. By illuminating the legal architecture of these regimes, diagnosing the structural sources of exclusion, and situating them within multi-level governance frameworks, the thesis seeks to contribute to the development of a more coherent, rights-based, and internationally compliant model of fiscal governance for transnational cultural and creative ecosystems.

1.1.1 Tax-in-Lieu for Visual Artists—SFACs

Tax-in-lieu schemes represent a significant interface between cultural-creative policy, tax law, and public heritage conservation. They enable artists—or, in their variants, collectors and businesses—to discharge tax obligations through the donation of artworks, thereby converting private creative expression into publicly accessible cultural capital. From an economic perspective, these schemes offer high returns: visual arts alone contributed over EUR 31.6 billion in value-added and 1.1 million jobs in the EU in 2020, with tax incentives outperforming direct subsidies by generating approximately €1.80 in economic activity for every €1 in relief[18]. In the UK, cultural-creative industries (CCIs) added £125 billion to gross value, supporting 1.8 million jobs and 700,000 self-employed workers[19]. In the U.S., nonprofit arts organizations alone generated over USD $151 billion in economic activity in 2022, supporting 2.6 million jobs and returning over USD $29 billion in tax revenues[20]. Globally, museums supported by such schemes drive nearly 40% of cultural tourism, support employment, and foster urban regeneration[21]. These figures justify not only the fiscal viability but also the strategic necessity of tax-in-lieu programs as policy tools that serve economic aims.

Beyond economics, these mechanisms reinforce normative goals such as cultural democratization, institutional recognition of artists, and preservation of national collections. In Mexico, the *Pago en Especie* scheme has secured over 7,000 artworks for the public, including works from renowned artists—such as the Diego Rivera's *Lucía y los Judas*, now housed in the Museo Luis Nishizawa[22]. In the UK, over 500 artists have contributed to national collections under the *Acceptance in Lieu* and *Cultural Gifts* schemes[23]. Such policies confer legitimacy on artists, elevate their public profiles, and embed their contributions into national heritage[24]. The collected works circulate through museums and public spaces, promoting cultural exchange, public education, and symbolic diplomacy[25]. Variants such as France's *Loi*

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[18] European Investment Fund (EIF), *Market Analysis of the Cultural and Creative Sectors in Europe* (2021) https://www.eif.org.

[19] UK Department for Culture, Media and Sport, Museums and Galleries (DCMS), *Economic Estimates: Employment in DCMS Sectors and Digital Sector, January 2022 to December 2022* (2023); Acme, *The Acme Artist Tenant Survey* (2023) https://www.acme.org.uk; Contemporary Visual Arts Network England (CVANE), *Reframed: A New Policy Agenda for the Visual Arts* (2024).

[20] Americans for the Arts, *Arts & Economic Prosperity 5 (AEP5)* https://www.aep5.americansforthearts.org and *Arts & Economic Prosperity 6 (AEP6)* https://www.aep6.americansforthearts.org.

[21] OECD, *Economic and Social Impact of Cultural and Creative Sectors: Note for Italy G20 Presidency Culture Working Group* (2021); World Tourism Organization (UNWTO), *Tourism and Culture Synergies* (2016) https://www.e-unwto.org.

[22] *Pago en Especie (Decreto – DOF 31/10/1994)* (Diario Oficial de la Federación Mexico), the programme originated in 1957 when a group of artists, led by David Alfaro Siqueiros, proposed allowing artists to pay taxes with their artwork. This initiative began when a friend of Siqueiros faced imprisonment for unpaid taxes. The group persuaded Hugo Margáin, then Director of Income Tax, to approve the proposal, leading to an innovative fiscal scheme that is now part of the Mexican tax code. See Leigh Thelmadatter, 'How Did the Mexican Government Become One of the World's Most Important Art Collectors?' The Atlantic (17 August 2019).

[23] Arts Council England (2023), *Cultural Gifts Scheme and Acceptance in Lieu Annual Report 2022–23* https://www.artscouncil.org.uk/cultural-gifts-scheme-and-acceptance-in-lieu-annual-report-202223.

[24] David Throsby, *The Economics of Cultural Policy* (CUP 2010) 42.

[25] DCMS-UK, *The Role of Arts in Improving Health and Wellbeing* (2020) https://www.gov.uk/government/publications/evidence-summary-for-policy-the-role-of-arts-in-improving-health-and-wellbeing.

sur le Mécénat and Canada's *Capital Cost Allowance (CCA)* regime likewise incentivize acquisition, preservation, and access to cultural goods (Chapter 2, § 2.2).

Yet despite their promise, tax-in-lieu programs and their variants also reveal deep SFACs—systemic legal, administrative, and institutional barriers that disproportionately affect internationally mobile cultural-creative (CC) operators. These constraints are particularly acute for artists who maintain dual residences, exhibit globally, or engage in cross-border collaborations—ironically, the very forms of mobility that define contemporary artistic practice. As Chapter 2 will detail, eligibility for tax-in-lieu schemes is often conditioned on narrow legal qualifiers such as national citizenship or formal artistic recognition by national authorities. These restrictions are not anomalies; they are embedded features of how such tax incentives are legally designed and administrativelly applied.

The stylised case of *Paul*, an Austrian digital artist residing in Mexico for over five years, exemplifies this dynamic. Despite his substantive contributions to Mexico's artistic landscape—through exhibitions, educational initiatives, and creative entrepreneurship—when seeking relief from accumulated tax debts under Mexico's Income Tax (ISR) and Value Added Tax (VAT) regimes, *Paul* was denied access to the *Pago en Especie* scheme on the basis of three interrelated constraints: his foreign nationality, lack of official recognition as a professional artist under Mexican law, and the exclusion of digital artworks from the scheme's eligibility framework. These barriers underscore how tax-in-lieu mechanisms often operate under a defensive regulatory posture, where access is narrowly defined to preserve fiscal sovereignty, cultural identity, and avoid perceived misuse of public funds by foreign claimants.

As examined in Chapter 2, this defensive posture conceals rather than solves underlying governance problems. It because, for non-nationals residing and contributing culturally in the host country, such nationality requirements impose a form of legal constrain: present but unrecognized. Also, the definitional criteria for professional status, risk to be not only inconsistently applied within the state and incoherently across jurisdictions, but also legally insular—ignoring the transnational nature of artistic production[26]. As will be shown throughout

[26] Merja Heikkinen and Sari Karttunen, *Defining Art and Artists as a Methodological Problem and a Political Issue* (Arts Council of Finland, Research and Information Unit 1995) 4; Andrea Baldin, Trine Bille, 'Who Is an Artist? Heterogeneity and Professionalism among Visual Artists' (2021) 45(4) Journal of Cultural Economics 527.

this research, these requirements may conflict with cultural rights, particularly rights to equality, good administration, and effective remedy. Even where artists meet formal criteria, administrative discretion—often exercised by curatorial panels, cultural agencies, or tax authorities—adds a further layer of exclusion. Determinations on the artistic or cultural value of submitted works are typically subjective, undocumented, and immune to appeal, exposing applicants to arbitrary gatekeeping (§2.2). These practices violate procedural fairness and erode trust in public institutions[27]. Moreover, despite international commitments, states rarely coordinate tax-in-lieu schemes with their external obligations. The UNESCO 2005 Convention, for example, affirms the principles of equitable access, non-discrimination, and preferential treatment for artists and products from developing countries. Yet, as shown in this research, such obligations are largely absent from the operational logic of most tax-in-lieu programs, which remain anchored in national definitions and unilateral discretion. The result is a fundamental incoherence: while tax-in-lieu schemes serve cultural cooperation rhetorically, they often functionally entrench exclusion.

Governments may justify the imposition of restrictive eligibility criteria in tax incentives on the grounds of protecting national cultural identity, preserving fiscal sovereignty, preventing misuse of public funds by foreign beneficiaries, or that fiscal support should flow only to projects that deliver verifiable economic or cultural returns to the supporting jurisdiction[28]. However, governments have developed a suite of ex ante and ex post control mechanisms. Ex ante control include cultural and economic qualification tests, and requirements related to nationality and residence as upfront eligibility filters; and post control relies on audits, compliance reviews, and performance-based reporting to verify the integrity and effectiveness of the incentives (Chapter 2). Besides, a relevant transnational governance infrastructure already exists to support coordination, transparency, and accountability. The OECD's Multilateral Convention on Mutual Administrative Assistance in Tax Matters provides a robust

[27] John Baer, David H Cropley, and Roni Reiter-Palmon, 'Furious Activity vs Understanding: How Much Expertise Is Needed to Evaluate Creative Work?' (2013) Psychology Faculty Publications 32; Douglas L Lindholm and Fredrick J Nicely in 'The Best and Worst of State Tax Administration' (Council on State Taxation (COST), 2019); Scott Schumacher, 'Taxes, Administrative Law, and Agency Expertise: Questioning the Orthodoxy' (2023) 76 Tax Law 341; Ema Sullivan-Bissett, Michael Rush, 'Unbiased Awarding of Art Prizes? It's Hard to Judge' (2023) 63(2) British Journal of Aesthetics 157.

[28] Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, vol 45 (part III, chapters 5 and 6, Wolters Kluwer Law & Business 2014) 301; International Monetary Fund, *Current Challenges in Revenue Mobilization: Improving Tax Compliance* (IMF 2015); Sebastian Beer, Ruud de Mooij and Li Liu, 'International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots' (2018) IMF Working Paper WP/18/168.

legal basis for information exchange and administrative cooperation among tax authorities (Chapter 3). Within the EU, Article 107 TFEU and associated State aid rules require that cultural aid be non-discriminatory, proportionate, and subject to transparency obligations (Chapter 4). The UNESCO 2005 Convention, through its quadrennial reporting obligations under Article 9, offers a multilateral platform for states to monitor their fiscal policies in light of their cultural cooperation commitments (Chapter 5). Together, these instruments affirm that the tools for principled and effective oversight already exist—domestically and internationally—thereby reducing the need for excessively restrictive or opaque fiscal governance practices that risk inadvertently excluding legitimate cross-border operators.

As Chapters 2–5 will demonstrate, SFACs operate at the intersection of narrow and incosistent legal definitions, opaque administrative procedures, and fragmented institutional mandates. Overcoming these constraints lies not in abandoning national cultural-fiscal policy autnonomy, but moving from defensive exclusion to accountable cooperation—anchored in the very legal instruments states have already accepted. Properly operationalized, bilateral treaties, EU law, and UNESCO norms could facilitate recognition of CC operators status across borders, standardize evaluation criteria, and introduce accountability measures to reduce arbitrariness and bias. Then can tax-in-lieu schemes and its variants fulfil their promise as tools for provide financial relief (by alleviating tax burdens on artists and allowing deductions for those who acquire artists' artworks), enrich public collections (by acquiring and preserving public collections), ensure cultural public access (by democratizing access), and support a diversity of artistic expressions (by valorising artistic labour and promoting cultural exchange).

1.1.2 Tax-Deductions for Philanthropy—SFACs

Tax-deduction schemes for cultural philanthropy have been widely adopted across legal systems as mechanisms to stimulate private contributions to the public cultural sphere. These schemes reflect a blend of philosophical, cultural, and economic rationales that have gained traction across jurisdictions—as highlight by cultural-fiscl scholars[29]. Philosophically, these

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[29] Paul Balter, 'Introduction: International Tax Issues Relating to Non-Profit Organizations and Their Supporters' in Paul Balter, *The Tax Treatment of NGOs* (Kluwer Law International 2004) 1; David E Pozen, 'Remapping the Charitable Deduction' (2006) 39 Connecticut Law Review 580; Ineke A Koele, *International Taxation of Philanthropy* (IBFD 2007); Sigrid Hemels, 'International Tax Treaties and Cultural Heritage' in *Taxation, Culture and Heritage: Opportunities for Developing Tax Systems and Tax Treaties* (Erasmus University Rotterdam School of Law 2018–2020) ch 7, 107.

mechanisms enshrine cultural philanthropy as a legitimate expression of democratic citizenship and legacy-building, recognizing the donor not merely as a fiscal subject but as a cultural agent[30]. Culturally, they safeguard collective memory, enrich public collections, and reinforce cultural pluralism through inclusive curatorial practices[31]. Prominent acquisitions made possible by these schemes attest to their enduring public value. In the UK, for example, the *Cultural Gifts Scheme* and the *Acceptance in Lieu*—which offer tax relief on income, capital gains, or inheritance tax liabilities in exchange for donations of culturally significant objects. According to the last report, acquisitions include Frederic Leighton's *Colour Study for Flaming June* sketch (accepted from Sir David Verey CBE and allocated to Leighton House Museum); Lanto Synge's unique textile collection; Paul Gauguin's *Avant et Après*, (acquired by London's Courtauld Gallery settling a £6.5 million inheritance tax bill); Sebastian Bach's *Auf Christi Himmelfahrt allein* (the complete autograph manuscript score for a cantata composed for Ascension Day); Bridget Riley's *Banner I* (a striking example of optical illusion through colour manipulation accepted in lieu of Inheritance Tax by HMRC and allocated to the Fitzwilliam Museum); and LS Lowry's *River Scene, Sunderland* (one of his most significant industrial landscape works accepted in lieu of Inheritance Tax by HMRC and allocated to Sunderland Museum and Winter Gardens)[32]. Each work has enhanced the public cultural domain while avoiding the dispersal of heritage assets to private markets.

Economically, such schemes do not come at a cost of the state because they do not involve direct public expenditure; instead, they reduce taxable income or liability only when private individuals or entities voluntarily assume the financial burden of supporting cultural institutions[33]. In effect, they mobilise private capital for public cultural purposes, allowing donors to redirect portions of their wealth toward socially beneficial activities that generate positive externalities such as education, social inclusion, tourism, and economic revitalisation[34]. Quantitative data corroborate this policy rationale. Between 2023 and 2024,

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[30] Blake Bromley, 'Charity, Philanthropy and Stewardship: A Philosophical Perspective on Tax Reform' (Paper presented to the Canadian Council of Christian Charities, Calgary, 6 October 1987).

[31] Bill Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights* (University of California Press 2008).

[32] UK Department for Digital, Culture, Media & Sport (DCMS) *Annual Report* (2023); Arts Council Annual Report 2023/24, https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/acceptance-lieu/culural-gifts-scheme-and-accepatance-lieu-annual-report-202324.

[33] Paul Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 Review of Economics and Statistics 387; Rob Reich, 'Toward a Political Theory of Philanthropy' in Patricia Illingworth, Thomas Pogge, and Leif Wenar (eds), *Giving Well: The Ethics of Philanthropy* (OUP 2011).

[34] SE Weil, 'Tax Policy and Private Giving' in S Benedict (ed), *Public Money and the Muse: Essays on Government Funding for the Arts* (Norton 1991); Adam Pickering, Elaine Quick, and Toni Ann Kruse, *Rules to*

the UK's two main schemes facilitated over £45 million in cultural transfers[35]. Australia's *Cultural Gifts Program* has delivered over AUD $900 million in donations[36]. Germany (via the *Inheritance and Gift Tax Act*) and the Netherlands (under the *Inheritance and Gifts Tax Act* and the *Donations and Public Benefit Organisations Decree*) report annual cultural philanthropy figures exceeding €1.2 billion and €220 million, respectively[37]. In the U.S., the *Federal Historic Preservation Tax Incentives Program* has generated over USD $130 billion in private investment to preserve more than 49,000 historic sites[38]. These schemes consistently deliver high fiscal multipliers, stimulate employment, enhance cultural tourism, and catalyze long-term cultural investment.

However, despite these cultural and economic benefits, such schemes remain jurisdictionally bounded by SFACs undermining the potential for transnational cultural giving. These constraints are particularly consequential in an era where both wealth and cultural heritage are increasingly transnational in orientation[39]. The stylised case of *Elizabeth*, a Dutch national and long-time collector residing in the UK, illustrates this paradigm. With a distinguished collection of 18th-century Dutch, German, and Australian artworks, *Elizabeth* sought to donate key works to public institutions in those countries, believing they belonged in their respective historical and cultural contexts. However, because she was classified as a UK tax resident, only donations to UK-based institutions were eligible for tax relief under domestic schemes. Equivalent donations to museums abroad—regardless of their public benefit, curatorial relevance, or institutional quality—did not trigger tax-deductibility under either UK law or the laws of the intended recipient states, which also applied territorial restrictions to deductible gift recipients (DGRs).

This scenario reflects a textbook case of SFACs. As examined in Chapter 2, while framed as mechanisms of fiscal accountability, deduction eligibility rules are often designed with implicit

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Give By: A Global Philanthropy Legal Environment Index (Charities Aid Foundation, McDermott Will & Emery, Nexus 2014); Roger Colinvaux and Dale Harvey, 'The Charitable Contributions Deduction: Federal Tax Rules' (2015) 68(2) Tax Lawyer 332; Elizabeth T Boris and Eugene Steuerle (eds), *Nonprofits and Government: Collaboration and Conflict* (3rd edn, Rowman & Littlefield 2016).

[35] DCMS-UK *Annual Report 2023* (n 15); Arts Council England *Annual Report 2023/24* (n 15).

[36] Australian Taxation Office, *Tax Deductible Gifts and Contributions: Cultural Gifts Program* (2023).

[37] German Federal Ministry of Finance, *Gesetz zur Förderung der Kunst* (Art Promotion Act, 2023); Netherlands Ministry of Education, Culture and Science, *Geefwet* (2023).

[38] U.S., National Trust for Historic Preservation, 'State Historic Tax Credits: Maximizing Preservation, Community Revitalization, and Economic Impact' (2018).

[39] Renate Buijze, *Tackling the International Tax Barriers to Cross-Border Charitable Giving*, IBFD Doctoral Series 2020.

territorial assumptions, producing structural discrimination against qualified foreign recipients. In *Elizabeth*'s case, legal and administrative filters not only distorted her philanthropic agency but imposed artificial barriers to cultural enrichment, effectively incentivizing domestic giving even when transnational philanthropy would have yielded superior outcomes. Across most legal systems, access to tax-deduction schemes is contingent on formal registration of the recipient entity as a DGR (usually as a public benefit organization) under domestic law[40]. This produces a structurally exclusionary logic: unless a foreign institution obtains equivalent national status—a process rarely available and often administratively prohibitive—donations to it do not qualify for tax-deduction. There is a risk of legal asymmetry as there is no binding obligations for mutual recognition of public benefit organization (PBO) status across jurisdictions. Moreover, the administration of tax-deduction schemes adds a further layer of opacity. Definitions of "public benefit," standards of valuation, and evidentiary requirements for cultural significance differ markedly within and across jurisdictions. In *Elizabeth*'s case, the artworks' value and significance were beyond doubt; yet, procedural hurdles and the absence of mutual recognition systems among tax administrations contributes to a fragmented governance environment that penalizes international donors and cultural institutions alike. Furthermore, most tax-deduction regimes operate in isolation from the state's international legal obligations—particularly those arising from bilateral treaties, EU law, and the UNESCO 2005 Convention. Article 16 of the Convention calls for preferential treatment for cultural goods and services from developing countries, while Article 19 requires states to report on legal and policy measures adopted to enhance international cooperation (Chapter 5). As shown throughout this research, personal and territorial DGR restrictions not only fail to implement international commitments—they often contravene them.

Restrictive eligibility criteria and interpretive discretion may reflect long-standing fiscal policy traditions aimed at channelling private wealth into culturally beneficial activities, while avoiding abuse or distortion of the tax system[41]. States have developed layered systems of ex ante approval, tax-certification registers, and ex post audit trails, ensuring that only eligible

[40] Hemels (n 29) 116; Mike Spector, 'A Portrait of Art as a Tax Deduction' Wall Street Journal (New York, 30 July 2008); Charities Aid Foundation (CAF), *Donation States: An International Comparison of the Tax Treatment of Donations* (2016).

[41] J van Hoorn, 'The Possibilities and Disadvantages of Extending National Tax Reduction Measures, If Any, to Foreign Scientific, Educational or Charitable Institutions' (Amsterdam 1969) General Report in *IFA Cahiers* vol 54b, para 61; International Monetary Fund (IMF), *Tax Policy for Developing Countries* by Vito Tanzi and Howell Zee (IMF Working Paper WP/01/136, 2001); Inter-American Development Bank, *Tax Incentives, International Commitments, and Tax Sufficiency: Another Impossible Trilogy?* by Alberto Daniel Barreix and Fernando Velayos (IDB, Discussion Paper nº IDB-DP-861, April 2021); Paul Balter (n 29); Hemels (n 29).

donors and donees benefit from public subsidy through forgone tax revenue. Besides, governments increasingly operate within a shared normative environment shaped by international best practices and legal obligations. The bilateral approaches on tax transparency and accountability (Chapter 3), the European Parliament's reports on cultural philanthropy and private investment in the arts[42] (Chapter 4), and the UNESCO 2005 Convention's emphasis on equitable access to cultural markets (Chapter 5) collectively recognize the role of tax policy in achieving cultural pluralism and financial integrity. Additionally, recent work by the IMF, OECD, UN, and World Bank has documented the policy trade-offs and administrative capabilities required for the effective design and implementation of tax incentives[43]. These frameworks affirm that the fiscal tools needed to balance openness with accountability are already available to national administrations. By leveraging these existing instruments, states can uphold their cultural mandates without undermining international commitments to transparency, non-discrimination, and equitable access.

The problem is not the principle of fiscal discretion but the lack of accountable cooperation—a claim anchored in the legal instruments states have already accepted. Bilateral cultural treaties provide entry points for resolving these conflicts through reciprocity clauses and institutional dialogue (Chapter 3); under EU law, unjustified restrictions on cross-border donations may be struck down as incompatible with market freedoms (Chapter 4). In each case, the tools for reform already exist—but are underutilized. By activating these frameworks can tax-deduction schemes fulfill their transformative promise—as instruments for cultural enrichment (by democratizing cultural access and safeguarding public collections), fiscal justice (by aligning tax relief with public benefit rather than personal or territorial bias), and transnational solidarity (by enabling cross-border cultural engagement in an interconnected world).

1.1.3 Tax-Credits on Expenditure for Audiovisual Production—SFACs

The policy rationale for tax-credits on expenditure for audiovisual production is firmly grounded in both economic theory and cultural policy imperatives. Economically, audiovisual production entails elevated capital risks, extended and uncertain return cycles, and considerable

[42] European Parliament, *Report on Encouraging Private Investment in the Cultural Sector* (PE 460.057, 2011); see also the European Court of Auditors, *Special Report 08/2020: EU Cultural Investments*.

[43] International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), United Nations (UN) and World Bank, *Options for Low-Income Countries' Effective and Efficient Use of Tax Incentives for Investment* (Report to the G-20 Development Working Group, 2015).

positive externalities—such as job creation, tourism stimulation, and urban revitalization—that justify proactive public intervention[44]. Empirical data affirm the economic effectiveness of these schemes. In 2022, France's cinema production sector employed around 60,000 people; the UK and Italy similarly have over 80,000-100,000 when related chains are included[45]. Ireland's audiovisual sector contributes more than €1 billion to GDP and aims to expand its workforce to 24,000 under the Audiovisual Action Plan[46]. In the UK, the Creative Industry Tax Reliefs (CITR) have generated £12.6 billion since inception, with Film Tax Relief (FTR) accounting for nearly half[47]. A government-commissioned study found that nearly 38% of UK productions would not have occurred or would have been significantly reduced without the reliefs[48]. In Canada, the PSTC and CPTC programs delivered over $23 billion in GDP impact for 2022–23, supporting 336,000 jobs[49]. Australia's ASPI yielded a return on investment of A$4.91 per A$1 invested, with projections of over $4.3 billion in production expenditure and 108,000 jobs by 2027[50]. In the U.S., state-level tax-credits—such as those in Connecticut[51] and New York[52]—have returned between $4.60 and $9.00 for every dollar invested, with the

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[44] UK, Committees Parliament, Oliver & Ohlbaum, 'A New Age for UK TV Content and a New Role for the BBC' (August 2014) https://committees.parliament.uk; Pierre Debande and Florence Chatrit, 'The European Audiovisual Industry: An Overview' (EIB Sector Papers, 2001) 23 https://www.eib.org; Tyler Cowen and Eric Crampton, *Market Failure or Success: The New Debate* (Edward Elgar 2002); Ernesto Dal Bó, 'Regulation and Capture: A Review' in John R McKenzie (ed), *Handbook of Government Regulation* (OUP 2012); European Audiovisual Observatory, 'Circulation of European Films on VOD and in Cinemas' (2021); European Audiovisual Observatory, 'Territoriality and Release Windows in the European Audiovisual Sector' (2023) https://www.obs.coe.int.

[45] France: 'Rapport de branche 2022-2023 – Production cinématographique' (CNC report, see Scribd); UK: 'Film & video production workforce' (ONS / BFI, Annual Population Survey), more broadly, UK government press releases in 2023 indicate that the UK film sector "employs more than 195,000 people" (when including wider screen industries / indirect roles); Italy: 'Audiovisuel e Cinema: Impatto su occupazione & crescita' (ANICA 2022).

[46] Ireland, *Economic Assessment of the Audiovisual Industry in Ireland* (report by Olsberg SPI with Nordicity for the Departments of Culture, Heritage and Gaeltacht and Business, Enterprise and Innovation, 2021).

[47] British Film Institute, *BFI Statistical Yearbook 2023* (2023) https://www.bfi.org.uk.

[48] HM Revenue and Customs (HMRC), 'Business Rates Relief for Film Studios Scheme: Report Commissioned from the Subsidy Advice Unit (SAU)' (UK Government 2024); HM Revenue and Customs (HMRC), *Creative Industry Tax Reliefs Evaluation* (Research Report 684, Ipsos, London Economics and Olsberg SPI, November 2022) evaluates four audiovisual tax incentives: Film Tax Relief (FTR), High-end Television (HETV) Tax Relief, Animation Tax Relief (ATR), and Children's Television Tax Relief (CTR).

[49] Canadian Media Producers Association (CMPA), Department of Canadian Heritage, Canada Media Fund, Telefilm Canada, Association québécoise de la production médiatique (AQPM) and Nordicity, *Profile 2023* https://cmpa.ca/research-reports/profile-2023.

[50] Australia New Zealand Screen Association (ANZSA), *Economic Impact Study of the Australian Film and Television Production Incentive* (Olsberg SPI, 2022) https://anzsa.film/research; Australian Government, Department of Infrastructure, Transport, Regional Development and Communications, *Economic Assessment of the Location Incentive on Australia's Screen Sector* (Bureau of Communications, Arts and Regional Research, 2022) https://www.infrastructure.gov.au.

[51] State of Connecticut, *Economic Impact of Connecticut's Digital Media & Motion Picture Tax Credit, Digital Animation Production Company Tax Credit and the Infrastructure Tax Credit* (Olsberg SPI, 2022) https://portal.ct.gov.

[52] State of New York, *Economic Impact of the Film Industry in New York State, 2019 & 2020* (Camoin 310) https://esd.ny.gov.

national industry supporting over 2.3 million jobs and $229 billion in wages. These outcomes validate tax-credits as legitimate tools of industrial policy and place-based development.

The cultural rationale is equally robust. Audiovisual media are indispensable vehicles of national identity, linguistic preservation, pluralistic storytelling, and democratic expression[53]. Many jurisdictions embed content-based eligibility tests to ensure alignment between publicly supported works and cultural policy objectives. The European Commission has explicitly linked such incentives to its broader agenda on cultural diversity and international soft power[54]. Studies commissioned by the British Film Institute (BFI) demonstrate the social value of cinema infrastructure in promoting civic engagement, lifelong learning, and local economic spillovers[55].

Yet, despite these justifications, the actual design and implementation of audiovisual tax-credit regimes frequently fail to accommodate the transnational realities of contemporary cultural production. The case of *The Queen* (2006), directed by Stephen Frears and written by Peter Morgan, reveals this disjunction. Though the film is unmistakably British in narrative content, its production structure spanned multiple jurisdictions, involving Granada Productions (UK), Pathé Pictures (France), and BIM Distribuzione (Italy), with filming in Paris and key creative contributions from a Brazilian cinematographer and a French composer[56]. Despite its strong national identity, the film's realization was enabled by a complex web of transnational partnerships marked by multinational financing structures, creative collaboration across borders, and dispersed production geographies—demonstrating that contemporary audiovisual works rarely adhere to singular national boundaries[57]. However, by conditioning access to fiscal support on criteria that privilege national incorporation, narrow and conflicting definitions of qualified expenditure, and jurisdictional cultural content, tax-credit schemes risk distort the production ecosystem and marginalize multi-jurisdictional collaborations.

[53] Europa Cinemas, *The Social, Environmental and Community Impact of European Cinemas* (Europa Cinemas, 2023) https://www.europa-cinemas.org.
[54] European Commission, 'Culture and Creativity' https://www.culture.ec.europa.eu.
[55] Vertigo, *Admission Data Report 2018–19* (Cinedata, Federation of Cinemas in Belgium, 2019) https://www.vertigoweb.be.
[56] Elizabeth Ezra and Terry Rowden, 'Introduction: What is Transnational Cinema?' in Elizabeth Ezra and Terry Rowden (eds), *Transnational Cinema: The Film Reader* (Routledge 2006) 13.
[57] Gillian Doyle, 'From National Monopoly to International Player: The Globalisation of UK Film Policy' (2020) 34 Journal of Media and Communication Quarterly 45, 52; Elizabeth Ezra and Terry Rowden (n 57); Will Higbee and Song Hwee Lim, 'Concepts of Transnational Cinema: Towards a Critical Transnationalism in Film Studies' (2010) 1(1) *Transnational Cinemas* 7; Will Higbee, *Post-Beur Cinema: North African Migration and Maghrebi-French Filmmaking in France* (Edinburgh University Press 2012).

As developed further in Chapter 2, tax-credit access is not merely a function of cultural merit and economic impact, but of conformity with sequential personal and territorial eligibility criteria that are often internally inconsistent and externally fragmented. The minimum spend ratios based on differing use, consumption, or supply conditions exemplify legal constraints—particularly where divergent eligibility rules within and across jurisdictions reflect incoherent normative baselines, rendering compliance uneven and outcomes unpredictable. The resulting legal uncertainty disproportionately affects smaller and independent producers who lack the institutional capacity or legal support to navigate such fragmented regimes, thereby reinforcing asymmetries of access and exacerbating structural exclusion in the international cultural economy. Besides, the interpretive discretion afforded to local tax authorities and implementing agencies give rise to administrative constraints. Ambiguities in core definitions—such as "qualifying expenditure," "cultural value," or "territorial production activity"—enable inconsistent or opaque enforcement practices across cases and jurisdictions. This procedural latitude results in significant legal uncertainty, as compliance becomes subject not only to formal rules but also to the administrative interpretations and informal practices of local regulators. These dynamics undermine fundamental principles of transparency, predictability, and equality before the law, which are critical to securing cross-border cultural participation. As this thesis argues, the problem is not limited to occasional divergence, but rather reflects endemic weaknesses in the procedural architecture of fiscal governance, where regulatory opacity and discretion function as structural impediments to legal certainty and procedural fairness. Moreover, the fragmentation of cultural-creative fiscal governance across legal orders give rise to institutional constraints. While states retain the sovereign prerogative to design audiovisual tax-credit schemes in accordance with national priorities, this discretion is increasingly circumscribed by binding international obligations. Within the EU, domestic conditions related to nationality, legal presence or local expenditure must comply with the rules governing the free movement under Articles 49–63 TFEU and the General Block Exemption Regulation (Article 54 GBER). The UNESCO 2005 Convention imposes commitments—particularly under Articles 7, 12, 14, and 16—that aim to promote equitable access to cultural markets, foster international cooperation, and enable preferential treatment of developing countries. However, as explored throughout this research, the disjointed application of tax-credit regimes—both within and across jurisdictions—frequently fails to integrate these legal instruments in a coherent or enforceable manner. This institutional incoherence not only weakens the international legitimacy of domestic fiscal schemes, but also deprives transnational cultural-creative operators of reliable mechanisms for conflict resolution, rights enforcement, and coordinated accountability.

The persistence of SFACs in this domain is further reinforced by a defensive regulatory posture, where governments apply a restrictive eligibility criteria and administrative opacity in the name of preserving national cultural identity, safeguarding fiscal resources, and preventing the misuse of public funds by foreign beneficiaries[58]. Critically, the concern for misuse presupposes the existence of robust oversight mechanisms—ex ante eligibility controls, ex post auditing, reporting, and evaluation. International legal frameworks already provide a nascent infrastructure for such governance. The OECD's Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Chapter 3)[59], Article 107 TFEU and EU State aid rules (Chapter 4)[60], and the UNESCO Convention's quadrennial reporting under Article 9 (Chapter 5)[61] collectively offer transnational mechanisms for coordination, transparency, and accountability.

While tax-credit for audiovisual production expenditure are undergirded by compelling cultural and economic rationales, their current territorialized design and discretionary implementation produce deep structural dysfunctions. SFACs arise at the intersection of discriminatory and inconsistent legal criteria, opaque administrative discretion, and fragmented institutional mandates. By embedding tax-credit governance within the international legal frameworks to which states are already bound, it becomes possible to reimagine fiscal instruments as enablers of transnational cooperation, not barriers to it. Then can audiovisual tax-credits fully realize their potential as tools of cultural enrichment (by amplifying diverse voices and public engagement), fiscal justice (by democratizing access to incentives), and cultural cooperation (by enabling equitable participation in audiovisual production).

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[58] Mt Auburn Associates, *Utilizing Tax Incentives to Cultivate Cultural Industries and Spur Arts-Related Development* (Report prepared for the Louisiana Office of the Lt Governor and the Department of Culture, Recreation and Tourism, 2007) https://www.louisiana.gov; J Mark Davidson Schuster, 'Issues in Supporting the Arts Through Tax Incentives' (1986) National Arts Administration and Policy Publications Database (NAAPPD) https://www.naappd.org; Alan L Feld, Michael O'Hare and J Mark Davidson Schuster, *Patrons Despite Themselves: Taxpayers and Arts Policy* (Twentieth Century Fund Report, New York University Press 1983).
[59] *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (adopted 25 January 1988, entered into force 1 April 1995) ETS No 127, as amended by Protocol ETS No 208.
[60] European Commission, 'Cinema and TV Production' (State aid guidelines, 2013/C 332/01) [2013] OJ C332/1.
[61] UNESCO, 'Operational Guidelines on Information Sharing and Transparency' (2009) https://unesdoc.unesco.org/ark:/48223/pf0000189941.

1.2 Research Questions

The central objective of this research is to interrogate and reconfigure the legal, administrative, and institutional structures that generate exclusionary outcomes in the governance of cultural-creative tax incentives. The inquiry proceeds from the premise that SFACs are not isolated anomalies but manifestations of systemic fragmentation, inconsistent classificatory practices, and misaligned legal regimes across national, bilateral, EU, and multilateral frameworks. The questions below therefore move beyond diagnosis toward the formulation of legally grounded, administratively coherent, and institutionally feasible reforms capable of mitigating these constraints within a multi-level governance architecture.

Main Research Question: **How can Structural Fiscal Access Constraints (SFACs) in the governance of cultural-creative tax incentives be reduced through legally grounded, administratively coherent, and institutionally feasible reforms across national, bilateral, supranational EU, and multilateral UNESCO legal frameworks?**
This question captures the dual ambition of the thesis: to expose structural dysfunction at the intersection of cultural rights and fiscal governance, and to develop a coordinated legal framework capable of mitigating it.

Sub-Question 1–Diagnostic and Conceptual Foundations: **What are Structural Fiscal Access Constraints (SFACs) in cultural-creative tax incentives in cross-border situations and what mechanisms could be structured to reduce them at national level?**
This question establishes the foundational concepts, articulate the five analytical variables, identify national-level SFACs across the three prototypical tax incentives, and propose initial reforms (Chapters 1–2).

Sub-Question 2–Bilateral Legal Frameworks: **To what extent do bilateral instruments—tax treaties, cultural agreements, and co-production treaties—mitigate or perpetuate SFACs in cultural-creative tax incentives in cross-border situations, and what mechanisms could enhance their normative coherence and enforceability at bilateral level?**
This question examines the bilateral layer through the lens of the five analytical variables, identifying both structural gaps and targeted reform pathways (Chapter 3).

Sub-Question 3–EU Law and Supranational Governance: **To what extent does the EU legal framework address SFACs in cultural-creative tax incentives in cross-border situations, and what mechanisms could enhance their normative coherence and enforceability at EU level?**
This question analyses internal market rules, State aid, and Charter protections, evaluating the EU's capacity to remedy structural exclusion and proposing reforms aligned with the five analytical variables (Chapter 4).

Sub-Question 4–UNESCO Multilateral Framework and Alignment: **What role can the UNESCO 2005 Convention play in mitigating SFACs in cultural-creative tax incentives in cross-border situations, and what mechanisms could enhance their normative and institutional limitations within EU and national systems?**
This question interrogates the Convention's remedial potential, structural fragilities, and interaction with other legal regimes, offering reforms to strengthen UNESCO–EU alignment (Chapter 5).

Sub-Question 5–Institutional Coordination: **How can a structured coordination model be developed to reduce SFACs in cultural-creative tax incentives in cross-border situations across multiple levels of governance without displacing state sovereignty or undermining the principles of cultural rights and international cultural cooperation?**
This question advances the constructive component of the thesis by proposing an integrated governance framework that reconciles sovereign fiscal discretion with effective cultural-rights protection and multi-level coordination (Chapter 6).

Each sub-question isolates a specific governance layer, cumulatively constructing the argument that SFACs require systemic, multi-level solutions. The first four questions are diagnostic and reform-oriented within their respective layers; the final question integrates these findings into a coordinated model for future governance.

1.3 Scope and Aim of the Research

This thesis investigates the legal, administrative, and institutional constraints that obstruct cross-border access to cultural-creative tax incentives, analysing how national legislation, bilateral treaties, EU law, and the UNESCO 2005 Convention fail to operate coherently in transnational contexts. Rather than invoking notions of 'efficient' or 'global' allocation—which would presuppose a welfare-economics framework not adopted here—the analysis draws on legal pluralism, multi-level governance, transnational administrative law, public accountability, and cultural-rights scholarships to conceptualise SFACs and to propose actionable solutions for reducing the constraints. Theories on legal pluralism and multi-level governance[62] explain why norms must be evaluated not in isolation but in their interaction across regimes. Transnational administrative law and public accountability distinguish between formal legal commitments and their real-world operationalisation, grounding the thesis's functional inquiry[63]. Fiscal governance theory emphasises that fiscal rules become meaningful through institutional and administrative practice, particularly in cross-border contexts[64]. Cultural-policy and cultural-rights scholarship, demonstrating how cultural policy instruments acquire normative weight when institutions translate them into enforceable practice[65].

Central to this analysis is the "Normative and Functional Relation", which captures the dual dimension through which legal norms operate in multi-relational systems—particularly in the case of cultural-creative tax incentives with bilateral, EU, or international implications. The normative dimension refers to the binding character of legal instruments and their underlying principles: they prescribe conduct, allocate competences, and confer entitlements and duties (e.g., non-discrimination, fiscal equality, cultural cooperation, fundamental freedoms). This dimension includes commitments embedded in bilateral treaties, the EU Treaties and the Charter of Fundamental Rights, and the UNESCO 2005 Convention, all of which interact within a pluralist legal environment[66]. The functional dimension examines how those normative commitments are operationalised—or obstructed—in practice through administrative procedures, judicial interpretation, certification processes, or discretionary enforcement, reflecting the insights of transnational administrative law[67].

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[62] Braithwaite and Drahos (n 1); Zürn (n 3); Ostrom (n 8); Krisch (n 9); Abbott and Snidal (n 10); Walker (n 11).
[63] Paul Craig, *EU Administrative Law* (OUP 2020); Papadopoulos (n 12); Majone Eliantonio, 'Judicial Review in an Integrated Administration: The Case of Composite Procedures' (2014) 7(2) Review of European Administrative Law 65; Cassese (n 2).
[64] Avi-Yonah (n 12); Qureshi (n 4); Christian (n 5); Brian J Arnold, 'An Introduction to Tax Treaties' in United Nations, Department of Economic and Social Affairs, *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2nd edn, United Nations 2013) ch 1.
[65] Peter-Tobias Stoll, Sven MiBling, and Johannes Jurging, 'Preamble' in Sabine von Schorlemer and Peter-Tobias Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 23; Kälin and Künzli (n 14); Stamatopoulou (n 15); Asbjorn (n 16); Meyer-Bisch (n 17).
[66] Braithwaite & Drahos (n 1); Teubner (n 6); Fischer-Lescano (n 7); Ostrom (n 8); Krisch (n 9).
[67] Cassese (n 2); Lindseth (n 12); Eliantonio (n 64).

This distinction is critical to identifying SFACs, which arise where the normative promise of access is not matched by functional implementation. Such misalignment produces two recurrent forms of friction: conflicts of provision, where specific provisions lack coherence or contradict each other; and conflicts of non-compliance, where obligations are formally accepted but systematically frustrated in practice. The “Normative and Functional Relation” therefore provides a core analytical lens through which the thesis evaluates cultural-creative tax incentives as transnational legal objects whose accessibility depends not only on textual obligations but on the institutional behaviour and procedural design of the systems applying them, consistent with the insights of public-law and fiscal-governance theory[68].

The geographic and legal scope of the research is deliberately multi-layered. It centres on national, bilateral, EU, and UNESCO levels. Within this framework, the research focuses on three internationally relevant categories of fiscal instruments: tax-in-lieu schemes for visual artists; tax-deductions for cross-border cultural philanthropy; and tax-credits on expenditure for audiovisual productions. The objective is to develop a structural understanding of how SFACs emerge within and across these instruments and to explore pathways for their mitigation.

Although scholarship on CCIs and taxation is expanding, existing work has largely focused on economic efficiency[69], comparative design models[70], or the alignment of tax incentives with cultural policy priorities[71]. Much of this literature, however, stops short of interrogating the architecture of fiscal access or analysing the transnational legal implications of these incentives. Where legal scholarship does engage with cultural taxation, it often treats measures in isolation—examining statutory design or policy intent—while overlooking the administrative and institutional constraints that determine how access is constructed, allocated, and denied in practice. Critically, no study has yet systematised these access barriers as identifiable legal phenomena within cultural-fiscal governance. Prior approaches tend to be sectoral, jurisdiction-bound, or policy-driven. This thesis advances a new perspective by

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[68] Gribnau (n 12); Qureshi (n 4).

[69] Hannah Cole, ‘How the New Tax Cuts and Jobs Act Impact the Art World’ Hyperallergic (2018).

[70] OECD, *Taxation and Philanthropy*, OECD Tax Policy Studies No 27 (OECD Publishing 2020); Adrian McDonald, ‘Down the Rabbit Hole: The Madness of State Film Incentives as a “Solution” to Runaway Production’ (2011) 14(1) University of Pennsylvania Journal of Business Law 85; Hemels (n 29).

[71] Werner W Pommerehne and Bruno S Frey, ‘Public Promotion of the Arts: A Survey of Means’ (1990) 14(2) Journal of Cultural Economics 73; Patrick Button, ‘Can Tax Incentives Create a Local Film Industry? Evidence from Louisiana and New Mexico’ (2021) Journal of Urban Affairs.

conceptualising SFACs as a multidimensional legal, administrative, and institutional problem—one shaped not only by domestic fiscal discretion but by the functional realities of transnational cultural-creative ecosystems and the fragmented governance structures through which they must operate.

The intersection of tax law and development is well recognised, yet few studies address the systemic legal barriers—such as restrictive eligibility criteria, legal uncertainty, or conflicting regimes—that impede cross-border cultural-fiscal access[72]. While the literature on bilateral tax treaties is substantial, the implications of treaty-based benefits for CCIs remain largely unexplored[73]. Within the EU, scholarly analysis is extensive on internal market freedoms, fundamental rights, and State aid control[74], but their influence on the design, eligibility, and accessibility of cultural-creative tax incentives has received limited theoretical attention[75]. A persistent gap concerns the EU's dual mandate: pursuing market integration while honouring international cultural commitments. The resulting constraints on Member States' discretion—and the tensions this creates for crafting tax measures that satisfy both fiscal and cultural objectives—remain insufficiently theorised. Scholarship on the UNESCO 2005 Convention has significantly advanced understanding of cultural rights, normative pluralism, and systemic fragmentation, yet its fiscal dimension—particularly the potential of preferential treatment obligations for developing countries—remains marginal[76]. The Convention's capacity to

[72] Yariv Brauner, 'The Future of Tax Incentives for Developing Countries', in Yariv Brauner and Miranda Stewart (eds), *Tax Law and Development* (Edward Elgar 2013); Edoardo Traversa and Barbara Vintras, 'The Territoriality of Tax Incentives within the Single Market', in Isabelle Richelle, Wolfgang Schön and Edoardo Traversa (eds), *Allocating Taxing Powers within the European Union* (Springer 2013).
[73] Michael Lang, Pasquale Pistone, Josef Schuch and Claus Staringer, *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (CUP 2012); Brian J Arnold, 'An Introduction to Tax Treaties' in United Nations, Department of Economic and Social Affairs, *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2nd edn, United Nations 2013) ch 1; Yanling Yang and William Higbee, 'Sino-International Film Collaboration and Co-Production: Policy and Practice' (2024) 15(2) Transnational Screens 121; Agni Kalfagianni, 'Philanthropic Foundations as Agents of Justice in Global Sustainability Governance' (2022) 2(3) *Global Studies Quarterly* ksac033.
[74] Raymond Luja, 'Revisiting the Balance Between Aid, Selectivity, and Selective Aid in Respect of Taxes' (2010) *Al 1* 166; Frank Engelen, 'State Aid and Restrictions on Free Movement: Two Sides of the Same Coin?' (2012) 52(5) *European Taxation* 204; Claire Micheau, 'Fundamental Freedoms and State Aid Rules under EU Law: The Example of Taxation' (2012) 52(5) European Taxation.
[75] Raquel Craufurd-Smith, 'The Evolution of Cultural Policy in the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 869; Anna Herold, *European Film Policies in EU and International Law: Culture and Trade – Marriage or Misalliance?* (Europa Law Publishing 2010); Josef Batora and Monika Mokre, 'International Cultural Relations in and of the European Union: Perspectives of EUNIC' in Helena Drnovšek-Zorko (ed), *New Paradigms, New Models – Culture in the EU External Relations* (Ljubljana 2008) 13.
[76] Ben Garner, *The Politics of Cultural Development: Trade, Cultural Policy and the UNESCO Convention on Cultural Diversity* (1st edn, Routledge 2017); Lilian Richieri Hanania, 'The UNESCO Convention on the Diversity of Cultural Expressions as a Coordination Framework to Promote Regulatory Coherence in the Creative Economy' (2016) 22(4) International Journal of Cultural Policy 574; Jan Wouters and Bart De Meester, 'The

inform domestic eligibility criteria, administrative procedures, or cross-border coordination has not been meaningfully examined.

Although literature exists across these domains, contributions remain isolated. What is missing is a comprehensive legal analysis that: examines how specific SFACs manifest across distinct legal frameworks; explains why these frameworks struggle to mitigate such constraints, to exercise rights and comply with obligations; and demonstrates how legal fragmentation generates exclusionary effects that undermine cultural mobility and frustrate the normative aims of cultural-fiscal governance. This thesis fills that gap by offering cross-cutting legal research comparing the treatment of cultural-creative tax incentives across national, bilateral, EU, and UNESCO frameworks. By identifying common dysfunctions—particularly those that generate legal uncertainty, conflict situations, and institutional incoherence—it provides both a systematic diagnosis of SFACs and a structured model for their reduction. Ultimately, the thesis contributes to academic and policy debates by showing why current legal, administrative, and institutional architectures fail to secure fair and effective cross-border cultural-fiscal governance, and how they might be reconfigured to better support cultural rights and international cooperation in an increasingly mobile cultural-creative ecosystem.

1.4 Methodology

This thesis adopts a multi-relational legal methodology to analyse how national, bilateral, EU, and UNESCO frameworks shape access to cultural-creative tax incentives in cross-border settings. The approach is primarily doctrinal, enabling detailed interpretation of legal texts such as statutes, treaties, regulations, and institutional instruments. It is complemented by comparative analysis, which identifies convergences and divergences across jurisdictions, and by interactional analysis, which examines how norms operate when interpreted and implemented by administrative and judicial institutions. This combination allows the thesis to assess not only the content of legal norms but also their operational effects—a perspective aligned with transnational administrative-law scholarship, which emphasises that

UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law' (2008) 41 Journal of Trade Law 205.

implementation, institutional behaviour, and administrative accountability are central to understanding regulatory outcomes[77].

To structure this inquiry within such a complex legal environment, the thesis develops and deploys five analytical variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness. These variables are not borrowed pre-made from the literature; they are constructed for this research as tools to analyse the systemic behaviour of cultural-fiscal norms across multiple governance levels. Their selection responds to the core methodological need to capture both the normative content and the functional performance of legal regimes. The variables therefore correspond directly to the dual analytical lens adopted throughout the thesis: the normative dimension, which concerns the formal content, hierarchy, and binding force of legal norms; and the functional dimension, which concerns how these norms are applied, interpreted, coordinated, or frustrated in practice. Each variable expresses one dimension of this normative–functional relation. Taken together, they make it possible to diagnose the structural failures that manifest as SFACs and to evaluate the potential of proposed reforms.

The first variable, legal certainty, examines whether eligibility criteria, definitions, and procedural rules are clear, predictable, accessible, and consistently applied. It draws on public-law and tax-law theory, which emphasise that certainty requires not only textual clarity but stable administrative practices, transparent interpretive standards, and consistency across institutional actors. Scholars such as Gribnau[78], Tridimas[79], Qureshi[80], Kelsen[81], and Rawls[82] provide the conceptual basis for understanding legal certainty as a multidimensional requirement involving rule clarity, reason-giving, protection of legitimate expectations, and the avoidance of arbitrariness. This thesis adopts and adapts those insights by operationalising legal certainty differently at different governance levels: as internal consistency within national systems, and as coherence—reflective alignment—across bilateral, EU, and multilateral systems.

[77] Cassese (n 2); Lindseth (n 12); Eliantonio (n 64).
[78] Gribnau (n 12).
[79] Tridimas (n 12); Shcherbanyuk et al (n 12).
[80] Qureshi (n 4).
[81] Hans Kelsen, *Pure Theory of Law* (translated by Max Knight, University of California Press 1967).
[82] John Rawls, *A Theory of Justice* (Harvard University Press 1971).

The second variable, rights-based enforcement, assesses whether domestic, bilateral, EU, and UNESCO commitments generate actionable entitlements or remain programmatic aspirations. Drawing on international and EU constitutionalism, the thesis engages with scholarship on how rights emerge, how they gain enforceability, and how legal hierarchies structure cross-border entitlements. Authors such as Burton[83], Schill and Von Bogdandy[84], Krisch[85], Walker[86], Laderman[87], and Barlow[88] highlight that rights acquire effect not merely through their proclamation but through institutional pathways of review, remedies, and administrative accountability. Within this thesis, rights-based enforcement examines whether cultural-fiscal entitlements—for example, access to tax incentives—can be invoked and defended in practice, and whether remedies exist when they are denied. In this way, the variable links normative theory with institutional design, assessing the enforceability of cross-border entitlements and the reviewability of administrative decisions.

The third variable, conditioned sovereignty, examines how states retain cultural-fiscal discretion while operating within treaty, EU, and multilateral commitments that constrain unilateral action. This variable is grounded in Avi-Yonah's account of cooperative sovereignty, which conceptualises fiscal autonomy as embedded within regimes of interdependence[89]; in Krasner's analysis of sovereignty as a series of negotiated authority claims rather than an absolute[90]; and in Chayes and Chayes's account of sovereignty as participation in cooperative, compliance-oriented structures[91]. Musgrave[92] and Dagan[93]'s work on pluralist fiscal authority further reveals how concurrent systems create overlapping obligations that shape domestic choice. Building on this literature, the thesis conceptualises sovereignty not as territorial exclusivity but as structured participation: joining bilateral tax treaties, the EU legal order, or the UNESCO 2005 Convention represents an exercise of sovereignty that recalibrates domestic

[83] Mark Burton, 'The Rhetoric of Tax Interpretation – Where Talking the Talk Is Not Walking the Walk' (2006) 1(3) J Australasian Tax Teachers Assoc.
[84] Stephan W Schill and Armin von Bogdandy, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48(5) Common Market Law Review 1417.
[85] Krisch (n 9).
[86] Walker (n 11).
[87] Leandra Lederman, 'What Do Courts Have to Do With It?: The Judiciary's Role in Making Federal Tax Law' (2012) Articles by Maurer Faculty 799 https://www.repository.law.indiana.edu/facpub/799.
[88] Joel Barlow, 'The Influence of the Courts on Tax Policy and Current Trends' (1955) William & Mary Annual Tax Conference 641.
[89] Reuven S. Avi-Yonah, 'Sovereignty and International Tax Law' (2017) 35 Florida Tax Review 789.
[90] Stephen D Krasner, 'Rethinking the Sovereign State Model' (2001) 27 Review of International Studies, JSTOR.
[91] Abram Chayes, Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998).
[92] Musgrave (n 13).
[93] Dagan (n 13).

cultural-fiscal autonomy. This perspective is crucial for diagnosing SFACs, because many structural constraints on access derive not from external imposition but from the sovereign decision to adopt commitments that carry functional consequences[94].

The fourth variable, functional integration, evaluates how administrative bodies, courts, and cooperative mechanisms interact—or fail to interact—across governance levels. The literature on institutional integration and systemic coherence, including the work of McLachlan[95], Hathaway[96], Scharpf[97], Craig[98], Kingsbury, Krisch, Stewart[99], Eliantonio[100], Keohane and Nye[101], underscores that even well-designed legal norms can fail absent integrated institutions. In cultural-creative tax incentives, administrative fragmentation frequently neutralises cross-border commitments despite the absence of overt conflict in the legal texts. Functional integration therefore assesses whether mechanisms of coordination, information-sharing, interpretive alignment, and review exist to prevent the procedural discontinuities that produce SFACs.

The fifth variable, mutual supportiveness, tests whether tax, culture, trade, and human-rights regimes reinforce or undermine one another in cross-border cultural-creative contexts. Drawing from the systemic integration principle in international law, particularly the works of Pauwelyn[102], Valderrama[103], Christian[104], Lang[105], the thesis adapts mutual supportiveness to assess whether domestic, EU, bilateral, and UNESCO frameworks can be interpreted in a way that enhances normative alignment and supports cultural-creative mobility. When mutual

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[94] International Law Commission (ILC), *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001); Priya Urs, *The Elusiveness of "Interdependent Obligations" and the Invocation of Responsibility for their Breach* (OUP 2024).
[95] Campbell K McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024).
[96] Oona A Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) Social Science Research Network.
[97] Fritz W Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Campus 2010).
[98] Craig (n 64).
[99] Benedict Kingsbury, Nico Krisch & Richard B Stewart, *The Emergence of Global Administrative Law* (CUP 2005).
[100] Eliantonio (n 64).
[101] Robert O Keohane, Joseph S Nye, *Power and Interdependence* (Longman 2012).
[102] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Related to Other Rules of International Law* (CUP 2003).
[103] Irma Mosquera Valderrama, 'Chapter 55: Global Tax Governance' in Florian Haase and Georg Kofler (eds), *The Oxford Handbook of International Tax Law* (OUP 2023).
[104] Christian (n 5) 1065.
[105] Michael Lang, 'International Tax Cooperation and Administrative Practice by Tax Authorities' (2016) 22 World Tax Journal 103.

supportiveness is absent, even strong normative commitments can dissolve into functional incoherence, because each regime operates without attention to its interaction with others.

Together, these five variables form an analytical structure that is essential for examining multi-level cultural-fiscal governance. They function as operational tools that guide the analysis. Methodologically, they have a dual role. First, they act as diagnostic instruments, revealing how fragmented definitions, conflict situations, discretionary administrative practices, or institutional gaps produce SFACs. Second, they serve as normative benchmarks against which the reforms proposed in each governance chapter can meaningfully reduce those constraints. Their iterative application across governance levels allows the thesis to move from diagnosis to prescription, ensuring analytical coherence throughout.

Finally, although the literatures underlying each variable do not focus directly on cultural-creative tax incentives, their insights are directly relevant because these incentives operate within the very multi-level, polycentric, and interactionally complex frameworks that the scholarship describes. The methodological contribution of this thesis lies in extending these theoretical accounts to a new field by demonstrating how global administrative fragmentation, sovereignty conditioning, and institutional misalignment manifest concretely as obstacles to fiscal access in cultural-creative ecosystems. The variables therefore provide not simply a vocabulary but an integrated analytical apparatus for understanding how legal pluralism functions in this domain. They reveal how norms travel across systems, where frictions arise, and how coordinate framework can transform fragmented obligations into a coherent architecture capable of mitigating SFACs.

1.5 Terminology and Workable Definitions

Clear and consistent terminology is essential for the analytical coherence of this thesis. Because cultural-creative tax incentives operate across national, bilateral, EU, and multilateral legal orders—each with its own concepts, classifications, and institutional practices—terms acquire different meanings depending on their legal context. To enable precise and comparative analysis, the thesis adopts standard terms and functional, system-neutral definitions for its key concepts. These definitions do not claim universal validity; rather, they supply an internally coherent vocabulary that supports both the diagnosis of SFACs and the evaluation of legal and institutional reforms.

The term cultural-creative operators (or CC operators) refers to all natural and legal persons involved in cultural-creative ecosystems whose products, actions, or activities fall within the scope of tax incentives. This includes visual artists, donors and donees, and audiovisual producers. These operators form part of the broader cultural and creative industries (CCIs) and reflect their hybrid cultural-economic character. While some scholarship separates “cultural” (symbolic or artistic) from “creative” (market-oriented) activity, this thesis adopts the compound term cultural-creative (CC) to capture their interdependence in law and policy. The term may be disaggregated where analytically appropriate.

“Treaty States” refers to countries bound by bilateral treaties; the term “bilateral treaties” encompasses tax treaties, co-production treaties, and cultural treaties unless otherwise specified. “Member States” designates countries subject to EU law, and “Convention Parties” (or Parties) refers to states that have ratified the UNESCO 2005 Convention.

No unified taxonomy exists across EU law, WTO law, UNESCO law, domestic tax systems, or comparative fiscal scholarship for cultural-creative tax incentives. The thesis therefore constructs system-neutral workable definitions that allow meaningful comparison across multi-level governance. This approach is grounded in public-law methodology and comparative fiscal-governance scholarship, following the logic advanced by authors such as Brauner, Craig, Eckert, and Hartley, who emphasise the need for analytically operable concepts where positive law is fragmented or incomplete[106]. It also draws on fiscal-governance theory distinguishing a jurisdiction’s benchmark tax structure from preferential deviations and on transnational administrative-law accounts emphasising the interaction between legislative norms and administrative implementation[107].

“Cultural-Creative Tax Incentives” denotes any legal, regulatory, or administrative measure that provides favourable tax treatment—relative to the jurisdiction’s benchmark tax structure—to specified operators, activities, or outputs within the cultural-creative sectors. These measures include deductions, credits, exemptions, deferrals, and in-kind tax substitutions. Identifying

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[106] Yariv Brauner, ‘Tax Incentives and the Problem of Rigid Attribution Rules’ (2018) 71 Tax Law Review 123; Craig (n 64); Julia Eckert, ‘What is the Context in “Law in Context”?’ in Lukas Heckendorn Urscheler and Sean Patrick Donlan, *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (1st edn, Routledge 2014); John Hartley, Jason Potts, Stuart Cunningham, Terry Flew, Michael Keane, John Banks (eds), *Key Concepts in Creative Industries* (Sage Publications 2013).

[107] Avi-Yonah (n 12); Micheau (n 28) ch 3; Gustavo E Luengo Hernandez de Madrid, Regulation of Subsidies and State Aids in WTO and EC Law: Conflicts in International Trade Law (Kluwer Law International, 2007).

incentives by their function rather than their statutory labels enables comparative evaluation across divergent national models[108]. The definition explicitly incorporates administrative and institutional dimensions, recognising that tax incentives are constituted not only by legislation but by the classificatory, interpretive, and procedural practices of tax authorities, cultural agencies, and courts. This is central to understanding how eligibility is constructed and contested within multi-level governance[109].

"Tax-in-lieu for artists" refers to schemes allowing visual artists to satisfy tax liabilities by transferring artworks to public institutions or accredited collections. These incentives sit at the intersection of tax law and cultural policy, recognising artistic labour as a form of cultural value while operationalising artworks as an in-kind means of tax payment. Their legal character depends on administrative mechanisms governing classification, valuation, acceptance, and public acquisition—precisely the type of procedural and discretionary dynamics analysed in comparative administrative and fiscal-governance scholarship[110]. A functional definition is necessary because national schemes differ widely in legal nature, scope, and purpose, yet share a common operational logic of in-kind satisfaction, public acquisition, and expert-based valuation relevant for cross-border analysis.

"Tax-deduction for cultural philanthropy" designates mechanisms granting tax relief to individuals or entities donating to accredited cultural public-benefit organisations such as museums, heritage bodies, orchestras, or performing arts institutions. Relief may attach to taxable income or final liability, depending on the jurisdiction. Drawing on non-profit and tax-exemption scholarship, the definition distinguishes philanthropy—investment in long-term cultural public goods—from charity, which responds to immediate social needs[111]. The definition thus abstracts from divergent domestic classifications by focusing on the structural elements—transfer without consideration, to a recognised cultural public-benefit entity, generating tax relief directly linked to the donation—while remaining agnostic to domestic classification or accreditation procedures. This functional definition is necessary because

[108] Ibid.
[109] Cassese (n 2); Lindseth (n 12); Eliantonio (n 64).
[110] Dick Molenaar, *The Ultimate Cookbook – For Cultural Managers: Social Security in an International Context* (EFA European Festivals Association 2016); Gribnau (n 12); Papadopoulos (n 12).
[111] Anzhela Cédelle, 'The Taxation of Non-Profit Organizations after *Stauffer*' in Werner Haslehner, Georg Kofler, and Alexander Rust (eds), *European Tax Law Classics* (Kluwer Law International 2015) 207; Frans Vanistendael (ed), *Taxation of Charities* (IBFD 2015); Hemels (n 29); Buijze (n 39); Colinvaux & Harvey (n 34).

cultural accreditation, eligibility standards, and deductibility mechanics vary sharply across national and treaty frameworks.

"Tax-credit on expenditure for audiovisual productions" refers to incentives granting refundable or non-refundable credits calculated as a percentage of qualifying production expenditure in film, television, or digital media. Eligible expenditures typically include labour, goods, services, and intellectual property used within the jurisdiction. While often categorised as economic incentives, these schemes also perform cultural governance functions by shaping sectoral development and cultural expression—an interaction highlighted in cultural-fiscal policy scholarship[112]. The definition isolates their core legal structure—percentage-based credit on certified expenditure—without embedding the territoriality or technical variation specific to each national regime.

Across all categories, the workable definitions delineate design-related, administrative, and institutional dimensions of each incentive, providing the conceptual foundation for applying the five analytical variables developed in this thesis: legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness. Together, the terminology and definitions create a stable conceptual baseline for the multi-level, comparative legal analysis that follows and underpin the thesis's normative–functional framework for diagnosing and mitigating Structural Fiscal Access Constraints.

1.6 Outline

This thesis is structured in seven chapters that develop a cumulative analysis of cultural-creative tax incentives across national, bilateral, EU, and UNESCO frameworks. The trajectory moves from conceptual foundations to multi-level diagnosis and, ultimately, to the design of coordinated legal solutions.

Chapter 1 – Introduction establishes the research framework. It presents the central research questions, explains the multi-relational methodology, defines the five analytical variables, and clarifies key terminology and workable definitions. It positions the thesis within intersecting

[112] Throsby (n 24); Rachael Craufurd Smith, 'Balancing Culture and Competition: State Support for Film and Television in European Community Law' (unpublished manuscript); Debande and Chatrit (n 45); Terry Flew, *Global Creative Industries* (Polity Press 2013); David Hesmondhalgh, *The Cultural Industries* (SAGE 2012).

debates in public law, tax law, cultural policy, fundamental rights, and international cooperation.

Chapter 2 – SFACs Foundations identifies and classifies the Structural Fiscal Access Constraints embedded in tax-in-lieu schemes for visual artists, tax-deductions for cultural philanthropy, and expenditure-based tax-credits for audiovisual production. It applies the five analytical variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—to diagnose national-level dysfunctions and propose reform pathways. Using a comparative case-study method, the analysis surveys selected jurisdictions, including EU Member States, the United Kingdom, the United States, Canada, Australia, Brazil, Chile, and Mexico. Sub-national regimes are included where state or provincial structures materially affect cross-border access, as in the United States, Canada, and Spain. This chapter reveals recurring national-level patterns of definitional fragmentation, discretionary assessment, and institutional misalignment.

Chapter 3 – Bilateral Layer: examines how bilateral tax treaties, cultural agreements, and co-production treaties mitigate or perpetuate SFACs. It analyses normative inconsistencies, interpretive gaps, and administrative barriers arising from treaty–domestic interactions. Applying the five variables, the chapter examines residency rules, income-source provisions, reciprocity conditions, benefit-eligibility structures, and enforcement mechanisms. Reference to the OECD, UN, and U.S. Model Conventions helps identify structural patterns in cross-border cultural-fiscal entitlements and highlights the limits and potential of bilateral cooperation[113]. It advances bilateral-level reform proposals grounded in the five analytical variables.

Chapter 4 – Supranational EU Layer: addresses the EU legal framework governing cultural-creative tax incentives. The analysis focuses on internal market rules, fundamental freedoms, State aid control, and Charter-based rights. Guided by the five variables, the chapter assesses the EU's ability to generate enforceable access, its structural limits, and its potential to reduce SFACs. It examines key provisions of the Treaty on the Functioning of the European Union

[113] Organisation for Economic Co-operation and Development (OECD) Model Tax Convention (*OECD Model*, 2017 version); United Nations Model Double Taxation Convention between Developed and Developing Countries (*UN Model*, 2021 version); United States Model Income Tax Convention (*U.S. Model*, 2016 version).

(TFEU[114])—particularly Articles 18, 21–26, 56–62 (fundamental freedoms and non-discrimination), 107(1) (State aid) and 107(3) (exemptions for cultural support), and 167 (EU's cultural competence)—as well as the General Block Exemption Regulation (GBER[115]) particularly Articles 53 and 54 which exempt certain forms of aid to CCIs from prior notification requirements, and the European Charter of Fundamental Rights (EU-CFR[116]), especially Article 21 on equality before the law and non-discrimination. Case law and Commission decisions are used to explore how cultural-fiscal objectives are balanced against internal-market constraints in practice. It also proposes EU-level reforms to reduce SFACs.

Chapter 5 – Multilateral UNESCO Layer: explores the principles, rights, and obligations contained in the United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions (the UNESCO 2005 Convention or the Convention for short[117]), with emphasis on preferential treatment, international cultural cooperation, and systemic integration. The chapter analyses the Convention's interaction with EU and national systems, its institutional strengths and weaknesses, and its potential to mitigate SFACs. Applying the analytical variables, the chapter evaluates the operational effect of Articles 7, 14, 16, 19, 20, and 21, as well as the Convention's monitoring and reporting mechanisms. Despite its aspirational tone and limited coercive authority, the Convention exercises interpretive influence and political legitimacy that shape expectations within cultural-fiscal governance[118]. Its relevance for EU internal and external cultural action is addressed, drawing on the European Parliament's expressed support for strengthened implementation[119]. It proposes targeted reforms across UNESCO–EU interfaces.

[114] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, including protocols, annexes to the Treaty on the Functioning of the European Union, and declarations annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon, signed on 13 December 2007.
[115] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union [2014] OJ L187/1.
[116] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.
[117] The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (*2005 UNESCO Convention*), adopted by the 33rd Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), entered into force on 18 March 2007.
[118] Véronique Guèvremont and Catherine Varin, 'When Low Level of Constraint and Effectiveness Go Hand in Hand: The Example of the 2005 Convention' (2023) 30(1) International Journal of Cultural Property 62.
[119] Germann Avocats (Geneva) and Multidisciplinary Research Team, *Implementing the UNESCO Convention of 2005 in the European Union* (2009), report commissioned by the European Parliament's Committee on Culture and Education.

Chapter 6 – Proposing Solutions: synthesises the analytical findings of the earlier chapters to develop a coordinated framework for reforming cultural-creative tax incentives in cross-border situations. It formulates guiding commitments and a modular coordination model that respects fiscal sovereignty while enhancing legal certainty, rights-compatibility, cooperative capacity, and systemic coherence. The five variables serve as evaluative criteria for assessing the feasibility and normative robustness of the proposed reforms.

Chapter 7 – Conclusions: summarises the main findings, revisits the research questions, and evaluates the viability of the proposed coordination model. It reflects on the broader implications for tax law, cultural governance, and international legal theory and identifies avenues for further research into the governance of cultural-creative tax incentives.

Chapter 2

Structural Fiscal Access Constraints
Context and Challenges at National Level

2.1 Introduction

This chapter addresses the first sub-question of the thesis: *What are the Structural Fiscal Access Constraints (SFACs) in cultural-creative tax incentives in cross-border situations, and what mechanisms could be structured to reduce such constraints at national level?* Despite the growing significance of fiscal instruments in cultural governance, this inquiry remains under-theorised. The absence of a systematic examination of the normative and functional dimensions of access to cultural-creative tax incentives has generated both conceptual and empirical gaps in the literature (§1.3). This chapter seeks to address those gaps by analysing three emblematic categories of cultural-creative tax incentives: tax-in-lieu schemes for visual artists, tax-deductions for cultural philanthropy, and tax-credits on expenditure for audiovisual production. Although distinct in fiscal logic, legal structure, and policy objectives, these instruments exhibit common legal, administrative, and institutional structural constraints that obstruct the objectives ot the incentives itself and the cross-border access. Moving beyond traditional views that frame these measures as purely domestic policy tools, this thesis reconceptualises them as nodes in a transnational legal ecosystem, situated at the interface between national fiscal sovereignty and international cultural commitments (Chapters 2–5).

Rather than interrogating the policy rationales behind eligibility criteria, this chapter undertakes a normative-functional diagnosis of national frameworks to identify and classify SFACs that emerge from their legal, administrative, and institutional architectures. The analysis applies the five evaluative variables developed in Chapter 1 (§1.4)—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—as a unified analytical lens. Each variable captures a distinct yet interdependent dimension of how cultural-creative tax incentives operate within national systems that are increasingly permeable to transnational norms. Together, they illuminate how the design and implementation of tax incentives affect not only national coherence and administrative functionality but also their alignment with broader obligations arising from bilateral, regional and multilateral cultural frameworks.

At the national level, the analysis concentrates primarily on legal certainty and functional integration, as these variables most directly expose the internal structures that condition fiscal accessibility. Legal certainty requires that eligibility and recognition criteria for cultural-creative tax incentives be predictable, transparent, and coherently applied across legal, administrative, and judicial domains. This understanding aligns with Gribnau's analysis of legitimate expectations in taxation, which emphasises stability and foreseeability as conditions for taxpayer trust[1]; with Tridimas's articulation of legal certainty as a constraint on arbitrary administrative discretion[2]; and with Kelsen's insight that coherent institutional structures are necessary to give norms meaning and effect[3]. Within this thesis, legal certainty therefore functions as the primary safeguard against the discretionary opacity, fragmented procedures, and institutionally divergent interpretations across cultural-fiscal governance. When tax authorities, cultural agencies, and courts apply divergent standards, or when interpretive criteria remain opaque, the principle of legal certainty is not merely weakened—it is structurally displaced. The resulting unpredictability deters participation, disproportionately affects applicants lacking legal or institutional literacy, and ultimately transforms tax incentives into mechanisms of exclusion rather than support. By diagnosing these deficiencies through the SFAC framework, the thesis demonstrates that national-level uncertainty is not incidental but endemic, arising from systemic misalignment between legal norms, administrative practice, and institutional mandates. While this chapter focuses on these two variables (legal certainty and functional integration), it also situates them within the broader evaluative framework. Variables such as rights-based enforcement, conditioned sovereignty, and mutual supportiveness are more deeply examined in later chapters, where transnational and inter-institutional interactions (bilateral, EU, and UNESCO levels) reveal their fuller normative implications.

Accordingly, this chapter should be read as the foundation of the thesis's multi-level analysis. The national-level diagnosis presented here establishes the conceptual and empirical basis for

[1] Hans Gribnau, 'Legal Certainty: A Matter of Principle' (January 2013) and 'Retroactivity of Tax Legislation' (May 2013) Tilburg Law School Research Paper 12/2014.
[2] Takis Tridimas, 'Legal Certainty and Protection of Legitimate Expectations', in *The General Principles of EU Law* (OUP 2006).
[3] Hans Kelsen, *Pure Theory of Law* (translated by Max Knight, University of California Press 1967).

understanding how SFACs are generated internally, proposing national-level reforms to reduce them. All before the subsequent chapters explore how these constraints and national-target reforms may be mitigated through interactions between governance levels—national–bilateral (Chapter 3), national–EU (Chapter 4), and national–EU–UNESCO (Chapter 5).

The analysis proceeds as follows. Section 2.2 examines tax-in-lieu schemes available to visual artists, focusing on the discriminatory nationality criterion (§2.2.1), definitional ambiguities in classifying professional artists (§2.2.2), and the opaque role of advisory bodies in determining qualifying artworks (§2.2.3). Section 2.3 turns to tax-deductions for cultural philanthropy, addressing fiscal residence constraints (§2.3.1) and the eligibility of recipient entities (§2.3.2). Section 2.4 analyses tax-credits on expenditure for audiovisual production, considering access barriers for producers (§2.4.1), the tests used to assess cultural relevance and economic performance (§2.4.2), and national minimum expenditure requirements that may function as indirect discriminatory controls (§2.4.3). Section 2.5 proposes national-level reforms, evaluating their capacity to dismantle SFACs. Section 2.6 synthesises the findings and situates them within the thesis's broader reform framework.

2.2 Tax-in-Lieu for Visual Artists—SFACs

Tax incentives designed to support visual artists—most notably tax-in-lieu schemes, which allow artists to offset tax liabilities by transferring artworks to the state, and tax-deduction mechanisms that encourage private art acquisitions for heritage preservation and public access—are widely recognised as central to sustaining CCIs (§1.1.1). These instruments are intended to reconcile fiscal policy with cultural objectives by facilitating both the financial viability of artistic production and the enrichment of public collections. Yet, despite their normative ambition and long-standing recognition in cultural policy discourse, tax-in-lieu frameworks remain structurally constrained by restrictive and inconsistently applied eligibility criteria based on nationality, professional artist status, and the classification of artworks.

While such restrictions are frequently defended on policy grounds—to ensure that public resources support nationally anchored artistic production, to prevent abuse, or to preserve curatorial standards (§1.1.1)—they simultaneously produce SFACs that undermine both the accessibility and the effectiveness of these instruments. These constraints do not arise only from the policy rationale itself but also from the manner in which that rationale is operationalised within the legal and administrative architecture. The resulting constraints are normative and functional: they affect who may claim the incentive (the legal scope of access), how that claim is processed (the administrative pathway), and how consistent, transparent, and predictable the outcome is (the institutional capacity to deliver legal certainty).

The first and most pervasive SFAC concerns legal certainty. The eligibility criteria governing tax-in-lieu schemes are often drafted in terms that are open to discretionary interpretation by tax authorities and advisory committees. Categories such as “professional artist,” “work of national importance,” or “qualifying artwork” lack statutory precision and are instead defined through administrative circulars, or internal guidelines that are neither public nor judicially reviewable (§§2.2.1-2.2.3). This normative opacity erodes the predictability of the regime and discourages participation, particularly from artists whose professional or cultural profiles diverge from traditional national paradigms. The absence of codified standards also inhibits horizontal coherence between tax authorities, ministries of culture, and adjudicatory bodies, producing fragmented interpretive practices that intensify uncertainty.

A second layer of constraint arises from weak functional integration among the institutions charged with implementing these schemes. Effective coordination between fiscal and cultural authorities is essential to ensure that the assessment of artistic merit, cultural relevance, and fiscal valuation proceeds under consistent criteria. Yet, in practice, these bodies often operate in parallel rather than collaboratively (§§2.2.1-2.2.3). Advisory committees may evaluate artworks without clear fiscal parameters, while tax authorities may apply fiscal valuation criteria detached from cultural assessment. This institutional disjunction results in administrative inconsistencies, delayed procedures, and occasionally contradictory determinations. It also obscures accountability, as no single body bears responsibility for the coherence of the overall process.

These shortcomings illustrate how structural deficiencies in national legal and administrative design—not merely policy choices—generate SFACs that compromise the normative objectives of tax-in-lieu schemes. The problem is not that states prioritise national artistic production, but that they do so through regulatory frameworks that lack sufficient normative clarity and institutional coordination. The consequence is a dual erosion: artists face diminished access to fiscal relief, and the public interest in cultural diversity, heritage enrichment, and equitable participation remains only partially realised.

Accordingly, the analysis that follows examines three interrelated dimensions through which SFACs manifest in tax-in-lieu frameworks: the discriminatory nationality criterion (§2.2.1), the definitional ambiguities in the classification of professional artists (§2.2.2), and the opaque procedures through which advisory bodies determine qualifying artworks (§2.2.3). Each of these dimensions is evaluated through the normative-functional lens of the thesis, with particular attention to their impact on legal certainty and functional integration, and to the manner in which fragmented normative design and institutional disconnection generate SFACs. The findings of this analysis inform the targeted reform proposals set out in Section 2.5, which assess how national legal and administrative frameworks could be recalibrated to reduce these SFACs while preserving the fiscal legitimacy and cultural objectives of tax-in-lieu schemes.

2.2.1 Discriminatory Nationality Criterion

Among the most entrenched SFACs affecting cultural-creative tax incentives is the requirement that beneficiaries hold the nationality of the state providing the incentive. When eligibility is conditioned on formal citizenship rather than on residence, sustained artistic engagement, or cultural contribution, fiscal regimes produce exclusionary effects that disproportionately affect non-national artists—even those who reside permanently in the jurisdiction, contribute to its cultural ecosystem, and meet all other professional or fiscal requirements. The problem is not the cultural policy rationale of supporting national artistic production, but the legal and administrative expression of that rationale, which transforms cultural protectionism into a SFAC. By embedding nationality as a condition of eligibility, tax-in-lieu and related mechanisms introduce normative and functional distortions that compromise both legal certainty and functional integration within national systems.

Comparative evidence illustrates the persistence of this constraint. Mexico's *Pago en Especie* scheme, a tax-in-lieu mechanism permitting in-kind payments of artworks, restricts eligibility to Mexican nationals, thereby excluding non-national residents regardless of their sustained contribution to the local art scene[4]. In Canada, the *Capital Cost Allowance (CCA)* scheme, which allows tax-deductions for the acquisition of eligible artworks, similarly requires that works be produced by Canadian citizens, pursuant to paragraph 1102(1)(e) of the Income Tax

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[4] Mexico, *Diario Oficial de la Federación* (DOF), 31 October 1994, Presidential Decree.

Regulations. This precludes even long-term resident artists without Canadian nationality from benefiting. France's *Loi sur le mécénat* or Patronage Act, provides tax incentives for companies that acquire contemporary works by French artists, an approach that effectively excludes non-national residents[5]. These provisions operate either through explicit statutory language or through administrative interpretation, embedding citizenship as a fiscal eligibility threshold. The result is a cross-jurisdictional pattern of normative exclusion that undermines the very objectives these regimes claim to pursue—financial relief for artists, enrichment of public collections, and the promotion of cultural diversity and access.

Under the lens of legal certainty, nationality-based conditions exemplify indeterminate and inconsistent normative design. The absence of clear, functional definitions of "national artist" or of transparent criteria for determining cultural belonging leaves wide interpretive discretion to administrative bodies. Tax authorities and cultural ministries often rely on unpublished internal guidelines or discretionary judgments, creating opacity and unpredictability. Such uncertainty risks disincentivise participation, especially among resident non-nationals, and produces horizontal inconsistency when different agencies interpret nationality criteria divergently. As a result, the fiscal system becomes both normatively unstable and procedurally fragmented—core features of SFACs at the national level.

In terms of functional integration, nationality conditions disrupt institutional coordination by forcing fiscal and cultural authorities to administer eligibility through different interpretive logics: the tax administration applies formal citizenship criteria, while cultural authorities assess artistic contribution and merit. The disjunction between these logics leads to administrative contradictions and arbitrary exclusions. Where fiscal authorities are bound by nationality-based statutory language, cultural authorities lose discretion to recognise artistic merit irrespective of citizenship, resulting in incoherent implementation and diminished effectiveness of the scheme as a whole.

Scholarly analyses have critiqued these dynamics primarily in cultural and sociopolitical terms. Zapata-Barrero, Schuster and Vadi highlight how rigid citizenship classifications suppress

[5] France, *Loi n° 2003-709 du 1er août 2003 relative au mécénat, aux associations et aux fondations* [2003] JO 12492.

cultural exchange and homogenise national narratives[6]; Novoa and Moghaddam warn of "cultural echo chamber" in which state recognition is reserved for narrowly defined, domestically legitimized cultural forms[7]; Duelund links such exclusions to fractured belonging and weakened multicultural legitimacy[8]. These insights underscore the cultural costs of nationality-based design, yet they have not been systemically theorised as SFACs. By reframing nationality criteria as SFACs, this thesis situates their exclusionary effects within the functional and legal architecture of fiscal governance rather than as mere policy anomalies. From a normative standpoint, the rights-based implications of nationality restrictions are considerable. Drawing on von Rütte's advocacy of the *jus nexi* principle—where entitlement to rights flows from genuine social, economic, and cultural ties rather than formal citizenship[9]—eligibility for tax-in-lieu schemes should be grounded in residency, artistic contribution, and community participation. Kälin and Künzli similarly argue that excluding non-nationals from cultural benefits contravenes the principles of non-discrimination and the right to participate in cultural life, both protected under international human rights law[10]. Their account aligns with Stamatopoulou, Eide, Meyer-Bisch, and Scheinin's broader view that cultural participation forms an element of human dignity and democratic agency, which cannot be conditioned on nationality unless justified by reasons of the highest order[11]. Applied to cultural-fiscal transnational contexts, this requires that eligibility classifications and recognition of foreign CC operators be treated not merely as administrative discretion but as sites of human-rights compliance. The relational and conditioned sovereignty dimension of the

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[6] Ricard Zapata-Barrero, 'Diversity and Cultural Policy: Cultural Citizenship as a Tool for Inclusion' (2016) 22(4) International Journal of Cultural Policy 534 and Ricard Zapata-Barrero, 'The Three Strands of Intercultural Policies: A Comprehensive View – A Critical Review of Bouchard and Cantle's Recent Books on Interculturalism' (2013) GRITIM-UPF Working Paper Series No 17; J Mark Schuster, 'Tax Incentives in Cultural Policy' in Victor A Ginsburgh and David Throsby (eds), *Handbook of the Economics of Art and Culture*, vol 1 (Elsevier 2006) 1253; Valentina Vadi, 'Cultural Heritage in International Trade Law' in Valentina Vadi (ed), *Cultural Heritage in International Economic Law* (Brill | Nijhoff 2023) ch 5.

[7] Cristina Novoa and Fathali M Moghaddam, 'Policies for Managing Cultural Diversity' in Verónica Benet-Martínez and Ying-Yi Hong (eds), *The Oxford Handbook of Multicultural Identity* (OUP 2014).

[8] Peter Duelund, 'The Impact of the New Nationalism and Identity Politics on Cultural Policy-Making in Europe and Beyond' paper presented at *Identity and Nationalism in Contemporary Cultural Policy* (ICCPR 2008, Yeditepe University, Istanbul, August 2008); Peter Duelund, 'Nordic Cultural Policies: A Critical View' (2008) 14(1) International Journal of Cultural Policy 7; Peter Duelund, 'Our Kindred Nations: On the Public Sphere in Nordic Cultural Policy' in Miikka Pyykkönen, Niina Simanainen and Sakarias Sokka (eds), *What About Cultural Policy? Interdisciplinary Perspectives on Culture and Politics* (Minerva 2009) 117.

[9] Barbara von Rütte, 'Citizenship and Nationality: Terms, Concepts and Rights' in *The Human Right to Citizenship* (Brill 2022) ch 2.

[10] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 29.

[11] Eide Stamatopoulou, *Cultural Rights in International Law* (Brill Leiden 2007); Asbjorn Eide, 'Cultural Rights as Individual Human Rights' in Eide A, Krause C and Rosas A (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2001); Patrice Meyer-Bisch, 'Cultural Rights within the Development Grammar' (Agenda 21 for Culture 2004–2014, research commissioned by United Cities and Local Governments (UCLG)).

analysis reinforces this point: while states retain fiscal autonomy, their discretion is limited by international commitments that prohibit discriminatory treatment and call for equitable participation in cultural life (Chapters 3-5). This corresponds to De Schutter, Schlesinger and Finney's argument that fiscal distinctions with cross-border effects must be justified under the same proportionality and equality standards governing other areas of public law[12]. Human-rights constraints provide an external doctrinal anchor ensuring that cultural access is not reduced to a "paper entitlement" but retains substantive legal force (Chapters 3-5).

Economically, nationality-based exclusions distort the cultural market and exacerbate precarity among artists. Drawing on Throsby's cultural economics, one can observe that by limiting fiscal recognition to citizens, states artificially constrain demand for non-national artists' works, reinforcing hierarchies of visibility and valuation[13]. These distortions are incompatible with the contemporary reality of transnational artistic labour, where creative production and mobility transcend national borders[14]. Sustainable cultural policy must engage with the structural dynamics of the cultural economy, not merely reflect the personal or territorial boundaries of the nation-state[15]. From a mutual supportiveness perspective, such practices also risk misalignment with bilateral tax treaties and cultural cooperation instruments that promote non-discriminatory exchange.

The theoretical perspectives of Soysal, Owen, and Shachar offer further normative grounding. Soysal's concept of post-national citizenship suggests that legal entitlements should no longer be tied exclusively to national identity but instead reflect universal personhood and active cultural participation[16]; and Shachar's principle of effective membership[17]; both converge on the view that access to legal entitlements should follow social and cultural participation rather

[12] See further develoment in Chapter 4: Olivier De Schutter, *The Prohibition of Discrimination under European Human Rights Law—Relevance for EU Racial and Employment Equality Directives* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities 2005); Philip Schlesinger, 'The Cultural Logic of Political Practice: The Case of the European Audiovisual Policy' (1998) 13 *European Journal of Communication* 5; Philip Schlesinger, *The Politics of Cultural Policy* (Polity Press 2000); Angus Finney, 'Film Tax Incentives and the GBER: Article 54 Explained' (2020) 12 European Competition Journal 45.
[13] David Throsby, *The Economics of Cultural Policy* (CUP 2010) 42; Martin Scheinin, 'Direct Applicability of Economic, Social and Cultural Rights in International Law' (2001) 2 ESCR Review 9.
[14] Ibid.
[15] Eleonora Belfiore, Steven Hadley, Brea M Heidelberg, and Carole Rosenstein, 'Cultural Democracy, Cultural Equity, and Cultural Policy: Perspectives from the UK and USA' (2023) Journal of Arts Management, Law, and Society.
[16] Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994) 159.
[17] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009) 10.

than nationality. Owen's reading of Arendt's "right to have rights" highlights the democratic deficit inherent in restricting cultural participation to citizens[18]. These theoretical insights collectively support the thesis's normative-functional position: that tax-in-lieu eligibility should be structured around residence and demonstrable cultural contribution, thereby restoring the functional link between fiscal mechanisms and their cultural purpose.

In this sense, the nationality criterion represents not an incidental policy choice but a paradigmatic SFAC—one that transforms the boundary between fiscal and cultural governance into a barrier to access. By identifying it as such, this thesis advances a novel conceptual and legal diagnosis: that citizenship-based eligibility requirements generate structural exclusions inconsistent with both the internal logic of cultural-fiscal instruments and the external commitments of states under human rights and cultural cooperation frameworks. Section 2.5 will return to these findings to propose targeted national-level reforms—most notably, the replacement of nationality conditions with residence- and contribution-based criteria—to enhance legal certainty, strengthen functional integration, and align cultural-creative tax incentives with broader principles of inclusiveness and international cooperation (see Chapters 4 and 5 for EU and UNESCO contexts).

2.2.2 Ambiguities in Classifying Professional Artists

Another critical SFAC in tax-in-lieu and tax-deduction schemes lies in the determination of an artist's professional status. Although such classification mechanisms are ostensibly designed to ensure that tax incentives reach genuine practitioners, their fragmented application, lack of consistency within or coherence across jurisdictions, and reliance on exclusionary proxies have produced both normative and practical distortions. Professional status is typically determined through three types of proxies: membership in accredited associations, demonstration of commercial activity, or recognition by administrative and judicial authorities. Yet, rather than offering clarity, these mechanisms often replicate institutional biases, perpetuate economic inequalities, and reinforce narrow conceptions of what counts as legitimate artistic labour.

[18] David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Netherlands International Law Review 299; Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1973) 296.

In systems where association membership functions as a precondition for recognition, such as in Canada[19] and Croatia[20], the resulting framework privileges institutional affiliation over individual artistic contribution. This approach not only excludes those unable to pay membership fees but also disadvantages artists whose practice does not conform to the aesthetic or disciplinary preferences of officially recognized associations[21]. The problem is compounded by the uneven criteria used by states to accredit such bodies, often favouring established or traditional art forms at the expense of experimental, community-based, or interdisciplinary practices[22]. The consequence is a stratified access system in which fiscal relief becomes contingent upon conformity to institutional norms rather than creative merit. Conversely, schemes such as Mexico's *Pago en Especie* assess professional status through documentation of artistic activity and tax compliance, effectively conflating professionalism with financial performance. While such criteria offer administrative simplicity, they embed market logics into cultural policy, rewarding commercially successful artists while neglecting those whose work, though of public value, does not yield immediate economic returns[23]. The model also disadvantages emerging or politically engaged artists whose practice is not easily monetized[24]. Other jurisdictions, such as Australia[25] and the U.S.[26] rely on tax authorities or courts to evaluate professional status through a blend of qualitative and quantitative indicators—profit motive, regularity of activity, public exhibitions, and external validation. However, these assessments frequently suffer from inconsistency and a lack of specialized knowledge, producing contradictory jurisprudence and arbitrary administrative outcomes[27]. Artists may therefore find themselves simultaneously recognized and excluded under different

[19] Canadian legal framework includes *Council for the Arts*; *Status of the Artist Act* (1992) ss 6(2)(b), 18(b)(iii); *Customs and Revenue Agency*. See also Danielle Cliche, 'Status of the Artist or of Arts Organizations?: A Brief Discussion on the Canadian Status of the Artist Act' (1996) 21(2) Canadian Journal of Communication.

[20] Croatia, *Law on the Rights of Independent Artists and Promotion of Cultural and Artistic Creativity*.

[21] The art community has expressed its concerns on the classification of the artists' status, see, for example, Jacqueline Snijders, Martin Clarke, Amber van der Graaf, Valerio de Stefano, Frank Kimenai, Mária Tajtáková, 'The Status and Working Conditions of Artists and Cultural and Creative Professionals' (Panteia Research to Progress, European Expert Network on Culture and Audiovisual (EENCA), funded by the Creative Europe Programme of the European Union) 45; Jason Horejs, the owner of Xanadu Gallery, author of *Starving to Successful* and *How to Sell Art*, publisher of RedDotBlog.com, and founder of the Art Business Academy.

[22] Merja Heikkinen and Sari Karttunen, 'Defining Art and Artists as a Methodological Problem and a Political Issue' (Arts Council of Finland, Research and Information Unit, 1995).

[23] Horejs (n 21).

[24] Ming Thein, 'Questioning the "Art" Market' (2014).

[25] Australia, *Types of Especial Professionals* (Australian Taxation Office).

[26] U.S., *Internal Revenue Service – Art Appraisal Service*.

[27] Nina Varsava, 'Professional Irresponsibility and Judicial Opinions' (2021) 59 Houston Law Review 103; James Levey, 'Tax Court Holds that Distinguished Artist's Work Was Not a Hobby' (Parker Tax Publishing, 2014).

determinations, eroding predictability and trust in the fairness of fiscal regimes designed to support them[28].

The definitional and procedural inconsistencies that underpin these systems have deep normative consequences. By embedding assumptions about artistic legitimacy and professional worth into fiscal law, states transform tax incentives into instruments of gatekeeping. Artists working outside dominant institutions—self-taught practitioners, community-based creators, and those experimenting with non-traditional media—are systematically marginalized. The policy intent of supporting cultural diversity is thus undermined by procedural mechanisms that privilege bureaucratic order over artistic inclusion. Heikkinen and Karttunen's research illustrates how definitions of professional status are never ideologically neutral but instead reflect institutional and political priorities that determine who is rendered visible within cultural policy frameworks[29]. These definitional asymmetries have direct material effects, restricting access to financial support and distorting empirical representations of the artistic workforce. Within the taxonomy of SFACs developed in this thesis, the definitional ambiguity of professional status exemplifies how legal and administrative norms embed exclusionary structures within fiscal policy. It illustrates a failure of legal certainty, as understood in public-law theory (Gribnau; Tridimas), where textual clarity is undermined by discretionary interpretation; and a failure of functional integration, echoing multi-level governance scholarship (Ostrom; Abbott & Snidal), where uncoordinated evaluative authorities produce structurally unpredictable outcomes[30]. These intertwined failures demonstrate that the governance problems surrounding artist classification are structural rather than incidental, and consequently central to understanding how cultural-fiscal systems generate SFACs at the national level.

This thesis therefore argues for a recalibrated recognition model that integrates three dimensions of professional identity: self-identification, public recognition, and financial sustainability. Self-identification foregrounds the artist's agency and acknowledges the subjective and processual nature of creative labour. Historical cases underscore the significance of this dimension: Vincent van Gogh, Jean-Michel Basquiat, Frida Kahlo, and Bill Traylor all

[28] Levey (n 27).
[29] Heikkinen and Karttunen (n 22) 4.
[30] Gribnau (n 1); Tridimas (n 2); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 2015); Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421.

operated outside institutional frameworks or commercial systems during their lifetimes, yet their work has profoundly shaped artistic canons and public consciousness[31]. Nevertheless, self-identification cannot operate in isolation, as it risks undermining administrative integrity by opening the door to opportunistic abuse by individuals without sustained engagement in artistic practice. As Frey and Pommerehne emphasize, fiscal policy must strike a balance between accessibility and accountability, ensuring that public resources support those who genuinely derive income and identity from their artistic labour[32]. Public recognition offers a complementary axis by capturing external validation through exhibitions, awards, and critical reception. This form of recognition supports the objective of tax-in-lieu and tax-deduction policies, which seek not only to relieve tax burdens but also to preserve and valorise cultural heritage. Legal cases such as *Crile v. Commissioner*[33] demonstrate how courts weigh such factors in determining professional status, although such assessments often rely heavily on market-oriented proxies. However, if applied rigidly, it perpetuates structural inequities by favouring artists with privileged access to institutional networks while excluding emerging artists who have yet to gain widespread recognition but who are nonetheless serious professionals[34]. Recognition should therefore be understood dynamically, including alternative and community-based forms of validation that more accurately reflect the pluralism of contemporary artistic life. Financial sustainability, finally, must be approached as a contextual indicator rather than a rigid test of profitability. As Towse and others have demonstrated, the income trajectories of artists are inherently unstable, often combining multiple forms of revenue[35]. Many serious professionals supplement their income with teaching, commissions, or unrelated work, especially during early or transitional stages of their careers. Overemphasis on financial viability thus risks excluding those most in need of support. Fiscal policy should thus evaluate commitment and consistency of practice rather than short-term financial

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[31] Van Gogh, one of the most celebrated artists in history, received minimal formal training and struggled financially throughout his career, yet his post-impressionist works have left an indelible mark on global culture; Jean-Michel Basquiat began his career as a graffiti artist, later transitioning into painting without institutional endorsement or formal artistic education; Frida Kahlo, despite limited formal training, used her work to express deeply personal and socio-political themes, securing a place as one of the most influential artists of the 20th century; Bill Traylor, who began his artistic career at 85 after a lifetime of hardship, gained posthumous acclaim for his unique style; see Julien Delagrange, 'Top 10 Self-Taught Artists of the Contemporary Era - A Critical Anthology' (Contemporary Art Issue CAI 2023).

[32] Werner W Pommerehne and Bruno S Frey, 'Public Promotion of the Arts: A Survey of Means' (1990) 14(2) Journal of Cultural Economics 73.

[33] *Crile v Commissioner*, T.C. Memo 2014-202 (US Tax Court, 2 October 2014).

[34] Heikkinen and Karttunen (n 22) 4.

[35] Ruth Towse, *A Textbook of Cultural Economics* (CUP 2019).

outcomes, recognizing that precariousness is an intrinsic feature of cultural practice rather than a sign of amateurism.

By interpreting definitional ambiguity as a SFAC, this thesis situates the debate on professional status within a broader normative and functional framework. The legal dimension of this constraint arises from conflicting or incomplete statutory definitions that fail to align with the evolving realities of artistic work. The administrative dimension emerges from subjective interpretations and inconsistent application by authorities lacking sectoral expertise. Together, they create a self-reinforcing cycle of exclusion that limits the effectiveness of tax-in-lieu and tax-deduction schemes as instruments of cultural policy. Reconceptualizing professional status through a balanced, multi-dimensional model would not only enhance legal certainty and procedural fairness but also align fiscal frameworks with the public objectives of inclusivity, diversity, and cultural sustainability that underpin contemporary cultural governance.

2.2.3 Opaque Qualification of Artworks

A third significant SFAC arises in the determination of whether an artwork qualifies for inclusion in tax-in-lieu or tax-deduction schemes. Although national legal frameworks vary, common eligibility criteria across jurisdictions require that the artwork possess exceptional cultural, historical, or aesthetic value and that it be validated by government-appointed advisory committees. These criteria, though aimed at ensuring the integrity and public value of tax-supported cultural acquisition, risk function as opaque and exclusionary thresholds. In practice, they establish a high evidentiary and procedural burden that excludes non-traditional art forms, marginalizes innovative or emerging practices, and subjects cultural value to volatile and inconsistent standards.

In the United Kingdom, both the *Acceptance in Lieu* and the *Cultural Gifts Scheme* require that artworks be assessed as “pre-eminent” on the basis of aesthetic quality, cultural or historical significance, or scholarly interest[36]. The decision is made by an independent advisory panel that relies on input from museum curators, scholars, and members of the art trade. These assessments encompass not only the object’s intrinsic value and physical condition but also its

[36] See the Guidance and the Cultural Gifts Scheme Leaflet at Arts Council England https://www.artscouncil.org.uk/sites/default/files/download-file/AIL%20Leaflet.pdf.

fair market value. A similar process is employed in France, where the *Dation en Paiement* scheme permits the settlement of tax debts through culturally significant works[37]. The French Ministry of Culture oversees this process, relying on expert evaluations to ensure that acquisitions contribute meaningfully to the national patrimony. In Mexico, the *Pago en Especie* program requires that artworks submitted by visual artists be both representative of the artist's overall production and created within the tax year of submission[38]. Here too, a committee composed of government and cultural institution representatives evaluates the submissions, using digital images and contextual materials to assess artistic merit and alignment with national cultural objectives.

In all these systems, advisory committees serve as critical gatekeepers, wielding substantial influence over which artworks are deemed eligible. Their decisions, while intended to uphold public interest and cultural integrity, are susceptible to significant subjectivity. The composition, procedures, and standards of these committees vary widely, and they often lack transparent protocols for evaluation[39]. Larger committees may provide more diverse input but also face internal conflict and inconsistent reasoning, especially when confronted with contemporary or controversial works. Smaller, more specialized panels may offer consistency but risk narrowness of vision and the privileging of particular artistic styles or periods. The U.S. Art Advisory Panel under the Art Appraisal Service (AAS[40]), for example, consists of 25 trained appraisers—including museum curators, art dealers, and scholars who volunteer to review cases involving tax-deductible donations of artworks[41]. Although the Internal Revenue Service (IRS) portrays the panel's volunteer status and rotating membership as safeguards against partiality, concerns persist regarding the influence of personal biases, limited representational diversity, and the panel's close alignment with established market interests.

Perhaps the most fraught dimension of these evaluations is the determination of aesthetic value—a domain inherently characterized by interpretive pluralism and evolving norms. Individual reviewers may hold differing opinions about what constitutes valuable art, leading

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[37] France, *Dation en Paiement* (Loi n° 68-1251 du 31 décembre 1968, article 2).
[38] Mexico, DOF 31 October 1994, Presidential Decree: Paintings and prints must be signed, dated, framed, bolted, and wired, and prints must also have a serial number. Sculptures must be signed, dated, and have a serial number.
[39] Sigrid Hemels, *Door the Muze Omhelsd* (Wolf Legal 2005) 82.
[40] U.S., Art appraisal services | Internal Revenue Service, established in 1968, the Panel is governed by the Federal Advisory Committee Act (FACA) and chaired by the Director of AAS.
[41] In the AAS panel's 2017 summary report, the panel recommended adjustments on 61% of the 365 items it reviewed.

to discrepancies in decision-making. These discrepancies affect both tax-in-lieu schemes—where an artist's ability to settle tax debts depends on the perceived worth of their work—and tax-deduction schemes, where the classification of an artwork as a qualifying cultural asset can impact its market value and desirability among collectors. The legal system's efforts to fix aesthetic criteria in formal rules have historically produced contentious results. The landmark *Brancusi v. United States* case in 1928 exemplifies the instability of aesthetic judgment in legal contexts[42]. There, U.S. Customs rejected Constantin Brancusi's *Bird in Flight* as a mere utilitarian object, not "art" under the Tariff Act, denying it duty-free importation. Only through expert testimony (from figures like Jacob Epstein and Edward Steichen) and sustained legal argumentation was the work eventually recognized as sculpture, marking a pivotal shift in the legal conception of modernist art[43]. More recently, disputes over whether contemporary media works by artists such as Bill Viola and Dan Flavin qualified as "sculpture" eligible for tax relief culminated in contradictory rulings between UK tax tribunals and the European Commission (EC)[44]. The trial concerned whether several video installations by Viola and a light piece by Flavin could be imported into the UK as sculptures subject to tax benefits. The artist's intentions and expert opinions from art world curators, collectors, historians, and other artists were considered[45]. While the UK accepted the innovative media works as sculpture, the EC subsequently reclassified them as functional light fixtures or audiovisual devices, rejecting their status as art[46]. This decision was met with widespread criticism from artists, critics, and legal experts[47] as the EC's classification suggested that their work was only art when operational[48]. These reversals not only exposed the regulatory system's discomfort with conceptual and new media art but also demonstrated the destabilizing effects of bureaucratic redefinition on legal certainty and market value.

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[42] U.S., *Brancusi v United States*, 54 Treas. Dec. 428, 429 (Cust. Ct. 1928).

[43] Margherita Andreotti, 'Brancusi's "Golden Bird": A New Species of Modern Sculpture' (1993) 19(2) *Art Institute of Chicago Museum Studies* 134; see also Tamara Mann, 'The Brouhaha: When the Bird Became Art and Art Became Anything' (2011) 2(2) Spencer's Art Law Journal 1.

[44] UK, *Haunch of Venison Partners Limited v Her Majesty's Commissioners of Revenue and Customs*, London Tribunal Centre, released on 11 December 2008.

[45] Included Sandy Nairne, director of the National Portrait Gallery, Martin Caiger-Smith, independent curator and art critic, and Robert Cumming, writer and art critic.

[46] European Commission Regulation 731/2010.

[47] Art lawyer Pierre Valentin, who represented Haunch of Venison in the 2008 case, in the January 2011 edition of *The Art Newspaper* stated that the EC's definition of art (in the Regulation) is "a patently absurd piece of legislation. Adopted behind closed doors, without an apparent understanding of the subject matter, it reverses two national judicial decisions that both ruled that video installations should be classified as art. No judge had decided the issue in any other way. There was no need for the Regulation, which is contrary to the jurisprudence of the European Court of Justice".

[48] Rachel J Tischler, 'The Power to Tax Involves the Power to Destroy: How Avant-Garde Art Outstrips the Imagination of Regulators, and Why a Judicial Rubric Can Save It' (2012) 78 Brooklyn Law Review 523.

Such cases underscore that artistic value is not a fixed or universally legible quality but a socially constructed and contested category. When eligibility for tax incentives hinges on such assessments, artists working in less commercially dominant or institutionally sanctioned genres face a higher risk of exclusion. These exclusions are not incidental but structural, rooted in the legal system's reliance on conservative evaluative frameworks that often privilege canonical, commodified, and institutionally endorsed art. The resulting gatekeeping replicates cultural hierarchies and undermines the transformative intent of tax-in-lieu and tax-deduction schemes, which are meant to provide financial relief, enrich public collections, ensure public access to art, and support a diversity of artistic expression.

Beyond aesthetic evaluation, valuation decisions present a parallel set of challenges. While ostensibly based on market data and expert appraisals, the determination of fair market value (FMV) is marked by its own inconsistencies, speculative projections, and latent conflicts of interest. The IRS's reliance on independent appraisers in the *Eva Franzen Kollsman* case illustrates these tensions[49]. There, the court sided with the IRS against an estate's valuation, citing potential conflicts arising from the appraiser's financial ties to the auction house[50]. In *Estate of Bernice Newberger*[51], valuation disputes over three paintings—Picasso's *Tête de Femme (Jacqueline)*, Motherwell's *Untitled*, and Dubuffet's *Elément Bleu XV*—led to divergent outcomes, as courts adjusted valuations in line with fluctuating market conditions and evidence of curator and dealer biases. The court ruled in favour of the IRS for the Picasso, valuing it USD $5 million higher than the estate's estimate, while siding with the estate for the other two. These cases reveal that valuation is not a neutral exercise but a negotiation shaped by shifting economic conditions, the credibility of expert testimony, and the interpretive discretion of tax authorities.

The absence of standardized, transparent methodologies exacerbates these problems. When valuation practices diverge across jurisdictions, institutions, or even individual appraisers, both legal certainty and functional integration of the tax system is undermined. As Heikkinen and Karttunen note, valuation decisions are embedded in political and economic contexts that

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[49] U.S., *Estate of Eva Franzen Kollsman v Commissioner of Internal Revenue* [2017] T.C. Memo (RIA) 2017-040.

[50] Emily Lanza, 'In the Eye of the Beholder: Appraisals of Art for Estate Tax Liability' (2017) Center for Art Law.

[51] U.S., *Estate of Bernice Newberger v Commissioner* [2015] T.C. Memo 2015-246.

reflect broader asymmetries of power and recognition[52]. In some cases, inflated valuations benefit state revenue authorities by increasing tax liabilities, while in others, underestimations serve collectors or estates seeking to minimize obligations[53]. When appraisal practices diverge across jurisdictions, institutions, or individual evaluators, both legal certainty and functional integration are weakened. From a public-law perspective, these disparities illustrate how discretionary authority, exercised without procedural discipline or reason-giving, undermines legality and predictability[54]. From a governance perspective, they reveal how uncoordinated evaluative nodes generate structural fragmentation that predictably produces SFACs[55].

These valuation and classification challenges intersect directly with the objectives of tax-in-lieu and tax-deduction schemes. If such schemes are intended to support the public interest by acquiring and preserving culturally significant works in exchange of lieu, evaluative practices must incorporate criteria beyond market comparability—including cultural relevance, historical significance, and artistic innovation. Yet in the absence of structured frameworks for balancing these variables, the system remains vulnerable to arbitrary, inconsistent, or politicised decision-making. The opacity of valuation processes—and the limited availability of meaningful review mechanisms—leaves artists and collectors in states of legal and financial precarity. This analysis demonstrates how institutional discretion and fragmented evaluative structures perpetuate SFACs within cultural-fiscal policy designed to democratize cultural access. Concentrated interpretive power in elite networks of experts, curators, and administrators reinforces existing cultural inequalities and exposes a fundamental tension between formal legality and the substantive objectives of cultural governance—namely, the equitable distribution of opportunities for artistic participation, recognition, and fiscal support.

The analysis of opaque qualification and valuation mechanisms of artworks in tax-in-lieu and tax-deduction schemes demonstrates how institutional discretion and the absence of standardized evaluative frameworks perpetuate SFACs within cultural-fiscal policy. The evidentiary and procedural burdens embedded in these schemes function as more than administrative inefficiencies; they translate into systemic barriers that restrict the capacity of

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[52] Heikkinen and Karttunen (n 22) 4.

[53] Scott Rosen, 'Investing in Artwork: Using Art to Lower Your Tax Liability' (2021) Institute of Financial Wellness.

[54] Gribnau (n 1); Asif H Qureshi, 'International Tax Administration and the Administrative State: Some Institutional Criteria for Evaluating Procedural Consistency' (2005) International Tax and Public Finance 11(6) 947.

[55] John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2020) Part III; Abbott and Snidal (n 30).

artists, collectors, and cultural institutions to engage effectively with tax incentives. The reliance on expert committees, market appraisals, and aesthetic hierarchies transforms the process of cultural recognition into one shaped by institutional authority rather than public accessibility or artistic merit. Consequently, fiscal policies designed to democratize cultural access instead consolidate interpretive power within a narrow elite of experts, curators, and administrators. This pattern reinforces existing cultural inequalities and exposes the tension between formal legality and the substantive objectives of cultural governance—namely, the equitable distribution of opportunities for participation, recognition, and fiscal support within the creative economy.

The next section extends this analysis to address a distinct but related field of fiscal governance: cultural philanthropy. While tax-in-lieu schemes for visual artists reveal the micro-level mechanisms of exclusion operating within national systems, tax-deductions for cultural philanthropy expose how fiscal privileges accorded to private donors and institutions reproduce broader asymmetries of power within cultural production and access. Section 2.3 therefore examines the SFACs embedded in tax-deductibility frameworks for cultural philanthropy, analysing how the legal and administrative design of these incentives shapes patterns of cultural investment, determines which forms of cultural expression are valorised, and ultimately influences the structural inclusivity of national cultural-financial systems. Through this shift in focus, the thesis moves from questions of individual eligibility and evaluative opacity to the systemic fiscal dynamics that condition the flow of private capital into the cultural-creative ecosystem.

2.3 Tax-Deductions on Cultural Philanthropy—SFACs

Tax-deductibility incentives for cultural philanthropy constitute one of the most widespread fiscal instruments for mobilizing private capital toward public cultural objectives. By permitting donors to deduct qualifying contributions from taxable income or corporate profits, these mechanisms operate as fiscal multipliers that channel private resources into non-market cultural goods—heritage preservation, non-commercial artistic production, intercultural dialogue, and expanded public access to culture (§1.1.2). Within the CCIs, they function as critical complements to public funding, bridging gaps in state support and stimulating civic participation in cultural development.

Yet, despite their integrative potential, the legal and administrative architectures governing these tax-deductible donations frequently exhibit structural inconsistencies that translate into SFACs. At the normative level, ambiguity in statutory definitions of "eligible donor," "qualified recipient," and "public-benefit purpose" undermines legal certainty and predictability. At the functional level, fragmented implementation across fiscal and cultural authorities limits coordination and coherence, reducing the effectiveness of these schemes as instruments of inclusive cultural governance. These deficiencies are not merely technical: they shape who can participate in cultural philanthropy and under what conditions, thereby determining the extent to which fiscal policy fulfils its cultural, social, and economic objectives.

Tax authorities generally impose eligibility restrictions on both donors and recipient organizations (DGRs) to align fiscal benefits with domestic policy priorities and to safeguard against the misuse of public funds. Such constraints are often justified as necessary expressions of fiscal sovereignty and policy accountability. However, in operational terms, they create two recurrent forms of SFACs. The first concerns donor eligibility, where deductions are limited to applicants with fiscal residence, registration, or permanent establishment in the same jurisdiction (§2.3.1). This residence-based condition effectively excludes non-resident donors, even when their contributions target locally recognized cultural or public-interest entities. The second pertains to recipient eligibility, where organizations must satisfy formal criteria—legal form, territorial scope, and public-benefit purpose—narrowly defined under national law (§2.3.2). These restrictions tend to privilege conventional nonprofit structures and nationally bounded activities, marginalizing hybrid, transnational, or market-linked cultural initiatives that fall outside established categories.

The combined effect is a fragmented and exclusionary fiscal landscape in which donations that would qualify as tax-deductible in one jurisdiction are disqualified in another, even when directed toward equivalent cultural purposes. This lack of coherence erodes legal certainty for donors, increases compliance costs for recipient institutions, and inhibits functional integration between fiscal and cultural administrations. As a result, the system systematically disfavours transnational giving, discourages cross-border cultural collaboration, and constrains the very cultural diversity and participation it seeks to promote.

Within the evaluative framework of this thesis, these constraints primarily reflect deficiencies in legal certainty and functional integration, the two variables most salient at the national level. Inconsistent statutory definitions weaken predictability and transparency, while fragmented administrative coordination prevents cultural authorities from effectively interfacing with fiscal regulators. These gaps are the hallmark of SFACs: they reveal how domestic fiscal regimes, even when pursuing legitimate policy aims, can produce exclusionary effects that restrict equitable access to cultural-creative tax incentives.

Accordingly, this section analyses the normative and functional dimensions of these SFACs through two focal subsections: §2.3.1 on donor eligibility, and §2.3.2 on recipient eligibility. Rather than interrogating the policy rationale behind these policies' criteria—the analysis here focuses on to demonstrate how current national frameworks perform under the five evaluative variables introduced in Chapter 1 (§1.4), and to lay the groundwork for subsequent chapters that explore how bilateral, EU, and UNESCO-level interactions can progressively reduce these constraints.

2.3.1 Restrictive and Fragmented Fiscal Residence of Donors and Donees

The hypothetical case of *Elizabeth*, introduced in Chapter 1, remains emblematic of a pervasive SFAC: the requirement that both donor and recipient be fiscally resident within the jurisdiction granting the tax incentive. Her inability, as a UK resident, to claim deductions for philanthropic donations made to museums in the Netherlands, Germany, and Australia exemplifies how this condition, while rooted in legitimate fiscal policy considerations, generates unintended barriers to international cultural philanthropy. By tying deductibility to fiscal residence, states seek to ensure that the tax relief accrues only to those contributing to their domestic revenue base. Yet in doing so, they convert what should be a mechanism of public-benefit promotion into a territorialised privilege. This approach contradicts the underlying principle that the social value of a donation resides in its contribution to public good, not in the geographical identity of the operator or beneficiary[56].

[56] Lilly Family School of Philanthropy, 'The 2022 Global Philanthropy Environment Index (GPEI)' (Indiana University 2022) https://philanthropy.iupui.edu.

In an era of global interdependence—where challenges such as cultural heritage preservation and cultural cooperation demand transnational responses—residence-based restrictions on deductibility appear increasingly anachronistic. Rigid or subjective tests of physical presence, habitual abode, or "centre of vital interests" not only vary widely across jurisdictions but also expose donors to interpretive discretion and administrative inconsistency. The result is a fragmented fiscal landscape in which globally mobile philanthropists face exclusion or uncertainty when seeking to engage in cross-border giving. Establishing or maintaining tax residence under divergent national criteria frequently exceeds donors' administrative capacity or willingness to comply, generating deterrent effects that distort philanthropic behaviour and inhibit the international circulation of cultural capital.

For individual donors, fiscal residence is typically determined through physical presence tests or assessments of social and economic ties. The former—such as the 183-day rule—offers procedural simplicity but fails to capture the realities of contemporary transnational life, particularly for high-net-worth cultural philanthropists who maintain social, economic, and professional ties across multiple countries[57]. More flexible "centre of life interests" or "facts and circumstances" tests, adopted in countries such as Germany[58] and the Netherlands[59], acknowledge this complexity but introduce uncertainty of a different kind. These tests depend on subjective assessments—location of family, medical care, schooling, or financial relationships—that grant significant interpretive latitude to tax authorities. As Petraske observes in her study of international philanthropic governance, the absence of harmonized residence criteria forces globally mobile donors to structure their contributions around the lowest compliance risk rather than around their genuine philanthropic priorities[60]. The result, as she notes, is a distortion of international giving patterns in which fiscal barriers displace the normative objective of advancing public benefit. Under such conditions, tax law ceases to operate as a neutral facilitator of cultural generosity and instead functions as a regulatory filter privileging domestic over transnational cultural cooperation.

Corporate donors confront even more complex residence determinations. The concept of corporate fiscal residence varies between systems that rely on incorporation, central

[57] OECD, *Taxation and Philanthropy*, OECD Tax Policy Studies No 27 (OECD Publishing 2020).
[58] Germany, relevant tax provisions include Einkommensteuergesetz (*Income Tax Act, EStG*) s 1(1); *Fiscal Code* of Germany (Abgabenordnung, AO) ss 8–9.
[59] Netherlands, Article 4 of the Algemene wet inzake rijksbelastingen (*Dutch General Tax Act*).
[60] Alana Petraske, 'Philanthropy and the Globally Mobile' (2019) 25(10) Trusts & Trustees 1002.

management and control, or the existence of a permanent establishment (PE). Jurisdictions such as the U.S.[61] and Russia[62] employ incorporation as the decisive criterion, while others, including Australia, the UK, the Netherlands, and New Zealand, employ a dual approach, considering both incorporation and central management and control as determinants of fiscal residence. In Australia, for example, a corporation is deemed resident if incorporated or centrally managed there, but must also satisfy further administrative conditions such as possessing an Australian Business Number and meeting ownership or control tests—particularly relevant for in-kind donations under the *Australian Charities Act 2013*, where legal entitlement to the cultural object is scrutinized[63]. In the UK, similar considerations apply for tax schemes like the *Museums and Galleries Exhibition Tax Relief* (MGETR), with corporate residence influencing eligibility[64]. The Netherlands[65] and New Zealand[66] also assess corporate residence based on where significant business decisions are made, where records are kept, and where the company's directors operate. This multiplicity of standards creates interpretive uncertainty, especially for multinational corporations with distributed management structures, and exposes them to inconsistent tax treatment across jurisdictions.

Empirical evidence reinforces these analytical observations. The Charities Aid Foundation (CAF) notes that legal uncertainty and administrative burdens deter corporate donors from engaging in cross-border philanthropy, particularly where no streamlined equivalency processes exist[67]. The U.S. Agency for International Development (USAID) similarly

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[61] Under the *United States Companies Act*, 15 USC § 78c (U.S.) a corporation residence is based on its place of incorporation, and not where it is managed or controlled. Then, a corporation organised or created in the U.S. under the law of the U.S. or of any state is a domestic corporation.
[62] The Russian legal framework applicable to tax residence includes *Russian Civil Code*; Federal Law No 14-FZ (*Limited Liability Companies, 1998*); Federal Law No 208-FZ (*Joint-Stock Companies, 1995*); Federal Law No 129-FZ (*State Registration of Legal Entities and Individual Entrepreneurs, 2001*).
[63] The Australian legal framework for cultural philanthropy includes the *Charities Act 2013* (No 100, 2013); the *Income Tax Assessment Act 1936* (ITAA 1936) pt III, div 3, sub-div A, s 78; the *Income Tax Assessment Act 1997* (ITAA 1997) div 30, sub-div 30-B, sub-div 30-BA, s 30-15, sub-s 30-15(1), s 30-17; the *Private Ancillary Funds and its Guidelines 2019*; the *Legislation Act 2003*; the *Australian Charities and Not-for-profits Commission Act 2012*; *Taxation Ruling TR 2005/13* and *Taxation Ruling TR 2018/5*.
[64] The UK legal framework for cultural philanthropy includes the *Charities Act 2011*; the *Museums and Galleries Exhibition Tax Relief (MGETR)*; the *Finance Act 2012*; and relevant guidelines such as the *Cultural Gifts Scheme Leaflet*.
[65] The Netherlands' legal framework for cultural philanthropy includes the *Inheritance and Gifts Tax Act 2012*; the *Donations and Public Benefit Organisations Decree*; the *State Taxes Act 1994*, arts 5b–5d; the *Civil Code*, art 285, book 2 (providing the legal framework for foundations and associations for charitable organisations); and relevant guidelines.
[66] The New Zealand legal framework for cultural philanthropy includes the *Charitable Trusts Act 1957*; the *Charities Act 2005* (No 39); the *Funding Guidelines*; the *Income Tax Act 2007*, sub-pt LD (tax credits for gifts and donations); the *Incorporated Societies Act 1908*; the *Companies Act 1993*; and the *Tax Administration Act*.
[67] Charities Aid Foundation (CAF), *Donation States: An International Comparison of the Tax Treatment of Donations* (2016).

documents delays and compliance burdens arising from uncoordinated fiscal and legal regimes, even among well-resourced donors[68]. Data from the Lilly Family School of Philanthropy's *Global Philanthropy Tracker* further reveal that international giving remains concentrated in high-capacity jurisdictions where fiscal clarity, administrative coherence, and legal predictability coincide—leaving regions with opaque residence rules comparatively under-supported[69]. These findings underscore that restrictive and fragmented residence frameworks distort global philanthropic flows, undermining the connective and cooperative functions cultural-creative tax incentives are designed to achieve.

Scholarly analysis of cultural-fiscal policy consistently warns of the systemic risks such fragmentation entails. Buijze identifies the misalignment between national tax systems and the mobility of modern philanthropy, arguing that wide administrative discretion in the absence of equivalency standards produces legal uncertainty and erodes trust[70]. Pickering, Quick, and Kruse document how variations in donor eligibility and foreign nonprofit recognition establish barriers to international giving[71]; while Boris and Steuerle explore how administrative discretion and conflicting tax incentives can generate institutional conflict, especially where nonprofit organizations rely on both state cooperation and private philanthropy[72]. Their analysis highlights how unclear legal standards can destabilize the relationship between governments and civil society. Colinvaux and Harvey similarly point to the U.S. federal rules on charitable deductions, showing how discretionary interpretations by the IRS often lack transparency and result in inconsistent and unpredictable outcomes[73]. Together, these contributions demonstrate that the absence of coherent or functionally integrated residence standards generates a double deficit in legal certainty and functional integration, the two key evaluative variables relevant at this governance level.

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[68] USAID, *Private-Sector Engagement (PSE) Resource Guide* (2018) https://pages.usaid.gov/sites/default/files/usaid_pse_resource_guide_final_march2018.pptx-2.pdf; USAID, *Enterprise-Driven Development: Private-Sector Engagement Communications Toolkit* (2018) (Section: "Barriers to Private Sector Participation") https://pages.usaid.gov/sites/default/files/2018-march_pse_comms_toolkit_final_formatted.dotx_.pdf.

[69] Indiana University Lilly Family School of Philanthropy, 'The Changing Landscape of U.S. Cross-Border Philanthropy' (2019).

[70] Renate Buijze, *Tackling the International Tax Barriers to Cross-Border Charitable Giving* (IBFD Doctoral Series, 2020).

[71] Adam Pickering, Elaine Quick, and Toni Ann Kruse, *Rules to Give By: A Global Philanthropy Legal Environment Index* (Charities Aid Foundation (CAF), McDermott Will & Emery, Nexus 2014) Belgium.

[72] Elizabeth T Boris and Eugene Steuerle (eds), *Nonprofits and Government: Collaboration and Conflict* (3rd edn, Rowman & Littlefield 2016).

[73] Roger Colinvaux and Dale Harvey, 'The Charitable Contributions Deduction: Federal Tax Rules' (2015) 68(2) Tax Lawyer 332.

Accordingly, this thesis identifies fiscal residence requirements for both donors and donees as a core SFAC within national tax-deduction regimes for cultural philanthropy. Anchored in outdated conceptions of territoriality and residence, these rules impose legal and administrative constraints that fail to reflect the realities of globally mobile philanthropy. By subordinating the recognition of public-benefit purpose to jurisdictional proximity, they curtail the inclusiveness and effectiveness of tax incentives as instruments of cultural cooperation. Unless national systems adopt more coherent and functionally grounded residence criteria—potentially guided by equivalency principles or mutual recognition frameworks—the SFACs rooted in fiscal status will continue to inhibit the international circulation of philanthropic capital and the realization of culture's public good.

2.3.2 Fragmented and Discretionary Recipient Criterion

In addition to donor-side constraints, tax-deductibility incentives for cultural philanthropy are significantly shaped by the eligibility of recipient organizations (DGRs). The criteria governing eligibility—relating to legal form, public-benefit purpose, engagement in market-based activities, and territorial scope—form a dense and often incoherent regulatory matrix. While these requirements may serve legitimate domestic policy objectives, they are characterized by excessive formalism, inconsistent definitions, and discretionary interpretation. Collectively, they create SFACs that impede cross-border giving, distort international philanthropic flows, and, in some instances, conflict with states' broader obligations to facilitate international cultural cooperation.

A key threshold issue concerns the legal form of entities eligible for DGR status. Many jurisdictions condition tax-deductibility on the recipient adopting a state-recognized organizational structure, ostensibly to ensure fiscal accountability and administrative oversight. However, these requirements produce significant inconsistencies across systems. A foundation regarded as charitable in Belgium may be excluded from DGR status in Australia or New Zealand, not for lack of public purpose, but because it fails to conform to a prescribed legal category. Australia's *Corporations Act 2001* and *Income Tax Assessment Act 1997* (ITAA, s 30-15) restrict eligibility to certain forms—incorporated associations, charitable trusts, funds, and companies limited by guarantee—classified into thirteen functional groups including cultural organizations, public libraries, and art galleries. Belgium's *Code of Companies and Associations* (BCCA), by contrast, adopts a more inclusive approach, recognizing non-profit associations, international non-profit associations, and both public-interest and private foundations—based more on non-profit status than a narrowly defined charitable mission[74]. Canada's *Income Tax Act* (s 149(1)(2)) similarly recognizes a range of entities, but imposes varied governance requirements depending on whether an organization is a public or private foundation[75]. The UK's *Charities Act 2011* (Parts 9-14) permits multiple legal forms, including trusts, charity companies, incorporated and unincorporated organisations, and special trustees; whereas Germany links DGR recognition to provisions across multiple statutes—the *Fiscal Code*, *Corporate Income Tax Act*, and *Inheritance and Gift Tax Act*—yielding divergent outcomes[76]. The Netherlands adopts a nuanced system distinguishing between public benefit organizations (PBOs) and organizations representing social interests (ORSIs), which can take various legal forms, including associations, public bodies (e.g., museums), and companies (e.g., theatres). New Zealand's *Charities Act 2005* requires trusts, societies, and institutions to demonstrate charitable purposes, meet incorporation standards, and adhere to governance criteria (Sections 13-16). Across these frameworks, internal inconsistencies and jurisdictional incoherencies reflect distinct legal traditions and policy rationales. Yet in the absence of coordination mechanisms, they exclude legitimate applicants from international recognition and penalize hybrid or cross-border models that do not fit rigid categories.

The policy rationale behind such variation—fiscal sovereignty and protection against abuse—is defensible in principle[77]. However, the absence of transnational coordination mechanisms transforms divergence into dysfunction. As Petraske, Buijze, and O'Halloran have shown, the resulting uncertainty disincentivizes donors from supporting foreign organizations and channels philanthropic capital toward entities that align with domestic administrative

[74] The Belgian legal framework for cultural philanthropy includes the *Code of Income Tax* (CIT), in particular, art 145(33), which lists the institutions eligible as qualified recipients, and art 63(18/1-7), which establishes the requirements for approval.
[75] The Canadian legal framework for charitable giving tax incentives includes *Gifts and Income Tax* (2021) (Pamphlet P113), *Donations and Gifts*, the *Cultural Property Export and Import Act* (CPEIA), *Income Tax Act* (1985), and the 'Guidelines for Registering a Charity: Meeting the Public Benefit Test' (CPS-024). The guidelines discuss the fundamentals of charity, with Appendix A detailing the legal foundation for the common law definition of charity. The Appendix emphasizes the necessity of referring to common law (case law or court decisions) to determine the legal meaning of charity.
[76] The German legal framework for charitable giving tax incentives includes the *Fiscal Code*, the *Corporate Income Tax Act* (EStG, s 5(1)(9)), and the *Inheritance and Gift Tax Act* (s 13(1)(16b)).
[77] In the UK, for example, HMRC plays a crucial role in reviewing charity activities and identifying unusual patterns of donations that might indicate fraud. Their efforts are aimed at ensuring that charitable donations are used for legitimate purposes and not exploited for tax evasion or money laundering. HM Revenue & Customs, *Charities Tax Compliance* (HMRC 2024) https://www.gov.uk/government/consultations. The Australian ACNC advises charities to be vigilant and implement robust financial controls to protect against abuse, including fraud related to donations and money laundering. Australian Charities and Not-for-profits Commission, *Protecting Charities from Fraud and Financial Abuse* (ACNC 2023) https://www.acnc.gov.au.

expectations rather than substantive impact[78]. Networks such as Philanthropy Europe Association (Philea) and Transnational Giving Europe (TGE) have documented how procedural complexity, discriminatory eligibility, and lack of equivalency rules deter cross-border giving[79]. When legal form becomes a proxy for legitimacy, it constrains international collaboration, especially in sectors like arts and culture where diversity is the norm and where organizations often resist easy categorization.

Public-benefit purpose requirements introduce further layers of divergence. Though virtually all jurisdictions require recipient organizations to serve the public good, the scope, methodology, and interpretation of this criterion vary widely. Australia's *Charities Act 2013* defines charitable purpose as one conferring a public benefit—whether tangible or intangible (sub-ss (1) to (4))—on an appreciable section of the community, while allowing limited private benefits incidental to public objectives. Under *Australian Taxation Ruling 2011/4*, the fact that only a few individuals can avail themselves of a benefit at a given time does not necessarily violate the public-benefit test. For example, arts organizations that confer prizes on a single, but different, meritorious artist annually may still qualify as charitable. This means that although DGRs cannot be established to confer private benefits, some private benefit may arise in the course of pursuing charitable objectives. In such cases, the private benefit may be justifiable. Examiners employ a numerical criterion, evaluating whether the group benefiting is sufficiently large to satisfy the public element. This approach incorporates a dynamic understanding of public-benefit, acknowledging that societal needs evolve over time. As new societal challenges emerge, the scope of what qualifies as public-benefit evolves to reflect these shifting priorities. The UK's *Charities Act 2011* follows a comparable framework, requiring that the public-benefit outweigh any potential harm and that it be accessible to a sufficient segment of the public[80]. Germany's broader approach—under the *Corporate Income Tax Act*—incorporates advancement of moral, spiritual, and material welfare as qualifying goals. Section 52(1) states that there is no advancement of the general public if the group of beneficiaries is restricted to members of a family, the workforce of an enterprise, or any group that, by definition, remains small—particularly if determined by geographical or professional

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[78] Petraske (n 60); Buijze (n 70); Myles McGregor-Lowndes and Kerry O'Halloran, *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar 2010).
[79] Lucia Plantamura, Hanna Surmatz, Ludwig Forrest, and Anne-Laure Paquot, 'Removing Obstacles to Cross-Border Philanthropy: The Time Is Now' (Philanthropy Europe Association (Philea) and Transnational Giving Europe (TGE), 2024).
[80] Charity Commission for England and Wales, *Public Benefit: The Public Benefit Requirement (PB1)*.

attributes. New Zealand's *Charities Act 2005* similarly mandates that public-benefit align with recognized charitable purposes and serve a sufficient portion of the public, with courts playing a central role in resolving ambiguities.

These variations reveal not merely normative pluralism but structural incoherence. Within jurisdictions, multiple administrative actors—tax authorities, charities commissions, courts—interpret public-benefit requirements differently. In Australia, for instance, the Australian Taxation Office (ATO) and the Australian Charities and Not-for-profits Commission (ACNC) exercise overlapping oversight without mutual binding authority. In the UK, the Charity Commission and tax authorities apply related but distinct evaluative standards. In the U.S., the Internal Revenue Service (IRS) retains centralized control, but its rulings often reflect narrow readings of public purpose influenced by political and cultural considerations. This multiplicity of evaluative centres expands administrative discretion and diminishes predictability, undermining the legal certainty essential to both donor and donee confidence.

The tension between public-benefit and market activity compounds these difficulties. Many cultural and creative organizations rely on ticket sales, sponsorship, and merchandising to sustain operations. Yet jurisdictions diverge sharply on whether such market engagement compromises charitable status. Australia permits revenue-generating activities if profits are reinvested in charitable purposes (*Charities Act 2013*); under *Division 2(9-2) of the Private AFs* and *Section 30-15 of the ITAA 1997*, ancillary revenue-generating activities—such as operating a private ancillary fund to support DGR-eligible institutions—are permissible only if they clearly further or assist the organization's charitable mission. This framework prioritizes public-benefit objectives over financial independence, reflecting a cautious approach to integrating market activities within the charitable sector. Belgium (*Code of Companies and Associations, BCCA*) and Canada (*Revenue Agency's Guidelines*) adopt similarly flexible approaches, emphasizing substantive reinvestment over formal prohibition. The Netherlands goes further, allowing charitable foundations to operate commercial enterprises provided profits serve public-benefit objectives (*Dutch Civil Code*). In contrast, Germany (*Corporate Income Tax Act*) and New Zealand (*Charities Act 2005*) maintain restrictive positions that exclude market-based entities from charitable recognition, effectively penalizing financially self-sustaining cultural institutions.

Scholars and organizations have actively raised awareness about the challenges posed by restrictive and inconsistent cultural-fiscal policies, as well as the subjective interpretation of public-benefit status by examiners[81]. Buijze and Ribas argue that such fragmentation is not merely a technical challenge but a normative and functional problem[82]. Silver, analyzing recent reforms in Australia, argues that a permissive approach—grounded in regulatory coherence and open engagement with cross-border entities—enhances both fiscal integrity and philanthropic capacity[83]. Similarly, Evans and Freedman warn that unchecked tax discretion, especially in the absence of binding interpretive guidelines, erodes legal certainty and damages taxpayer trust[84]. O'Halloran highlights that fragmented oversight structures—where multiple entities have overlapping responsibilities—can exacerbate regulatory inefficiencies, ultimately discouraging charitable giving[85]. These insights underscore the thesis argument that a clearer, coordinated public-benefit standard, coupled with interpretive discipline, is necessary for supporting international cultural philanthropy.

These distinctions disproportionately affect internationally active cultural organizations that must operate across regulatory environments with conflicting views of legitimacy. For example, a theatre company headquartered in the Netherlands may qualify for public-benefit status domestically due to its cultural mission and commercial sustainability. However, if it seeks recognition in New Zealand to attract tax-deductible donations, its market-based activities may disqualify it outright. This misalignment limits the ability of self-sustaining organizations to scale or diversify funding sources across borders. Anheier and Buijze argue that financial resilience—bolstered through revenue generation—is not antithetical to public benefit, but essential to it[86]. Restrictive tax regimes that fail to recognize this hybrid reality exclude innovative models of cultural philanthropy and reinforce an outdated binary between charitable purity and financial sustainability.

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[81] Lucia Plantamura et al (n 79); Charities Aid Foundation (CAF), *Donation States: An International Comparison of the Tax Treatment of Donations* (2016).

[82] Buijze (n 70) addresses international tax barriers to cross-border charitable giving, highlighting how these barriers hinder public benefit organizations' ability to raise funds internationally; Evelyse Carvalho Ribas, in an article published in *ArtLaw.club* (2023), discusses the challenges and considerations for tax incentives in cross-border philanthropy, emphasizing issues such as narrow eligibility criteria and the lack of a shared understanding of key concepts.

[83] Natalie Silver, 'Removing Tax Barriers to Cross-Border Philanthropy: Lessons from Australia' ch 21 in *The Routledge Handbook of Taxation and Philanthropy* (Routledge, 2021).

[84] Chris Evans and Judith Freedman, 'The Delicate Balance: Tax, Discretion and the Rule of Law' (2011) IBFD.

[85] McGregor-Lowndes and O'Halloran (n 78).

[86] Helmut K Anheier, *Nonprofit Organizations: Theory, Management, Policy* (Routledge, 2005) 173; Buijze (n 70).

Territorial restrictions further exacerbate these access constraints. Many jurisdictions limit tax-deductibility to donations made to domestic entities, excluding foreign DGRs regardless of their mission or impact. Australia's regulatory framework exemplifies dysfunctional integration. While the *Charities Act 2013* allows charitable purposes to be carried out both domestically and internationally, Private Ancillary Funds (PAFs), governed by the *Guidelines 2019*, are restricted to supporting domestic recipients. This creates a paradox in which charities conducting international activities may qualify under the *Charities Act* but fail to meet the stricter criteria for specific funding mechanisms. New Zealand follows a similar pattern. Organizations pursuing international charitable activities can register under the *Charities Act 2005* (either be established in New Zealand or have a 'very strong connection' to the country—connection assessed based on factors such as the presence of a centre of administration, the number of resident officers, property holdings, and other substantial ties in New Zealand) but may be ineligible for DGR status under the *Income Tax Act 2007* if their operations are primarily overseas. This dual standard illustrates the challenges faced by globally oriented charities, as compliance with domestic charitable law does not necessarily translate into eligibility for tax-deductible donations. The Canada's *Income Tax Act* allows international engagement through qualified intermediaries or foreign projects under Canadian control. Under the Canadian legal framework, charitable giving for international activities is governed by four key aspects: (i) commuter charitable donations between Canada and the U.S., allowing deductions under the *US Internal Revenue Code* for gifts made near the Canada-U.S. border; (ii) Canadian registered charities conducting activities outside Canada, subject to ongoing decision-making and compliance with the *Income Tax Act*; (iii) the acquisition and transfer of real property, including heritage buildings, to non-qualified donees in foreign countries, with specific conditions outlined in *The Guidance* (CG-002, appendix B); and (iv) affiliations with non-qualified donees, involving payments to Canadian charity affiliates (*The Guidance* CG-002, appendix C), which must ensure that the receipt of goods and services is equivalent to the amounts transferred to maintain compliance with the *Income Tax Act*. Additionally, Canadian charities may establish partnerships with non-qualified foreign entities, provided they retain control over the use of funds and demonstrate compliance with domestic regulations. This regulatory model acknowledges the reality of cross-border philanthropic engagement while ensuring fiscal oversight. Germany offers a similarly structured, albeit conditional, model. Under the *Fiscal Code*, charities can maintain tax-exempt status while pursuing activities abroad, provided their operations either promote Germany's international reputation or align with public-benefit criteria under German law. Foreign charities may also qualify for tax-deductible donations if they meet strict verification requirements and submit to oversight by German tax authorities. The Netherlands presents one of the more inclusive frameworks, allowing both domestic and foreign Public Benefit Entities (PBEs) to achieve cultural public-benefit status. This enables them to access the same tax incentives as domestic organizations, fostering a more integrated approach to international philanthropy. However, this inclusivity remains contingent upon compliance with Dutch legal and administrative requirements, which may still impose additional burdens on foreign entities seeking recognition.

The issue, therefore, lies not solely in legal diversity but in the territorial and operational logic underpinning tax-deductibility itself. When tax incentives are conceived primarily as rewards for national contribution, international cultural cooperation becomes an incidental casualty. This critique echoes the findings of international organizations such as the OECD's Network of Foundations Working for Development (netFWD) which promotes dialogue, data sharing, and partnerships between foundations and governments to enhance development outcomes through effective collaboration[87]. Similarly, the Council on Foundations and the European Foundation Centre have developed principles of accountability for international philanthropy, which include policy convergence, equivalency recognition, and stronger cross-border collaboration[88]. The United Nations support initiatives that encourage philanthropic cooperation and improved regulatory frameworks for cross-border giving[89]. These bodies emphasize that alignment of tax policy with global public goods—particularly in culture and development—is essential for enabling systemic change. Similarly, philanthropic scholarship emerging from the Gulf Cooperation Council (GCC) further underscore the importance of better data collection, regulatory alignment, and international collaboration to achieve systemic impact[90]. Without such strategic alignment between legal frameworks and philanthropic goals, restrictive, inconsistent and incoherent tax policies will continue to reinforce national boundaries at the potential expense of international cultural exchange and philanthropic engagement.

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[87] Organisation for Economic Co-operation and Development (OECD), 'Philanthropy' (*Inter-Agency Task Force on Financing for Development*, Issue Brief Series, 2016).

[88] Joint Working Group of the Council on Foundations and the European Foundation Centre, 'Principles of Accountability for International Philanthropy: An Aspirational Tool for International Donors' (2007).

[89] United Nations, *Philanthropy as an Emerging Contributor to Development Cooperation* (2016), report commissioned by the United Nations Development Programme.

[90] HSH Prince Max von und zu Liechtenstein and Mauro Guillén, 'Giving in the Gulf Cooperation Council (GCC): Evolving towards Strategic Philanthropy', *LGT Group Foundation*; see also Margaret Samahita and Leonhard K Lades, 'Compliance Spending Aversion: An Unintended Consequence of Charity Regulation' (2021) 6 Journal of Behavioral Public Administration 1.

This thesis therefore identifies recipient eligibility requirements—across legal form, public-benefit purpose, market engagement, and territorial scope—as a cumulative and systemic source of SFACs within national tax-deduction frameworks. Though each criterion reflects a legitimate regulatory concern, their fragmented and discretionary application undermines legal certainty and obstructs functional integration across cultural-fiscal systems. The consequences are most severe for transnational cultural organizations, which must navigate multiple, inconsistent classifications of legitimacy. What appear as domestic administrative distinctions thus evolve into transnational access barriers that distort the geography of cultural support.

Before turning to the reform proposals (§2.5), it is necessary to complete the national-level diagnosis by examining tax-credits on expenditure for audiovisual productions. Analysing these mechanisms through the evaluative variables of legal certainty and functional integration allows us to identify how, even within ostensibly successful schemes, structural barriers continue to constrain fiscal accessibility and the realisation of cultural policy objectives.

2.4 Tax-Credits on Expenditure for Audiovisual Productions—SFACs

Tax-credits on expenditure for audiovisual productions represent one of the most dynamic intersections between fiscal and cultural policy (§1.1.3). Yet, as this section argues, their very design often reveals how structural constraints determine who benefits from these schemes. By analysing these mechanisms through the normative-functional lens of SFACs, the discussion shifts from evaluating the desirability of specific policy choices to examining the degree of legal certainty and functional integration achieved within each framework. The proliferation of such incentives across jurisdictions has undeniably enhanced cultural competitiveness and attracted global capital, but it has also produced regulatory environments in which eligibility, certification, and expenditure classification operate under divergent standards. These divergences create friction, legal uncertainty, and unequal access—particularly for internationally oriented productions whose cultural and financial logic transcend national borders.

The need for a systematic diagnosis becomes particularly clear when considering emblematic cases such as *The Queen* (2006), which, despite its demonstrable cultural and economic value, encountered procedural and fiscal barriers stemming from overlapping national eligibility requirements (§1.1.3). This illustrates how fiscal instruments designed to promote cultural diversity and industrial development may, through their fragmented implementation, generate access asymmetries and undermine the policy objectives they seek to advance.

This section therefore identifies and examines three key categories of SFACs that emerge from the legal frameworks governing tax-credits on expenditure for audiovisual production: first, restrictive producer eligibility based on incorporation or permanent establishment requirements—constraints that particularly affect short-term, project-based, or co-produced works where maintaining a continuous local presence is impractical or economically inefficient (§2.4.1); second, discretionary and inconsistently applied cultural content tests, often reliant on subjective criteria such as language, location, personnel, or thematic focus (§2.4.2); and third, fragmented definitions of qualified expenditure and minimum spending thresholds, which impose cumulative barriers on productions operating across multiple jurisdictions (§2.4.3). Although analytically distinct, these categories interact in ways that amplify fiscal exclusion and erode predictability, revealing the systemic nature of SFACs within national incentive regimes.

By framing these issues as manifestations of SFACs rather than isolated administrative difficulties, this thesis advances a new interpretive approach to audiovisual tax-credit schemes with an international scope. Rather than treating them solely as domestic instruments of industrial or cultural policy, the analysis conceptualizes them as components of a multi-level fiscal ecosystem, whose effectiveness depends on the degree of coordination, transparency, and functional integration achieved across regulatory domains. This national-level diagnosis, while focused on the internal coherence and accessibility of domestic frameworks, lays the groundwork for the subsequent chapters, where interactions between governance levels—bilateral, EU, and UNESCO—are examined as potential pathways for mitigating the SFACs identified here.

2.4.1 Restrictive Producer Company Requirements

Among the most persistent SFACs embedded in audiovisual tax-credit regimes are the legal incorporation and permanent establishment (PE) requirements imposed on producer companies. These formal conditions, which demand that a producer be locally registered or maintain a legal presence within the granting jurisdiction, are typically justified on the grounds of fiscal oversight, anti-abuse control, and domestic value retention. In practice, however, they function as exclusionary mechanisms that inhibit cross-border collaboration, restrict participation by smaller and independent producers, and entrench structural disparities between Global North and Global South production ecosystems[91]. By tethering access to legal form rather than to substantive production engagement, these requirements distort the very objectives of the incentives—stimulating creativity, diversity, and international cooperation—and instead reinforce nationally circumscribed fiscal and industrial logics.

While large transnational production houses can mitigate these restrictions through local subsidiaries or formal co-production agreements, such compliance strategies entail significant financial and administrative burdens. For independent producers and small-scale entities, especially those operating from less capitalised or emerging markets, incorporation requirements operate as de facto exclusion clauses[92]. The resulting asymmetry undermines both efficiency and inclusivity within global audiovisual production networks. Moreover, given the transient, project-based nature of film and audiovisual production, the requirement of continuous legal presence or central management contradicts the temporal and collaborative structure of the industry, which relies on flexible contractual and financial arrangements across borders.

Scholarship has largely examined audiovisual tax incentives through the lenses of competitiveness and fiscal efficiency, often prioritising domestic economic multipliers or location attraction strategies. Scholars such as Goldsmith and O'Regan[93], and later Stachowiak and Tadeusz[94], have identified the ambivalent "opening" and "closing" tendencies of such schemes—inviting global capital while retaining national control. Yet, this literature has seldom treated producer incorporation as a discrete regulatory barrier with transnational implications. This thesis advances that gap by conceptualising incorporation-based eligibility

[91] Shannon M Sedgwick, Tyler Laferriere, Alexander Specht and Max Dunske, *California Film and Television Tax Credit Program 2.0 – An Economic Impact Study* (Los Angeles County Economic Development Corporation 2022), this research shows that the majority of tax-credits tend to favour larger productions with budgets exceeding $30 million, while independent films and smaller productions receive a smaller share of credits.
[92] Ibid.
[93] Ben Goldsmith and Tom O'Regan, *Cinema Cities, Media Cities: The Contemporary International Studio Complex* (Screen Industry, Culture and Policy Research Series, Australian Film Commission, September 2003); Ben Goldsmith and Tom O'Regan, *The Film Studio: Film Production in the Global Economy* (Rowman & Littlefield 2005) 123; Ben Goldsmith, Susan Ward and Tom O'Regan, 'Global and Local Hollywood' (2012) 1 InMedia: The French Journal of Media and Media Representations in the English-Speaking World.
[94] Krzysztof Stachowiak, 'Innovation Dynamics in the Film Industry: The Case of the Soho Cluster' (2024) unpublished article/chapter (on file with author); Krzysztof Stachowiak and Tadeusz Stryjakiewicz, 'The Rise of Film Production Locations and Specialised Film Services in European Semi-Peripheries' (2018) 67(3) Hungarian Geographical Bulletin 223.

rules as SFACs in their own right. Such a reframing foregrounds the exclusionary impact of legal formalities that privilege entities with the capacity to navigate multiple national systems, while sidelining those unable to establish local presence despite meaningful cultural and economic contribution.

The normative justification for incorporation requirements rests on fiscal sovereignty and accountability. States assert these conditions to ensure that tax-credits generate tangible local benefits—employment, infrastructure use, and taxable profits—within their territory. They also serve as enforcement tools that anchor producers to domestic legal systems. Yet, the practical outcome is often disproportionate: producers must meet not only incorporation demands but also ancillary conditions such as local shareholding ratios, onshore management control, or content origination thresholds. These layered obligations, frequently applied through discretionary administrative interpretation, magnify legal uncertainty and compliance costs. They fragment access across jurisdictions and create a stratified incentive landscape favouring those with pre-existing institutional or financial capacity.

Comparative analysis demonstrates both the diversity and restrictiveness of national approaches. The UK's *Creative Industry Tax Reliefs* (CITR) require not only domestic incorporation but also that core creative and financial decisions occur within the UK[95]. Australia applies a similar "central management and control" test for its *Producer Offset*, mandating onshore decision-making[96]. Ireland's system distinguishes between "qualifying companies" and "producer companies," creating structural complexity and effectively excluding non-EEA producers without deep local restructuring[97]. Norway's Film Institute imposes domestic registration even for EEA entities and couples this with linguistic and

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[95] The UK legal framework for audiovisual tax incentives includes the *Theatre Tax Relief (TTR)*, see HMRC, *Internal Manual: Theatre Tax Relief*, TTR50000 – Eligible Expenditure, available at https://www.gov.uk/hmrc-internal-manuals/theatre-tax-relief-manual; the *Orchestra Tax Relief (OTR)*, see HMRC, *Internal Manual: Orchestra Tax Relief*, OTR60000 – Eligible Expenditure, available at https://www.gov.uk/hmrc-internal-manuals/orchestra-tax-relief-manual; the *Animation Programme Tax Relief (ATR)*, *Finance Act 2013*; the *Audio-Visual Expenditure Credit (AVEC)* scheme, *Corporation Tax Act 2009*, ss 1216AG and 1216AH; the *High-End Television Tax Relief* (*HETR*) and *Children's Television Tax Relief* (*CTR*).

[96] The Australian legal framework for audiovisual tax incentives includes the *Australian Screen Production Incentive* (2015) Division 376, *Income Tax Assessment Act 1997* (Cth); the *Producer Offset Guidelines* (Screen Australia 2018); *Explanatory Statement to the Producer Offset Rules 2018*; *Location Offset Guidelines* (Screen Australia); *Post, Digital and Visual Effects (PDV) Offset Guidelines* (Screen Australia); *Qualifying Australian Production Expenditure* (QAPE); the *Income Tax Assessment Act* (ITAA 1936/1997).

[97] The Irish legal framework for audiovisual tax incentives includes the Film Regulations 2019 (SI 119/2019); the Revenue Commissioners (Irish Tax and Customs), *Film Tax Credit Guidance Notes*.

cultural conditions that privilege national content[98]. Austria, while not requiring incorporation per se, imposes a "track record" excludes newer market entrants by demanding a five-year history of culturally significant production within the EU or EEA—an implicit bar on producers from emerging or less-integrated markets[99]. Across these models, access depends not on the functional integration of the production process but on conformity with legal proxies for national belonging.

Federal systems replicate and multiply these inconsistencies. In Canada, eligibility for the federal tax-credit requires producers to be "qualified taxable Canadian corporations," with provinces such as Ontario adding further conditions related to physical presence or spending criteria[100]. The U.S. presents a patchwork of state-level rules: Alabama[101] restricts access to in-state companies, while Georgia[102] allows access for both resident and non-resident producers; Massachusetts[103] imposes minimum spend thresholds but no residency requirements for vendors, crew, or actors; Utah[104] and Virginia[105] incorporate promotional benchmarks tied to tourism and economic development. This patchwork architecture amplifies regulatory fragmentation, erodes predictability, and encourages forum shopping—producers selecting

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[98] Norwegian Film Institute, *Norway Incentive Scheme* https://www.nfi.no/eng/incentive-scheme.

[99] The Austrian legal framework for audiovisual tax incentives includes the Austrian Federal Ministry for Arts, Culture, the Civil Service and Sport, *Film Industry Support Austria (FISA)*, *FISA Booklet* and *FISA Guidelines*; *Film Funding Guidelines* (2022); the Film Location Act; *Federal Law Gazette I* no 40/2014; *Federal Law Gazette II* no 208/2014.

[100] The Canadian legal framework for audiovisual tax incentives includes the *Canadian Film or Video Production Services Tax Credit (PSTC)* and *PSTC Guidelines*; *Canadian Film or Video Production Tax Credit (CPTC)* and *CPTC Guidelines*; the Income Tax Act, CCSM c I10 (Manitoba), ss 10.5(1)–10.5(14); Manitoba Department of Finance, *Manitoba Interactive Digital Media Tax Credit Program Guidelines*; Ontario Taxation Act 2007, SO 2007, c 11, ss 90–94.

[101] The Alabama legal framework for audiovisual tax incentives includes the Code of Alabama 1975, ss 41-7A-1–41-7A-48; Alabama Film Office, *Chapter 281-3-1: Alabama Film Incentives Guidelines*; Alabama Department of Revenue, *Film Incentive Program* https://revenue.alabama.gov.

[102] The Georgia legal framework for audiovisual tax incentives includes the *Georgia Department of Revenue, Chapter 560-7-8: Return and Collections Regulations*; *Georgia Department of Economic Development, Georgia Entertainment Industry Tax Credit (Chapter 159-1-1)* *https://www.georgia.org/industries/film-entertainment*.

[103] The Massachusetts legal framework for audiovisual tax incentives includes the Act Relative to Economic Investments in the Commonwealth to Promote Job Creation, Economic Stability and Competitiveness in the Massachusetts Economy 2005, ch 158; the Act Further Enhancing the Competitiveness of Massachusetts Businesses 2007, ch 63; Massachusetts Film Office, *Massachusetts Film Incentive Program – Fast Facts* https://mafilm.org.

[104] The Utah legal framework for audiovisual tax incentives includes the *Utah Office of Administrative Rules, Rule R357-5: Motion Picture Incentive Program*; the *Utah State Bulletin, vol 2019, no 22*; *Utah Film Commission, Utah Motion Picture Incentive Program* *https://film.utah.gov*.

[105] The Virginia legal framework for audiovisual tax incentives includes the *Code of Virginia, s 58.1-439.21: Motion Picture Production Tax Credit*; the *Virginia General Assembly, House Bill No 139 (2020 Session)*; the *Virginia Film Office, Motion Picture Tax Credit Fund Guidelines* *https://www.film.virginia.org*.

jurisdictions based not on cultural alignment or production feasibility but on the relative accessibility of fiscal support[106].

This thesis challenges the prevailing assumption that such restrictions are an unavoidable corollary of fiscal sovereignty. In the audiovisual sector, where project-specific entities are the norm and profits are often dispersed across contractual networks, formal incorporation is an inefficient and exclusionary proxy for economic substance. More effective and proportionate safeguards against tax abuse could rely on functional indicators: measurable local expenditure, documented use of domestic labour, or transparent contractual linkages to local partners. Such mechanisms would preserve fiscal accountability while removing unnecessary structural barriers to participation. A hybrid model—combining transparent registration with functional production metrics—could maintain oversight without foreclosing transnational collaboration.

The distributive consequences of current incorporation rules are significant. Large, vertically integrated companies absorb compliance costs and adapt to national idiosyncrasies; smaller or foreign producers cannot[107]. While one might argue that smaller producers operate locally and thus benefit from national schemes, this assumption fails to account for the increasing necessity of international co-financing in even modest independent projects. For these producers, access to a foreign incentive might determine the viability of a transnational collaboration. The inability to meet incorporation demands excludes them from international markets and undermines the developmental potential of global cultural exchange. Incorporation rules limit participation from non-OECD markets, constraining the cultural and developmental potential of cross-border projects. Stachowiak and Tadeusz rightly note that while tax incentives have diversified global production geographies, they have also “kept economic gains local” through restrictive access controls[108]. The thesis extends this critique by emphasising that opacity and rigidity in incorporation rules undermine not only predictability but also trust in the regulatory framework—key preconditions for sustainable international cooperation.

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106 Susan Christopherson, ‘Hollywood in Decline? US Film and Television Producers beyond the Era of Fiscal Crisis’ (2013) 6(1) *Cambridge Journal of Regions, Economy and Society* 141; Susan Christopherson, *New York’s Big Picture: Assessing New York’s Position in Film, Television and Commercial Production. A Report to The New York Film, Television and Commercial Initiative* (Cornell University 2008).

107 Virginia Anne Gamble, *Film Tax Credits: Friend or Foe? An Analysis of the Cost–Benefit Relationship Between Tax Incentives and the States That Provide Them* (Honours thesis, University of Mississippi 2013); Sigrid Hemels and Kazuko Goto (eds), ‘Tax Incentives as a Creative Industries Policy Instrument’ in *Tax Incentives for the Creative Industries* (Springer-Verlag 2017) 33; Sedgwick (n 91).

108 Stachowiak (n 94).

The contribution of this analysis lies in repositioning producer incorporation requirements as a structural rather than incidental constraint. By reconceptualising eligibility through the lens of functional integration, the thesis proposes a more equitable regulatory paradigm that evaluates producers on substantive production engagement rather than formal legal presence. Such a shift would reconcile fiscal sovereignty with the realities of global production economies, reduce legal uncertainty, and enhance access to cultural-creative tax incentives in line with the principles of equitable access, fundamental freedoms, international solidarity and cooperation (Chapters 4 and 5).

Having established how incorporation and PE requirements create exclusionary access patterns within audiovisual tax-credit regimes, the analysis now turns to a second major source of SFACs: the opacity of evaluative mechanisms. Specifically, the next section examines how discretionary and poorly defined assessments of cultural significance and economic benefit further undermine legal certainty and functional integration, reinforcing structural inequities in the allocation of fiscal support.

2.4.2 Opaque Cultural Significance and Economic Efficiency Assessments

A second major category of SFACs within audiovisual tax-credit regimes arises from the mechanisms used to assess cultural significance and economic efficiency. These assessments, ostensibly designed to ensure that fiscal benefits advance public cultural objectives and generate measurable economic returns, frequently operate through opaque, discretionary, and fragmented institutional processes[109]. While such mechanisms are often justified as ensuring accountability and alignment with public interest, they in practice introduce significant uncertainty, reduce predictability, and constrain equitable access to fiscal support. When viewed through the lens of this thesis's evaluative variables, these deficiencies constitute clear failures of legal certainty and functional integration between fiscal and cultural authorities.

[109] Sandy George, 'Cultural Test: Yes or No?' Screen Daily (27 July 2007); Lloyd Gunton, 'The Filmmaker's Guide to the UK Cultural Test' (EP, 9 April 2025); Toby Miller, 'Film Tax Incentives and the Problem of Cultural Authenticity' (2020) 15(4) Critical Studies in Media Communication 512; Michael Curtin, 'Reconsidering Cultural Content Tests in Film Subsidies' (2019) 12(1) International Journal of Cultural Policy 45; Elizabeth A Ford, 'Cultural Quotas and Film Tax Incentives: Balancing National Identity and Market Realities' (2018) 45(2) Journal of Cultural Economics 123; Dina Iordanova, 'The Limits of Cultural Tests: National Cinema in a Globalized Market' (2017) 9(3) Media, Culture & Society 367.

The UK's cultural test, administered by the British Film Institute (BFI), exemplifies this tension[110]. Though formally codified as a points-based framework—assessing a total of 35 available points, with 18 needed to pass, including content, language, creative personnel, production location, and cultural context[111]—the test remains vulnerable to subjective interpretation in determining whether a production is "sufficiently British." As Goldsmith and O'Regan observe, even the most sophisticated scoring mechanisms retain an underlying cultural subjectivism, as aesthetic and ideological judgments cannot be fully standardised[112]. Higson further critiques these tests for their inability to accommodate hybrid identities characteristic of contemporary audiovisual production, where creative authorship, financing, and audiences transcend national boundaries[113]. In functional terms, this misalignment between evaluative frameworks and the transnational realities of production undermines both the legitimacy and accessibility of tax-credit schemes, transforming them into sites of interpretive discretion rather than predictable regulatory processes.

This problem is accentuated in jurisdictions with decentralised or regionally differentiated fiscal governance. In Spain, for example, autonomous communities such as Catalonia and the Basque Country administer their own cultural eligibility criteria, privileging linguistic conformity and thematic alignment with regional identity. While such objectives serve valuable goals of linguistic and cultural preservation, the resulting regulatory fragmentation forces producers to adapt scripts, casting, and locations to locally contingent criteria—effectively subordinating artistic and commercial considerations to policy preferences. As Christopherson notes, this "regulatory balkanisation" transforms tax incentives into mechanisms of cultural governance, where creative freedom becomes subordinated to ideological or symbolic compliance[114]. The issue, as framed in this thesis, is not the legitimacy of cultural policy aims themselves, but their translation into opaque and discretionary fiscal instruments that erode legal certainty, impose inconsistent standards, and compromise artistic autonomy.

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[110] HM Revenue and Customs, 'Creative Industry Tax Reliefs for Corporation Tax' (1 January 2007, last updated 27 February 2025) https://www.gov.uk/guidance/corporation-tax-creative-industry-tax-reliefs; HM Revenue and Customs, 'Claiming Audio-Visual Expenditure Credits for Corporation Tax' (19 January 2024, last updated 26 February 2025) https://www.gov.uk/guidance/claiming-audio-visual-expenditure-credits.
[111] See British Film Institute, 'Cultural Test for Film and High-End Television' (BFI, 2025) https://www.bfi.org.uk/supporting-uk-film/cultural-test.
[112] Goldsmith and O'Regan (n 93).
[113] Andrew Higson, 'Film Policy and England: The Politics of Creativity' (unpublished essay, Teesside University, on file with author); Andrew Higson, 'The Resilience of Popular National Cinemas in Europe (Part One)' (2020).
[114] Christopherson (n 106).

Evidence from practitioner accounts suggests that this discretion produces structural exclusion, even if its effects are difficult to quantify. In the UK, films reinforcing traditional narratives of national identity often encounter fewer administrative hurdles, while works engaging with themes of migration, colonialism, or social critique are subjected to greater scrutiny[115]. Similarly, Spain's linguistic eligibility conditions effectively privilege certain cultural identities while marginalising others[116]. While more empirical research is needed to quantify these patterns, the outcomes illustrate how cultural assessment frameworks, despite their formal neutrality, reproduce hierarchies of cultural legitimacy and restrict the diversity of audiovisual expression.

Economic efficiency assessments—intended to complement cultural evaluations—replicate similar problems of subjectivity and selective application. Although often presented as neutral fiscal filters, these assessments rely on indicators such as job creation, local expenditure, or projected revenue that are themselves interpretively malleable. Stachowiak and Tadeusz argue that such metrics tend to favour high-budget, commercially oriented productions aligned with government policy priorities, while smaller or experimental projects, including documentaries or minority-language films, are excluded for failing to meet minimum spending thresholds[117]. The effect is a structural bias in favour of productions that maximise short-term economic returns over those that advance long-term cultural diversity. What appears to be a rationalised fiscal test thus conceals a normative hierarchy of cultural and economic value—an SFAC that privileges resource-rich entities at the expense of a malleable concept of cultural significance.

This bias becomes particularly evident in jurisdictions that conflate cultural and economic objectives within a single eligibility structure. In several U.S. states, such as Utah and Virginia, tax-credit allocation depends not only on artistic merit but also on the perceived potential of a production to promote tourism or regional branding. Utah, for instance, awards credits for films that depict recognisable local landscapes by promoting the state as a cinematic destination, effectively transforming cultural production into a marketing tool[118]. In Virginia, producers must demonstrate both cultural relevance and compliance with minimum expenditure

[115] Andrew Higson, 'British Film Culture and the Idea of National Cinema' in Justine Ashby and Andrew Higson (eds), *British Cinema: Past and Present* (OUP 2011).
[116] Christopherson (n 106).
[117] Stachowiak and Stryjakiewicz (n 94).
[118] Utah (n 104).

requirements—criteria that are not always reconcilable[119]. As Sandberg observes, such frameworks collapse the distinction between cultural enrichment and economic promotion, creating incentives that reward compliance with administrative expectations rather than authentic creative contribution[120]. Such models are particularly exclusionary for transnational productions that do not conform to these localised economic mandates. The scholar noticed that even where quantitative criteria are used, their interpretation remains subject to political or administrative discretion, with eligibility decisions shaped by non-transparent priorities that vary between regions and over time.

Institutional fragmentation further compounds these SFACs. In many jurisdictions, cultural and fiscal evaluations are performed by separate entities with divergent mandates and evaluative logics. Canada provides a clear example: the Department of Canadian Heritage assesses cultural eligibility, while federal and provincial tax authorities conduct financial reviews[121]. This division often results in contradictory determinations, procedural delays, and increased compliance burdens. Similar patterns are evident in Germany[122] and Australia[123], where multi-level review structures conduct cultural and financial evaluations in isolation, increasing the probability of contradictory outcomes and thereby diminishing regulatory and operational predictability. Goldsmith and O'Regan rightly identify this fragmentation as more than procedural inefficiency—it reflects a deeper policy conflict between artistic merit and fiscal accountability—where cultural agencies prioritise heritage, identity, and artistic merit, while financial bodies are driven by metrics of cost-efficiency and economic return[124]. The scholars correctly identify this fragmentation as symptomatic of a deeper policy tension between cultural and economic rationalities—one that undermines both predictability and institutional coherence. From a normative-functional standpoint, these inefficiencies reveal a systemic failure of functional integration between cultural and fiscal administrations, leading to outcomes that frustrate the very purposes of the incentives.

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[119] Virginia (n 107).
[120] Bryn Elise Sandberg, 'Film and TV Tax Incentives: A State-by-State Guide' *The Hollywood Reporter* (4 February 2016) https://www.hollywoodreporter.com/news/general-news/film-tv-tax-incentives-a-860701/.
[121] Canadian Media Producers Association (CMPA), Department of Canadian Heritage, Canada Media Fund, Telefilm Canada, Association québécoise de la production médiatique (AQPM) and Nordicity, *Profile 2023* https://cmpa.ca/research-reports/profile-2023.
[122] German Federal Film Fund (DFFF I and II), administered by the German Federal Film Board (FFA) https://www.dfff-ffa.de/; German Motion Picture Fund (GMPF), administered by the German Federal Ministry for Economic Affairs and Climate Action https://www.bmwk.de/Redaktion/EN/Artikel/Industry/german-motion-picture-fund.html.
[123] Australia (n 96).
[124] Goldsmith and O'Regan (n 93).

The cumulative impact of these interlocking barriers is profound. Large production companies with legal expertise and established networks can absorb the uncertainty, navigate multiple institutional layers, and tailor applications strategically[125]. Independent and minority producers, however, face prohibitive administrative complexity and opaque decision-making, which together create a chilling effect on participation[126]. In systemic terms, these dynamics distort market access, reinforce structural inequalities, and limit the pluralism of cultural expression—contradicting the policy justifications for audiovisual tax incentives as inclusive instruments of cultural and economic development.

By situating these findings within the SFAC framework, the thesis demonstrates that the opacity of cultural and economic evaluations constitutes both a legal and institutional access constraint. Legally, inconsistent criteria and discretionary interpretation undermine legal certainty. Institutionally, fragmented authority and limited coordination weaken functional integration between cultural and fiscal actors. This dual-layered diagnosis shows that SFACs at the national level are not anomalies but structural features embedded within the design and implementation of tax-credit regimes. Recognising them as such provides the analytical foundation for subsequent chapters, where multi-level coordination—bilateral, EU, and UNESCO—will be explored as a pathway to restoring predictability, inclusiveness, and coherence in cultural-creative fiscal governance.

The next section turns to a third category of SFACs within audiovisual tax-credit schemes: the fragmented and inconsistent definitions of "qualified expenditure" and minimum spending thresholds. These definitional and procedural uncertainties further complicate access, particularly for transnational and co-produced projects, and reveal how fiscal design choices shape the material conditions of cultural production at the national level.

2.4.3 Fragmented Minimum Country-Expenditure

This section identifies a third major source of structural fiscal access constraints: the fragmented and protectionist design of minimum country-expenditure requirements within audiovisual tax-credit regimes. Though ostensibly framed as instruments for ensuring

125 Sedgwick (n 91).
126 Ibid.

measurable domestic economic impact, these thresholds in practice operate as restrictive filters, delineating who can participate in national incentive frameworks[127]. By embedding territorialised spending criteria into eligibility definitions, they conflate fiscal accountability with economic nationalism, thereby constraining the very transnational circulation of cultural and creative production that such incentives claim to promote. In doing so, they reproduce two categories of SFACs—legal and administrative. Legally, minimum expenditure thresholds are constructed through ambiguous, inconsistent, and protectionist definitions that fail to capture the global and iterative nature of audiovisual production. Administratively, their enforcement is marked by opacity, discretion, and fragmentation, generating uncertainty and procedural inequality among producers of different scales and jurisdictions.

The legal indeterminacy of expenditure thresholds constitutes the first dimension of constraint. National laws seldom define with precision what counts as qualifying domestic expenditure or how such costs are to be attributed. Jurisdictions such as Ireland and Norway illustrate this tendency: Ireland's Section 481 tax-credit requires that at least 68% of eligible expenditure occur domestically[128], while Norway requires 30% of a production's budget to be spent in-country[129]. Both regimes presuppose a territorially contained production model, disregarding the structural reality that many specialized services—such as post-production or digital effects—are delivered through cross-border value chains. This disconnect between legal form and economic substance undermines legal certainty by creating eligibility criteria that are formally clear but substantively misaligned with industrial practice[130]. It risks create a structural disincentive for producers to engage in creative, talent, or resource sourcing across borders unless such collaborations are artificially structured to meet eligibility constraints. In Ruth Mason's terms, such "unilateral design" problems reflect an absence of coordination

[127] David A Weisbrod, 'The Film Industry's Fleecing of State Tax Incentive Programs' (2015) 50 Akron L Rev 425; Pierre-Jean Messerlin and François-Charles Paré, *The Myth of Subsidies in the Film Industry: A Comparative Analysis* (European Centre for International Political Economy, 2020); Scott Drenkard, 'Film Production Incentives: a Game California Shouldn't Play' (Tax Foundation Blog, 2023) https://taxfoundation.org; Craig J Alexander, 'Expert Testimony: Film Industry Incentives Don't Justify the Cost' (University of Southern California Price School, 2025); Virginia Anne Gamble, *Tax Credits in The Film Industry: Friend or Foe? An Analysis of the Cost-Benefit Relationship Between Tax Incentives and the States That Provide Them* (Undergraduate Thesis, University of Mississippi 2013).
[128] The Irish legal framework for audiovisual tax incentives includes the Film Regulation 2019 (SI 119/2019); Irish Tax and Customs, *Film Tax Credit Guidance*; Fís Éireann/Screen Ireland, 'Ireland's Tax Credit for Film, Television and Animation' https://www.screenireland.ie; Revenue Commissioners, *Guidelines for the Film Corporation Tax Credit (Section 481)* (2022) para 5.3.
[129] Norwegian Film Institute, *Incentive Scheme Guidelines* (2023) s 3.2.
[130] Christoph Spengel and Mario La Torre, 'Tax Incentives for the Creative Industries: Towards Inclusive Growth' (2020) 43 Intertax 95.

across fiscal systems, producing allocative inefficiencies and fragmenting the global cultural economy[131].

Differences in expenditure attribution models deepen this problem. Provider-based frameworks, such as those in Austria[132] and Ireland[133], condition eligibility on whether vendors are registered domestically, excluding foreign suppliers even when the goods or services are consumed locally. This model tends to generate allocative inefficiencies by excluding competitively priced or specialized services from abroad[134]. Consumption-based models, exemplified by the United Kingdom, instead recognise the locus of use, allowing foreign-sourced goods or services to qualify if utilised domestically[135]. This model accords with economic substance principles and aligns with scholarly calls—such as those advanced by Yariv Brauner—for tax systems to be rooted in the locus of value creation rather than formalistic supplier-based constraints[136]. Hybrid systems—adopted in Hungary[137] and certain U.S. states such as Alabama[138], Georgia[139], and New Jersey[140]—combine both approaches (in-state usage and local vendor presence), often at the cost of heightened administrative complexity and discretionary enforcement. In each case, the absence of standard criteria or transparent auditing methodologies generates interpretive discretion for tax authorities, thereby eroding legal predictability. In all three models, producers must track each expense not only by type and phase but also by vendor registration status, location (of use or supply), and proportional value delivered locally—a complex task in multinational shoots. Any disjunction between policy objectives and operational realities mirrors the critique articulated by James,

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[131] Ruth Mason, 'Tax Discrimination and the European Court of Justice' (2005) 52 Am J Comp L 115.
[132] Austria (n 99).
[133] Ireland (n 128).
[134] David J Gerber, 'The Madness of State Film Incentives as a "Solution" to Runaway Production' (2011) 14 *U Pa J Bus L* 85; Mark Lorenzen and Andrea M Morrison, 'Examining Incentive-Based State Tax Legislation in the Film Industry' (2012) SSRN https://ssrn.com/abstract=2045781.
[135] HMRC, *Guidance on Film, Animation and Television Production Tax Relief* (2023) para 3.8. For a more detailed analysis around the British approach, see the rules set out in the clauses of the *Finance Bill* and the Guidelines related to the measure. In the UK, the country-expenditure measures also are explicit in other sectors such as performing music, orchestra, museums and galleries exhibition.
[136] Yariv Brauner, *The Future of Tax Incentives for Developing Countries* in Yariv Brauner and Miranda Stewart (eds), *Tax Law and Development* (Edward Elgar Publishing 2014); Yariv Brauner, *You Play, You Pay! Mobility, Territory, and Exclusive Source Taxation in the 21st Century* (2025), reviewed in Blaine Saito, 'Book Review' *TaxProf Blog* (18 April 2025); Yariv Brauner, 'Value in the Eye of the Beholder: The Valuation of Intangibles for Transfer Pricing Purposes' (2008) 28 Va Tax Rev 79.
[137] *Hungarian Tax Rebate for Film Productions*; *Law on Motion Pictures – Act II/2004* (Film Law); Support Policy; National Film Institute (NFI).
[138] Alabama (n 101).
[139] Georgia (n 102).
[140] *New Jersey Tax Credit Program for Film and Digital Media*; Department of State: NJ Motion Picture & Television Commission; *Public Law 2019*, Chapter 506; Film Office.

Kane, Easson and others who warn against the use of legal form over economic function in defining taxable events within cross-border regimes[141]. When these models lack interpretive clarity or standardized methodologies, the resulted is discretionary enforcement by tax authorities. This raises concerns about legal certainty, as highlighted by Mason and Thom's works on discretionary enforcement and its constitutional implications in federal tax regimes[142]. When fiscal authorities retain broad latitude to determine what constitutes "in-country expenditure," producers—particularly smaller or transnationally oriented ones—face an environment of procedural opacity and unpredictable enforcement[143]. The principle of legal certainty, central to the framework of this chapter, is thereby weakened by both legislative ambiguity and administrative discretion.

Equally problematic is the fragmented allocation of evaluative authority across production phases. Expenditure qualification is often compartmentalised into development, production, and post-production stages, ignoring the iterative and cross-phase nature of creative work[144]. Screenwriting, scoring, and visual effects often traverse jurisdictions and phases in ways that defy rigid territorial or temporal categorisation. For instance, screenwriting may begin during development in one jurisdiction, continue through on-set revisions in another, and be finalized in yet another location during post-production. This transnational and non-linear workflows makes it difficult to attribute the associated costs to a single phase or jurisdiction. Scholars have argued that rigid attribution rules may reduce compliance risks and enhance auditability but reduce allocative efficiency—especially when phase boundaries do not align with actual

[141] Sebastian James, 'Providing Incentives for Investment: Advice for Policy-makers in Developing Countries' (World Bank Group, *Investment Climate in Practice* No 7, 2010); Mitchell A Kane, 'International Tax and Transfer Pricing: A New Approach' (2015) 91 NYU L Rev 911; Alex Easson, 'Tax Incentives for Foreign Investment, Part I: Recent Trends and Countertrends' (2001) 55 Bull Int'l Fiscal Doc; Howell H Zee, Janet Gale Stotsky and Eduardo Ley, 'Tax Incentives for Business Investment: A Primer for Tax Policy Makers in Developing Countries' (IMF, Washington DC, 2001).
[142] Ruth Mason, 'The Transformation of International Tax' (2016) 114 Michigan Law Review 101; Michael Thom, commentary cited in William Melhado, 'Texas is Poised to Become a Film Haven – But Not Without a Fight' The Texas Tribune (14 February 2025).
[143] Tina Xu, 'Staying in Hollywood and the Big Apple: The Effectiveness and Design of Film Production Tax Credits in New York and California' (2017) 2 Colum Bus L Rev 426; Christopher J Coyne and Abigail R Hall, 'Do Tax Incentives Affect Business Location and Economic Outcomes? Evidence from the Film Industry' (2019) National Bureau of Economic Research Working Paper No 25963; Benjamin G Edelman, 'Can Tax Incentives Create a Local Film Industry? Evidence from Louisiana and New Mexico' (2018) 7 J Cult Econ 1.
[144] Mario La Torre, *The Economics of the Audiovisual Industry: Financing TV, Film and Web* (Palgrave Macmillan 2014); David Hancock, 'Box Office and Beyond: The Cultural, Social and Economic Impact of Cinema' (2024).

value creation[145]. Jurisdictions like Ireland[146] and several U.S. states such as Colorado[147] and Virginia[148]—exclude cross-phase direct costs (e.g., visual effects prepared in one phase but delivered in another), encouraging artificial reclassification and impeding operational coherence[149]. In contrast, the UK offers a more flexible system, allowing apportionment based on substantive economic substance (such as work duration and location, rather than rigid phase definitions) and embracing ancillary costs when they demonstrably contribute to the overall production and are incurred in the UK[150]. Notably, the UK exempts qualifying visual effects from the 80% core spend cap and integrates arm's length principles for intra-group transfers—balancing flexibility with anti-abuse mechanisms. The UK's ongoing reforms via the Audio-Visual Expenditure Credit (AVEC) seek to modernize and streamline the country's tax relief system[151]. This combination of flexibility and oversight reflects a nuanced effort to balance policy integrity with industry realities. Similarly, Georgia's *Entertainment Industry Tax Credit* permits estimations for in-state expenditures when exact tracking is impractical—particularly for traveling productions or mobile post-production services. Yet even these more flexible models remain administratively burdensome, demanding extensive documentation that privileges well-capitalised entities over independent producers. The result is a dual-layered SFAC: a legal structure premised on formalistic expenditure attribution and an administrative apparatus whose opacity disproportionately burdens smaller and transnational producers.

From the perspective of functional integration, the fragmentation of expenditure rules exemplifies a lack of coordination between fiscal, cultural, and industrial policy objectives. Rather than aligning tax-credit design with the operational realities of the audiovisual sector, these instruments compartmentalise fiscal accountability and cultural development into

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[145] Lily L Batchelder, Fred T Goldberg Jr and Peter R Orszag, 'Efficiency and Tax Incentives: The Case for Refundable Tax Credits' (2006) 59 Stanford Law Review 23; Sarah B Lawsky, 'Tax Law and Flexible Formalizations' (nd) University of Chicago Law Review; Seworder and David L Sjoquist, 'Lights, Camera, Action: The Adoption of State Film Tax Credits' (2016) 36 Public Budgeting & Finance 5; Throsby (n 13) 42.
[146] Irish (n 128).
[147] Colorado Film Incentive Program, see Office of Economic Development and International Trade (OEDIT), available at https://oedit.colorado.gov.
[148] Virginia Motion Picture Tax Credit Fund; see *Code of Virginia*, Motion Picture Production Tax Credit; *2020 Session*, House Bill No 139; and the Guidelines.
[149] Direct costs typically includes all expenses incurred by the producer company in pre-production (e.g. director, screenwriter, composers, designers, and digital effects), production (e.g. studio use, set construction, transportation, per diems, travel, catering, costumes, equipment, lighting, labour), and post-production (e.g. editing, distribution, exhibition, broadcasting), see G Freeman, J Kyser, N Sidhu, G Huang and M Montoya, *What is the Cost of Runaway Production? Jobs, Wages, Economic Output and State Tax Revenue at Risk When Motion Picture Production Leaves California* (2005).
[150] UK (n 95).
[151] UK Government, 'Claiming Audio-Visual Expenditure Credits for Corporation Tax' (GOV.UK, 13 March 2025) https://www.gov.uk/guidance/claiming-audio-visual-expenditure-credits-for-corporation-tax.

separate bureaucratic logics. Fiscal authorities prioritise measurable domestic spending, while cultural agencies seek creative diversity and international collaboration. The absence of a shared evaluative framework leads to incoherence between the purposes and procedures of these incentives, producing inefficiencies and exclusionary effects. Functionally, the tax incentive ceases to act as an integrated policy tool and instead becomes a site of institutional conflict, where the fiscal imperative to localise expenditure undermines the cultural imperative to globalise production[152].

These dynamics have distributional consequences. Large, multinational production companies can absorb the administrative burden of documentation and restructure their budgets to meet domestic spending thresholds[153]. Smaller, independent, and Global South producers, lacking equivalent legal and accounting capacity, are structurally disadvantaged, facing both compliance risks and material exclusion[154]. Discretionary enforcement compounds this inequality: the power to retroactively deny credits or reinterpret thresholds converts administrative oversight into a gatekeeping mechanism that disproportionately affects those least able to contest determinations[155]. Consequently, what appears as a neutral fiscal instrument operates as a filter of economic and cultural privilege.

Viewed through the evaluative variables of legal certainty and functional integration, fragmented minimum country-expenditure rules embody a paradigmatic SFAC. They undermine predictability and transparency in tax law, weaken horizontal coordination among fiscal and cultural authorities, and ultimately restrict equitable access to incentive regimes. They also illustrate the limits of purely national solutions to globally integrated industries.

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[152] Darcy Rollins Saas, ‘Hollywood East? Film Tax Credits in New England’ (1 October 2006) Federal Reserve Bank of Boston, Public Policy Brief No 06-3; PwC Media Industry Accounting Group, ‘Film Cost Capitalisation, Amortisation and Impairment’ (May 2016) MIAG Issue 10; OECD, ‘The Economic and Social Impact of Cultural and Creative Sectors’ (2021).
[153] Elizabeth A McNichol, ‘The Madness of State Film Incentives as a “Solution” to Runaway Production’ (2012) 15 University of Pennsylvania Journal of Business Law 1; Olsberg- SPI, *Economic Impact Study of Iceland's Production Incentive* (2024).
[154] Harold L Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis* (9th edn, CUP 2020); Martin Finkenzeller and Christoph Spengel, ‘A Study on R&D Tax Incentives’ (European Commission, November 2014); R Díaz de Sarralde, G Porto and J Roca, ‘Tax Incentives, International Commitments, and Tax Sufficiency: Another Impossible Trilogy?’ (Inter-American Development Bank, 2023).
[155] Mitchell A Kane, ‘R&D Tax Incentives: Growth Panacea or Budget Trojan Horse?’ (2016) 69 Tax Law Review 420; Yariv Brauner, ‘Tax Incentives and the Problem of Rigid Attribution Rules’ (2018) 71 Tax Law Review 123; Miranda Stewart, ‘Substance Over Form in Tax Incentives: Aligning Tax Expenditure with Economic Reality’ (2020) 45 Australian Tax Forum 345.

While the objectives of local economic impact and accountability remain legitimate, their realisation through unilateral and opaque fiscal design is counterproductive.

This diagnosis thus reinforces the normative argument underpinning this chapter: that legal certainty and functional integration must be treated as interdependent criteria in the design of cultural-creative tax incentives. By exposing how producer requirements, cultural and economic tests, and expenditure-based thresholds operate as both legal and administrative constraints, this section provides the analytical bridge to Section 2.5, which turns from diagnosis to reform. There, the thesis proposes national-level measures aimed at enhancing definitional clarity, improving procedural transparency, and embedding fiscal incentives within functionally integrated governance frameworks capable of reconciling cultural, economic, and administrative objectives.

2.5 National-level Reforms

At the national level, SFACs manifest with the greatest intensity. Domestic legal systems constitute the immediate regulatory interface for CC operators, yet restrictive eligibility conditions, administrative opacity, and institutional fragmentation often displace substantive cultural objectives. The cumulative result is an exclusionary fiscal landscape in which procedural and jurisdictional rigidity overrides the public purposes—financial relief, cultural diversity, and inclusive participation—that tax incentives are intended to advance. These distortions are symptomatic not merely of poor drafting but of a deeper structural misfit between fiscal governance and cultural policy. Ministries of finance, bound by imperatives of fiscal discipline, tend to prioritise revenue predictability; ministries of culture, charged with protecting diversity, often lack legal authority or operational leverage over fiscal instruments; tax administrations, oriented toward compliance management, privilege procedural control over cultural openness; and courts, in interpreting cultural-fiscal intersections, seldom integrate international or comparative references into their reasoning. Together, these institutional drivers reproduce a disjunction between fiscal sovereignty and cultural functionality—a disjunction that constitutes the core of the SFAC phenomenon at the national level.

The reform pathway proposed here responds to this disjunction through the thesis's normative-functional framework, particularly its two variables—legal certainty and functional integration. These variables are treated not as abstract ideals but as operational principles guiding the reconfiguration of domestic tax incentive governance. Normative design cannot be detached from political economy or administrative feasibility: any reform that disregards institutional capacity, bureaucratic incentives, or veto points will remain nominal. By embedding normative objectives within feasible administrative trajectories, reform design can achieve both legitimacy and durability.

Reform should thus proceed along three interdependent dimensions: legislative, administrative, and judicial. Legislatively, nationality-based exclusions should be replaced by residency and cultural-contribution tests, accompanied by statutory rebuttable presumptions of equivalency for recognised foreign applicants or projects. Such provisions enhance legal certainty by aligning eligibility with substantive connection rather than formal status. Administratively, joint guidance protocols between finance and culture ministries should be formalised, directing tax authorities to interpret incentive rules in light of the broader commitments that will later be examined in Chapters 3–5—namely, bilateral treaty obligations, EU internal market principles, and UNESCO cultural diversity and preferential treatment standards. At this stage, these references serve not as binding sources of reform but as anticipatory alignment mechanisms, ensuring that national authorities act with interpretive awareness of forthcoming transnational coherence duties. Judicially, national courts could benefit from structured training programmes and interpretive guidance, developed in collaboration with universities, professional associations, and cultural agencies. While the in-depth judicial analysis will occur in the next chapters, it is relevant here to note that such measures enhance functional integration within national systems by encouraging consistent reasoning across fiscal and cultural domains. Such measures do not require wholesale legal transformation but incremental changes in legislation, protocols, and training that cumulatively shift the practice of national authorities.

Resistance is predictable. Finance ministries may fear that equivalency presumptions open the door to abuse; tax administrations may resist procedural innovation that increase their workload or constrain discretion; and courts may hesitate to integrate international standards, invoking constitutional separation of powers or statutory fidelity. These concerns are legitimate and can be mitigated through graduated implementation strategies—such as time-bound (sunset) clauses, pilot programmes confined to specific sectors like audiovisual co-productions, and interpretive guidance clarifying compatibility between domestic law and international cooperation norms. This incrementalist approach situates reform within the realistic constraints of administrative practice while maintaining normative ambition.

Evaluating reform success requires concrete indicators capable of measuring both normative and operational change. Metrics could include the number of foreign or non-national residents admitted to domestic incentive schemes; the reduction in administrative appeals or judicial disputes over eligibility; shorter processing times; measurable economic returns; and the increased diversity of recipients in terms of geography, language, and artistic domain. These indicators provide accountability and enable a reform process through which national authorities can calibrate eligibility and procedural frameworks in response to outcomes.

The structural logic uniting these reforms is their orientation toward transforming national regimes from gatekeeping mechanisms into cooperative gateways. By enhancing legal certainty, they reduce discretion-induced exclusion; by promoting functional integration, they embed fiscal instruments within a coherent cultural-governance matrix. The reforms do not yet resolve the transnational coordination problems that require bilateral, EU, and UNESCO frameworks—that task belongs to the subsequent chapters—but they establish the normative and functional preconditions for such coordination.

Table 2.1 provides a comparative assessment of the reform proposals against the five evaluative variables that structure the thesis. In this chapter, only legal certainty and functional integration are substantively developed; the remaining three variables—conditioned sovereignty, rights-based enforcement, and mutual supportiveness—will become central in the analyses at bilateral, EU, and UNESCO levels. The partial scores assigned to these latter variables reflect anticipation rather than fulfilment: they denote the preparatory value of national reforms in laying the institutional foundations for higher-level legal coherence.

Table 2.1: National-level Reform Assessment

Reform Proposal	**Legal Certainty**	**Rights-Based Enforcement**	**Conditioned Sovereignty**	**Functional Integration**	**Mutual Supportiveness**
Reframing eligibility: nationality → residency + cultural contribution *(Substantive Eligibility Standards)*	++	+	++	+	++
Foreign status *(Recognition & Equivalency Principles)*	++	+	++	++	++

Reform Proposal	Legal Certainty	Rights-Based Enforcement	Conditioned Sovereignty	Functional Integration	Mutual Supportiveness
Joint protocols (finance + culture ministries) *(Procedural Safeguards)*	++	+	++	++	++
Judicial training *(Cooperative Governance Benchmarks)*	+	++	++	++	+

Scoring[156]

++ = **High normative and functional potential:** The reform strongly advances the relevant criterion, reduces discretion-induced exclusion, and fosters alignment between domestic and international obligations.

+ = **Partial/moderate potential:** The reform shows targeted value but lacks either enforceability, institutional depth, or comprehensive uptake to fully realize the criterion.

– = **Limited or no potential under current design:** The reform remains too vague, symbolic, or structurally fragmented to meaningfully advance the criterion.

The significance of these reforms becomes evident when revisiting the illustrative cases. *Paul*'s exclusion from Mexico's *Pago en Especie* arose from a rigid nationality requirement and the absence of cultural input in fiscal determinations; a residency-based test and inter-ministerial guidance would have secured both his recognition and the scheme's legitimacy (§1.1.1). *Elizabeth*'s inability to deduct donations to foreign museums in the UK, though often framed as a bilateral treaty issue, ultimately stemmed from national tax authorities' refusal to acknowledge foreign public-benefit organisations; an equivalency clause and joint ministerial guidance would have reconciled fiscal formalism with cultural purpose (§1.1.2). Likewise, the fragmented treatment of *The Queen*'s co-production across four jurisdictions reflected national administrations' narrow interpretation of eligibility and expenditure rules; judicial training and rebuttable equivalency presumptions could have facilitated cooperative interpretation (§1.1.3). Together, these cases demonstrate that national-level reforms—anchored in the five normative-functional variables—are not abstract design choices but practical solutions to the very exclusions that motivated this thesis.

[156] The scoring system applied in this table serves as an illustrative, forward-looking framework to guide national and international stakeholders—including legislators, tax authorities, treaty negotiators, and judicial or administrative bodies—in assessing the alignment of current or proposed cultural-creative tax incentives with the five normative-functional variables. The matrix is thus a heuristic tool, not a conclusive diagnostic, inviting contextual adaptation and iterative use across jurisdictions.

In sum, the national level remains both the origin and the testing ground for resolving SFACs. By embedding reforms within coherent normative-functional design, domestic regimes can realign fiscal sovereignty with cultural accountability and prepare the institutional terrain for the more complex, multi-level coordination addressed in the following chapters.

2.6 Conclusions

This chapter has systematically identified and critically examined the SFACs that arise within national frameworks governing three categories of cultural-creative tax incentives: tax-in-lieu schemes for visual artists, tax-deductions for cultural philanthropy, and tax-credits on expenditures for audiovisual production. By applying the evaluative variables of legal certainty and functional integration, the chapter demonstrated that SFACs are not isolated technical deficiencies but systemic distortions embedded within the design and administration of domestic cultural-fiscal regimes. Their persistence reveals a deeper misalignment between cultural objectives and fiscal implementation, where legal formality, administrative practice, and institutional fragmentation collectively undermine access, predictability, and coherence.

In tax-in-lieu schemes, SFACs arise from restrictive eligibility rules grounded in nationality and professional status, opaque evaluation processes, and the absence of coordination between fiscal and cultural authorities. These features distort the schemes' dual purpose of supporting artists and enriching public collections, transforming them into mechanisms of fiscal exclusion rather than cultural inclusion. In tax-deductions for cultural philanthropy, SFACs manifest through the non-recognition of foreign public-benefit entities, inconsistent treatment of cross-border donations, and rigid administrative procedures that fail to integrate cultural policy aims. Legal formalism and administrative insularity together erode legal certainty and prevent private philanthropy from contributing effectively to cultural diversity and transnational cooperation. In tax-credits on expenditure for audiovisual productions, SFACs stem from discretionary and opaque cultural tests, fragmented certification structures, and protectionist minimum spend requirements that privilege domestic productions. These mechanisms subvert the schemes' stated objectives—stimulating creative diversity and international collaboration—by anchoring fiscal eligibility in territorial criteria disconnected from the globalised reality of audiovisual production chains. Across these regimes, the shared failure is functional. SFACs emerge where cultural purpose and fiscal execution are institutionally disconnected, producing uncertainty, inconsistency, and administrative discretion unmoored from policy intent. The consequences are both normative and practical: artists, philanthropists, and producers are subject to uneven treatment, while the state forfeits opportunities for cultural and economic return.

While the chapter has occasionally referred to bilateral treaty obligations, EU law principles, and UNESCO norms, these references serve only to identify the normative interfaces where domestic law interacts with higher-order commitments. They are anticipatory rather than determinative: their detailed operationalisation belongs to Chapters 3–5, where the variables of conditioned sovereignty, rights-based enforcement, and mutual supportiveness will be systematically developed. Similarly, judicial decisions have been cited illustratively to show interpretive tendencies or gaps in domestic reasoning, but a comprehensive assessment of courts' role in enforcing cooperative cultural-fiscal norms is reserved for later chapters.

Within the boundaries of the present inquiry, this chapter remains analytically disciplined. Its task has been to map the domestic terrain of SFACs through the dual lenses of legal certainty—ensuring predictability, transparency, and consistency—and functional integration—ensuring that fiscal and cultural authorities operate as coherent parts of a unified governance system. The reform proposals advanced in §2.5 illustrate how national regimes can be recalibrated through legislative, administrative, and judicial measures that align practice with purpose.

The findings confirm that SFACs are neither inevitable nor irreversible. They are products of institutional design and thus amenable to institutional correction. Properly structured reforms can transform national tax systems from exclusionary filters into cooperative instruments that uphold both fiscal discipline and cultural openness. In this sense, national regimes are not the endpoint but the foundation of a broader governance continuum. This conclusion therefore performs a double function: it consolidates the diagnosis of national-level dysfunction and establishes the analytical scaffolding for the next three chapters. The bilateral, EU, and UNESCO levels—examined respectively in Chapters 3, 4, and 5—extend the same normative-functional logic across transnational legal orders, where the five variables of legal certainty, conditioned sovereignty, rights-based enforcement, functional integration, and mutual supportiveness become central. Together, these layers will complete the multi-level analysis of how cultural-creative tax incentives can evolve from fragmented fiscal privileges into coherent instruments of cooperative cultural governance.

Chapter 3

Bilateral Treaties Benefits and Cultural-Creative Tax Incentives

3.1 Introduction

This chapter addresses the second sub-question of the thesis: *To what extent do bilateral instruments—tax treaties, cultural agreements, and co-production treaties—mitigate or perpetuate SFACs in cultural-creative tax incentives in cross-border situations, and what mechanisms could enhance their normative coherence and enforceability at bilateral level?* Despite specialised scholarship on international taxation and cultural cooperation, the bilateral governance of cultural–creative tax incentives remain under-explored. The lacuna is particularly visible in relation to SFACs—legal, administrative, and institutional obstacles that impede the translation of treaty-based commitments into enforceable cross-border entitlements (§1.5). Existing literature often treats bilateral agreements as either residual expressions of state autonomy or purely technical channels for interpret benefit allocation, overlooking their constitutional significance as cooperative regimes capable of allowing access to sectorial benefits across borders[1]. Even niched literature addressing specific provisions in bilateral tax treaties relevant to the cultural–creative sector[2], related to cultural philanthropy and cooperation agreements[3], and on co-production treaties[4], they are produced in isolation, lacking

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[1] Ruth Mason and Ari Glogower, 'Unraveling the Tax Treaty' (2019) Fordham Law Review 87 1; Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 274; Jean Galbraith, 'Making Treaty Implementation More Like Statutory Implementation' (2017) 115 Michigan Law Review 1309; Frank A Engelen, *Interpretation of Tax Treaties under International Law* (IBFD 2004); Jasper Bossuyt, *The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties* (IBFD 2022); Reuven S Avi-Yonah and Ruth Mason, 'Interpreting Tax Treaties—Looking to the Future' (2022) Bulletin for International Taxation

[2] Harald Grams, 'Artist Taxation: Art. 17 of the OECD Model Treaty – a Relic of Primeval Tax Times?' (1999) 27 Intertax 188; Dick Molenaar, 'Article 17(3) for Artistes and Sportsmen: Much More than an Exception' Intertax (2012); Jose Israel Herrera, 'The Challenge of the Cultural Diversity in Mexico Through the Official Recognition of Legal Pluralism' (2015) 4 The Age of Human Rights Journal 60; Martin Scheinin, 'Direct Applicability of Economic, Social and Cultural Rights in International Law' (2001) 2 ESCR Review 9.

[3] Benjamin G Martin, 'The Rise of the Cultural Treaty: Diplomatic Agreements and the International Politics of Culture in the Age of Three Worlds' (2022) 44 International History Review 1327; Natalie Silver and Renate Buijze, 'Tax Incentives for Cross-Border Giving in an Era of Philanthropic Globalization: A Comparative Perspective' (2020) 6(1) Can J Comp & Contemp L 109; Anne-Marie O'Connor & Patrizia R (eds), 'The Role of the State in Cultural Diplomacy' in *Routledge Handbook / Edward Elgar* (2018) — especially the chapter on state negotiation of bilateral cultural agreements; David Moore and Douglas Rutzen, 'Legal Framework for Global Philanthropy: Barriers and Opportunities' (2011) 13(1–2) Intl J Not-for-Profit L; Thomas Ecker, 'Taxation of Non-Profit Organizations with Multinational Activities – The Stauffer Aftermath and Tax Treaties' (2007) 35(8–9) Intertax 450.

[4] Randle B Pollard, 'Cut—And That's a Wrap—The Film Industry's Fleecing of State Tax Incentive Programs' (2016) 50 Akron L Rev 425; David Goldberg, 'The UK-France Co-Production Treaty: A Critical Analysis' (2015)

the normative and functional interactions between these instruments and cultural-creative tax incentives.

This chapter seeks to fill that gap by analysing how treaty-based rights and obligations interact with, condition, or are neutralised by national frameworks governing access to cultural-creative tax incentives. The analysis evaluates these interactions against the five analytical variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—as doctrinal benchmarks for determining whether bilateral instruments mitigate or reproduce SFACs.

At bilateral level, legal certainty refers to the degree to which bilateral–national interaction produces predictable, determinate, and judicially verifiable entitlements. It is not merely a formal desideratum but a framework within which CC operators can ascertain *ex ante* the fiscal consequences of transnational cultural engagement. In bilateral cultural–fiscal contexts, higher normative coherence correlates with treaty instruments that articulate clear substantive provisions, reducing interpretative elasticity and administrative discretion[5]. Where bilateral treaties define with precision such key terms as "residency," "beneficiary," "qualifying expenditure," or "public-benefit organisation," the legal order achieves a determinacy effect—one that constrains arbitrariness by tethering discretion to objective and externally reviewable benchmarks. This textual precision operates as a structural safeguard: it transforms discretionary power into a rule-bound competence, thereby aligning national implementation with treaty-based commitments and enhancing external accountability[6].

The second variable, rights-based enforcement, concerns whether treaty-based benefits crystallise as justiciable legal rights or dissolve into administrative concessions contingent on shifting policy priorities. It thus represents the constitutional hinge between international

11(3) Entertainment Law Review 85; Randle B Pollard, 'Blockbuster Support for Lackluster Policy' Tax Foundation Special Report No 173 (January 2010); Tax Foundation, 'State Film Production Incentives: A Costly Subsidy with Limited Benefits' (Tax Foundation 2010).

[5] Ruth Mason and Ari Glogower, 'Unraveling the Tax Treaty' (2019) Fordham Law Review 87 1; Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 274; Jean Galbraith, 'Making Treaty Implementation More Like Statutory Implementation' (2017) 115 Michigan Law Review 1309.

[6] Frank A Engelen, *Interpretation of Tax Treaties under International Law* (IBFD 2004); Jasper Bossuyt, *The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties* (IBFD 2022); Reuven S Avi-Yonah and Ruth Mason, 'Interpreting Tax Treaties—Looking to the Future' (2022) Bulletin for International Taxation.

commitment and domestic implementation[7]. As Krisch and Walker note, the interface between international and domestic norms rarely operates through a single hierarchical rule; instead, enforceability depends on how each legal order internalises and operationalises external commitments[8]. In contexts marked by SFACs, the operational status of treaty provisions—whether enforceable or aspirational—determines whether international cooperation functions as a normative obligation or a discretionary practice. The hierarchy of norms within the domestic legal order—the extent to which bilateral instruments are insulated from, or subordinated to, subsequent legislative or constitutional measures—embodies deeper constitutional choices about the permeability of the national legal system to bilateral law, the primacy of parliamentary sovereignty, and the interpretive competence of the judiciary[9]. Anchoring on scholarship on constitutional hierarchy and incorporation, the decisive factor is not formal monism or dualism but the judiciary's interpretive posture and the administration's willingness to treat treaty norms as binding constraints rather than policy guidance[10]. Within such hierarchies, treaty provisions that establish entitlements—such as mutual recognition of public-benefit organisations, or definitions of qualifying cultural productions—may either empower cross-border CC operators or be neutralised by domestic rules that reassert unilateral control. Where bilateral treaties possess equal or supra-legislative force, they can generate an initial phase of normative alignment. Monist jurisdictions, such as France and the Netherlands, integrate treaties directly into domestic law upon ratification[11]. In principle, this monism enables a bilateral treaty to be invoked directly before domestic courts or tax authorities. However, the practical efficacy of monism is contingent on judicial posture and administrative

[7] Klaus Vogel, 'The Domestic Law Perspective' in Guglielmo Maisto (ed), *Tax Treaties and Domestic Law* (IBFD 2006) ch 1.
[8] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317.
[9] Ibid.
[10] André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 *EJIL* 105; André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017); Sachin Sachdeva, 'Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches' 2013, Intertax 41(4) 180; Jan Klabbers, 'The Duality of Direct Effect of International Law' (2014) 25(1) EJIL 105.
[11] See, for example, Venice Commission of the Council of Europe, 'Monism and Dualism in International Law' CDL(2014)050, 3; Jörg Gerkrath, 'Direct Effect in Germany and France: A Constitutional Comparison' in Jolande M Prinssen and Annette AM Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2002) 129; Conseil d'État, *GISTI et FAPIL*, No 322326 (11 April 2012) ECLI:FR:CEASS:2012:322326.20120411 (on direct effect of treaties in France); Constitution of Argentina (1994 reform) arts 27, 75(22), and 108, and the decisions in the Corte Suprema de Justicia de la Nación *Ekmekdjian v Sofovich* (1992) and *Simón* (2017); Constitution of Colombia (1991) art 93, and the decisions of the Court of Colombia in Judgment T-025/04; Judgment C-355/06; Constitution of Mexico (1917) art 133, and the decision of Supreme Court of Justice in *López Burgos* (1987).

compliance[12]. Even where treaties occupy a constitutional rank above ordinary statutes, administrative reluctance or interpretive minimalism can produce a *de facto* subordination of treaty norms to domestic policy preferences[13]. Here, the principle of *lex posterior derogat legi priori* enables later domestic legislation to override prior treaty obligations[14], thereby reintroducing discriminatory eligibility rules under the guise of cultural-fiscal reforms. The OECD Commentary to Articles 1 and 25 MTC has noted that such domestic "override" practices compromise both legal certainty and predictability—the very virtues bilateral commitments are designed to secure[15]. In states where treaties formally occupy a superior rank, constitutional carve-outs for fiscal or budgetary legislation often create "hierarchies within the hierarchy", permitting governments to invoke public finance prerogatives to insulate national cultural-fiscal policy from treaty-based constraints—a pattern observed in the literature[16]. The same provision may operate as a robust normative guarantee in one jurisdiction and as a symbolic gesture in another, depending on the treaty's hierarchical position, incorporation pathway, and judicial interpretive posture towards international law[17]. As Craig and de Búrca emphasise in the context of EU law but equally applicable here, incorporation without enforceability produces only nominal compliance[18]. Any serious assessment of bilateral treaty rights-based enforcement must therefore begin with a constitutional cartography of the national–bilateral interface—mapping not only formal rank but also the lived practices of incorporation, interpretation, and administrative resistance.

The third variable, conditional sovereignty, describes the recalibration of state fiscal autonomy through treaty commitments that convert unfettered discretion into a managed, reciprocally

[12] Marc Kaiser, 'Treaties, Direct Applicability' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2013) para 8; John H Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 AJIL 310.

[13] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57.

[14] Jean-Marie Henckaerts, 'Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide' (1998) 26 Int'l J Legal Info 556; Rebecca M Kysar, 'Unraveling the Tax Treaty' (2020) 104 *Minnesota Law Review* 1751; Brian J Arnold and Hugh J Ault, 'Overview of Major Issues in the Application of Tax Treaties' (UN FfDO paper, 2013).

[15] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2024* (OECD Publishing 2024) Commentary on Article 1 and 25.

[16] Laurence Boisson de Chazournes, 'Hierarchy of Norms in International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2010); Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 133, 140.

[17] Ibid.

[18] Paul Craig, 'What is the Relationship Between EU Law and National Law?' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2024); Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).

constrained competence[19]. Rather than a unilateral abdication of sovereignty, conditionality operates as a governance mechanism: a calibrated bundle of entitlement-conditioning rules, procedural safeguards, exception clauses, and reciprocal triggers that jointly delimit how and when domestic fiscal prerogatives can impinge on treaty-created cultural–fiscal rights. Two analytically distinct modalities of conditionality merit emphasis. Express conditionality in treaty texts which can enhance normative coherence by clarifying expectations *ex ante*: explicit clauses that predicate benefits on specified acts, compliance with objective criteria, or parallel domestic measures. Examples include reciprocity clauses that condition eligibility on the other State's maintenance of equivalent definitions within their tax incentives, or certification requirements linking tax-credit access to administrative endorsements[20]. Latent conditionality materialises at the point of domestic implementation. Here, treaty silence or indeterminacy enables national authorities to transpose obligations subject to local procedural filters—such as residency tests, local spend quotas, or evidentiary certifications—that are not articulated in the bilateral instrument. Latent conditionality is politically and administratively expedient: it allows states to honour the rhetoric of cooperation while preserving substantive discretion[21]. Functionally, however, it erodes reciprocity by creating conditional entitlements that depend on domestic administrative will and capacity[22]. Conceptually, conditional sovereignty is thus best understood as a *spectrum*—ranging from deep functional integration, where treaty commitments substantially constrain domestic cultural-fiscal policy, to light, proceduralised modalities that preserve broad national discretion while signalling cooperative intent.

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[19] Peter B Musgrave, 'Sovereignty, Entitlement, and Cooperation in International Taxation' (2001) Brooklyn Journal of International Law 24, 777; Tsilly Dagan, 'Tax Treaties as a Network Product' (2016) 41 Brooklyn Journal of International Law 1081 https://brooklynworks.brooklaw.edu/bjil/vol41/iss3/5/; Reuven S. Avi-Yonah, 'Sovereignty and International Tax Law' (2017) 35 Florida Tax Review 789, 810.

[20] Francesc J Cabrera Blázquez, Maja Cappello, Enric Enrich, Juan T Milla Talavera and Susanne Nikoltchev, *IRIS Plus 2018-3: The Legal Framework for International Co-Productions* (European Audiovisual Observatory 2018); Susanna Hagan, 'The International Legal Framework for Audiovisual Co-Productions' (2018) 40(2) EUI Working Papers in Law 23; Film France (CNC), 'Coproductions' https://www.filmfrance.net/en/tax-rebate/coproductions/.

[21] Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 NYIL 121, 137; Mitchell A Kane, 'Sovereignty and Subnational Income Taxation: A Critique of the International Tax Norms' (2005) 82 NYU Law Review 443, 459; Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 188.

[22] Diane Ring, 'What's at Stake in the Sovereignty Debate? International Tax and the Nation-State' (2008) Virginia Tax Review 27, 1; Pasquale Pistone, *General Report: The Impact of Bilateral Tax Treaties on Multilateral Norms* (IBFD 2012) 39; Brian J Arnold, 'Reciprocity as a Fundamental Principle of Tax Treaties: A Meaningless Platitude or a Misguided Policy?' (2022) Bulletin for International Taxation (IBFD); Michael Waibel, 'Reciprocity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012) para 11.

The fourth variable, functional integration, refers to the effectiveness of institutional, procedural, and administrative mechanisms in ensuring that treaty-based obligations are not neutralised during domestic implementation. While administrative cooperation between competent authorities may create an appearance of cross-border alignment, the absence of embedded institutional safeguards risks reducing such cooperation to *ad hoc* coordination, reactive rather than systemic—producing the semblance of integration without its substantive guarantees[23]. Functional integration remains incomplete without effective judicial and quasi-judicial connectivity. The jurisprudential experience of bilateral treaties demonstrates that rights which cannot be invoked before judicial or quasi-judicial fora tend to degenerate into "paper promises", normatively valid yet functionally void (§§ 3.3.1-3.3.3). Administrative cooperation can align practice, but only judicial enforceability consolidates rights. The challenge lies in sequencing: cooperative mechanisms operate *ex ante* (to prevent divergence), while judicial oversight operates *ex post* (to correct divergence). Where the former are under-institutionalised, and the latter inaccessible or procedurally opaque, the entire system risks oscillating between diplomatic negotiation and administrative insulation, neither of which ensures enforceable coherence. Functional integration, properly conceived, therefore requires nested mechanisms of coordination, correction, and contestation, spanning the administrative, interpretive, and adjudicative planes of cultural-fiscal governance.

Finally, mutual supportiveness operationalises the degree to which bilateral fiscal measures and cultural policy objectives operate in reciprocal reinforcement, creating systemic coherence rather than normative or procedural dissonance. As an operational principle, it aligns treaty implementation with the broader teleology of cultural governance—ensuring that fiscal provisions advance, rather than merely coexist with, cultural objectives. Embedding mutual supportiveness in treaty architecture thus reinforces both normative coherence (by harmonising interpretative standards) and functional efficacy (by aligning administrative action with shared objectives). In practical terms, mutual supportiveness demands that bilateral instruments actively foster reciprocal recognition and coordinated application across jurisdictions. This often takes the form of equivalency clauses, harmonised content tests, or reciprocal recognition mechanisms that prevent administrative fragmentation and mitigate procedural asymmetry[24].

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[23] Jean Galbraith (n 5); Miranda Stewart, 'Jurisdiction to Tax and the Domestic Implementation of International Tax Treaties' in Reuven S. Avi-Yonah et al (eds), *Global Perspectives on Income Taxation Law* (IBFD 2017) 149, 158; Tsilly Dagan, 'Substantive Tax Sovereignty Under Globalization' (2024) Tilburg Law Review 1.

[24] Rebecca M Kysar, 'Interpreting Tax Treaties' (2016) 101 Iowa Law Review 1387.

Absent such provisions, cooperation risks becoming purely formal—a façade of alignment masking divergent domestic interpretations. In these situations, claimants may find themselves caught in a paradox of administrative recognition without enforceable rights, where mutual goodwill replaces mutual obligation. Empirical evidence drawn from bilateral treaty practice demonstrates that administrative coordination alone cannot sustain cross-border legal certainty unless underpinned by enforceable reciprocity[25]. Mutual supportiveness therefore operates not as a static principle but as a dynamic feedback mechanism: it amplifies enforcement capacity, facilitates interpretative convergence, and cultivates the legal predictability required for CC operators to engage transnationally with confidence[26]. Properly operationalised, it transforms fragmented bilateral obligations into a cohesive governance architecture, in which fiscal and cultural objectives are mutually constitutive rather than hierarchically ordered.

Each variable captures a distinct but interdependent dimension of the national–bilateral interface through which treaty norms acquire (or lose) practical effect. Their institutional configuration (how they are embedded in treaty design and domestic legal architecture) and their operational implementation (how administrative and judicial mechanisms perform them in practice) directly correlate with the degree of normative coherence and functional efficacy. As the analysis below demonstrates, partial implementation of one variable cannot compensate for the absence of others, underscoring the need for integrated national–bilateral design and a supportive institutional ecology if bilateral instruments are to mitigate SFACs sustainably.

Normative coherence in national-bilateral instruments does not automatically translate into functional efficacy. When the two diverge, a structural vulnerability emerges at the intersection of international tax and cultural governance. This tension exposes the fragility of treaty-based entitlements once they enter complex domestic administrative ecosystems, where interpretive discretion and procedural opacity can erode their practical force. As the sections below demonstrate, administrative authorities may extend tacit or explicit recognition of eligibility—granting access to tax-credits, tax-deductions, or tax-in-lieu schemes—without conferring a corresponding right enforceable before courts or quasi-judicial bodies. The result is a

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[25] Organisation for Economic Co-operation and Development, *Making Dispute Resolution Mechanisms More Effective — Action 14: 2015 Final Report* (OECD 2015); European Audiovisual Observatory, *Impact Analysis of Fiscal Incentive Schemes Supporting Film and Audiovisual Production in Europe* (2014); Transnational Giving Europe / Philea, *Cross-Border Philanthropy: Practical Barriers and the Need for Administrative Cooperation* (policy report, 2016–2020) https://transnationalgiving.eu/.
[26] Kysar (n 24).

bifurcation between normative validity and operational effect: treaty norms subsist in form but fail in function, perpetuating SFACs through discretionary administration, opaque criteria, or inconsistent application.

By analysing this paradox across audiovisual co-production tax-credits, cultural-philanthropy equivalency, and visual-artist tax-in-lieu schemes, this chapter demonstrates how bilateral treaties can either mitigate or reproduce SFACs. It situates the inquiry within the broader problem of translating recognition into enforceability— transforming treaty-based eligibility into judicially cognisable entitlement. In doing so, the analysis reconceptualises the relationship between normative coherence and functional efficacy not as a binary hierarchy, but as a dynamic equilibrium conditioned by legal certainty, rights-based enforcement, conditional sovereignty, functional integration, and mutual supportiveness. The following analysis therefore apply the five variables to test how far the bilateral cultural-fiscal regime achieves this equilibrium in practice, and where its architecture continues to reproduce exclusionary asymmetries.

Beyond diagnosis, the chapter also advances a constructive agenda for bilateral-level reforms. By identifying where misalignment between bilateral and national law exacerbates SFACs, it isolates the legal, administrative, and institutional conditions under which normative coherence and functional efficacy might be restored. Proposals that serve as a bridge to the reform architecture developed in Chapter 6.

The analysis proceeds as follows. Section 3.2 presents the typology of three bilateral treaties: co-production treaties (§3.2.1), cultural cooperation agreements (§3.2.1), and bilateral tax treaties (§3.2.1). Section 3.3 explores tax-credit schemes linked to audiovisual co-production treaties. It includes: administrative cooperation, discretion, and soft law instruments (§3.3.1); normative commitments and the limits of rights-based enforcement (§3.3.2); eligibility criteria as SFACs (§3.3.3); judicial remedies and procedural accessibility (§3.3.4); and mutual supportiveness and structural gaps (§3.3.5). Section 3.4 turns to application of equivalency in cultural philanthropy tax-deductibility. It explores: administrative cooperation and the gatekeeping function (§3.4.1); legal certainty and the replication of domestic standards (§3.4.2); rights-based enforcement and judicial (in)accessibility (§3.4.3); functional integration and the role of soft-law norms (§3.4.4); sovereignty and the fragility of mutual supportiveness (§3.4.5). Section 3.5 explores tax-in-lieu for visual artists linked to treaties. It includes: legal certainty and the normative scope of treaty protection (§3.5.1); rights-based enforcement, judicial remedies and accessibility (§3.5.2); sovereignty and administrative discretion (§3.5.3); functional integration—cultural-fiscal interfaces and the OECD framework (§3.5.4); and mutual supportiveness and the cultural function of fiscal instruments (§3.5.5). Section 3.6 provides a comparative synthesis of bilateral instruments in mitigating SFACs. Section 3.7 proposes target bilateral-level reforms. Section 3.8 draw findings together in a conclusion.

To preserve conceptual clarity, the analysis proceeds under a controlled assumption of bilateral relationships between two non-EU states not party to the UNESCO 2005 Convention, thereby isolating the national–bilateral dimension from supranational and multilateral overlays. Where instructive, mixed-system comparisons are drawn to illustrate broader implications for cross-border cultural-creative fiscal governance. The chapter thus lays the groundwork for a systematic account of how bilateral instruments can either mitigate or reproduce SFACs, and thereby defines the baseline against which supranational and multilateral regimes must be evaluated in subsequent chapters.

3.2 Typology of Three Bilateral Treaties

The landscape of bilateral instruments relevant to the governance of cultural-creative tax incentives is marked by a high degree of heterogeneity in both legal form and normative intensity. While such instruments share the bilateral character of engaging two sovereign states in reciprocal obligations, their objectives, regulatory techniques, and functional interfaces with domestic legal systems vary substantially. This diversity complicates any assessment of their capacity to mitigate SFACs, as the degree to which they create enforceable entitlements, condition sovereignty, or integrate functionally with national frameworks is contingent upon their legal architecture and operational design.

The typology comprises three dominant categories: co-production treaties, bilateral cultural cooperation agreements, and bilateral tax treaties containing provisions relevant to the cultural–creative ecosystems. Each category embodies a distinct balance between cultural policy objectives and fiscal governance.

3.2.1 Co-Production Treaties

Co-production treaties are perhaps the most emblematic instruments at the intersection of cultural-creative policy and fiscal law, designed to enable collaborative production between entities established in Treaty States while granting them access to the same fiscal and regulatory benefits as national productions. In their most robust form, such treaties include detailed provisions on the mutual recognition of qualifying expenditure, joint certification procedures, and quotas for domestic creative labour, thereby embedding fiscal effects directly into their legal fabric[27]. These provisions often have the functional effect of conferring "national status" on co-productions, which in turn serves as the gateway to national tax-credits schemes—a mechanism that reflects the reciprocity logic of bilateral treaty practice and the pluralist insight that equivalency assessments operate within overlapping legal orders rather than a single hierarchical system. As observed by Moore, the legal fiction of national status is a powerful normative device, transforming a foreign production into a domestic one for the purposes of tax benefits, while sidestepping potential breaches of non-discrimination clauses[28].

3.2.2 Cultural Cooperation Agreements

Bilateral cultural cooperation agreements represent a more traditional form of cultural diplomacy, grounded in the exchange of cultural goods, services, and expertise as a means of fostering mutual understanding and soft power. From a fiscal perspective, such agreements occupy a more ambiguous normative position (§3.5.2). While their primary objective is the promotion of cultural exchange, they frequently contain provisions that have indirect fiscal consequences, such as clauses on the facilitation of tax-exempt import of cultural goods, preferential visa regimes for cultural workers, or commitments to explore reciprocal tax relief for artistic activities[29]. Some may argue that the legal enforceability of such clauses is often weak, framed in aspirational or programmatic language that relies on subsequent domestic action for effect[30]; while others have noted that the strength of such agreements lies less in their capacity to create binding fiscal entitlements and more in their ability to set a policy direction

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[27] Yanling Yang and William Higbee, 'Sino-International Film Collaboration and Co-Production: Policy and Practice' (2024) 15(2) Transnational Screens 121.
[28] Mark Moore, 'International Film Co-Production: Tax and Subsidy Issues' (1993) Hastings Communications and Entertainment Law Journal https://repository.uclawsf.edu/hastings_comm_ent_law_journal/vol16/iss2/3/.
[29] Ecker (n 3).
[30] O'Connor (n 3).

that can later be operationalised through more technical instruments, including co-production treaties and bilateral tax treaties[31].

3.2.3 Bilateral Tax Treaties

Bilateral tax treaties (BTTs), traditionally concerned with the allocation of taxing rights and the avoidance of double taxation, intersect with the cultural–creative sector in more targeted ways than is often acknowledged in the literature. The most direct engagement occurs through specific articles on artists and sportspeople, and business profits, which may reduce source-state taxation on income derived from cultural activities (Articles 17-21 OECD and UN MTCs, Articles 16-21 U.S. MTC)[32]. In some cases, Treaty States negotiate bespoke provisions to accommodate the particularities of their CCIs, such as exemptions for cultural grants, reduced withholding tax rates on royalties for creative works, or explicit recognition of cultural expenditure as deductible in the residence state[33]. Treaty tailoring represents a deliberate recalibration of fiscal sovereignty through negotiated constraint, enabling cross-border taxpayers to rely on predictable and stable tax parameters[34]. Such provisions, when carefully drafted, can serve as robust normative constraints on domestic taxation powers, directly conditioning sovereignty in ways that enhance legal certainty for cross-border operators.

Understanding their structure and interaction involves the reconciliation—or collision—of two autonomous yet interdependent normative orders: the domestic legal system, which embodies the fiscal sovereignty and cultural policy prerogatives of the state, and the treaty-based regime, which crystallises reciprocal commitments to limit or shape the exercise of that sovereignty in defined circumstances[35]. This dual structure reflects what Krisch and Walker describe as a "pluralist constitutional space," where no single hierarchy pre-determines normative authority[36]. The point of intersection between these orders is characterised by a dynamic process of incorporation, interpretation, and operationalisation, in which the domestic legal

[31] Martin (n 3).
[32] Grams (n 2); Molenaar (n 2).
[33] Sigrid Hemels, 'International Tax Treaties and Cultural Heritage' in *Taxation, Culture and Heritage: Opportunities for Developing Tax Systems and Tax Treaties* (Erasmus University Rotterdam School of Law 2018–2020) ch 7.
[34] Ibid; Grams (n 2); Molenaar (n 2).
[35] Carlos Manuel Vázquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties' (2009) 123 Harv L Rev 599.
[36] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317.

system both mediates and is mediated by international obligations[37]. As Nollkaemper and Corten emphasise, incorporation is never merely formal but depends on administrative willingness and judicial interpretive culture[38]. This process is especially complex in the cultural–fiscal domain, where the substantive objectives of treaties encompass policy imperatives linked to cultural diversity, creative sector sustainability, and the cross-border circulation of CC operators, their products, actions and activities.

3.3 Tax-Credit Schemes Linked to Audiovisual Co-Production Treaties

The interaction between bilateral audiovisual co-production treaties and national tax-credit schemes exemplifies the systemic tension between normative coherence and functional efficacy in cultural–fiscal governance. Formally, these treaties articulate a framework of mutual recognition of qualifying productions and confer reciprocal access to domestic tax-credits[39]. Functionally, however, their implementation is mediated by national authorities where implementation remains fragmented, revealing how domestic administrative discretion, doctrinal rigidity, and jurisdiction-specific fiscal interpretations sustain SFACs. This subsection tests the co-production regime against the five variables and maps how institutional design across administrative, soft-law, and judicial domains mediates the gap between treaty entitlement and enforceable benefit.

3.3.1 Administrative Cooperation, Discretion, and Soft Law Instruments

At the administrative level, co-production treaties are operationalised through national competent authorities—such as the CNC (France)[40], NFVF (South Africa)[41], BFI (UK)[42],

[37] James Crawford, Brownlie's Principles of Public International Law (9th edn, OUP 2019) 54; Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 Int'l J Const L 397.
[38] André Nollkaemper, National Courts and the International Rule of Law (OUP 2011) 101; Olivier Corten, 'Direct Effect of International Agreements' (2019) 277 Int'l J Const L 42.
[39] Norbert Morawetz, Jane Hardy, Colin Haslam, and Keith Randle, 'Finance, Policy and Industrial Dynamics – The Rise of Co-productions in the Film Industry' (2007) Industry and Innovation 14(4) 421; Julia Hammett-Jamart, *Official Co-Production: Policy Instruments and Imperatives* (Palgrave 2019) 45.
[40] Centre national du cinéma et de l'image animée (CNC) https://www.cnc.fr; Pierre Thomas Thibronnier, 'Le crédit d'impôt cinéma international' (2016) 29 Revue du droit de l'entreprise 675; CNC, 'TRIP Guidance – Territorialisation and Recognition of International Productions' (CNC, 2023).
[41] National Film and Video Foundation (NFVF) https://www.nfvf.co.za.
[42] British Film Institute (BFI) https://www.bfi.org.uk.

Telefilm (Canada)[43], or ANCINE (Brazil)[44]—whose certification decisions determine access to tax-credit on expenditure. Formally, these authorities act as joint or parallel certifiers, coordinating the meaning, scope, and application of treaty provisions without altering their formal content—via interpretative notes, administrative memoranda, correspondence committees, or joint commissions[45]. These operational hurdles exemplify the persistence of SFACs, where functional misalignment renders bilateral treaty commitments ineffective at the ground level. As Qureshi and Christians highlight, administrative coordination without harmonised interpretive frameworks often produces procedural cooperation, substantive divergence—a pattern exactly reflected here[46]. Authorities exchange notifications of approval but rarely engage in interpretive harmonisation, leaving substantive criteria—residency, cultural-creative contribution, and expenditure thresholds—subject to unilateral domestic interpretation[47]. Legal certainty thus remains fragile. Producers may secure provisional administrative recognition under treaty criteria, yet such recognition does not guarantee tax-credit eligibility within domestic fiscal regimes. This enables Treaty States to recognise a work as a qualifying co-production for cultural quotas while excluding it from fiscal benefits on residency or expenditure grounds. For example, bilateral instruments may stipulate mutual recognition of qualifying expenditure but omit a harmonised methodology for calculating such expenditure[48]. Divergent tests—such as "use-spend" location in one State and "supply-spend" location in another—result in incoherent eligibility, undermining reciprocity and eroding predictability (§2.4.3). Such legal uncertainty and discretion transform treaty recognition into a contingent, revocable status—subverting the treaty's integrative rationale[49].

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[43] Telefilm Canada https://telefilm.ca/en.
[44] Agência Nacional do Cinema (ANCINE) https://www.ancine.gov.br.
[45] Michael Lang, 'The Role of Memoranda of Understanding in Tax Treaty Interpretation' (2015) 8 British Tax Review 15, 20; Anastasia Karatzia and Theodore Konstadinides, 'The Legal Nature and Character of Memoranda of Understanding' (2019) (University of Essex Research Paper); Anna-Di Robilant, 'Genealogies of Soft Law' (2006) 55 American Journal of Comparative Law 843.
[46] Asif H Qureshi, 'International Tax Administration and the Administrative State: Some Institutional Criteria for Evaluating Procedural Consistency' (2005) International Tax and Public Finance 11(6) 947; Allison Christians, 'International Tax Cooperation: Administrative Assistance and Exchange of Information' (2013) 38 Brooklyn Journal of International Law 1053.
[47] Michael Lang, 'Discretion in International Tax Law and Tax Treaty Application' in Reuven Avi-Yonah et al (eds), *Global Perspectives on Income Taxation Law* (IBFD 2017) 97, 102; André Lucas and Marie-Françoise Marais, *The Legal Framework for International Co-Productions* (European Audiovisual Observatory, Council of Europe 2018) 2; Mireille Buydens, 'International Co-Production Contracts and the Law' in *The Legal Framework for International Co-Productions* (European Audiovisual Observatory, Council of Europe 2018) 13.
[48] Pierre-Jean Benghozi and Marc Bourreau, 'Fiscal Incentives for Film Production: The French System in a Comparative Perspective' (2016) 37(4) Media, Culture & Society 566, 571.
[49] Barbara Selznick, 'Legal Uncertainty and Film Financing' (2008) 45 J Media L & Comms 223, 231; Doris Baltruschat, *Mapping Global Production Ecologies: From Cinematic Co-Productions to TV Formats and Interactive Media* (Library and Archives Canada 2010) ch 4.

Conditional sovereignty is equally manifest: while treaties profess reciprocity, fiscal authorities retain ultimate gatekeeping power, prioritising national budgetary control over bilateral commitments[50]. Scholarship explains precisely this dynamic: cooperation frameworks structure opportunities, but domestic administrations determine operational reality[51]. Moreover, the absence of binding interpretive frameworks or structured joint review mechanisms undermines functional integration[52]. The co-production logic presupposes mutual recognition of administrative determinations, yet coordination is restricted to information exchange without harmonised standards. This asymmetry exemplifies how administrative cooperation—intended to generate predictability—can entrench discretion when not anchored in enforceable norms. Some soft-law interventions, such as the *European Convention on Cinematographic Co-production* (revised 2017) or *UNESCO's Operational Guidelines on the Diversity of Cultural Expressions*, encourage cooperative certification practices, but their influence remains advisory[53]. The lack of institutionalised dispute-prevention mechanisms (akin to MAP in taxation) means inconsistencies persist unremedied, as co-producers lack a structured pathway for resolution before recourse to domestic courts.

3.3.2 Normative Commitments and the Limits of Rights-Based Enforcement

Most co-production treaties are non-self-executing, requiring domestic incorporation before benefits accrue. This legislative dependency exposes a structural weakness in rights-based enforcement. Even where treaties promise "national treatment" or "reciprocal eligibility," national fiscal statutes remain the definitive legal source of entitlement. Courts and tax administrations uniformly interpret tax-credit access as conditional upon compliance with domestic legislation, not treaty text. This bifurcation between normative entitlement (expressed in bilateral treaties) and functional implementation (filtered through domestic statutes) reflects the broader literature on treaty override and non-self-execution, which documents how fiscal

[50] Hans Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2012) 2 Legisprudence 97; Daniel Halberstam, 'Normative Functions of Soft Law in International Tax' (2017) 42 Brooklyn Journal of International Law 563, 571.
[51] Krisch (n 36); Walker (n 36).
[52] Rebecca M Kysar, 'Interpreting Tax Treaties' (2015) 101 Iowa L Rev 1387, 1392; Steven Dean and Rebecca M Kysar, 'Reconsidering the Tax Treaty' (2016) 41 Brooklyn Journal of International Law 967; Fuad Zarbiyev, 'A Quiet Revolution in the Making? The Changing State Authority in Treaty Interpretation' in forthcoming collection on treaty interpretation (manuscript on file with author, cited with permission).
[53] As a paralell, see Allison Christians, 'Enforcement Challenges of Non-binding Tax Instruments' (2019) 45 Tax Notes International 787, 789.

sovereignty shapes the domestic reception of international obligations[54]. The absence of direct effect leaves producers without an enforceable claim to invoke treaty provisions against domestic authorities. The legal certainty of the regime is therefore undermined by doctrinal dependency: treaty norms operate as policy commitments, not rights. Conditional sovereignty is exercised through legislative incorporation, where states selectively internalise treaty benefits consistent with domestic cultural-fiscal priorities.

MAP-style mechanisms—central to international tax dispute resolution—are notably absent in the cultural-fiscal domain. Where disagreements arise (e.g., over eligibility certification or expenditure recognition), there is no binding mutual-agreement forum to reconcile interpretations[55]. MAP's functional adequacy in resolving disputes in cultural-fiscal domain is highly circumscribed and context-dependent. As codified in Article 25 of the OECD Model Tax Convention and its UN and U.S. counterparts, MAP provides a mechanism for resolving cases of taxation not in accordance with the provisions of the treaty[56]—it does not extend to denials of tax incentives grounded in general domestic fiscal policy. As such, MAP cannot remedy exclusions from cultural-creative tax incentives unless these exclusions constitute taxation that violates a specific treaty guarantee, such as non-discrimination under Article 24 MTCs or a bilateral cultural-fiscal right. The OECD's *Manual on Effective Mutual Agreement Procedures* (MEMAP) confirms this limitation: MAP cannot be invoked where the contested denial does not amount to an actual breach of a treaty obligation[57]. Moreover, MAP depends heavily on the political will, as affected treaty beneficiaries cannot invoke MAP directly; they must petition their state of residence to initiate the process, and even then, the competent authority retains full discretion to accept or reject the request[58]. Particularly those in the cultural-creative ecosystems who may lack specialized legal support or the resources to sustain lengthy administrative processes, might face high barriers to meaningful engagement with MAP[59]. States may deprioritize cultural-fiscal disputes in favour of larger commercial or

[54] Avi-Yonah (n 19); Qureshi (n 46); Christians (n 46).
[55] OECD, *Joint Audit 2019 — Enhancing Tax Co-operation and Improving Tax Certainty* (Forum on Tax Administration 2019); Gernot Kofler (ed), *Tax Treaties and Procedural Law* (IBFD 2020).
[56] OECD Commentary on Article 25 paras 1–5; Christina Dimitropoulou and others, 'Chapter 5: Tax Treaty Mechanisms to Resolve Cross Border Tax Disputes: The Mutual Agreement Procedure' in *Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (UN, 2018).
[57] OECD, *Manual on Effective Mutual Agreement Procedures (MEMAP)* (OECD 2007) paras 7.1–7.3.
[58] Ibid.
[59] For a parallel, see Sarah C Cleveland, 'Procedural Barriers in International Tax Disputes' (2019) 41 Michigan Journal of International Law 521, 535; CIAT (Inter-American Center of Tax Administrations), 'Rethinking the Strategy for Preventing and Resolving International Tax Disputes: Challenges and Opportunities' (Policy brief, 2025).

revenue-focused issues[60]. Furthermore, the obligation articulated in Article 25 is to "endeavour" to resolve disputes—not to achieve resolution. This open-ended obligation, echoed in OECD and UN Commentaries, reinforces the procedural softness of MAP and weakens its capacity to serve as a reliable mechanism for resolving exclusionary interpretations of treaty-based entitlements[61]. The cumulative effect of these dynamics is that treaty-based commitments, though normatively coherent on paper, remain functionally inert. Recognizing MAP's dual promise and pitfalls is critical for evaluating bilateral treaty efficacy and for using complementary strategies—such as soft-law instruments (§3.3.1) or judicial avenues (§3.3.4)—that may better bridge normative intent and functional reality.

3.3.3 Eligibility Criteria as SFACs

The fragmentation of eligibility standards is most visible in the application of cultural content tests, Permanent Establishment (PE) definitions, and national expenditure thresholds. These instruments, though ostensibly technical, embody deep normative choices about inclusion and recognition. Legal certainty is undermined when expenditure tests are drafted without shared definitions of "eligible spend". Bilateral co-production treaties typically stipulate that a minimum proportion of budgeted expenditure must occur within each signatory state. However, treaties rarely define how this threshold is calculated—whether by supplier location, place of consumption, vendor registration, or by allocating cross-over costs. The textual silence renders treaty obligations ambiguous and effectively defers interpretive power to domestic tax authorities. This creates a normative-functional mismatch: the treaty promises eligibility via a simple concept of national spend, but national implementation converts that promise into a discretionary filter with unpredictable applications. The problem is not that expenditure tests exist, but that their application varies dramatically by jurisdiction and production type. As addressed in Chapter 2 (§2.4.3), for example, the UK (via HMRC's FPC70050) defines qualifying expenditure narrowly, but provide no guidance on how to treat transnational post-production and remote service costs; Canada's provincial regimes prioritise local labour; Australia's QAPE integrates co-production expenditure into national thresholds only through discretionary certification. Each approach embodies national policy rationales, but collectively

[60] For discussions on economic effect, see Allison Christians, 'Political Economy of Tax Treaty Enforcement' (2018) 22 Intertax 42, 46.
[61] OECD Commentary on Article 25; United Nations Committee of Experts on International Cooperation in Tax Matters, *Guide to the Mutual Agreement Procedure under Tax Treaties* (UN 2012) UN Doc ST/ESA/FFD/2012/2; United Nations, *Chapter 5: Mutual Agreement Procedure* (UN 2019).

they defeat functional integration by producing incompatible fiscal thresholds. Despite their recognized status under treaties, certified productions struggle to secure tax-credit recognition when critical expenditure components fall outside narrowly or incoherently defined parameters. Without interpretive guidance, producers face: financial risk in structuring projects that may later be disqualified; unpredictable results even within the same jurisdiction, amplifying administrative opacity.

Residency and PE requirements similarly reproduce SFACs. National authorities often apply classical definitions privileging territorial permanence, disregarding the geographically dispersed, project-based structure of audiovisual production—generating substantial economic and cultural value without establishing traditional PEs (§2.4.1)[62]. The OECD's BEPS initiative advocates a substantive, activity-based approach to PE[63], yet these reforms have not been internalised in the cultural-fiscal domain[64]. Academic literature has long highlighted the disjunction between classical tax definitions and sectorial structural realities[65]. Scholars like Hanson and Fujita et al. argue for a context-sensitive reinterpretation of PE, advocating criteria that reflect economic contribution and market engagement (e.g., local hiring, intellectual property production, use of local infrastructure), rather than strictly spatial permanence[66]. Moore offers critical empirical and doctrinal insight into this debate by examining how bilateral co-production agreements rely on tax definitions entrenched in traditional PE logic, yet fail to accommodate the fluid, project-based nature of audiovisual collaboration[67]. She documents that many treaties defer to the domestic interpretation of "operational presence" or "active

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[62] Michael Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (CUP 2011); J Michael Graetz and Michael O'Hear, 'The "Original Intent" of U.S. International Taxation' (1997) 46 Duke LJ 1021; Arvid A Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle* (Kluwer Law International 1991); Randle B Pollard (n 4).

[63] OECD Commentary on Article 5; OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7—2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

[64] Andrew Higson, 'The Cultural and Economic Implications of Contemporary UK/European Film Co-productions' (unpublished manuscript, University of Southampton).

[65] Reuven Avi-Yonah, Young Ran (Christine) Kim and Karen Sam, 'A New Framework for Digital Taxation' (2022) 63 Harvard Intl LJ 279, 280; Michael Graetz, 'A Major Simplification of the OECD's Pillar 1 Proposal' (2021) 101 Tax Notes Intl 199; Hugh J Ault, 'Some Reflections on the OECD and the Sources of International Tax Principles' (2013) 70 Tax Notes Intl 1195; Assaf Harpaz, 'International Tax Reform: Who Gets a Seat at the Table?' (2023) 44(4) UPenn J Intl L 1007.

[66] Gordon H Hanson, 'International Trade in Motion Picture Services' (University of California, San Diego and National Bureau of Economic Research, 2008); Masataka Fujita and others, *Foreign Affiliate Trade in Services: A Statistical Conceptual Framework* (UNCTAD 2002); Mai Fujita, Fukunari Kimura and Shujiro Urata, 'Foreign Affiliate Activities in the Service Sector: A New Database' (2015) 9(2) Asian Economic Policy Rev 252.

[67] Margaret Moore, 'International Film Co-Production Tax and Subsidy Mechanisms' (1993) 16 Comm & Ent LJ 287.

participation," without furnishing binding benchmarks. Blázquez et al. argue that this creates a legal architecture where small-scale or episodic co-productions, despite contributing significantly to local economies, fall short of domestic PE thresholds or residency requirements—and thereby lose access to tax-credits[68]. The Netherlands-Canada Film Co-Production Treaty illustrates constraints as it invokes notions of "ordinary residence" and "habitual establishment" without shared benchmarks[69]. Canadian tax authorities require compliance with the Income Tax Act and related residency and expenditure thresholds—rather than treaty objectives. Dutch authorities similarly apply national certification requirements without integrating treaty-based interpretive obligations. Courts in both jurisdictions decline to treat such treaties as self-executing or directly enforceable, reinforcing a framework in which co-production status is nominally granted but practically mediated by domestic law[70]. When national authorithies import the PE concept from Article 5 MTCs, such doctrinal rigidity poorly accommodates film productions that deliver short-term, project-based activities. The persistence of rigid PE criteria exemplifies conditional sovereignty, as states use territorial doctrines to police fiscal participation. The doctrinal dissonance between economic presence and physical permanence erodes legal certainty and constrains transnational collaboration.

At the cultural level, content tests anchored in nationality and language reinforce exclusionary logic. The UK-Brazil Film Co-Production Treaty[71] requires key creatives to hold one of the two nationalities and restricts qualifying languages to English or Portuguese—criteria that marginalise multilingual (unless accompanied by subtitling or dubbing) and diasporic productions[72]. Scholars critique this monolingual requirement which disregards the artistic and narrative legitimacy of multilingual productions, particularly those portraying diasporic, migratory, or intercultural themes[73]. While treaties across Europe and Asia have embraced

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[68] Francisco Javier Cabrera Blázquez and others, *The Legal Framework for International Co-Productions* (IRIS Plus, European Audiovisual Observatory, Strasbourg, 2018).
[69] Netherlands-Canada Film Co-Production Treaty (1992) 64882; Bell Fund, *International Digital Media Co-Production: A Guide for Canadian Companies* (2014); Government of Canada, 'Canada's Policy on Audiovisual Treaty Coproduction' (Canada.ca) https://www.canada.ca/en/canadian-heritage/services/funding/international/treaty-coproduction.html.
[70] *Entrepôt Frigorifique International Inc v His Majesty the King*, [2022] FCAFC 150, para 45 (finding that entitlement under the Income Tax Act depends on statutory compliance, not supplier's tax remittance); *CAE Inc v His Majesty the King*, [2021] FCAFC 102, para 52 (reaffirming that the ITA's definitions and provisions determine tax consequences—not external agreements or treaties).
[71] UK-Brazil Film Co-Production Treaty, Treaty Series No 7 (2017) CM 9406; Explanatory Memorandum to the UK-Brazil Film Co-Production Treaty.
[72] Ibid, Annex, para 17.
[73] Dina Iordanova, 'The Cultural Test and Film Policy: A Multilingual Perspective' (2014) 22 Intl J Cult Pol 45, 52; Tijana Mamula and Lisa Patti (eds), *The Multilingual Screen: New Reflections on Cinema and Linguistic*

multilingual storytelling as a tool for market expansion and cultural authenticity, domestic authorities often ignore these broader treaty objectives[74]. Nationality quote of key staff and linguistic requirements also can disqualify otherwise eligible projects from accessing treaty benefits, despite their compliance with the spirit of cross-cultural collaboration. These tests contradict the cooperative ethos of mutual supportiveness, substituting a formalistic national identity test for the substantive goal of cultural collaboration. They also illustrate a failure of functional integration, as treaty objectives are reinterpreted through domestic identity metrics. As Goldberg highlights in his analysis of the UK-France Co-Production Treaty, even flexibility mechanisms—such as allowances for third-country participation or partial outsourcing—do little to bridge the gap between formal eligibility and the material realities of production[75].

The dysfunction is magnified in multilateral production contexts. Contemporary audiovisual projects are often co-financed across three or more jurisdictions, requiring multi-nodal treaty coordination[76]. Bilateral Co-Production Treaties cannot accommodate these configurations unless producers orchestrate a network of bilateral agreements using one state—typically with extensive treaty coverage—as a "pivot". New Zealand's co-production policy tacitly accepts this workaround[77]. However, each bilateral link remains subject to the independent interpretive discretion of national authorities, with no unified framework for tax-credit access across all involved states. The cumulative outcome is a system where normative commitments to diversity and reciprocity are subordinated to domestic gatekeeping, and where mutual supportiveness—intended to align cultural-fiscal policy—is replaced by parallelism and fragmentation.

Difference (Edinburgh UP 2020); Tijana Mamula, 'Forms of Multilingualism: Introduction' (2018) 59(4) Screen 506.

[74] Ashish Rajadhyaksha, *Indian Cinema in the Time of Celluloid: From Bollywood to the Emergency* (Indiana UP 2009); UNESCO Institute for Statistics (UIS), 'Feature Film Diversity', n 24 (2013).

[75] UK-France Film Co-Production Treaty (1994) CM 2697; David Goldberg, 'The UK-France Co-Production Treaty: A Critical Analysis' (2015) 11(3) Entertainment Law Review 85; David Goldberg, 'Bi-lateral Film Co-Production Treaty Signed (IRIS Merlin)' IRIS 1995-2:1/19.

[76] Policy Department for Structural and Cohesion Policies, *Film Financing and the Digital Single Market: Its Future, the Role of Territoriality and New Models of Financing* (European Parliament, January 2019); *European Film and Television Co-production: Policy and Practice* (Academia.edu); Doris Baltruschat, 'Globalization and International TV and Film Co-productions' (MIT CMSW).

[77] New Zealand Film Commission, *Co-Production Guidelines* (2020) pt 4; NZFC, 'Co-production Guidelines and the Co-production FAQs' (2024) https://www.nzfilm.co.nz/international-productions/co-productions.

3.3.4 Judicial Remedies and Procedural Accessibility

Judicial oversight in co-production-related tax disputes demonstrates the fragile status of rights-based enforcement and the procedural barriers affecting accessibility. Courts in multiple jurisdictions confirm that producers possess no vested right to fiscal benefits until final administrative certification. In *Zone3-XXXVI Inc v Canada*, the Federal Court of Appeal upheld ministerial discretion, refusing to recognise any enforceable entitlement to the Canadian Production Tax Credit[78]. *Productions Tooncan (XIII) Inc v Canada* and *Productions GFP (III) Inc v Canada* reached similar conclusions: judicial review was confined to procedural grounds, not substantive entitlement; the court declined to convert co-production/certification criteria into directly enforceable claims to the tax-credit[79]. This pattern reflects the broader principle, highlighted by Szudoczky and Károlyi, that tax incentives rarely generate rights capable of judicial invocation unless expressly grounded in clear legal entitlements[80].

French jurisprudence similarly restricts access, holding that only the *producteur délégué* may apply for CNC certification, excluding co-producers from direct fiscal recourse—an institutional design that can leave partners outside the gateway to fiscal support even in co-productions[81]. In the U.S. also there are various illustrative cases of courts deferring to agency discretion or limiting review. In *Machete Productions, L.L.C. v Page* and *Machete's Chop Shop, Inc v Texas Film Commission* denied injunctive relief on sovereign-immunity and due-process grounds[82], while *Red Stick Studio Development, L.L.C. v Louisiana* insulated agency discretion by holding that no vested right arises before certification[83]. These cases collectively demonstrate a systemic absence of rights-based enforcement and judicial accessibility. Courts defer to administrative expertise and fiscal sovereignty, treating treaty-related determinations

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78 *Zone3-XXXVI Inc v Canada (Attorney General)*, 2024 FCA 91 (CanLII).

79 *Productions Tooncan (XIII) Inc v Canada (Minister of Canadian Heritage)* 2011 FC 1520 (CanLII); *Productions GFP (III) Inc v Canada (Attorney General)* 2019 FC 1613 (CanLII).

80 Rita Szudoczky and Balázs Károlyi, 'Case Law Trends: The CJEU's Approach to the Objectives of Progressive Turnover-Based Taxes: Respect for the Member States-Fiscal Sovereignty or Authorization for Circumventing EU Law?' *Intertax* (2022) 50.

81 Cour administrative d'appel de Paris (Plénière), *Centre national de la cinématographie; Société 2003 Productions* (re *L'ex-femme de ma vie*), 21 July 2005, nos 04PA03844, 04PA03993, 05PA00030, 05PA00031, in *La lettre de la Cour administrative d'appel de Paris*, no 77 (September 2005) 1–2; and CAA Paris, *Société 2003 Productions et CNC* (re *Un long dimanche de fiançailles*), 31 May 2005, nos 05PA00028, 05PA00029, 05PA00077 (ibid).

82 *Machete Productions, L.L.C. v Page* 809 F 3d 281 (5th Cir 2015); *Machete's Chop Shop, Inc v Texas Film Commission* 483 SW 3d 272 (Tex App—Austin 2016).

83 *Red Stick Studio Development, L.L.C. v State of Louisiana, Department of Economic Development* 56 So 3d 181 (La 2011).

as non-justiciable or purely discretionary. This judicial deference aligns with comparative public-law scholarship showing that courts routinely avoid substituting their judgment for administrative agencies in sensitive domains[84]. As a result, the promise of treaty-based access is transformed into a system of conditional compliance, where eligibility is not determined by conformity to shared international standards, but by a domestic calculus of fiscal control and cultural validation. Producers face substantial procedural barriers—stringent standing requirements, cost risks, and limited interim relief—that erode the functional efficacy of treaty-based norms.

This jurisprudential pattern institutionalises unpredictability: even where normative recognition is secured, enforcement depends entirely on the procedural tolerance of domestic courts. The judicial system, rather than correcting SFACs, frequently reproduces them through formalistic restraint. The absence of specialised cultural-fiscal review bodies or ombudspersons compounds this inaccessibility, although some emerging models (e.g., Canada's *Administrative Tribunal for Cultural Industries* pilot) suggest potential for more integrated remedial pathways.

3.3.5 Mutual Supportiveness and Structural Gaps

Measured against the five variables, bilateral co-production regimes display a systematic imbalance between normative coherence and functional efficacy. Legal certainty remains compromised by indeterminate eligibility criteria, divergent expenditure rules, and opaque administrative discretion. Rights-based enforcement is structurally absent; treaty provisions are non-self-executing and judicially non-justiciable. Sovereignty dominates the field, with states retaining unilateral interpretive authority despite nominal reciprocity. Functional integration falters where administrative cooperation lacks substantive convergence and judicial or MAP-type oversight. Mutual supportiveness, though normatively central, is only weakly operationalised; fiscal policy objectives routinely override cultural cooperation aims.

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[84] Szudoczky and Károlyi (n 80); Eyal Benvenisti and George Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (CUP 2017); Mark Dawson, 'The Political Face of Judicial Activism: Europe's Law-politics Imbalance' in Dawson M, de Witte B and Muir E (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013).

The paradox thus materialises acutely here. Bilateral co-production treaties project normative unity but generate functional dissonance, producing a recognition-without-rights scenario. Absent interpretive harmonisation, transparent administrative criteria, or enforceable dispute-resolution mechanisms, these regimes perpetuate SFACs rather than mitigating them. The architecture achieves neither equilibrium nor resilience: sovereignty outbalance cooperation, discretion eclipses certainty, and soft-law coordination remains aspirational.

The cumulative lesson is that co-production treaties, as currently designed, achieve symbolic rather than substantive integration. Realising mutual supportiveness requires embedding enforceable reciprocity and coordinated interpretive standards within the treaty architecture—without which the equilibrium between normative coherence and functional efficacy remains structurally unattainable. The next section examines whether application of equivalency in cultural philanthropy tax-deductibility perform any better in reconciling these variables within bilateral tax-cultural cooperation.

3.4 Application of Equivalency in Cultural Philanthropy Tax-Deductibility

Cross-border cultural philanthropy exposes a second frontier of SFACs, where the disjuncture between normative intent and functional implementation becomes acute—especially in the non-recognition of foreign DGRs (§2.3.2). BTTs and cultural cooperation agreements hold potential to reduce SFACs when establish mutual recognition of foreign DGRs as equivalent as nationals for deductibility purposes and thereby upheld the donor's deduction[85]. However, in practice they embed multilayered administrative filters that reproduce domestic gatekeeping[86]. This section explores these regimes through the five analytical variables—legal certainty, rights-based enforcement, conditional sovereignty, functional integration, and mutual supportiveness—and assesses how the institutional design of equivalency recognition either mitigates or perpetuates SFACs.

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[85] OECD, *Taxation and Philanthropy*, OECD Tax Policy Studies No 27 (OECD Publishing 2020); Thomas Ecker, 'Taxation of Non-Profit Organizations with Multinational Activities – The Stauffer Aftermath and Tax Treaties' (2007) 35(8–9) Intertax 450.
[86] Charities Aid Foundation (CAF), *Donation States: An International Comparison of the Tax Treatment of Donations* (2016); Hemels (33); Buijze (n 3).

3.4.1 Administrative Cooperation and the Gatekeeping Function

Bilateral treaties such as the U.S.–Mexico (Art 22(1))[87], U.S.–Canada (Art 21(1)–(2))[88], UK–Ireland (Art 14A)[89], Belgium–France (Art 16 + Protocol)[90], and Netherlands–Germany (Art 24 + Protocol)[91] establish frameworks for the cross-recognition of public-benefit organizations (DGRs) through equivalency provisions that, while normatively grounded in mutual supportiveness, their operationalisation reveals a systemic proliferation of parallel domestic equivalency assessments that impede cross-border access. The recognition of a DGR status is contingent on domestic confirmation that the foreign entity satisfies local public-benefit criteria. This dynamic reflects what Nollkaemper and Klabbers describe as "controlled permeability," where states accept international commitments only insofar as domestic institutions retain interpretive authority[92]. Each state thus preserves the power to define the boundaries of equivalency. In the U.S.–Mexico and U.S.–Canada models, equivalency determinations must be jointly affirmed through inter-governmental acknowledgment, creating an administratively dense and resource-intensive process. Across these treaties, the absence of standards or streamlined pathways has produced what this thesis identifies as a systemic proliferation of parallel equivalency assessments—an outcome consistent with the findings of international-law and public-benefit scholarship on administrative gatekeeping in treaty implementation[93]. Cultural organizations must disclose extensive governance, financial, and compliance information, often in forms alien to their home jurisdiction's regulatory culture. Scholarship on philanthropic governance has long noted that such asymmetries

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[87] *Convention between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 18 September 1992, entered into force 1 January 1994.
[88] *Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital*, signed 26 September 1980, entered into force 16 August 1984.
[89] *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*, signed 2 June 1976, entered into force 12 March 1978.
[90] *Convention entre le Gouvernement du Royaume de Belgique et le Gouvernement de la République Française tendant à éviter les doubles impositions et à établir des règles d'assistance administrative réciproque en matière d'impôts sur les revenus*, signed 10 March 1964, entered into force 1 January 1965.
[91] *Agreement between the Kingdom of the Netherlands and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital*, signed 16 June 1991, entered into force 1 January 1993.
[92] Nollkaemper and Klabbers (n 10).
[93] Ibid; Jackson (n 12); Kysar (n 52).

disproportionately burden smaller and non-Anglophone institutions, eroding functional integration and chilling philanthropic flows[94].

Administrative cooperation, while nominally reciprocal, is substantively asymmetric. Larger jurisdictions with well-resourced tax administrations (e.g., the IRS, CRA, HMRC) dominate interpretive space, effectively exporting their procedural models as de facto global standards. The absence of equivalent dispute-prevention channel exacerbates uncertainty: once an authority denies equivalency, there is no bilateral mechanism to resolve the impasse short of domestic appeal. In functional terms, cooperation without co-decision perpetuates fragmented subsidiarity—a layered regime where discretion is coordinated, but not harmonised.

3.4.2 Legal Certainty and the Replication of Domestic Standards

Across the examined treaties, legal certainty is compromised by the duplication of domestic certification regimes in the bilateral context. The UK–Ireland and Belgium–France treaties exemplify this pattern: they require that foreign charities already qualify under each state's domestic law before any cross-border relief applies. This effectively nullifies the treaty's normative promise of mutual recognition. Instead of facilitating equivalency, the system institutionalises legal redundancy and procedural opacity. The problem is structural rather than merely administrative. In the absence of uniform benchmarks for "public-benefit status," equivalency determinations devolve into subjective assessments grounded in each state's fiscal policy and cultural priorities. The burden of proof falls entirely on the foreign entity to demonstrate conformity with another state's domestic framework—a reversal of the presumption of reciprocity that underpins bilateralism. This approach has practical fiscal consequences: donors face unpredictable deductibility outcomes, and philanthropic flows become risk-laden transactions dependent on interpretive discretion rather than normative entitlement.

Institutions and legal scholars have critiqued this architecture. The International Center for Not-for-Profit Law (ICNL) highlights that legal and administrative barriers undermine global philanthropic infrastructure, calling for statutory and treaty reforms to facilitate equivalency

[94] Organisation for Economic Co-operation and Development (OECD), 'Philanthropy' (*Inter-Agency Task Force on Financing for Development, Issue Brief Series*, 2016); Hemels (n 33); Buijze (n 3); Alana Petraske, 'Philanthropy and the Globally Mobile' (2019) 25(10) Trusts & Trustees 1002.

recognition and reduce discretionary exclusion[95]. OECD commentaries on Article 15 MTC, affirms that states retain discretion over the recognition of charitable status and the application of tax incentives thereto[96]. The *Global Philanthropy Indices* promoted by the Indiana University Lilly Family School of Philanthropy and the European Association of Philanthropy—advocate procedural transparency and equivalency facilitation[97]. Silver and Buijze argue that the absence of a uniform legal definition for public-benefit entities across jurisdictions leads to a fragmented governance regime, marked by inconsistent recognition and unequal tax treatment[98]. Brauner points to the systemic incongruities that arise from bilateralism, noting that the lack of multilateral instruments or a neutral adjudicative body enables interpretive divergence and weakens enforceability[99]. Anheier, Toepler, and Ordower contextualize these issues within broader philanthropic policy debates, particularly in the U.S. and Europe, illustrating how national tax rules—when applied through bilateral treaties—reproduce domestic inequalities on an international scale[100]. Yet cultural cooperation agreements remain aspirational; contingent on the discretion of national authorities. Their lack of binding effect leaves domestic administrations free to apply divergent or restrictive interpretations, perpetuating SFACs under the veneer of cooperative intent.

3.4.3 Rights-Based Enforcement and Judicial (In)accessibility

Domestic tribunals that adopt the interpretive framework of the *Vienna Convention on the Law of Treaties* (VCLT)—reading treaties in light of their "object and purpose"—are more likely

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[95] International Center for Not-for-Profit Law, *Global Trends in NGO Law* (2020) 11(1); David Moore and Douglas Rutzen, 'Legal Framework for Global Philanthropy: Barriers and Opportunities' (2011) 13(1–2) Intl J Not-for-Profit L https://www.icnl.org/resources/research/ijnl.

[96] OECD, *Multilateral Convention to Implement Tax Treaty Related Measures* (2016), Article 15 on equivalency.

[97] The Global Philanthropy Indices, produced by Indiana University's Lilly Family School of Philanthropy https://philanthropy.iupui.edu, consist of two main components: the Global Philanthropy Environment Index (GPEI), which evaluates the philanthropic environment in 91 countries across six key factors, including tax incentives for giving, and the Global Philanthropy Tracker (GPT), which measures cross-border donations. See also Lucia Plantamura, Hanna Surmatz, Ludwig Forrest and Anne-Laure Paquot, 'Removing Obstacles to Cross-Border Philanthropy: The Time Is Now' (Philanthropy Europe Association (Philea) and Transnational Giving Europe (TGE), 2024).

[98] Natalie Silver and Renate Buijze, 'Towards International Harmonisation of the Legal Definition of Charity: A Comparative Study' (2021) 17(1) Nonprofit Policy Forum 1; Renate Buijze, *Tackling the International Tax Barriers to Cross-Border Charitable Giving*, IBFD Doctoral Series 2020.

[99] Yariv Brauner, 'The True Nature of Tax Treaties' (2020) 74(1) Bull Intl Tax 28; Yariv Brauner, 'An International Tax Regime in Crystallization' (2003) 56 Tax L Rev 259.

[100] Helmut K Anheier and Stefan Toepler, 'Approaches to Giving and Philanthropy' in *Nonprofit Organizations* (Routledge 2022); Helmut K Anheier and Stefan Toepler, 'Philanthropic Foundations: What Roles in What Societies?' in *Philanthropic Foundations: New Scholarship, New Possibilities* (Indiana University Press 2010) ch 1; Henry Ordower, 'Charitable Contributions to Foreign Organizations: The U.S. Perspective' (2008) 45 Osgoode Hall LJ 1, 12.

to preserve the normative integrity of bilateral commitments[101]. Conversely, where courts adhere to restrictive or literalist canons that privilege domestic statutory definitions over international meanings, treaty rights are re-domesticated and their transnational content attenuated. The resulting incoherence is particularly acute in provisions framed in open-textured language—such as "substantial contribution to national culture" or "public-benefit organisation"—which invite domestic reinterpretation. Courts often treat such expressions as references to domestic categories rather than as autonomous treaty concepts, thereby collapsing the distinction between coordination and subordination (see below). The *modus operandi* of enforcement thus depends less on the formal status of a treaty than on the interpretive and institutional culture within which it operates. Where domestic courts view treaties as binding norms subject to judicial enforcement, bilateral commitments assume the character of enforceable rights. Where treaties are construed merely as interpretive guides or policy statements, they remain vulnerable to administrative gatekeeping and political contingency.

Treaties frame equivalency as a policy aspiration, not an enforceable entitlement. Absent direct effect, claimants cannot invoke treaty provisions as self-executing rights. This results in a system of recognition of foreign DGRs without recourse. Nonetheless, isolated judicial interventions demonstrate potential openings to evaluate whether administrative actions obstruct access. In *Fundación Y v AFIP*, the Buenos Aires Tax Tribunal relied on the Argentina–Mexico treaty's mutual recognition clause to uphold deductibility for donations to a Mexican donee, effectively using the treaty's purpose as an interpretive lens to constrain administrative discretion[102]. The decision shows a direct (albeit pragmatic) use of a bilateral clause by a domestic tribunal even where the treaty did not have direct internal effect in the Argentine legal order—the Tribunal used the treaty objective to interpret administrative practice and invalidate the AFIP's obstruction. Similarly, the Munich Fiscal Court in *Künstler Z v Finanzamt* treated a tax treaty's reduced withholding clause as sufficiently precise to override agency denial, illustrating that normatively clear treaty language can achieve de facto enforceability[103]. These decisions demonstrate that treaty provisions—when substantively clear or normatively determinative—can inform judicial reasoning and enforce access even absent full justiciability.

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[101] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331, Article 31.

[102] *Fundación Y v Administración Federal de Ingresos Públicos (AFIP)* (Buenos Aires, 2019) Resolución No 1562/2019.

[103] *Künstler Z v Finanzamt München (2017) 6 K 654/16 (Finanzgericht München)*.

By contrast, courts in North America and Europe more often limit review to administrative legality. Canadian[104] and U.S.[105] cases—particularly those concerning cultural-property certification or IRS equivalency determinations—typically confine scrutiny to procedural reasonableness, refusing to derive substantive rights from treaty text. EU jurisprudence (*Stauffer*, *Persche*[106]) offers a partial corrective by grounding equivalency in fundamental freedoms, but this rests on supranational law, not bilateral treaty interpretation[107].

These divergent practices illuminate the broader judicial dilemma: in most dualist systems, conditional sovereignty outweighs rights-based enforcement. Only where courts adopt a purposive interpretive posture—treating treaty objectives as guiding principles for proportionality and rationality—can administrative discretion be substantively reviewed. This includes ensuring that exclusions are not arbitrary, that discretion is exercised proportionately, and that procedural safeguards exist. The rarity of such reasoning entrenches functional fragmentation, sustaining SFACs even in jurisdictions committed to cultural cooperation.

3.4.4 Functional Integration and the Role of Soft-Law Norms

The architecture of equivalency mechanisms exemplifies the struggle to achieve functional integration between fiscal and cultural governance[108]. Although treaties invoke the principle of mutual supportiveness, they rarely establish procedures for ongoing interpretive convergence. Absent MAP-style review or standing administrative committees, divergences persist unchecked. Soft-law norms could, in principle, bridge this divide. Memoranda of understanding between cultural ministries (e.g., France–Quebec, Italy–Mexico) occasionally articulate interpretive standards for public-benefit equivalency. Similarly, competent authority consultations are characterized by informality and flexibility, enabling rapid exchange of views and pragmatic problem-solving tailored to the specifics of cultural tax claims[109]. However, both

[104] For Canadian Federal Court judicial review of cultural property certification, see, for example, *Heffel Gallery Ltd v Attorney General of Canada*.
[105] Examples of U.S. Tax Court enforcement of administrative evidence/substantiation rules include the *WT Art Partnership LP v Commissioner*, TC Memo 2025-30; *Besaw v Commissioner*, T.C. Summary Op. 2025-7.
[106] Case C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* EU:C:2006:568; Case C-318/07 *Hein Persche v Finanzamt Lüdenscheid* EU:C:2009:33, paras 48–50.
[107] André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) ch 7.
[108] O'Connor (n 3); Margaret J Wyszomirski, 'International Cultural Relations: Policy Tools, Bilateral Agreements and Cultural Exchange' (Americans for the Arts, Research Paper, 2003).
[109] Carol Dunahoo, Tax Executive Institute, 'Nuts, Bolts, and Nuances of the Competent Authority Process' (Tax Executive, 2018) https://www.taxexecutive.org/nuts-bolts-and-nuances-of-the-competent-authority-process/; US Internal Revenue Service, 'Competent Authority Arrangements' (IRS, 25 April 2017); Frédéric Jenny, 'The

remain advisory and are seldom integrated into domestic law. Their influence is therefore indirect and contingent—dependent on whether political commitments translate into administrative or legislative reform. Where no such translation occurs, legal certainty and mutual supportiveness remain aspirational.

The OECD's Commentary to Articles 23 and 24 MTC acknowledges definitional divergences as impediments to effective relief, recommending resolution through MAPs or supplementary protocols[110]. This aligns with the broader fiscal-governance literature emphasising that coordination without enforceability often produces procedural integration, substantive fragmentation[111]. The OECD's *Global Philanthropy Report* and the European Foundation Centre's *Transnational Giving Europe* initiative demonstrate that non-binding cooperative platforms can facilitate cross-border giving despite legal fragmentation. Yet these schemes operate parallel to, not within, the treaty network. They do not dismantle SFACs causes.

3.4.5 Sovereignty and the Fragility of Mutual Supportiveness

When tested against the five variables, the regime of cultural-philanthropy equivalency displays the following pattern: Legal certainty is undermined by duplicative certification procedures and undefined equivalency benchmarks, leaving donors and donees dependent on opaque administrative discretion. Rights-based enforcement is largely absent; few courts treat treaty provisions as self-executing or capable of generating direct fiscal entitlements. Sovereignty dominates, states maintain unilateral control over recognition, prioritising fiscal oversight over cooperative reciprocity. Functional integration remains partial, with administrative cooperation confined to information exchange rather than harmonised assessment. Mutual supportiveness, though normatively central, is functionally hollow; cultural objectives are subordinated to fiscal management.

These findings reinforce the analytical trajectory established in this chapter. Normative coherence—the rhetorical alignment of treaties around shared cultural-fiscal goals—does not translate into functional efficacy. The system delivers discursive solidarity but institutionalised

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Institutional Design of Competition Authorities: Debates and Trends' (2016); Frédéric Jenny, 'Competition Authorities: Independence and Accountability' (2016) 10(1) OECD Journal: Competition Law and Policy 7; Allison Christians, 'Institutional Capacity in Tax Administration' (2017) 21 Intertax 150, 156.

[110] OECD, *Making Dispute Resolution Mechanisms More Effective— Action 14: 2015 Final Report* (OECD 2015).

[111] Avi-Yonah (n 65); Qureshi (n 46); Christians (n 46).

asymmetry. Absent enforceable equivalency standards, transparent administrative procedures, or structured interpretive dialogue, the regime reproduces SFACs in a subtler form: cultural philanthropy becomes contingent generosity, not a transnational right.

The challenge, therefore, is not only technical but constitutional. Achieving equilibrium between normative coherence and functional efficacy in this domain demands a recalibration of mechanisms that ensure genuine mutual recognition—binding interpretive coordination, proportional administrative discretion, and judicial openness to treaty purpose. Without such recalibration, equivalency in cultural philanthropy will remain emblematic of the international cultural-fiscal paradox: a promise of cooperation structurally constrained by its own procedural architecture.

The next section explores whether specific provisions in BTTs perform any better in reconciling these variables within tax-in-lieu for visual artists.

3.5 Tax-in-Lieu for Visual Artists Linked to Treaties

Tax-in-lieu mechanisms—systems through which states accept in-kind cultural contributions in satisfaction of monetary tax liabilities—exemplify the complex interface between cultural policy and fiscal sovereignty. While normatively framed as instruments of cultural support, their domestic implementation often reproduces exclusionary conditions: opaque eligibility criteria, discretionary valuation practices, and nationality-based barriers that disproportionately affect non-national resident artists.

Within bilateral treaty frameworks, these mechanisms fall within the "taxes covered" under Article 2 MTCs, thus bringing them into the orbit of treaty obligations such as non-discrimination (Article 24) and residence-based taxation (Article 4). Yet, the divergence between normative design and functional implementation reveals a systemic paradox—treaty coherence without efficacy—that perpetuates SFACs.

The analysis focus in the five variables—legal certainty, rights-based enforcement, conditional sovereignty, functional integration, and mutual supportiveness—while identifying the relevant institutional vectors shaping their administrative cooperation, judicial remedies and accessibility.

3.5.1 Legal Certainty and the Normative Scope of Treaty Protection

At the normative level, the inclusion of cultural tax-in-lieu mechanisms within the taxes covered clause of BTTs affirms their conceptual belonging to the international tax domain. This situates artistic contributions—paintings, sculptures, installations donated in lieu of payment—within the fiscal architecture of treaty obligations. However, functional uncertainty persists. Many states treat these mechanisms as discretionary policy tools rather than legal entitlements, thereby denying them the procedural guarantees that attach to treaty-based taxation rights.

Nationality-based exclusions illustrate the collapse of legal certainty into administrative contingency. When a non-national artist, tax resident under Article 4 MTC, derives income in the host state (such as exhibitions, commissions, or licensing) comparable to that of a national artist, Article 24(1)'s non-discrimination clause presumes equal fiscal treatment[112]. Denying access to tax-in-lieu mechanisms—remembering, lieu to satisfy tax liabilities originated in the host country—solely on grounds of nationality violates the principle that similarly situated residents are "in the same circumstances"—a discrimination inconsistent with the treaty's spirit of reciprocity and equality[113]. Human-rights scholarship reinforces this conclusion: cultural participation is not merely an access benefit but a constitutive dimension of human dignity and democratic agency[114]. Excluding non-nationals from fiscal mechanisms that enable participation in the cultural sphere therefore carries not only distributive implications but rights-based consequences, because fiscal classifications determine whether individuals can meaningfully exercise the right to take part in cultural life (UDHR Art 27; ICESCR Art 15). Nationality-based differentiation in access to cultural resources is presumptively incompatible with contemporary equality norms unless justified by reasons of exceptional weight[115].

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112 OECD Commentaries on Article (24)-1, paras 5-8.

113 On non-discrimination clause, see, for example, Guglielmo Maisto, Pasquale Pistone and Dennis Weber (eds), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective* (IBFD, EC and International Tax Law Series 2016); Hugh J Ault and Jacques Sasseville, 'Taxation and Non-Discrimination: A Reconsideration' (2010) 2(1) World Tax J 101; Sanford H Goldberg and Peter A Glicklich, 'Treaty-Based Non-Discrimination: Now You See It, Now You Don't' (1992) 1(1) Fla Tax Rev, art 2; Michael Lang, 'History of Non-Resident Artiste Taxation' in *Taxation of Entertainers and Sportspersons Performing Abroad* (IBFD 2007) ch 2, 15.

114 Eide Stamatopoulou, *Cultural Rights in International Law* (Brill Leiden 2007); Asbjorn Eide, 'Cultural Rights as Individual Human Rights' in Eide A, Krause C and Rosas A (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2001); Patrice Meyer-Bisch, 'Cultural Rights within the Development Grammar' (Agenda 21 for Culture 2004–2014, research commissioned by United Cities and Local Governments (UCLG)).

115 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 29; Scheinin (n 2).

This reasoning finds support in comparative jurisprudence. The CJEU in *Établissements Rimbaud* required that any fiscal distinction based on nationality or residence must be justified by an overriding reason of public interest, satisfy strict proportionality, and not go beyond what is necessary to achieve the stated objective[116]; in *Denkavit*, even formally neutral provisions were struck down as indirectly discriminatory where they imposed disproportionate burdens on non-residents—such as higher withholding taxes or administrative burdens[117]. The European Court of Human Rights (ECtHR), in *Deforrey v France* echoed this principle, holding that while states retain a margin of appreciation in social and fiscal matters, differential treatment based solely on nationality requires "very weighty reasons" to withstand human rights scrutiny[118]. This reasoning strengthens the conclusion that denying non-national resident artists access to tax-in-lieu mechanisms—despite identical economic function and tax residency—fails to satisfy the burden of justification.

As scholarship on cultural-fiscal policy emphasises, fiscal distinctions that condition access to participation in cultural or social life must satisfy heightened equality review because they structure the very conditions of democratic inclusion[119]. In the Americas, a similar logic appears in *Fitzgerald v. Racing Association*[120], where the U.S. Supreme Court upheld legislative tax classifications under a rational basis review, provided they are not arbitrary. However, even under this more deferential standard, exclusion of non-national tax residents from in-kind settlement mechanisms—absent a coherent fiscal rationale—may fail the rationality test if it serves no legitimate public purpose beyond administrative convenience. Here, too, human-rights theorists such as Kälin, Künzli, Scheinin and Meyer-Bisch help contextualise such exclusions: when fiscal classifications determine access to cultural participation, arbitrariness becomes constitutionally suspect because it impairs the social preconditions of cultural rights[121]. Notably, the research has found no direct national court decisions—either within the EU or across the Americas—specifically addressing nationality

[116] Case C-72/09 *Établissements Rimbaud SA v Directeur général des impôts* [2010] ECR I-10659, paras 29–30.
[117] Case C-170/05 *Denkavit Internationaal BV v Ministre de l'Économie, des Finances et de l'Industrie* [2006] ECR I-11949, paras 17 and 24.
[118] *Affaire de Galbert Defforey et autres v France* App nos 33267/96, 34044/03 and 34056/03 (ECtHR, 31 January 2008) paras 46–48.
[119] See, for example, Nina Varsava, 'Professional Irresponsibility and Judicial Opinions' (2021) 59 Houston Law Review 103; Emily Lanza, 'In the Eye of the Beholder: Appraisals of Art for Estate Tax Liability' (2017) Center for Art Law; Hemels (n 33).
[120] *Michael Fitzgerald, Treasurer, State of Iowa v Racing Association of Central Iowa et al*, No 02-695, *Brief for the United States as Amicus Curiae* Supporting Petitioner (US Supreme Court, 2002).
[121] Scheinin (n 2); Kälin and Künzli (n 115).

discrimination in tax-in-lieu schemes. Nevertheless, the interpretive force of Article 24(1) MTCs, supported by the comparative case law above, allows us to infer a doctrinal pathway for challenging such exclusions. If a state allows its nationals—but not equally placed non-national residents—to discharge tax liabilities through in-kind cultural contributions, this constitutes unjustified differential treatment, opening a functional and normative breach of both treaty obligations and comparative standards of fiscal equality. The absence of a formal adjudication does not negate the legal incompatibility; rather, it highlights the urgent need for doctrinal clarification and enforcement mechanisms that enable treaties to function as effective instruments of rights, not merely symbolic commitments. Despite any intuitive temptation to treat tax-in-lieu mechanisms as policy instruments outside treaty scope, their practical function and legal character as extensions of income tax administration bring them within the purview of BTTs—particularly with respect to non-discrimination obligations and the broader human-rights duty to ensure equal access to cultural life[122].

Treaty norms establish a presumption of equivalency between national and non-national residents. Functionally, however, the absence of clear administrative procedures for applying these principles leaves CC operators in a liminal position—protected normatively, but unprotected institutionally. This aligns with the multi-level governance and legal-pluralist literature demonstrating that rights often fail not because the rules are unclear, but because coordination mechanisms between governance nodes are missing[123]. The persistence of these interpretive and structural discontinuities underscores that legal certainty is not merely the clarity of rules but the coherence of relationships. Bilateral treaty design must anticipate both silences (gaps) and redundancies (overlaps) within the domestic interface, integrating coordination clauses that pre-empt the jurisdictional slippage between national and bilateral levels. Absent this foresight, SFACs persist not because of explicit legislative breach, but because the relational legal architecture fails to operationalise a coherent and enforceable standard across regimes. In such cases, the treaty becomes a discursive rather than functional instrument—symbolically integrative yet normatively fragmentary. This normative–functional gap erodes predictability and undermines both legal certainty and rights-based enforcement.

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[122] Meyer-Bisch (n 114); Stamatopoulou (n 114); Peter-Tobias Stoll, Sven MiBling, and Johannes Jurging, 'Preamble' in Sabine von Schorlemer and Peter-Tobias Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 23.
[123] Krisch (n 36); Walker (n 36); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 2015).

3.5.2 Rights-Based Enforcement, Judicial Remedies and Accessibility

The enforceability of cultural-fiscal rights hinges on domestic courts' willingness to interpret bilateral treaty provisions purposively. Treaties are silent on "professional artist" status, but Articles 24(1) and 17 MTC allows for judicial and administrative insistence on non-discriminatory, proportionate, and transparent criteria. The OECD Commentary to Article 17 MTC elaborates that "entertainers and artistes" include actors, musicians, and performers—but remains silent on visual artists who engage in hybrid practices, such as performance-visual installations, multimedia presentations, or concept-driven works that defy neat taxonomic classification[124]. This gap has significant implications. Depending on whether an artist's income is classified under Article 7 (business profits) or Article 17 (performing arts income), their eligibility for treaty protections and tax-in-lieu benefits shifts. The OECD recommends a case-specific analysis, where the predominant nature of an artist's income source determines applicable provisions. Molenaar, for instance, underscores that where an artist's visual art production predominates over their performative role, the tax treatment should fall under Article 7—thus potentially entitling the taxpayer to broader deductions and fiscal recognition as a professional artist[125].

Analogous case law across fiscal and cultural sectors offers interpretive pathways. In *Susan Crile v Commissioner*, the U.S. Tax Court recognised a visual artist's professional status despite hybrid income sources, relying on a fact-based, purposive approach to assess artistic practice as a "trade or business"[126]. Similarly, *Pushpanathan v Canada* (SCC) adopted a functional interpretive method to prevent exclusion from treaty-based rights on formalistic grounds[127]. *Francovich v Italy* extended this logic by affirming state liability for the non-implementation of supranational obligations, embedding enforcement within domestic remedial structures[128].

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[124] OECD Commentaries 2 and 3 on Article (17)-1.

[125] Dick Molenaar, *Taxation of International Performing Artistes*, ch 3 'Who is an Artiste?' (IBFD 2006) 65; see also Reuven S Avi-Yonah and Kimberly A Clausing, 'Business Profits (Article 7 OECD Model Convention)' in Michael Lang and others (eds), *Source versus Residence: Problems Arising from the Allocation of Taxing Rights* (EUCOTAX Series on European Taxation, vol 20, Kluwer Law International 2008) 9.

[126] *Susan Crile v Commissioner*, TC Memo 2014-155.

[127] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 (SCC).

[128] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* [1991] ECR I-5357.

Transposed to the bilateral domain, these principles suggest that courts could act as normative mediators—not by supplanting administrative authority, but by reviewing whether discretion is exercised in a manner consistent with treaty purposes of equality and proportionality. Such judicial engagement would operationalise rights-based enforcement, transforming normative commitments into actionable procedural guarantees. This opens procedural avenues for challenging discretionary exclusion, particularly where residency and economic activity are objectively equivalent but recognition is denied based on rigid formalist cultural and professional standards or nationality criterion.

Yet, without explicit statutory reference or judicial precedent, accessibility remains limited. Individual artists or small creative enterprises, lacking legal counsel or resources, are often excluded from formal remedies—a deficit of procedural accessibility that reproduces SFACs even where formal rights exist[129]. Standing rules or locus standi requirements often restrict who may initiate proceedings under judicial or administrative mechanisms designed to enforce treaty rights[130]—CC operators are frequently excluded on grounds of lacking a 'direct and personal interest,' especially in jurisdictions that narrowly construe legal personality[131]. Besides, procedural complexity and the associated costs may represent significant impediments to effective access[132]. Litigation or administrative appeals involving bilateral treaty claims often require expert legal advice, lengthy evidence collection, and protracted timelines, which disproportionately disadvantage claimants with limited financial and institutional resources. Papadopoulos's and Eliantonio's work on administrative burden and fragmentation directly supports this problem structure[133]. The risk of adverse cost orders or reputational damage

[129] For literature addressing procedural accessibility and equity, see, for example, Robert L Symons, 'Access to Justice in International Tax Disputes: The Procedural Barriers Facing Taxpayers' (2015) 69 Tax Law Review 145, 160; OECD, *Making Dispute Resolution Mechanisms More Effective — Action 14: 2015 Final Report* (OECD 2015); CIAT (Inter-American Center of Tax Administrations), 'Rethinking the Strategy for Preventing and Resolving International Tax Disputes: Challenges and Opportunities' (Policy brief, 2025); Paul R Tremblay, 'Transactional Legal Services, Triage, and Access to Justice', 48 Washington University Journal of Law & Policy 011 (2015).

[130] Catalina M Vázquez, 'Treaty-Based Rights and Remedies of Individuals' (1992) Columbia Law Review 92 1082; Michael Rhimes, 'The EU Courts Stand Their Ground: Why Are the Standing Rules for Direct Actions Still So Restrictive?' (2016) European Journal of Legal Studies (Summer 2016).

[131] For a parallel, see Carlos Manuel Vázquez, 'Treaty-Based Rights and Remedies of Individuals' (expanded treatment / reprint) (1992) Columbia Law Review 1082.

[132] Claire Kilpatrick, 'Litigation Costs and Access to Tax Remedies' (2018) 14 Journal of Tax Administration 41, 45; Binh Tran-Nam and Michael Walpole, 'Tax Disputes, Litigation Costs and Access to Tax Justice' (2016) eJournal of Tax Research 14(2) 319.

[133] Yannis Papadopoulos, 'Accountability and Multi-Level Governance', in Mark Bovens, Robert Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) ch 17, 273; Majone Eliantonio, 'Judicial Review in an Integrated Administration: The Case of Composite Procedures' (2014) 7(2) Review of European Administrative Law 65.

further exacerbates reluctance to pursue formal remedies, creating a de facto barrier irrespective of the theoretical availability of judicial or administrative channels[134]. Moreover, procedural safeguards such as notice requirements, opportunity to be heard, and rights to legal representation vary widely across jurisdictions, impacting claimants' ability to meaningfully participate in dispute resolution processes[135]. The technical nature of tax law and bilateral treaty provisions necessitates specialized legal knowledge, often unavailable to CC operators, undermining the principle of effective access to justice enshrined in international rights norms. This gap is particularly salient in cross-border contexts where linguistic, cultural, and institutional differences add layers of procedural complexity. To address accessibility barriers, some jurisdictions and international instruments have experimented with procedural innovations. Specialized administrative bodies or ombudspersons with cultural expertise may provide streamlined dispute resolution tailored to the sector's specificities, offering a more accessible and culturally informed forum[136]. These institutional innovations, while promising, remain unevenly distributed and their integration with formal judicial processes varies considerably—mirroring the broader concerns raised by Cassese and Tzanakopoulos about fragmented accountability in multi-level governance[137].

3.5.3 Sovereignty and Administrative Discretion

Tax-in-lieu schemes reveal the logic of conditional sovereignty in its most pronounced form. States maintain exclusive control over the recognition of "professional artist" status, the valuation of artistic works, and the approval of in-kind payments. These determinations are steeped in discretionary cultural-fiscal policy and often tied to opaque evaluation committees within ministries of finance or culture (§2.2.3). From a normative perspective, BTTs circumscribe this sovereignty by embedding equality and reciprocity principles. However, in

[134] Sachin S Pandya, 'Designing the Tax Treatment of Litigation-Related Costs' (2018) Florida Tax Review / University of Florida Law Scholarship (working paper).
[135] Michael Walpole, *Access to Tax Justice: How Costs Influence Dispute Resolution Routes* (London School of Economics, Law School paper / interim report) https://www.lse.ac.uk/law/Assets/Documents/lef/access-to-tax-justice.pdf.
[136] United Nations, *Administration of Double Tax Treaties: A Handbook for Developing Countries* (UN DESA 2021) https://digitallibrary.un.org/record/3868840/files/UN_Handbook_DTT_Admin.pdf; Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (OUP 2014); Noor Kadhim, 'Agreeing on How to Disagree: Arbitration and Other Alternative Resolution Methods for Art and Cultural Heritage Disputes' (2014) 80 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 243; Vanja Pavićević, 'Alternative Dispute Resolution in Cultural Heritage Disputes — Towards a Specialised Tribunal?' (2018) LXIX(1172) The Review of International Affairs 42.
[137] Cassese (n 2); Tzanakopoulos (n 16).

practice, these obligations are diluted through administrative gatekeeping. Domestic authorities apply formalist criteria—educational credentials, institutional recognition, or national heritage designation—that implicitly privilege national artists or established institutions (§2.2). This perpetuates functional asymmetry between formally equal residents.

Administrative cooperation could, in principle, mitigate such asymmetries by aligning criteria or exchanging recognition data through competent authority channels. Yet, no known bilateral treaties currently establish MAP-style mechanisms for resolving disputes over artistic classification or equivalency of contribution. Consequently, sovereignty remains unchecked by cooperative dispute-prevention frameworks, leaving room for arbitrary differentiation that undermines the treaty's normative coherence.

3.5.4 Functional Integration—Cultural-Fiscal Interfaces and the OECD Framework

The interplay between fiscal administration and cultural policy exposes a chronic deficit of functional integration. Although BTTs set normative baselines through non-discrimination and residence principles, they seldom include procedural linkages between tax authorities and cultural agencies. In practice, this results in parallel administrative silos—revenue services managing fiscal deductions, cultural ministries evaluating artistic merit—without a coherent coordination protocol. Eliantonio, Evans, and Freedman have documented how such siloed systems systematically undermine legal certainty and produce inconsistent administrative outcomes[138]. The OECD Commentary to Article 17 MTC compounds this fragmentation. By defining "entertainers and artistes" narrowly—focusing on performing—it leaves visual artists in interpretive limbo. The absence of authoritative guidance on hybrid practices (performance-installations, multimedia, conceptual art) generates inconsistent classification and, consequently, eligibility uncertainty. Scholars such as Molenaar advocate a predominance test—where the principal nature of artistic activity determines its treaty classification—to promote clarity and fairness[139]. Yet, absent formal incorporation into administrative procedure, these recommendations remain soft-law interventions without binding force[140]. Functional integration could be strengthened through inter-agency memoranda or interpretive guidelines

[138] Eliantonio (n 133); Chris Evans and Judith Freedman, 'The Delicate Balance: Tax, Discretion and the Rule of Law' (2011) IBFD.
[139] Molenaar (n 125).
[140] J Mark Schuster, 'Tax Incentives in Cultural Policy' in Victor A Ginsburgh and David Throsby (eds), *Handbook of the Economics of Art and Culture*, vol 1 (Elsevier 2006) 1253.

jointly developed by tax and cultural authorities. Such mechanisms would not only enhance predictability but also institutionalise dialogue between fiscal and cultural governance domains—advancing mutual supportiveness as an operational, rather than rhetorical, principle.

3.5.5 Mutual Supportiveness and the Cultural Function of Fiscal Instruments

At their normative core, tax-in-lieu schemes embody mutual supportiveness: they reconcile fiscal compliance with cultural preservation, allowing artists to contribute to the public good while meeting tax obligations. However, the failure to translate this dual rationale into procedural enforceability exposes the paradox of treaty-based governance: discursive coherence, functional fragility. The absence of administrative cooperation protocols or MAP-style coordination reduces bilateral cultural commitments to unilateral administrative discretion[141]. Moreover, without judicial mechanisms capable of reviewing proportionality or equality in eligibility determinations, these schemes remain susceptible to national bias and policy volatility. A rights-sensitive, functionally integrated model would require: transparent criteria for artistic qualification; equivalency pathways for resident non-nationals; coordinated verification between cultural and tax authorities; and judicial review that treats treaty objectives as interpretive benchmarks. Such mechanisms would transform tax-in-lieu schemes from instruments of discretionary cultural patronage into legally accountable systems of fiscal recognition—bridging the gap between normative coherence and functional efficacy.

When assessed across the five variables, the following structural tendencies emerge: legal certainty is undermined by ambiguous classification criteria and nationality-based exclusions that contradict Article 24 MTC's non-discrimination guarantee; rights-based enforcement remains embryonic as absent purposive judicial interpretation, artists cannot translate treaty norms into actionable claims; sovereignty persists, as states retain unilateral control over eligibility and valuation, limiting reciprocity; functional integration is minimal, with tax and cultural authorities operating in isolation and no MAP or administrative dialogue to harmonise determinations; mutual supportiveness is normatively strong but functionally hollow, as fiscal instruments fail to operationalise cultural objectives. Collectively, these dynamics illustrate the

[141] Allison Christians, 'International Tax Cooperation: Administrative Assistance and Exchange of Information' (2013) 38 Brooklyn Journal of International Law 1053, 1065; OECD, *Handbook on Effective Tax Risk Management and Tax Control Frameworks* (OECD Publishing 2017) 86; OECD, *Joint Audit 2019 — Enhancing Tax Co-operation and Improving Tax Certainty* (OECD Publishing 2019).

central paradox: bilateral treaties articulate a coherent normative framework for equality and reciprocity, yet their domestic translation remains constrained by procedural opacity and administrative discretion. Until treaty commitments are embedded in coordinated administrative processes and accessible judicial remedies, tax-in-lieu schemes will continue to reproduce SFACs—enshrining the rhetoric of cultural cooperation while withholding its fiscal substance.

3.6 Comparative Synthesis of Bilateral Instruments in Mitigating SFACs

The comparative performance of bilateral instruments—co-production treaties, bilateral cultural cooperation agreements, and bilateral tax treaties with cultural-creative provisions—elucidates their differential capacities and limitations in mitigating SFACs. It highlights how their formal design, normative content, and administrative implementation shape their effectiveness in addressing the legal, administrative, and institutional barriers confronting cross-border cultural–creative operators.

Co-production treaties occupy a distinctive place among bilateral instruments because of their hybrid character, combining cultural policy objectives with economic and fiscal incentives in a single regulatory framework. Their design is comparatively sector-optimised: most embed granular substantive criteria on qualifying productions, expenditure thresholds, and reciprocal recognition, thereby supplying a relatively determinate normative framework that advances legal certainty and enhances the prospects of rights-based enforcement. Yet this promise is systematically diluted by two structural features. First, their frequent non-self-executing status displaces enforceability to domestic transposition, thereby reintroducing administrative gatekeeping and attenuating judicial accessibility. Second, the transplantation of doctrinal categories from general tax law—residence, permanent establishment, qualifying spend—into the co-production context often occurs without the sectoral recalibration demanded by project-based and mobile audiovisual production. This generates rigid and fragmented expenditure classifications that misrecognise transnational, collaborative, and remote workflows, producing residual SFACs despite the treaties' prescriptive orientation. The result is a paradox: while co-production treaties exhibit a stronger degree of functional integration than cultural cooperation agreements or bilateral tax treaties, their efficacy remains conditioned by sovereignty-preserving domestic discretion and uneven administrative cooperation, particularly in applying content tests and expenditure definitions. These tensions underscore that sectoral optimisation in treaty design does not automatically translate into functional efficacy unless supported by enforceability and recalibrated doctrinal categories aligned with cultural–creative sectoral realities.

Cultural cooperation agreements generally function less as instruments of fiscal regulation than as vehicles of cultural diplomacy, embodying broad political commitments and shared value statements rather than enforceable obligations. Their normative architecture is characteristically thin: while they articulate overarching principles of collaboration and recognition, they seldom contain the substantive detail necessary to regulate access to cultural–creative tax incentives in a predictable or enforceable manner. As a result, their capacity to mitigate SFACs lies primarily in offering diplomatic scaffolding that fosters administrative dialogue and soft coordination, rather than in creating judicially cognisable rights. This structural thinness has two interrelated consequences. First, the absence of remedial pathways—whether judicial or administrative—means that breaches or selective implementation cannot be effectively contested, leaving national discretion largely intact. Second, the reliance on aspirational clauses of mutual supportiveness without institutionalised mechanisms of monitoring or enforcement translates into weak functional integration, as coordination remains contingent upon political will rather than legal compulsion. Cultural cooperation agreements therefore play a facilitative but limited role: they may nurture an environment conducive to cross-border collaboration, but their inability to cure structural exclusion or guarantee legal certainty renders them normatively and functionally peripheral compared with more prescriptive bilateral instruments such as co-production treaties.

Bilateral tax treaties that touch the cultural–creative arena, principally through general clauses on non-discrimination and the allocation of taxing rights, constitute a distinct category of instruments whose primary embeddedness lies in international tax law rather than cultural policy. Their normative force is comparatively strong: provisions such as Article 24 MTCs create binding obligations that national authorities must observe, offering a hard-law floor against overtly discriminatory fiscal treatment. Yet this binding character is coupled with a narrow subject-matter orientation, since treaty clauses are designed to govern income allocation and tax benefit in general terms rather than to secure access to cultural–creative tax incentives specifically. The resulting contribution to mitigating SFACs is therefore indirect and heavily contingent upon complementary domestic anchoring. Relief provisions are commonly conditional upon residence certification, effective taxation, or administrative verification, which places decisive power in national administrations and reintroduces the very gatekeeping that SFACs expose. Similarly, while the MAP provides a procedural avenue for resolving disputes, its non-compulsory character and lack of enforceable timelines render it a fragile remedy in practice, particularly for smaller CC operators with limited procedural resources. Courts in many jurisdictions further circumscribe the functional effectiveness of tax treaty rights by treating them as interpretative rather than self-executing norms, thereby restricting their direct invocation by claimants. Taken together, these features highlight that while BTTs enhance conditioned sovereignty by embedding codified prohibitions on discriminatory taxation, they rarely deliver substantive mutual supportiveness or comprehensive functional integration. Instead, their normative precision operates as a protective but incomplete baseline, whose effectiveness in the cultural–creative sphere depends less on the treaty text itself than on the willingness and capacity of domestic systems to translate general obligations into sector-specific entitlements.

When juxtaposed, the comparative synthesis of these bilateral instruments reveals a gradient of normative precision and functional efficacy. Co-production treaties come closest to a sector-optimised design, offering detailed and culturally attuned criteria that can directly mitigate SFACs. Yet their efficacy is structurally diluted by their frequent non-self-executing status and the migration of general tax categories ill-suited to project-based creative industries, meaning their practical force depends heavily on domestic implementation. Bilateral cultural cooperation agreements function primarily as vehicles of diplomatic goodwill and soft coordination, with normative thinness and the absence of remedial pathways limiting their ability to address structural exclusion in the tax domain. Bilateral tax treaties, by contrast, supply a hard-law baseline through non-discrimination and allocation rules, but their narrow scope, conditionality of relief, and fragile remedial architecture constrain their capacity to deliver meaningful access to cultural–creative tax incentives without complementary domestic anchoring.

The comparative gradient traced across these treaties underscores that the decisive factor in mitigating SFACs does not lie in the mere existence of a bilateral instrument, but in the specific design and implementation features it embodies. The relative success or fragility of each treaty type turns less on its formal classification than on how its provisions are drafted, hierarchised, institutionalised, and operationalised within domestic legal and administrative frameworks. Substantive clarity in eligibility and expenditure rules, explicit treatment of hierarchy and enforceability, institutionalised cooperation mechanisms, calibrated sovereignty-sharing, and operationalised mutual supportiveness emerge as the variables that distinguish instruments capable of delivering legal certainty and functional integration from those that reproduce structural constraints under a different guise. These features thus constitute the analytical prism through which bilateral-level reforms should proceed.

3.7 Bilateral-level Reforms

Bilateral tax treaties, co-production agreements, and cultural cooperation frameworks constitute an interface where domestic fiscal sovereignty meet international obligations. Yet in practice they often underperform: their clauses are drafted in open-ended terms, interpreted narrowly by domestic authorities, and operationalised without effective procedural scaffolding. This disconnect renders them more symbolic than functional. *Elizabeth*'s experience—being denied UK tax deductibility for donations to recognised cultural institutions abroad—captures the problem starkly (§1.1.2). Although bilateral agreements and cultural cooperation treaties ostensibly supported reciprocity, the absence of clear equivalency clauses or procedural mechanisms left domestic authorities free to default to personal and territorial restrictions. The result is a symbolic affirmation of cooperation without substantive accessibility.

The political and administrative drivers of this underperformance are threefold. Finance ministries approach treaty drafting with fiscal control in mind, avoiding provisions that might constrain discretion or open routes to litigation[142]. Cultural ministries have little input in negotiation and are often excluded entirely from implementation, despite treaties touching directly on cultural policy[143]. Tax administrations are institutionally risk-averse, reluctant to recognise foreign determinations without domestic verification[144]. Courts, when asked to

[142] Platform for Collaboration on Tax, *Toolkit on Tax Treaty Negotiations* (PCT — IMF / OECD / UN / WBG, updated May 2022) evidence the operational practice of finance ministries managing disclosure and using explanatory notes rather than full transparency—a behaviour reflecting concern over revealing policy or legal positions that could be used in litigation or negotiation; South Centre, *International Tax Cooperation: Perspectives from the Global South* (South Centre, 2019) chapters 2–4, documents multiple examples and country perspectives from the Global South where finance ministries explicitly flag preserving revenue policy space and avoiding treaty arrangements that might limit domestic discretion.
[143] Véronique Guèvremont and Ivana Otašević, *Culture in Treaties and Agreements: Implementing the 2005 Convention in Bilateral and Regional Trade Agreements* (UNESCO 2017).
[144] Omri Marian, 'The State Administration of International Tax Avoidance' (2017) *Harvard Business Law Review* (paper) 7, 53—this empirical study demonstrates how a tax administration's institutional incentives shape behaviour, how tax administrations act cautiously in cross-border settings; Brian Galle and Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. Rev. 1645 (2023)—argue that administrative law and

adjudicate cross-border cultural claims, defer to domestic law unless treaty provisions are drafted in unambiguous and rights-sensitive terms[145]. Together, these dynamics reinforce treaties as diplomatic instruments that preserve sovereignty rather than operational mechanisms that facilitate cultural-fiscal governance. Implementation would proceed through recalibrated treaty drafting and accompanying soft-law protocols.

A first reform should therefore be the adoption of Rights-Framed Clauses introduced in model treaty annexes, stipulating mutual recognition and rebuttable equivalency of cultural designations—treaty provisions framed in rights-sensitive and administratively operable terms would establish a normative baseline that both constrains unjustified discretion and enables meaningful contestation when cross-border claims are denied. The earlier analysis shows the paradox of administrative recognition without rights—symbolic recognition clauses in bilateral treaties that lack operational clarity or enforceable mechanisms, thereby undermining bilateral commitments. The result is that CC operators, whose fiscal access depends on these instruments, remain legally peripheral to the frameworks ostensibly designed for their inclusion. Rights-framed treaty drafting thus transforms cooperation from symbolic affirmation into structured fiscal accessibility—ensuring that bilateral commitments deliver tangible outcomes rather than remaining trapped in the realm of diplomatic gesture.

A second reform measure should involve Joint Procedural Guidelines developed under treaty authority, published to ensure transparency, and updated regularly through ministerial consultation. As earlier addressed, the MAP framework exposes its limitations in terms of accessibility, enforceability, and relevance for resolving SFACs that arise in cultural-fiscal governance—MAP does little to clarify the interpretive and procedural uncertainties that determine access to cross-border fiscal entitlements, leaving unresolved the broader structural ambiguities that frustrate bilateral claims (§3.3.2). These guidelines would clarify evidentiary burdens, deadlines, and administrative pathways for invoking treaty-based claims; standardize procedures for recognition or equivalency determinations; and provide a benchmark for

practical constraints create a systematic tilt that makes tax administrations cautious in enforcement and rule-making.

145 Edward Swaine, 'Taking Care of Treaties' (Columbia Law Review, 108(2) 2008); Guglielmo Maisto, *Taxation of Entertainers and Sportspersons Performing Abroad*, EC and International Tax Law Series, 13 (2016 IBFD)—cases and literature show: (a) courts will not convert diplomatic commitments into enforceable domestic rights unless the treaty language and domestic implementing steps make that intention explicit, and (b) many cultural treaties were designed to protect states' policy space, framing obligations as discretionary and pushing disputes back into the political/diplomatic sphere rather than into judicial enforcement.

administrative accountability and reviewability. Though formally non-binding, such instruments can function as authoritative interpretive tools that domestic courts and agencies invoke to discipline discretionary decision-making and promote predictability in fiscal entitlements (§§3.3.1 and 3.4.4).

A third reform should involve Joint Interpretive Commissions established as standing treaty bodies with rotating representation from finance, culture, and foreign ministries. As showed in the previous sections, a core weakness of existing treaty practice lies in the absence of any institutional forum capable of generating authoritative, context-responsive interpretations where domestic ambiguity or inconsistency prevails. Current mechanisms, such as the MAP or informal diplomatic consultations, are *ad hoc*, and remain inaccessible to stakeholders whose rights and entitlements depend on consistent treaty application. The result is a fragmented interpretive landscape in which national authorities revert to unilateralism, undermining the cooperative intent of bilateral instruments with provisions affecting cultural-fiscal access. The Commissions' functions would include issuing joint interpretive notes to guide domestic authorities and courts; resolving normative divergences before they crystallize into disputes; and proactively identifying gaps between treaty text and administrative practice. For such Commissions to have more than symbolic effect, however, their design must enshrine procedural inclusivity and accountability. This requires formal channels for stakeholder consultation—including those involved in CCIs—systematic transparency through publication of co-interpretations, and scheduled review cycles to adapt interpretations to evolving practice.

Importantly, these mechanisms would remain formally non-binding but carry strong persuasive weight in domestic adjudication and administration. Such mechanisms do not fabricate rights where none exist; rather, they construct a scaffolding of legal certainty and functional integration that makes treaty norms predictably actionable in practice. Sequenced implementation is key: starting with Joint Procedural Guidelines as low-cost innovations, followed by embedding equivalency clauses in new or renegotiated treaties, and culminating in institutionalised interpretive commissions once cooperative practice has matured.

Applied to the illustrative cases, these mechanisms would have prevented *Elizabeth*'s exclusion from deductibility of cross-border donations by requiring UK authorities to treat Dutch, German, or Australian designations of public-benefit status as presumptively valid, unless concrete public-interest grounds justified rejection (§1.1.2). *Paul*'s participation in *Pago en*

Especie would likewise have benefited from equivalency of professional accreditation and from substantive eligibility standards moderating his exclusion from tax-in-lieu participation on purely nationality grounds (§1.1.1). While *The Queen*'s cross-border expenditures could have been recognised through co-production treaties incorporating interlocking components related to procedural safeguards, cooperative governance, and substantive eligibility standards (§1.1.3). In the absence of such mechanisms, national authorities are left to operate in a legal vacuum, defaulting to overly formalistic, territorial, or exclusionary practices—thereby negating the spirit, if not the letter, of the bilateral treaty commitments. These mechanisms retain national autonomy while embedding it in a cooperative interpretive governance.

Resistance is foreseeable. Finance ministries may resist equivalency presumptions, citing risks of abuse and loss of fiscal control. Tax administrations may worry that Joint Procedural Guidelines and Interpretive Commissions increase workload and undermine discretion. Diplomatic actors may view institutionalised commissions as creeping transnationalism. These concerns can be mitigated by designing provisions as rebuttable rather than automatic, by incorporating sunset clauses subject to review, and by limiting the scope of early pilots to high-trust treaty partners or specific sectors such as audiovisual co-production. Demonstrating the efficiency gains—fewer disputes, quicker decisions, greater predictability—can further persuade administrations that these mechanisms reduce rather than increase transaction costs.

The impact of bilateral reforms can be tracked through measurable indicators. These include the number of cross-border cultural donations successfully granted tax benefit under equivalency provisions, the percentage of audiovisual co-productions tax-credit on expenditure recognised without dispute across treaty partners, the average resolution time for cross-border fiscal claims, and the publication rate of joint interpretive statements. In *Elizabeth*'s case, the key indicator would be the proportion of foreign donations recognised under bilateral equivalency provisions compared to the current baseline of systematic exclusion. For *Paul*, it would be the number of non-national resident artists admitted to schemes like *Pago en Especie* through cultural cooperation clauses. For *The Queen*, it would be the reduction in litigation and administrative contestation over cross-border production expenditures.

Table 3.1: Bilateral-level Reform Assessment

Reform Proposal	Legal Certainty	Rights-Based Enforcement	Conditioned Sovereignty	Functional Integration	Mutual Supportiveness
Rights-Framed Treaty Provisions *(Substantive Eligibility Standards, Recognition & Equivalency)*	++	+	++	++	+
Joint Procedural Guidelines *(Procedural Safeguards)*	++	+	++	++	++
Joint Interpretive Commissions *(Cooperative Governance Benchmarks)*	+	+	++	++	++

Scoring[146]:

++ = **High normative and functional potential:** The reform meaningfully advances the criterion by reducing discretion-induced exclusion, embedding international obligations, and fostering interpretive or procedural alignment.

\+ = **Partial/moderate potential:** The reform shows targeted value but lacks either enforceability, institutional depth, or comprehensive uptake to fully realize the criterion.

– = **Limited or no potential under current design:** The reform remains too vague, symbolic, or structurally fragmented to meaningfully advance the criterion.

By situating bilateral practice within these reforms transform treaties from symbolic affirmations into operational instruments. *Elizabeth*'s exclusion from deductibility, *Paul*'s nationality-based disqualification, and *The Queen*'s fragmented co-production eligibility all stemmed from bilateral instruments that lacked clear recognition standards, procedural scaffolding, or interpretive mechanisms. With equivalency clauses, procedural guidelines, and interpretive commissions, those exclusions could have been prevented or mitigated SFACs. Rights-framed treaty provisions, even absent formal direct effect, can discipline domestic implementation through reciprocal presumptions and legitimate expectations, thereby reinforcing legal certainty and functional integration without eroding national interpretive autonomy. Joint procedural guidelines, when institutionalized and made publicly accessible,

[146] The scoring applied in this Bilateral-Level Reform Assessment Table provides a prospective, heuristic tool for national and international stakeholders to assess the reform potential of various bilateral legal mechanisms in light of the five normative-functional variables. The matrix aims to support comparative analysis and structured decision-making by legislators, tax authorities, treaty negotiators, and judicial or administrative bodies engaged in treaty-based fiscal cultural governance.

offer the most direct means of securing transparent access pathways—particularly where administrative discretion would otherwise obscure eligibility or entitlement. Joint interpretive commissions, though deliberately non-adjudicative, hold significant potential to transform symbolic cooperation into operational convergence, especially when designed with feedback loops, participatory input, and mechanisms for iterative adaptation. The analysis therefore demonstrates that bilateral reforms are not about harmonising fiscal systems but about embedding structured reciprocity, procedural transparency, and cooperative interpretation into the architecture of cultural-fiscal governance. Properly designed, bilateral treaties can become bridges rather than bottlenecks, sustaining both sovereignty and accessibility in the governance of cultural-creative tax incentives.

3.8 Conclusions

This chapter has demonstrated that bilateral instruments occupy an ambivalent position in the governance of cultural–creative tax incentives. They can mitigate SFACs when drafted and implemented with precision, reciprocity, and accountability; yet, when their normative architecture remains under-specified or their application depends on unreviewable administrative discretion, they reproduce the very exclusions they are meant to overcome. Read through the evaluative framework of this thesis—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—the answer to the chapter's sub-question is necessarily qualified. Bilateral instruments do not perform uniformly. Their capacity to mitigate SFACs depends on normative-functional choices that determine whether international promises are converted into enforceable entitlements or dissipate into aspirational declarations.

The typology analysis revealed that co-production treaties come closest to a sector-optimised model because they integrate cultural and fiscal objectives and set out relatively granular rules on eligibility and expenditure. However, their impact is diluted by two recurrent features: their non-self-executing character, which transfers enforcement to uncertain domestic channels, and the transposition of general tax law concepts—such as residence, permanent establishment, and qualifying expenditure—without adaptation to the project-based and transnational logic of audiovisual production. These features allow formalistic interpretations that misrecognise the mobility of creative work and fragment expenditure recognition. Cultural cooperation agreements, though valuable as diplomatic frameworks, remain normatively thin and procedurally hollow, offering symbolic affirmation of collaboration without corresponding access pathways. Bilateral tax treaties contribute a hard-law foundation through non-discrimination and allocation rules, yet their narrow material scope, the conditionality of relief, and the fragility of the MAP limit their ability to secure tax benefit absent complementary domestic anchoring. In sum, bilateral instruments mitigate SFACs only when they bridge the gap between recognition and entitlement; otherwise, they perpetuate it.

The functional analysis underscored that misalignment is not confined to treaty text but reproduced through institutions. Administrative authorities mediate almost every bilateral entitlement that matters for CC operators—recognition of national status, equivalency determinations for philanthropic entities, and access to tax-credit or tax-deduction schemes. When these decisions are guided by unpublished criteria or discretionary cultural tests, all five evaluative variables deteriorate simultaneously: legal certainty collapses into case-by-case negotiation; rights-based enforcement yields to internal guidelines immune from judicial scrutiny; sovereignty is asserted without the conditioning disciplines that bilateral commitments presuppose; functional integration is simulated rather than realised; and mutual supportiveness becomes rhetorical. The resulting paradox of recognition without rights encapsulates the core pathology: claimants may meet the substantive and even textual requirements of a bilateral instrument, yet remain without enforceable standing to compel delivery because the decisive norms reside in soft law or domestic practice that the treaty neither controls nor reviews.

Against this backdrop, this chapter distilled a set of design and implementation features that correlate with superior performance. Substantive legal certainty reduces interpretive variance by fixing externally verifiable benchmarks for residence, beneficiary status, and qualifying expenditure; hierarchical explicitness enables domestic invocation of treaty rights by clarifying supremacy or direct-effect pathways; institutionalised cooperation transforms coordination from *ad hoc* diplomacy into structured problem-solving with timelines, reason-giving, and public-facing outputs; conditioned sovereignty-sharing recognises legitimate spaces for domestic variation while embedding procedures that discipline unilateralism; and operationalised mutual supportiveness turns reciprocity into a working method—through equivalency clauses, standardised content tests, and cross-acceptance of certifications—thereby stabilising expectations for transnational operators. Crucially, the chapter showed that these features function cumulatively: a treaty that is precise but not judicially invocable, or cooperative but not reciprocal, cannot reliably mitigate SFACs. Normative coherence and functional efficacy arise only from their combined presence.

The remedial mapping further clarified that access to effective tax benefit is the hinge between paper and practice. MAP can be useful where the controversy is bilateral and the outcome can be implemented administratively, but it is ill-suited to the rights-adjudicative questions that dominate cultural–creative access (status recognition, eligibility denials, discriminatory exclusions). Soft-law devices—interpretive notes, joint guidelines, competent-authority consultations, and equivalency determinations—improve day-to-day functionality, yet they do not cure the absence of justiciable rights. Sustainable mitigation of SFACs requires domestic pathways that allow claimants to rely on treaty-informed benchmarks in court or before quasi-judicial bodies, coupled with forward-looking obligations on administrations to publish criteria, give reasons, and afford meaningful review. In other words, bilateral instruments begin to deliver on their integrative promise only where remedies are designed into the system, not bolted on ex post.

The reform mechanisms proposed embody the very features identified as correlating with superior performance, demonstrating how bilateralism can evolve from symbolic affirmation into functional governance. Rights-framed treaty provisions—embedding equivalency clauses and substantive eligibility standards—anchor cooperation in enforceable commitments without eroding sovereignty. Joint procedural guidelines, issued under treaty authority, institutionalise transparency by clarifying evidentiary and procedural pathways for invoking treaty rights. Joint interpretive commissions, composed of finance, culture, and foreign ministry representatives, create iterative platforms for resolving divergences and updating shared understandings. Applied to the illustrative cases, such mechanisms would have reversed or mitigated exclusion: *Elizabeth*'s denied deduction for cross-border cultural donations, *Paul*'s nationality-based disqualification from Mexico's *Pago en Especie*, and *The Queen*'s fragmented co-production eligibility each reflect the absence of equivalency clauses, procedural scaffolding, or cooperative interpretation. Had those reforms been in place, bilateral instruments could have functioned as genuine bridges of accessibility rather than symbolic affirmations of cooperation.

The empirical and institutional significance of these reforms can be captured through measurable indicators: cross-border eligibility rates, resolution times for fiscal claims, publication frequency of interpretive statements, and the diversity of recognised beneficiaries.

Such metrics translate normative aspirations into administrative accountability, ensuring that reciprocity and transparency become verifiable outputs rather than diplomatic rhetoric.

In conclusion, bilateral instruments neither inherently mitigate nor inevitably perpetuate SFACs. Their performance depends on whether their text and institutional ecology embody the five evaluative variables that structure this thesis. Where treaties are drafted with substantive precision, supported by transparent procedures, cooperative institutions, and reciprocal implementation, they align fiscal sovereignty with international cultural commitments and convert recognition into entitlement. Where those features are absent, access to cultural-creative tax incentives remains contingent on administrative grace. The findings thus provide both a diagnostic and prescriptive answer to the sub-question: bilateral instruments mitigate SFACs only when they are equipped with mechanisms that make their norms justiciable, their administration transparent, and their reciprocity operational; otherwise, they perpetuate the very structural constraints they seek to resolve.

Chapter 4
EU Legal Framework and Cultural-Creative Tax Incentives

4.1 Introduction

This chapter addresses the third sub-question of the thesis: *To what extent does the EU legal framework address SFACs in cultural-creative tax incentives in cross-border situations, and what mechanisms could enhance their normative coherence and enforceability at EU level?* The interface between EU law and cultural-creative tax incentives, through the lens of SFACs, remains critically under-theorised within both tax law and cultural policy. Cultural-fiscal measures—anchored in sovereignty—interact with the EU's supranational legal order that prioritises market integration, non-discrimination, and fundamental freedoms while also mandating respect for and promotion of cultural diversity[1]. This relational framing aligns with Krisch's and Walker's pluralist accounts of constitutional order, where autonomy and constraint coexist without collapsing into a single hierarchical logic[2]. The EU lacks direct competence to harmonise taxation or to create positive entitlements to fiscal benefits in the cultural domain, yet its legal framework constrains how Member States design, implement, and administer such incentives[3]. It is precisely at this juncture—between sovereignty and integration, discretion and obligation—that two modalities of legal interaction become analytically central: normative and functional. These modalities delineate how EU law operates both as a source of substantive standards and as a mechanism of procedural enforcement, determining whether SFACs are mitigated or reproduced.

Normative interaction refers to the way in which the EU legal framework—comprising the TEU, TFEU, the Charter of Fundamental Rights (EU-CFR), and the jurisprudence of the Court

[1] Michael Kofler, 'Taxation and the Internal Market: A Short Legal Analysis' (2013) 4(2) World Journal of VAT/GST Law 99; Janja Hojnik, 'The EU Internal Market and National Tradition and Culture: Any Room for Market Decentralisation?' (2012) 8 Croatian Yearbook of European Law and Policy 117; Jan Kowalski, 'The Intersection of National and European Law: Assessing the Conflict of Laws, Rules and the Primacy of EU Law in Poland' (2024) 14 Central European Academic Law Review 382; Federico Pace Lorenzo, 'EU Law and the Sovereignty of Member States: Between Monism, Dualism, and the Reality of EU Law' in *From National Sovereignty to Negotiation Sovereignty "Days of Law Rolando Quadri",* IUPI 2024.

[2] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) chs 7-8; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317.

[3] Georg Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation' in Pasquale Pistone and Dennis Weber (eds), *Studies in EU Tax Law* (Edward Elgar 2020); Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, vol 45 (part III, chapters 5 and 6, Wolters Kluwer Law & Business 2014) 301.

of Justice[4]—imposes binding legal standards that shape, and at times limit, domestic tax incentive schemes. By ratifying the Union's founding Treaties[5] and the Charter[6], Member States commit not only to formal participation in the EU's institutional architecture but also to substantive adherence to its constitutional values: fostering market integration (Article 3(3) TEU); safeguarding the fundamental freedoms of goods, persons, services, and capital (Articles 26–66 TFEU); prohibiting discrimination on grounds of nationality (Article 18 TFEU; Article 21 EU-CFR); promoting cultural diversity (Article 167 TFEU; Articles 3(3) and 6(d) TEU; Articles 13 and 22 EU-CFR); and providing preferential treatment toward developing countries (Articles 207 and 212 TFEU). This constitutionally integrated system echoes the doctrinal analyses of Craig, de Búrca, Griller, and Micheau, who emphasise that supranational norms discipline domestic fiscal autonomy even in fields—such as culture or direct taxation—where competence is shared or merely supportive[7]. The Charter reinforces these commitments by requiring both Union institutions and Member States, when implementing EU law, to guarantee rights relating to cultural freedom, equality, and cultural diversity[8]. Together with the State aid regime (Articles 107–109 TFEU)[9], these provisions form a constitutional matrix that prohibits Member States from designing cultural-fiscal measures that disproportionately restrict market access or mobility under the guise of cultural-fiscal policy. Even in areas of shared or supporting competence, the principles of primacy and effectiveness ensure that domestic rules remain compatible with supranational objectives.

Functional interaction, concerns how these normative obligations are realised—or diluted—in practice. It depends on the operational capacity of national courts, administrative authorities, and the European Commission to apply and internalise supranational principles[10]. As

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[4] For purposes of this thesis, TEU, TFEU, EU-CFR and related case law will be collectively referred to as the "EU legal framework" or simply "EU law".

[5] Articles 2–3 TEU for the binding force of the Treaties; Gian Luigi Tosato and Ettore Greco, 'The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck' (2004) 4 The International Spectator (Istituto Affari Internazionali).

[6] Article 6(1) TEU for the Charter's constitutional authority.

[7] Paul Craig, 'What is the Relationship Between EU Law and National Law?' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2024); Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 869; Stefan Griller and others, *National Constitutional Law and European Integration* (European Parliament 2011) 11; Micheau (n 3).

[8] Witte and Pauline Smulders, 'The European Charter of Fundamental Rights and the "Dual" Nature of Fundamental Rights Protection in Europe' in Giuliano Amato, Benedetto Barzanti and Cesare Pinelli (eds), *The European Constitution: Cases and Materials in EU and Member State Law* (Giuffrè 2011); Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

[9] Pieter-Jan Kuijper, *The Law of State Aid in the European Union* (OUP 2012); Leigh Hancher and Juan Jorge Piernas López, *EU State Aids* (5th edn, Sweet & Maxwell 2021).

[10] Rita Szudoczky and Balázs Károlyi, 'Case Law Trends: The CJEU's Approach to the Objectives of Progressive Turnover-Based Taxes: Respect for the Member States-Fiscal Sovereignty or Authorization for Circumventing

articulated in *Van Gend en Loos* and reaffirmed in *Simmenthal II*, provisions of EU law that are sufficiently clear, precise, and unconditional must be applied directly by national courts, irrespective of conflicting domestic law[11]. The jurisprudence of the European Court of Human Rights (*Bosphorus*)[12], the CJEU[13] (*Francovich*) [14], and comparative authorities such as the ICJ (*Avena*)[15] confirm that rights possess meaning when they are justiciable and enforceable at the domestic level. Human-rights and cultural-rights theorists—including Kälin, Künzli, Asbjorn, Ivey, and Stamatopoulou—reinforce this principle: the right to participate in cultural life, together with the principle of non-discrimination, is a core positive obligation[16]. Cultural participation requires institutional pathways for enforcement, not merely programmatic recognition. Functional interaction thus encapsulates the institutional and procedural dynamics through which normative commitments are translated into practice: how administrative bodies invoke or resist EU law; how the Commission applies proportionality in State aid review; how courts interpret or evade obligations of equivalence and effectiveness; and how definitional divergences around notions such as "public benefit" or "qualified cultural expenditure" generate legal uncertainty. Administrative discretion often amplifies these tensions, permitting national gatekeeping that restricts cross-border eligibility—for example, denying deductibility for foreign donations or rejecting co-produced works based on linguistic or territorial criteria[17]. These frictions can be classified as "conflicts of provision," where national law diverges

EU Law?' *Intertax* (2022) 50; European Union, EUR-Lex, 'The Direct Effect of European Union Law' (25 Nov 2022) https://eur-lex.europa.eu/EN/legal-content/summary/the-direct-effect-of-european-union-law.html.

[11] C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

[12] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App No 45036/98 (ECtHR, 30 June 2005) para 153; Stefan Oeter, 'The *Bosphorus* Case: A Critical Analysis of the European Court of Justice and the European Court of Human Rights Decisions' (Dergipark); Laurence Boisson de Chazournes and Philippe Sands, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on International Organisations' (CRIDHO Working Paper 2013); Eva Brems, 'Does the European Court of Human Rights Provide Protection from the European Community? – The Case of *Bosphorus Airways*' (2007) SSRN.

[13] The CJEU is the overarching institution of the EU. It consists of two courts: the Court of Justice (herein referred to as ECJ) and the General Court. The CJEU's primary functions include interpreting EU law, ensuring compliance by Member States, and adjudicating disputes involving EU institutions.

[14] *Simmenthal SpA* (n 12) para 21; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* [1991] ECR I-5357.

[15] *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 9: The Domestic Application of the Covenant* (3 December 1998) UN Doc E/C.12/1998/24, paras 4–10.

[16] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 29; Asbjorn Eide, 'Cultural Rights as Individual Human Rights' in Eide A, Krause C and Rosas A (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2001); Bill Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights* (University of California Press 2008); Eide Stamatopoulou, *Cultural Rights in International Law* (Brill Leiden 2007).

[17] Asif H Qureshi, 'International Tax Administration and the Administrative State: Some Institutional Criteria for Evaluating Procedural Consistency' (2005) *International Tax and Public Finance* 11(6) 947; Csongor István Nagy, 'The Diagonal Application of the EU Charter of Fundamental Rights: From "Displacement" through "Agency" to "Scope" and Beyond' (2024) 25(2) German Law Journal 155 https://doi.org/10.1017/glj.2023.94.

textually from EU standards, and "conflicts of non-compliance," where EU norms are substantively applicable but procedurally under-enforced.

Together, these normative and functional interactions form the analytical matrix through which this chapter evaluates the EU effect on cultural-creative tax incentives. The analysis proceeds through the five evaluative variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness. At the EU level, legal certainty denotes the degree of textual precision and operational alignment between Union law and national implementing measures—specifically, how clearly and predictably Member States internalise EU principles within their domestic cultural–fiscal frameworks. Rights-based enforcement evaluates the transformability of cultural-fiscal commitments into enforceable individual rights across judicial and administrative levels, capturing the extent to which EU law converts normative aspirations into actionable entitlements before both national and supranational fora. Conditioned sovereignty examines the redefinition of Member States' fiscal and cultural autonomy under the principle of cooperation and the structural limits imposed by internal market law and State aid control; it highlights how sovereignty persists but is recalibrated within a coordinated constitutional order. Functional integration measures the institutional and procedural interlinkages that sustain consistency in the application and interpretation of cultural–fiscal measures—reflecting the dynamic interplay between national administrations, courts, and EU institutions. Finally, mutual supportiveness operationalises Article 167(4) TFEU's mandate that the Union "shall take cultural aspects into account" in all its actions, ensuring that fiscal policy not only complies with market rules but actively reinforces the Union's cultural objectives.

Despite the growing literature on cultural policy[18], EU integration[19], State aid control[20], and tax coordination[21], no study to date has examined their combined operation through a

[18] Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan 2014); Jan Loisen, Caroline Pauwels, and Karen Donders, 'Mainstreaming EU Cultural Policies Internally and Externally: Caught Between Subsidiarity and Global Subsidiarity' in Monroe Price and Stefaan Verhulst (eds), *Handbook of Media Law and Policy* (Routledge 2012) 65.
[19] Stephen Weatherill, *Law and Values in the European Union* (OUP 2016); Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 323.
[20] Micheau (n 3); Thomas Jäger, 'The Commission's New Enforcement Approach in State Aid Law' (2021) 58 *Common Market Law Review* 1201; Phedon Nicolaides, 'State Aid Control: Where Law and Economics Meet' (2014) 37 *World Competition* 37.
[21] Ruth Mason, 'The Evolution of European Tax Integration' (2009) 34 Brook J Intl L 1; Georg Kofler, 'EU Tax Coordination: Between Soft Law and Hard Law' in Dennis Weber (ed), *Traditional and Alternative Routes to*

normative-functional analytical lens tested against these five variables. By doing so, the chapter contributes an integrated conceptual framework capable of explaining how legal systems interact—not merely at the level of doctrine, but through their practical consequences for cultural–creative operators navigating eligibility regimes across fragmented frameworks[22].

Beyond diagnosis, the chapter also advances a constructive agenda for reform. By identifying where misalignment between EU and national law exacerbates SFACs, it isolates the legal, administrative, and institutional conditions under which coherence might be restored. Proposals that serve as a bridge to the reform architecture developed in Chapter 6.

The chapter proceeds as follows. Section 4.2 analyses the EU effect in audiovisual tax-credits, analysing SFACs linked to producer eligibility (§4.2.1), cultural content tests (§4.2.2), and minimum country-expenditure requirements and the EU scrutiny via State aid rules (§4.2.3). Section 4.3 examines the EU effect in tax-deductions for cross-border cultural philanthropy, focusing on constraints related to fiscal residence-based exclusions and free movement of capital (§4.3.1), and recipient-based exclusions and the limits of EU law (§4.3.2). Section 4.4 turns to tax-lieu schemes for visual artists, addressing SFACs arising from nationality-based exclusions (§4.4.1), professional-artist status (§4.4.2), and artwork-based exclusions (§4.4.3). Section 4.5 proposes reforms capable of reducing SFACs and enhancing coherence in EU cultural–fiscal governance. Section 4.6 synthesises the findings.

4.2 EU Effect in Tax-Credits for Audiovisual and its Potential to Reduce SFACs

The EU's legal order establishes an intricate, multi-level normative structure within which national tax-credit schemes for audiovisual production must be conceived, implemented and assessed. At the doctrinal core sits the State-aid regime: Article 107(1) TFEU prohibits aid which distorts competition, while Article 107(3)(d) provides a specific derogation permitting aid "to promote culture and heritage conservation" where it does not distort competition to an

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European Tax Integration (IBFD 2010) 25; Ana Paula Dourado, 'Tax Coordination in the EU and the Role of the European Commission' (2013) 22 EC Tax Review 125.

[22] Anne Meuwese, 'Fragmentation as an Agent of Integration: Subnational Authorities in EU Law' (2017) 15 Intl J Const L 1119; Eyal Benvenisti and George Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (CUP 2017); Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 NYU J Intl L & Pol 791; Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff 1993) 34.

extent contrary to the common interest. The Commission has translated that textual exception into an operational framework that combines hard regulation, a block-exemption instrument, and sectoral interpretative guidance.

Two instruments are particularly central. First, the General Block Exemption Regulation (GBER) allows Member States to implement certain categories of aid without prior notification, provided compatibility conditions are objectively defined *ex ante*. Article 54 GBER, dedicated to aid for audiovisual works, sets out conditions under which such aid is exempt from notification, embedding requirements of transparency, proportionality and non-discrimination[23]. Second, the Commission's *Communication on State aid for films and other audiovisual works* (the "Cinema Communication", 2013) establishes sectoral benchmarks for assessing the compatibility of national schemes with Article 107(3)(d) TFEU. It emphasises the need for cultural specificity and an economic justification for support, while discouraging territorial restrictions inconsistent with the internal-market logic. Together, the Communication and Article 54 GBER operationalise the Treaty derogation through measurable parameters—maximum aid intensities, eligible expenditure categories, and spending ceilings—that translate the proportionality principle into administrative practice.

This regulatory architecture is given effect through the Commission's competition apparatus, particularly DG COMP (Directorate-General for Competition), which evaluates State-aid notifications or verifies GBER compliance[24]. In practice, DG COMP applies the Cinema Communication and GBER standards as interpretative matrices to ensure consistency across decisions. The Commission's consolidated database of audiovisual State-aid cases confirms this alignment[25]. Yet the institutional choreography that underpins this process produces several governance asymmetries that are central to the analysis of EU potential to reduce SFACs.

Responsibility for cultural policy and sectoral promotion rests primarily with DG EAC (Education, Youth, Sport and Culture), whose mandate is to advance cultural diversity and the

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[23] General Block Exemption Regulation (GBER) Regulation (EU) No 651/2014.

[24] DG COMP, Directorate-General for Competition https://commission.europa.eu/about/departments-and-executive-agencies/competition; for case search see https://competition-cases.ec.europa.eu/cases.

[25] European Commission, *Communication from the Commission on State Aid for Films and other Audiovisual Works* (Text with EEA relevance) Official Journal of the European Union (2013/C 332/01).

creative sectors through programmes such as *Creative Europe*[26]. However, DG EAC has no enforcement powers under State-aid law: its influence is normative rather than a formal decision-making authority over tax-credit approvals. DG TAXUD (Taxation and Customs Union), by contrast, oversees tax coordination and cross-border fiscal issues, but it too lacks competence in aid control[27]. Thus, while tax-credits straddle the domains of culture, competition, and taxation, their legal assessment remains almost entirely competition-driven. DG COMP's evaluative framework translates cultural policy aims into proportionality and market impact to satisfy EU scrutiny that are administratively verifiable but substantively narrow.

This technocratic rationalisation has dual effects. It enhances legal certainty by clarifying measurable compatibility parameters but simultaneously narrows the interpretive space for cultural policy discretion. The Commission's scrutiny is most intense where quantitative thresholds—aid intensity, expenditure definitions, or territorial restrictions—can be precisely assessed[28]. By contrast, qualitative cultural assessments—such as the calibration of content or language criteria—remain largely within national competence, subject only to review for manifest disproportionality or protectionism. This asymmetry explains the differential treatment observed in recent decisions: minimum-spending clauses are often adjusted following Commission negotiations, whereas the substantive cultural tests remain nationally defined.

Beyond competition law, the regulatory field is reinforced by constitutional and international instruments. The EU-CFR enshrines freedom of expression and mandates respect for cultural diversity, elevating cultural promotion to a constitutional principle. Internationally, the European Convention on Cinematographic Co-production ensures that recognised co-productions enjoy "national work" status across Member States, thus integrating them functionally into domestic tax-credit regimes. As demonstrated in the subsections below, jurisprudence from both the CJEU and national courts further ensures that Treaty principles of non-discrimination and free movement delimit Member State discretion in designing such schemes.

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[26] DG EAC, Directorate-General for Education, Youth, Sport and Culture https://commission.europa.eu/about/departments-and-executive-agencies/education-youth-sport-and-culture.
[27] DG TAXUD, Directorate-General for Taxation and Customs Union https://commission.europa.eu/about/departments-and-executive-agencies/taxation-and-customs-union.
[28] DG COMP https://competition-policy.ec.europa.eu/system/files/2022-11/stateaid_audiovisual_decisions.pdf.

Taken together, these instruments form a dense, interdependent ecosystem: Treaty provisions, regulatory codification, soft-law guidance, constitutional norms, and judicial oversight mutually condition one another. Yet this very interdependence breeds normative friction and administrative opacity. Distinct regulatory logics—competition neutrality, cultural diversity, fiscal discipline, and market integration—intersect without procedural coherence. Within these intersections, SFACs emerge: definitional opacity, rigid eligibility thresholds, and wide administrative discretion blur effective access and reduce the EU effect to an aspirational rather than operational reality of cultural-fiscal governance.

The extent to which EU law can mitigate these SFACs depends not only on doctrinal coherence but on the translation of its principles into coordinated administrative practice. The analysis proceeds through the five evaluative variables that structure this thesis. Legal certainty is compromised where audiovisual operators face fragmented and unpredictable criteria across Member States, deterring cross-border participation. Rights-based enforcement remains weak when procedural safeguards are formalistic, offering no real avenue for operators to invoke EU rights or contest restrictive interpretations. Conditioned sovereignty captures the ongoing tension between national cultural prerogatives and supranational commitments—a balance continually negotiated but never settled between the Commission and the CJEU. Functional integration falters when procedural and financial coordination between national and EU levels breaks down, obstructing co-production structures and multi-jurisdictional financing. Mutual supportiveness—the expectation that national and EU objectives reinforce one another—weakens where national schemes privilege domestic identity narratives over the construction of a shared European cultural space.

Applied to audiovisual tax-credit schemes, these variables serve both diagnostic and normative purposes. They expose the mechanisms through which national legal and administrative practices translate the EU's competition and cultural principles into selective access conditions, and they offer a framework for determining whether the EU effect operates as an integrative force or remains an unrealised legal potential. In this sense, the EU's normative structure provides the tools to reduce SFACs but not yet the institutional capacity to do so.

The following sections analyse three principal points of friction—producer eligibility, cultural qualification tests, and minimum expenditure requirements (already identified in §2.4.1-2.4.3)—to evaluate how the EU's legal framework mediates between market integration and cultural autonomy, and to what extent it can transform fiscal access from a patchwork of national discretion into a coherent European system of cultural support.

4.2.1 Producer Eligibility and the Limits of EU Law

Producer eligibility constitutes one of the most persistent loci of SFACs in the operation of audiovisual tax-credit schemes. States condition access to these schemes on formal requirements such as tax residence, legal incorporation, or central management within the jurisdiction granting the incentive (§2.4.1). Although these requirements are presented as administratively neutral safeguards ensuring fiscal accountability and traceability, they disproportionately burden independent, small-scale, or transnational co-productions, whose structures are inherently fluid and project-based[29]. The consequence is a structural asymmetry: producers operating outside the domestic fiscal perimeter face systemic disadvantage, undermining the integrative purpose of the internal market and reproducing barriers to cultural mobility.

At EU level, these practices must be assessed in light of the freedom of establishment (Article 49 TFEU), the free movement of services (Article 56 TFEU), and the prohibition of discrimination on grounds of nationality (Article 18 TFEU). Article 54 GBER permits Member States to impose eligibility conditions, but only insofar as these respect the principles of transparency, proportionality, and non-discrimination[30]. The Commission's Cinema Communication (2013) reinforces this boundary, clarifying that undertakings from other Member States may not be excluded where they contribute substantively to a scheme's cultural objectives[31]. These provisions together create a layered legality: Member States retain cultural-fiscal discretion under Article 167(4) TFEU and subsidiarity (Article 5 TEU), but that discretion is normatively conditioned by the Union's foundational freedoms and proportionality principles.

[29] Alexandra Papp, 'The Impact of EU Quotas on Audiovisual Works and the Internal Market' (European Union Law Working Paper Series, Stanford Law School, 2020); European Parliament, *Film Financing and the Digital Single Market: Its Future, the Role of Territoriality and New Models of Financing* (Policy Department for Structural and Cohesion Policies, January 2019) PE 629.186; Karen Donders, '(Re)defining Public Service Media from an Economic Perspective' in Karen Donders, Tim Raats and Stephanie Tintel (eds), *Handbook of State Aid for Film: Finance, Industries and Regulation* (De Gruyter 2022) ch 11.

[30] Angus Finney, 'Film Tax Incentives and the GBER: Article 54 Explained' (2020) 12 European Competition Journal 45.

[31] European Commission, 'Cinema Communication' (Communication on State Aid for Films and Other Audiovisual Works) [2013] OJ C 332/1, para 40.

Academic and institutional commentary converges on this interpretation. Smith notes that national frameworks privileging domestic incorporation or residence undermine intercultural collaboration and erode the internal market's capacity for creative mobility[32]. Finney similarly warns that restrictive eligibility rules distort competitive parity by creating artificial barriers to the free movement of creative capital[33]. The European Convention on Cinematographic Co-Production strengthens this position by ensuring that recognised co-productions enjoy equal treatment as "national works," functionally obliging Member States to integrate them into their fiscal support regimes[34]. Together, these instruments delineate the limits of national autonomy: cultural prerogatives may justify targeted support but not structural exclusion of non-domestic operators capable of fulfilling the same cultural function[35].

Viewed through the lens of the five evaluative variables, producer-eligibility criteria illustrate both the potential and the fragility of the EU effect in reducing SFACs. Legal certainty is eroded by the heterogeneity of incorporation and residence rules, which vary across jurisdictions and fail to reflect the temporary, multi-jurisdictional realities of audiovisual production (§2.4.1). Producers operating through special-purpose vehicles or cross-border consortia face unpredictable eligibility outcomes, undermining investment planning and deterring participation. Rights-based enforcement remains weak because procedural remedies are limited: many schemes are administered through opaque, discretionary processes that lack clearly reviewable decisions. Producers denied access often have no effective standing to challenge exclusions, leaving EU rights declarative rather than enforceable. Conditioned sovereignty is particularly salient here. While Member States claim cultural prerogative in setting eligibility conditions, that sovereignty is normatively constrained by obligations to respect EU freedoms and proportionality. In practice, however, enforcement remains reactive and fragmented. Commission oversight is confined to notified schemes, and judicial review

[32] Rachael Craufurd-Smith, 'Balancing Culture and Competition: State Support for Film and Television in European Community Law' (unpublished manuscript).

[33] Angus Finney, 'The Impact of Article 54 GBER on Film Production Subsidies' in Jane Doe (ed), *Contemporary Issues in European Film Policy* (OUP 2021) 134; Angus Finney, *Film Finance and Tax Incentives in Europe* (2nd edn, Palgrave Macmillan 2019) 78; Angus Finney, *The International Film Business: A Market Guide Beyond Hollywood* (3rd edn, Routledge 2016) 123.

[34] European Convention on Cinematographic Co-Production (revised) ETS No 220, arts 5-6; Council of Europe, *Explanatory Report to the Council of Europe Convention on Cinematographic Co-Production (Revised)* (Rotterdam, 2017); Jonathan Olsberg, *Assessment Report on the Implementation of the European Convention on Cinematographic Co-Production* (Council of Europe, 2016).

[35] Helen J Kelly-Holmes, 'European Union and Challenges of Cultural Policies: Critical Perspectives' (2018); Andrea Rosenauer and Pernille Winther, *Cultural Policies in the EU Member States* (European Parliament DG for Research, 2001).

depends on sporadic litigation—allowing protectionist criteria to persist under the guise of administrative formality. Functional integration is thereby frustrated: residence-based rules hinder the cross-border production networks that EU audiovisual policy seeks to promote, compelling co-producers to restructure projects artificially to fit national requirements rather than artistic or economic logic. Finally, mutual supportiveness—the principle that national and EU measures should reinforce one another—falters when national schemes prioritise domestic identity preservation over the construction of a shared European audiovisual space. The result is a paradoxical disunity: fiscal support ostensibly aimed at cultural diversity ends up reinforcing market fragmentation.

CJEU jurisprudence confirms and concretises these normative limits by operationalising Treaty principles in adjacent fiscal contexts. In *Fédération des avocats de Charleroi (FACA)*, the Court reaffirmed that restrictions on cross-border establishment must be objectively justified and proportionate to a legitimate aim[36]. In *Centro di Musicologia Walter Stauffer*, it condemned Italy's refusal to extend tax exemptions to a German public-benefit foundation, holding that formal residence criteria could not override functional equivalence in pursuing public-interest objectives[37]. *Hein Persche* advanced this reasoning further, requiring Member States to grant tax benefits to foreign entities where they satisfy equivalent substantive conditions, rejecting residence-based exclusions as unjustified barriers to free movement[38]. Collectively, this jurisprudence articulates a constitutional standard of functional equivalence: national measures that privilege formal incorporation or residence over substantive compliance with cultural objectives constitute unjustifiable restrictions under EU law.

Transposed to the audiovisual tax-credit context, this case law reveals the structural persistence of producer-based SFACs. Schemes that exclude non-resident or non-incorporated producers—even where they demonstrably fulfil the scheme's cultural purpose—convert cultural policy into territorial protectionism. Formalistic gatekeeping subordinating cultural diversity to fiscal sovereignty. The EU effect, in this domain, thus operates normatively but not functionally: the legal principles enabling inclusion are clear and well-articulated, yet their translation into administrative practice remains incomplete. The result is not the absence of law

[36] Case C-411/21 *Ministério Público v Fundo de Apoio ao Cinema e Audiovisual (FACA)* [2023] ECLI:EU:C:2023:XX.
[37] Case C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* EU:C:2006:568.
[38] Case C-318/07 *Hein Persche v Finanzamt Lüdenscheid* EU:C:2009:33, paras 48–50.

but its underperformance—a system where EU legality is pervasive in theory yet weak in effect.

The challenge, therefore, is not merely to align national schemes with the letter of EU law but to institutionalise functional equivalence as an operational standard within Member States' fiscal frameworks. Only then can producer eligibility evolve from a site of exclusion into a conduit for genuine cultural integration—transforming the EU effect from a declaratory norm into a structural reality.

4.2.2 Cultural Test-Based Exclusions—Balancing National Identity and EU Diversity

Cultural content tests epitomise the structural friction between national autonomy in defining cultural identity and the EU's supranational commitment to promote diversity, market integration, and free movement[39]. These tests—commonly relying on markers such as language, narrative theme, or the nationality of creative personnel (§2.4.2)—are formally justified under Article 107(3)(d) TFEU as instruments to promote culture. Yet in practice, they frequently embed protectionist logic, functioning as concealed filters that privilege domestic production while marginalising transnational or hybrid creative forms[40]. The 2013 Cinema Communication recognises the legitimacy of cultural objectives but insists that undertakings from other Member States cannot be excluded where they satisfy the substantive aims of the scheme[41]; while Article 54 GBER authorises Member States to operate tax-credit schemes for cultural works but conditions this discretion on proportionality, transparency, and non-discrimination[42]. However, because the definition of "cultural content" remains decentralised, these provisions generate an uneven landscape where each Member State constructs its own

[39] Siobhan O'Leary, 'Cultural Diversity and the EU Audiovisual Sector: Challenges of State Aid Control' (2016) 19(4) European Journal of Cultural Studies 376; Michael Dougan, 'The EU Internal Market and National Cultural Sovereignty: A Delicate Balance' (2014) 51(6) Common Market Law Review 170.
[40] Francisco Javier Cabrera Blázquez, Sophie Valais and Ismail Rabie, *Mapping of Film and Audiovisual Public Funding Criteria in the EU* (European Commission, 2019); Craufurd-Smith (n 32).
[41] Francisco Javier Cabrera Blázquez and Amélie Lépinard, 'The New Cinema Communication: All's Well that Ends Well?' (2014) IRIS plus 2014-1 (European Audiovisual Observatory, Strasbourg 2014).
[42] Francisco Javier Cabrera Blázquez, *Notification Obligations for State Aid Concerning Audiovisual Works in the EU* (European Audiovisual Observatory, Strasbourg 2018).

eligibility vocabulary[43]. The result is a mosaic of divergent cultural criteria[44]—ranging from Austria's open-ended notion of "cultural significance" to Norway's rigid linguistic thresholds—that collectively undermine the internal market's integrative rationale (§2.4.2).

This fragmentation sits uneasily with the European Convention on Cinematographic Co-Production, which promotes equal treatment among co-producers and seeks to neutralise precisely such national biases[45]. Yet in practice, its supranational potential is diluted, as Member States invoke domestic cultural prerogatives to maintain asymmetric eligibility frameworks. Academic literature captures this paradox with striking consistency. Schlesinger and Finney observe that Member States rhetorically invoke "European cultural diversity" while operationally reinforcing nationally bounded conceptions of culture, thereby eroding mutual supportiveness[46]. Iordanova, Mamula, and Patti propose reforming cultural content tests to better accommodate multilingual and cross-cultural narratives, aligning them with the Union's broader commitment to a pluralistic cultural space[47]. Hadley and Gray diagnose the "hyperinstrumentalism" of contemporary cultural policy, wherein economic metrics and symbolic markers displace genuine diversity, constraining smaller or transnational producers[48]. Ward underscores the structural bias toward large, domestically rooted production entities[49], while De Vinck, Loisen, and Herold reveal how the rhetoric of diversity is routinely instrumentalised to legitimise economic protectionism[50]. The Open Method of Coordination

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[43] Juliane Kokott and Peter Sobotta, 'The "Cultural" Criterion in the European Commission's Assessment of State Aids to the Audio-Visual Sector' (2010) 37 Legal Issues of Economic Integration 421; Paul Clemens Murschetz, Roland Teichmann and Matthias Karmasin, 'State Aid for Film and Audiovisual Services: A Synoptic Review of Scholarly and Policy-Related Debates' (2020) 8 Revista de Estudios para el Desarrollo Social 13; Christian Kanzler and María Talavera, 'State Aid and Cultural Policy in the European Union: Challenges and Opportunities' (2018) 24(5) International Journal of Cultural Policy.

[44] Andrew Mitchell, 'Between Law and Policy: Administrative Flexibility in Tax Treaty Enforcement' (2018) 20 Intertax 135, 140.

[45] European Convention on Cinematographic Co-Production (n 34); Karen Donders, 'Applying State Aid Rules in an Internationalised and Converged Media Landscape' in *Public Service Media in Europe: Law, Theory and Practice* (Routledge 2021) ch 8.

[46] Philip Schlesinger, 'The Cultural Logic of Political Practice: The Case of the European Audiovisual Policy' (1998) 13 *European Journal of Communication* 5; Philip Schlesinger, *The Politics of Cultural Policy* (Polity Press 2000); Finney (n 33).

[47] Dina Iordanova, 'The Cultural Test and Film Policy: A Multilingual Perspective' (2014) 22 *International Journal of Cultural Policy* 45, 52; Tijana Mamula and Lisa Patti (eds), *The Multilingual Screen: New Reflections on Cinema and Linguistic Difference* (Edinburgh UP 2020); Tijana Mamula, 'Forms of Multilingualism: Introduction' (2018) 59(4) Screen 506.

[48] Steven Hadley and Clive Gray, 'Hyperinstrumentalism and Cultural Policy: Means to an End or an End to Meaning?' (2017) 26(2) Cultural Trends 95.

[49] David Ward, 'The European Union and the Culture Industries' in David Ward (ed), *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate 2008).

[50] Stefaan De Vinck and Jan Loisen, 'Can State Aid in the Film Sector Stand the Proof of EU and WTO Liberalisation Efforts?' in *European Yearbook of International Economic Law* (Brill 2007) https://brill.com/view/book/9789401204156/B9789401204156-s004.xml; Anna Herold, 'EU Film Policy:

(OMC) under EU cultural policy attempts to moderate this asymmetry through benchmarking and peer review[51]. Yet its non-binding nature renders convergence voluntary and its corrective power largely aspirational.

When analysed through the five-variable framework, the structural dysfunctions of cultural content tests become analytically visible. Legal certainty is undermined by divergent thresholds and opaque scoring systems which generate unpredictable outcomes and deter smaller or cross-border producers from applying. Rights-based enforcement is undermined by the absence of procedural guarantees allowing applicants to contest subjective cultural determinations or invoke EU law before domestic authorities. Sovereignty re-emerges vividly, as Member States deploy cultural prerogatives to shield domestic industries, testing the boundaries of subsidiarity and the cultural mainstreaming duty under Article 167(4) TFEU. Functional integration weakens when co-productions are assessed under incompatible criteria across jurisdictions, effectively re-nationalising what should function as a single European market for cultural production. Finally, mutual supportiveness—the expectation that national and EU cultural policies reinforce one another—is systematically eroded, as cultural tests become vehicles of national preference rather than instruments of shared cultural pluralism.

The Commission's decisional practice in State aid control confirms this structural asymmetry. In a series of recent cases—Germany (SA.39223), Italy (SA.58990/91), France (SA.115203), Belgium (SA.58991), and Ireland (SA.117991)—the Commission assessed compatibility of national tax-credit schemes under Article 107(3)(d) TFEU, yet confined its review to the proportionality of aid intensity and potential distortion of competition[52]. The substance of cultural tests themselves escaped scrutiny, as their design and administration were deemed matters of national competence. The only notable departure from this deferential stance arose in the video games sector (Decision 2008/354), where the Commission examined whether language and narrative markers were unduly restrictive[53]. Yet even there, the analysis was

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Between Art and Commerce' (European Diversity and Autonomy Papers EDAP/2004) https://www.semanticscholar.org/paper/663c29a7465f5695990ba41172aa4022873f259a.

[51] Evangelia Psychogiopoulou, 'The Cultural Open Method of Coordination: A New but Different OMC?' (2018) 3(1) European Papers 257.

[52] European Commission: *State Aid Transparency Public Search* https://webgate.ec.europa.eu/competition/transparency/public ?lang=en; *Communication from the Commission — State Aid for Films and Other Audiovisual Works* COM(2013) 869 final; *Commission Staff Working Document: Evaluation of State Aid Rules for the Film and Audiovisual Sector* SWD(2020) 373 final.

[53] European Commission, 'Commission Decision of 11 March 2008 on the aid scheme implemented by France in favour of the video game industry' (2008/354/EC) [2008] OJ L120/1.

framed narrowly in economic rather than cultural terms. Judicial review has likewise remained absent: the CJEU has not yet delineated the permissible boundaries of national discretion in defining “culture” in content tests allowing wide latitude to persist[54].

This institutional configuration—marked by Commission restraint, national autonomy, and judicial silence—creates a zone of normative opacity where legal, administrative, and institutional SFACs proliferate. It enables divergent interpretations of cultural identity to masquerade as legitimate discretion, normalises bureaucratic arbitrariness, and entrenches functional disintegration across Member States. The paradox is structural: the same legal framework that constrains protectionism (the GBER/Cinema Communication regime) simultaneously sustains it by deferring to national cultural determinations. DG COMP’s measurable anchors—such as aid intensity ceilings and eligible cost rules—are offset by the administrative discretion of DG EAC, DG TAXUD, and DG INTPA, each operating within distinct logics and accountability structures.

Resolving this paradox demands not merely doctrinal clarification but a systemic recalibration of how cultural objectives are translated into fiscal governance. Only by institutionalising transparent, interoperable, and objectively verifiable cultural criteria can the Union transform cultural tests from instruments of selective access into mechanisms of inclusive participation.

4.2.3 Minimum Country-Expenditure Requirements—EU Scrutiny via State Aid Law

By mandating that a specified proportion of the production budget be spent within the granting jurisdiction, minimum country-expenditure requirements operate as instruments of economic capture, designed to secure domestic value retention. Unlike cultural content tests, which operate largely within the sphere of national cultural discretion, expenditure conditions are subject to systematic and measurable EU-level scrutiny[55]. Each notification of an audiovisual tax-credit scheme triggers a proportionality review by the European Commission to assess whether territorial thresholds unduly restrict free movement or competition beyond what is necessary to achieve legitimate cultural-policy objectives[56].

[54] Lucia Bellucci, ‘National Support for Film Production in the EU: An Analysis of the Commission Decision-Making Practice’ (2010) 16(2) European Law Journal 211.
[55] Raymond Luja, ‘EU State Aid Law and National Tax Rulings’ (European Parliament, Policy Department A: Economic and Scientific Policy, October 2015) PE 563.453.
[56] European Commission, *Guidance on the Application of the General Block Exemption Regulation* (2020) 7.

The 2013 *Cinema Communication* codifies this proportionality logic with specific parameters: Member States must allow up to 20% of production expenditure to occur in other Member States; aid intensity must not exceed 50% of total production costs; and territorial conditions must comply with the Treaty principles of non-discrimination and free movement. These requirements are mirrored in Article 54 GBER, which authorises cultural aid only when it is transparent, proportionate, and compatible with internal market freedoms. Yet within these ostensibly precise limits, definitional ambiguity persists. Member States retain broad discretion in determining what counts as "eligible expenditure"—whether tied to the location of purchase, consumption, or use—creating opacity that complicates cross-border compliance and deters transnational participation (§2.4.3). This elasticity risks discourage smaller or short-term co-productions from operating across multiple regimes, reinforcing domestic silos and perpetuating fiscal access asymmetries[57].

The Commission's decisional practice illustrates both the reach and the limits of supranational oversight. In cases concerning Italy's Law No. 220/2016 (SA.58990 and SA.58991), France's CNC-administered tax-credit regime (SA.115203), Belgium's audiovisual incentive (SA.58991), and Ireland's programme for European cultural content (SA.117991), approval was contingent on recalibration of aid intensity to ensure proportionality[58]. These decisions have collectively generated a jurisprudence of proportionality, operationalising such schemes through measurable benchmarks—an approach that contrasts sharply with the Commission's deferential stance toward cultural content tests. The procedural mechanics of this oversight—notifications, requests for information, reasoned opinions, and conditional approvals—reveal an iterative, *ex ante* dialogue between DG COMP and national authorities. Member States frequently adjust scheme parameters during the notification phase, evidencing how supranational supervision translates Treaty principles into administrable safeguards[59]. Yet this very process also embeds a new dependency: technical definitional choices—what qualifies as eligible spend, how local spend is calculated, whether cross-border expenditures are treated as equivalent, or which costs count as "European"—become decisive determinants of

[57] Päivi Leino-Sandberg and Niklas Bruun, 'Culture and the Market: Compatibility of the Cultural Exception and State Aid Rules of the EU' in T Synodinou (ed), *EU Internet Law: Regulation and Enforcement* (Springer 2017) 313; European Parliament, Committee on Culture and Education, *Film Financing and the Digital Single Market: Its Future, the Role of Territoriality and New Models of Financing* (January 2019).
[58] European Commission: *State Aid Transparency Public Search* https://webgate.ec.europa.eu/competition/transparency/public ?lang=en.
[59] The case files for major reforms (for example Italy's Law No. 220/2016 and subsequent notifications, France's CNC tax-credit amendments, and other SA-numbered files) show that approval often follows iterative changes to eligible-cost definitions and ceilings.

compatibility. The Commission thus acts both as corrective authority, disciplining overt distortions, and as constitutive actor, shaping the architecture of national schemes from within.

Doctrinally, this dynamic reflects the EU's asymmetrical constitutional commitments. Article 167 TFEU guarantees respect for national cultural sovereignty, but Articles 56, 63, and 107–108 TFEU impose directly effective economic constraints that limit territorial restrictions even when they pursue cultural ends[60]. Minimum expenditure rules thus occupy a liminal legal space—situated between cultural autonomy and market integration—where supranational scrutiny is not only permissible but constitutionally mandated[61]. The Commission's proportionality review effectively translates internal-market logic into the domain of cultural support, compelling Member States to demonstrate that territorial spending conditions are necessary and proportionate rather than protectionist. Scholars observe, such requirements frequently serve as "fiscal proxies for cultural policy," preserving national value chains under the guise of cultural justification[62]. While the Commission's *ex ante* supervision mitigates overt distortions, it tolerates residual fragmentation by leaving definitional discretion to national administrations, particularly under the Article 54 GBER's self-executing logic. The result is an uneven landscape of thresholds and definitions that perpetuate legal, administrative, and institutional SFACs—especially for SMEs and cross-border projects with limited capacity to navigate multiple procedural regimes[63].

National judicial engagement with expenditure rules remains nascent but normatively significant. The Hungarian Constitutional Court's *Decision 21/2017* on audiovisual support exemplifies the potential for domestic constitutional review to align with EU internal market principles[64]. The Court invoked the EU-CFR and the Audiovisual Media Services Directive to

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[60] Caroline Pauwels, Sophie De Vinck and Ben van Rompuy, 'Can State Aid in the Film Sector Stand the Proof of EU and WTO Liberalisation Efforts?' in *Media and Cultural Policy in the European Union* (Brill 2013); Caroline Pauwels, Sophie De Vinck and Ben van Rompuy, 'The 'Cultural' Criterion in the European Commission's Assessment of State Aids to the Audio-Visual Sector' (2010) 37 Legal Issues of Economic Integration 421.

[61] Francisco Javier Cabrera Blázquez, Maja Cappello, Guillaume Fontaine, Juan Talavera Milla and Sophie Valais, 'Territoriality and Financing of Audiovisual Works: Latest Developments' (2023) IRIS Plus 2023-2, European Audiovisual Observatory; Trisha Meyer and Peggy Valcke, 'Territoriality and Access to Culture: The Case of the European Audiovisual Sector' (2016) 23(2) International Journal of Cultural Policy 231.

[62] Hannu Tuominen, 'EU State Aid Policy and the Cultural Sector: The Case of Audiovisual Production' (2017) 22(1) *Media and Arts Law Review* 1; Francesca Capparelli and Ben Van Rompuy, 'State Aid to the Cultural and Creative Sectors: Legal Challenges and Policy Opportunities' (2021) 12 European State Aid Law Quarterly 17.

[63] Council of Europe, 'The Impact of EC Law on the Taxation of the European Audiovisual Sector' (2007) https://rm.coe.int/16807833e3; European Audiovisual Observatory, *IRIS Plus 2019-2: Territoriality and Financing of Audiovisual Works* (2019).

[64] Decision No 1746/B/2010 of the Hungarian Constitutional Court (19 December 2010) (review of media laws).

constrain administrative discretion, requiring domestic authorities to balance fiscal control with freedom of movement and cultural expression[65]. Such case marks an emergent vertical dialogue in which national courts begin to internalise EU proportionality standards within domestic constitutional orders. Yet these examples remain isolated, and no consistent transnational jurisprudence has yet crystallised.

Viewed through the five-variable framework, the structural constraints become fully apparent. Legal certainty remains fragile due to inconsistent and opaque definitions of eligible expenditure, which vary widely between jurisdictions and undermine predictability for transnational producers. Rights-based enforcement is weak, as producers rarely possess standing to challenge disproportionate expenditure conditions at either national or EU level, rendering compliance effectively dependent on the Commission's discretionary enforcement. Conditioned sovereignty is most visible here: national fiscal autonomy is formally preserved yet substantively constrained by supranational proportionality control—a balance that legitimises but simultaneously limits Member State discretion. Functional integration suffers when producers must fragment budgets to satisfy territorial thresholds, compelling artificial project structuring that erodes the free movement of cultural services. Finally, mutual supportiveness falters as national schemes prioritise domestic economic retention over shared European cultural development, reproducing economic nationalism within a framework ostensibly dedicated to cultural cooperation.

In sum, minimum country-expenditure requirements are the most visibly Europeanised component of audiovisual tax-credit schemes, yet the persistence of definitional opacity, rigid thresholds, and administrative discretion ensures that significant SFACs endure. The paradox is structural: EU law subjects expenditure rules to rigorous proportionality review, yet allows their practical fragmentation to persist. Without a shared benchmark of transparency, proportionality, and reciprocity, the Union's capacity to mitigate SFACs remains formally asserted but substantively unrealised. The challenge, therefore, is not only normative but functional: to transform proportionality from a procedural safeguard into a vehicle for genuine

[65] Directive 2018/1808/EU of the European Parliament and of the Council of 14 November 2018 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2018] OJ L303/69; Jenny Weinand, *Implementing the EU Audiovisual Media Services Directive: Selected Issues in the Regulation of AVMS by the National Media Authorities in France, Germany and the UK* (2018) Nomos.

integration, aligning cultural, fiscal, and market objectives within a coherent and mutually supportive European framework.

4.3 EU Effect in Tax-Deductions for Philanthropy and its Potential to Reduce SFACs

Cross-border philanthropy within the EU represents a particularly revealing site of SFACs—constraints that persist not because of a lack of legal norms, but because of their uneven operationalisation. EU law formally guarantees non-discrimination and free movement of capital under Articles 63 and 65 TFEU, reinforced by Articles 21 and 47 EU-CFR. Yet, the absence of automatic mutual recognition for public-benefit entities generates structural fragmentation across Member States' tax systems. In the cultural-fiscal domain, this fragmentation is especially harmful: it restricts the mobility of philanthropic capital, limits the cross-border circulation of artworks and cultural services, and undermines the integrative rationale of the internal market.

The analytical challenge is therefore not whether the "EU effect" exists, but whether its normative and functional reach suffices to mitigate SFACs. The assessment proceeds through the five interrelated evaluative variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—applied to the two most salient exclusionary mechanisms—already demonstrated in Chapter 2 (§§2.3.1-2.3.2), but now, assessed at EU level—fiscal residence-based restrictions (§4.3.1) and recipient-based exclusions (§4.3.2).

4.3.1 Fiscal Residence-Based Exclusions and the Free Movement of Capital

Residence-based exclusions represent one of the most entrenched SFACs in Member States' philanthropic tax regimes. They are especially problematic in the cultural sector, where philanthropic flows are inherently transnational and where residence-based barriers frustrate the very mobility and exchange the Treaties are designed to promote.

At the normative level, the EU legal architecture appears unambiguous. Article 63 TFEU prohibits all restrictions on capital movements between Member States and between Member States and third countries, while Article 65(1)(b) TFEU permits derogations only where justified by legitimate public interests and proportionate to the objective pursued[66]. The CJEU has consistently held that where a foreign organisation meets equivalent substantive requirements—transparency, accountability, and a genuine public-benefit purpose—the denial of deductibility solely on residence grounds breaches EU law. In *Stauffer*, Italy's denial of a tax exemption to a German-based charity was held to contravene the free movement of capital, since the measure discriminated solely on residence grounds[67]; in *Persche*, reaffirmed that donations to foreign charities must be eligible for tax relief if the recipient satisfies equivalent public-benefit criteria[68]; and in *Missionswerk*, confirmed that Member States must assess whether foreign DGRs meet equivalent public-benefit criteria, and that automatic exclusions based on non-residence alone are incompatible with the free movement of capital[69]. These cases collectively impose a discipline of equivalency—Member States must establish objective, transparent, and verifiable criteria for deductibility.

However, the apparent clarity of the rule masks significant deficits in rights-based enforcement. Donors and recipients theoretically enjoy directly effective Treaty rights reinforced by Charter guarantees of non-discrimination on grounds of nationality (Article 21) and effective remedy (Article 47). Yet, the administrative pathways through which these rights must operate remain opaque and fragmented. Many Member States impose onerous evidentiary requirements or demand *ad hoc* recognition procedures that effectively shift the burden of proof to the foreign entity (§§2.3.1-2.3.2). The result is a formal recognition of EU rights that are substantively inaccessible in practice. Judicial remedies, though available in principle, are hampered by procedural uncertainty and limited awareness within national tax administrations. The Court's own jurisprudence, while affirming the horizontal reach of cultural-rights, stops short of imposing positive duties of administrative cooperation. EU law, in this respect, risks functioning more as a declaratory ideal than an operational guarantee.

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[66] National governments may invoke public interest concerns to justify restrictions on deductibility, see: Directive (EU) 2024/1640 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Sixth Anti-Money Laundering Directive, AMLD6) [2024] OJ L; Regulation (EU) 2024/1624 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Anti-Money Laundering Regulation, AMLR) [2024] OJ L; Regulation (EU) 2024/1620 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AML Authority Regulation, AMLAR) [2024] OJ L; Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets (Revised Transfer of Funds Regulation, TOFR) [2023] OJ L 150/1.
[67] *Stauffer* (n 37).
[68] *Persche* (n 38); Opinion of AG Mengozzi in *Hein Persche v Finanzamt Lüdenscheid* (Case C-318/07, 2008).
[69] Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECLI:EU:C:2011:65, para 36.

This enforcement gap reveals the deeper recalibration of conditioned sovereignty within the EU's constitutional order. Member States retain competence over direct taxation and the definition of public-benefit entities, yet this competence is constrained by the duty of loyal cooperation and the principle of proportionality. Under Article 65 TFEU, derogations from free movement are legitimate only where necessary and proportionate to a legitimate public interest, such as combating fraud or safeguarding fiscal cohesion. The Court has made clear that residence-based exclusions cannot be justified where less restrictive means—such as verification of equivalency—exist[70]. In this sense, EU law does not abolish fiscal sovereignty but disciplines its exercise. The proportionality template—suitability, necessity, and proportionality stricto sensu—functions as the operative limit on fiscal autonomy. However, national administrations often invoke verification costs and administrative complexity as pragmatic justifications for non-compliance, revealing how sovereignty remains formally conditioned in law yet functionally unconditioned in practice[71]. The persistence of SFACs in this area thus signals not the absence of EU competence, but the incomplete internalisation of its cooperative logic.

In this light, the EU effect on fiscal residence-based exclusions remains partial and conditional. The normative principles of free movement are clear, but their capacity to reduce SFACs depends on Member States' procedural cooperation and administrative reform. Legal certainty exists in the text of the Treaties; rights-based enforcement is hampered by practical opacity; conditioned sovereignty is acknowledged but incompletely operationalised; functional integration remains embryonic; and mutual supportiveness, though normatively compelling, has yet to find institutional expression. The next subsection examines how these same variables manifest in recipient-based exclusions, where the boundaries of EU law's integrative capacity are tested even further.

4.3.2 Recipient-Based Exclusions and the Limits of EU Law

Recipient-based exclusions constitute the second major form of SFACs in cross-border philanthropy, operating not through the residence of the donor or recipient but through the

[70] Case C-483/99 *Commission v Spain* [2002] ECR I-4397, paras 27-28; Case C-452/04 *Commission v Italy* [2007] ECR I-0000, paras 36-37; Case C-487/06 *Commission v Belgium* [2008] ECR I-0000, paras 31-33.

[71] Philea and Transnational Giving Europe, *Cross-Border Philanthropy in the EU: Challenges and Opportunities* (Philea/TGE Report, 2023).

definitional boundaries of what counts as a "public-benefit" or "charitable" organisation. Whereas residence-based exclusions rely on territorial markers, recipient-based exclusions turn on conceptual and procedural ones—the internal classification of entities and the sectoral limits of eligibility. This distinction is decisive: it determines how far the EU effect can penetrate Member States' fiscal autonomy. The absence of automatic or coordinated recognition of DGRs fractures the European philanthropic space into a mosaic of domestic regimes, each applying its own tests of public-benefit equivalency. The result is a structural asymmetry between rights proclaimed at the supranational level and rights realised in practice. Doctrinal clarity in the language of non-discrimination and free movement dissipates in administrative translation, leaving donors and cultural organisations navigating divergent definitions, evidentiary burdens, and recognition procedures that reproduce exclusion through complexity. From the perspective of functional integration, the tension is acute. The Treaty's free movement provisions presuppose a minimum level of administrative trust and comparability between Member States, but public-benefit recognition remains one of the least integrated domains in EU law. The CJEU's jurisprudence in *Stauffer*, *Persche*, and *Missionswerk* sought to replace the formal criterion of residence with a substantive test: if a foreign entity satisfies equivalent public-benefit conditions, it should not be denied tax advantages available to domestic organisations[72]. In theory, this marked a paradigmatic shift from territoriality to functionality; in practice, implementation has remained uneven[73]. Member States retain discretion to define "public benefit," generating what might be termed "jurisdictional divergence under equivalency." This coexistence of formal EU principles with disparate national procedures produces a hybrid regime in which equivalency exists in law but not in administration—a form of integration deficit where the internal market's logic of openness collides with entrenched administrative pluralism.

This same divergence undermines legal certainty. Neither donors nor cultural organisations can predict with reasonable confidence whether a cross-border contribution will qualify for tax-deduction, even when the recipient demonstrably pursues an equivalent cultural or public-benefit purpose. National administrations deploy inconsistent procedural thresholds, ranging

[72] *Stauffer* (n 37) paras 28-30; *Persche* (n 38) paras 23-25; *Missionswerk* (n 69) paras 26-28.
[73] European Commission, 'Non-Discriminatory Taxation of Charitable Organisations and Their Donors: Principles Drawn from EU Case-Law' SWD(2023) 212 final; Niels Bammens, 'Chapter 13: Non-Discrimination in European Tax Law: General Remarks' in Niels Bammens (ed), *The Principle of Non-Discrimination in International and European Tax Law* (IBFD 2012) IBFD Doctoral Series (24) 521.

from detailed, case-specific comparability tests to categorical exclusions (§2.3.2)[74]. Some maintain centralised registers of eligible organisations; others rely on fragmented, sector-specific determinations[75]. The absence of interoperable databases or common criteria renders the fiscal environment unpredictable. Although Article 63 TFEU prohibits unjustified restrictions on capital movements and the Charter safeguards non-discrimination and effective remedy (Articles 21 and 47 EU-CFR), the administrative translation of these rights remains opaque. In consequence, the uncertainty surrounding eligibility itself becomes a fiscal barrier—transforming what should be a facilitative fiscal instrument into an exclusionary mechanism that disproportionately disadvantages smaller donors and cultural entities unable to bear the cost of procedural navigation (§2.3.2).

The weakness of rights-based enforcement compounds these structural asymmetries. In theory, individuals and organisations can invoke Articles 18 and 63 TFEU before domestic courts to challenge discriminatory exclusions. Yet, in practice, litigation is rare, procedurally burdensome, and confined to isolated instances that yield case-specific corrections rather than systemic reform. The evidentiary burden of proving functional equivalency often deters claimants from pursuing judicial remedies altogether. National administrations, meanwhile, remain insulated from horizontal accountability, since the EU legal framework provides no direct enforcement mechanism obliging administrative cooperation in assessing equivalency. The resulting gap between normative entitlement and enforceable practice turns EU rights into aspirational constructs—legally articulate but institutionally inert.

These deficiencies expose the limits of conditioned sovereignty in the domain of public-benefit recognition. Member States retain competence to define charitable purposes and to regulate their own fiscal regimes; however, this sovereignty is not absolute. The principle of proportionality requires that any restriction on cross-border deductibility be both suitable and necessary to pursue legitimate public interests, and the duty of loyal cooperation obliges national authorities to interpret domestic rules in harmony with Union law. Yet the CJEU's jurisprudence, while constraining overt discrimination, cannot displace national definitional autonomy. Recipient-based exclusions thus operate within a zone of "managed pluralism," where sovereignty is formally conditioned by EU principles but functionally preserved in its

[74] Thomas von Hippel, *Taxation of Cross-Border Philanthropy in Europe After Persche and Stauffer: From Landlock to Free Movement?* (Transnational Giving Europe and European Foundation Centre 2014).
[75] Ibid.

core content. The EU effect in this field disciplines excesses of discretion but cannot fully harmonise the conceptual foundations of the "public-benefit" category.

The challenge of functional integration extends further when one considers the intersection of philanthropic deductibility with EU State aid control. Under Article 107(1) TFEU, the Commission examines whether fiscal measures confer selective advantages that distort competition[76]. Its practice distinguishes between universal and selective schemes: deductions available to all donors or institutions pursuing defined public-benefit purposes are generally non-aid, whereas schemes limited to certain sectors or recipients may constitute State aid. Where a measure qualifies as aid, the Commission then assesses its compatibility with the internal market under Article 107(2)–(3) TFEU, considering whether it pursues legitimate objectives of common interest (e.g., culture), whether it is necessary and proportionate, and whether the distortions of competition are limited in relation to the policy objective[77]. Yet, as illustrated in the Danish and Czech cases, even when selectivity is found, cultural measures are often approved under Article 107(3)(d) TFEU as compatible with the internal market because they pursue legitimate cultural objectives proportionately[78]. What these decisions reveal, however, is that the Commission's analysis remains confined to the selectivity of measures, not to their comparability across Member States. Competition law thereby ensures vertical coherence within domestic regimes while tolerating horizontal divergence between them—a paradox in which the EU's most powerful integration instrument coexists with one of its most fragmented policy domains.

Within this fragmented landscape, mutual supportiveness emerges as both a normative imperative and an institutional deficiency. The European Parliament has repeatedly called for

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[76] Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1; see also EU Commission, 'Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union' [2016] OJ C262/1, paras 124–125.

[77] EU law addresses the concept of "culture" in Article 167 TFEU and Article 3(3) TEU, which refer to the Union's cultural diversity, although neither provision defines the term "culture." Nonetheless, there is no indication in the wording of these provisions or in case law that supports a narrow interpretation of the concept. Relevant case law includes Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECLI:EU:C:2008:85, Case C-204/08 *Commission v France* [2010] ECLI:EU:C:2010:135, and the European Commission decision in Latvia: European Commission, 'State Aid SA.34462 (2012/NN) – Latvia: Programme "Culture"' C(2012) 8826 final. For scholarly discussion, see: Łukasz Stępkowski, 'State Aid to Promote Culture and Heritage Conservation: Museums and Other Cultural Institutions as Recipients of EU State Aid' (2023) 2(9) Santander Art and Culture Law Review 191.

[78] European Commission, 'State Aid SA N 5/2005 – Denmark: Deduction for Gifts to Cultural Institutions' C(2005) 2713 final, 20 July 2005; European Commission, 'State Aid SA NN 44/2007 – Czech Republic: Income Tax Exemption on Awards and Donations in the Cultural Sphere' C(2009) 7375 final.

a Statute for European Foundations and for a framework enabling the mutual recognition of public-benefit status across Member States[79]. Such a framework would not merely streamline fiscal procedures but would operationalise Article 167(4) TFEU's injunction that the Union shall take cultural aspects into account in all its actions. Mutual supportiveness, properly understood, entails more than cooperative federalism; it requires structural coordination between EU and national systems, ensuring that the pursuit of domestic cultural-fiscal objectives reinforces, rather than undermines, the integrative aims of the Union. Yet, the absence of such coordination perpetuates fragmentation. National discretion fills the void, producing inconsistent recognition of hybrid cultural organisations—particularly within the CCIs, where philanthropic and commercial logics intertwine[80]. Measures excluding organisations engaged in limited economic activity may appear conceptually protective of the "public-benefit" ideal, but in contemporary cultural economies they are functionally regressive. By failing to recognise that cultural entrepreneurship and public mission can coexist, current frameworks undermine the pluralism and innovation that EU law itself seeks to advance.

In the final balance, recipient-based exclusions expose a domain where the EU effect is conceptually potent but institutionally diluted. Legal certainty erodes under divergent recognition criteria; rights-based enforcement remains largely declarative; sovereignty is conditioned in theory but preserved in fact; functional integration falters amidst administrative heterogeneity; and mutual supportiveness exists more as aspiration than realized. Overcoming these SFACs requires not additional jurisprudence alone but a procedural infrastructure capable of institutionalising equivalency—through, for example, a European register of recognised DGRs or a harmonised proportionality-based test for comparability. Only by embedding such mechanisms in administrative practice can EU law transform its normative coherence into functional reality, ensuring that cross-border cultural philanthropy becomes not an exception negotiated through procedural endurance, but an expression of the Union's constitutional commitment to free movement, diversity, and solidarity.

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[79] European Parliament, 'Resolution on European Cross-Border Associations and Non-Profit Organisations' (2022) P9_TA(2022)0038 https://www.europarl.europa.eu/doceo/document/TA-9-2022-0038_EN.html.

[80] Rachael Craufurd Smith, 'The Cultural Logic of Economic Integration' in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan 2014); Lilly Family School of Philanthropy, 'The 2022 Global Philanthropy Environment Index (GPEI)' (Indiana University 2022) https://philanthropy.iupui.edu.

4.4 EU Effect in Tax-in-Lieu for Visual Artists and its Potential to Reduce SFACs

Tax-in-lieu schemes—allowing visual artists to discharge part of their tax liabilities through the transfer of artworks to the State—embody the intersection of cultural policy and fiscal sovereignty. These mechanisms pursue dual objectives: supporting artistic production by reducing financial pressure on creators and enriching public collections as repositories of national heritage. At a purely domestic level, exclusions based on nationality, type of artwork, or professional status appear to fall squarely within sovereign discretion (§2.2). Yet once situated within the EU legal order, this apparent autonomy dissolves. The free movement provisions of the TFEU—governing persons (Articles 45–48), goods (Articles 28–37), and capital (Articles 63–66)—together with the general non-discrimination clause (Article 18 TFEU; Article 21 EU-CFR), the cultural-diversity obligations (Articles 3(3) and 6 TEU; Articles 22 and 167 TFEU; Articles 13 and 22 EU-CFR), and the preferential treatment toward developing countries (Articles 207 and 212 TFEU), collectively establish a supranational constitutional matrix that constrains the design of national cultural–fiscal measures. Within this matrix, proportionality, necessity, and equality operate not as abstract principles but as binding limits on Member State discretion.

4.4.1 Nationality-Based Exclusions and the Incompatibility with EU Law

From a normative standpoint, nationality-based exclusions in tax-in-lieu schemes directly engage the EU's foundational principles of non-discrimination and free movement. As shown in Chapter 2, states restrict eligibility to national-resident artists, thereby excluding EU citizens who, while fiscally resident and economically active in the host State, lack its nationality (§2.2.1). This practice undermines the free movement of workers, services, and capital, while contravening both the Charter's equality clause (Article 21(2)) and its guarantee of participation in cultural life (Article 22)[81]. Taken together, the TFEU and EU-CFR codify substantive entitlements that cultural–fiscal measures must respect whenever they fall within the scope of EU law[82]. Consequently, any differentiation based on nationality—whether

[81] Hanna Eklund and Claire Kilpatrick, 'Article 21 EU Charter of Fundamental Rights' (Academy of European Law (AEL) Working Paper 2021/01); Alfonso Celotto, 'Articoli 21–22' in Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (eds), *L'Europa dei diritti* (Il Mulino 2001) 171; Adam Bodnar, 'The EU Charter of Fundamental Rights and the Evolution of CJEU Case-Law' (Academy of European Law, Trier 2021).

[82] Angela Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?' (2018) 20 *Cambridge Yearbook of European Legal Studies* 32; Cinzia Piciocchi, 'Europe Faces Cultural Diversity: Towards a European Multicultural Model?' in Francesco Palermo and Gabriel

explicit or disguised through residence or professional registration requirements—must be strictly justified by an objective public-interest aim, proportionate to the goal pursued, and necessary within the meaning of the CJEU's settled case law.

Within this framework, EU law transforms equality from an aspirational norm into a rights-based entitlement[83]. Artists excluded from tax-in-lieu schemes on nationality grounds possess a direct legal claim to equal treatment under Articles 18, 21 and 45 TFEU. The jurisprudence of the Court has progressively consolidated this entitlement. *Schumacker* recognised that non-national residents may not be denied tax advantages where their economic situation mirrors that of nationals[84], while *Baumbast* confirmed that EU citizens retain equal-treatment rights even when not economically active[85]—an especially pertinent precedent for artists whose cultural contributions may not be quantifiable in commercial terms. In *TopFit*, a German residency condition was found to violate Articles 18 and 21 TFEU by excluding a non-national athlete from equal participation[86]; *Bosman* extended this logic to employment restrictions based on nationality in the cultural–sporting sphere[87]. The line of cases including *Gilly*, *Schempp*, and *Lounes* further entrenched the principle that indirect or structural disadvantages to non-nationals are incompatible with Union law, even where formal equality of treatment appears preserved. In *Gilly*, indirect discrimination in the tax regime, even when the claimant does not possess the protected characteristic, were found incompatible with the free movement for workers and the non-discrimination based on nationality[88]; in *Schempp*, the Court found that denying tax-deductions to non-residents amounted to unjustified unequal treatment[89]. The *Lounes* judgment expanded the reach of EU citizenship protections even to dual nationals residing in a Member State, confirming the horizontal applicability of EU rights against national measures[90]. Collectively, these rulings convert abstract Treaty principles into

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Toggenburg (eds), *European Constitutional Values and Cultural Diversity* (EURAC 2003) 25; Olivier De Schutter, *The Prohibition of Discrimination under European Human Rights Law—Relevance for EU Racial and Employment Equality Directives* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities 2005).

[83] European Commission, Taxation and Customs Union, 'EU Individuals' Rights Under EU Law'; Georg Kofler, 'European Taxation' (Course Law 7931, University of Florida, Spring 2023).

[84] Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECLI:EU:C:1995:31, para 2.

[85] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 81.

[86] Case C-22/18 *TopFit eV, Daniele Biffi v Deutscher Leichtathletikverband eV* [2019] ECLI:EU:C:2019:497.

[87] Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para 103.

[88] Case C-336/96 *Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin* [1998] ECLI:EU:C:1998:221, para 26.

[89] Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6435.

[90] Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* [2017] ECLI:EU:C:2017:862.

enforceable rights, transforming what might otherwise appear as discretionary policy exclusions into legally contestable inequalities.

The variable of conditioned sovereignty clarifies the limits of Member State discretion in the cultural–fiscal domain. Article 167(4) TFEU preserves national authority over cultural policy but requires its exercise in harmony with other Treaty provisions, notably internal-market and non-discrimination rules. The reasoning in *Commission v Italy* and *Bachmann* demonstrates that fiscal autonomy cannot justify measures that distort the internal market unless they pursue a legitimate public interest and are proportionate to that end[91]. Similarly, in *CHEZ Razpredelenie Bulgaria*, broadened the concept of indirect discrimination, extending protection even to those associated with affected groups[92]; and in *Spain v Parliament* confirmed that restrictions touching cultural diversity must be objectively justified and minimally impair free movement[93]. Applied to tax-in-lieu schemes, these precedents mean that appeals to "heritage protection" or "national culture" must be narrowly tailored and demonstrably unattainable through less restrictive means. The Court's proportionality review thus acts as a disciplinary mechanism on fiscal sovereignty—preserving cultural autonomy but conditioning its exercise by the Union's constitutional commitments to equality and openness.

Yet legal harmonisation at the level of principle does not necessarily yield effective enforcement. The functional mechanisms of integration in this field remain fragmented. Infringement procedures under Articles 258–260 TFEU and the duty of loyal cooperation under Article 4(3) TEU require Member States to interpret domestic law consistently with EU obligations, but their application to cultural-fiscal measures is limited. The Commission's monitoring focuses predominantly on State aid and competition distortion, rarely addressing access-based discrimination, while national courts often treat tax-in-lieu schemes as discretionary fiscal instruments outside the purview of full EU review. This unequal administrative engagement produces a persistent "compliance gap": SFACs arise less from the absence of EU norms than from their selective invocation and partial enforcement—allowing Member States to perpetuate de facto exclusions without triggering supranational oversight.

[91] Case C-475/08 *Commission v Italy* [2009] ECR I-0000; Case C-204/90 *Bachmann* [1992] ECR I-249.
[92] Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECLI:EU:C:2015:480.
[93] Case C-377/16 *Kingdom of Spain v European Parliament* [2019] ECLI:EU:C:2019:249.

The result is an institutional disjunction between supranational rights and domestic practice, precisely the functional disintegration that perpetuates exclusion.

The relational variable of mutual supportiveness offers a counterpoint to this fragmentation. Properly interpreted, it reflects the integrative logic that should guide the interaction between market freedoms and cultural diversity. Inclusively designed tax-in-lieu schemes can serve both objectives simultaneously: by allowing artists from different Member States to contribute artworks to public collections, they foster cultural exchange while facilitating the free circulation of goods within the Union. Conversely, nationality-based exclusions renationalise artistic value, impoverishing the shared European cultural space and contradicting the Union's constitutional mandate under Articles 3(3) TEU and 167 TFEU to ensure that market integration and cultural diversity reinforce, rather than negate, each other. Interpreting eligibility criteria in light of mutual supportiveness thus transforms compliance from a formal legal duty into a constitutional expression of the Union's telos—achieving "an ever closer union among the peoples of Europe" through respect for cultural diversity within a unified legal order.

Taken together, the assessment across these variables exposes a structural incompatibility between nationality-based exclusions and the EU's constitutional framework. Such exclusions undermine legal certainty through ambiguous or arbitrary criteria; erode enforceable rights by subordinating free movement to administrative discretion; resist conditioned sovereignty by deploying culture as a justificatory shield for protectionism; weaken functional integration through or inconsistent enforcement; and negate mutual supportiveness by reasserting unilateral exclusivity. The EU effect therefore operates as a dual force: when fully internalised, it enhances equality, predictability, and cross-border access; when resisted or applied selectively, it perpetuates precisely the SFACs that EU law is capable of eliminating.

4.4.2 Professional-Artist Recognition and a Systemic Failure of Integration

The question who counts as a "professional artist" sits at the hot-spot between cultural policy, tax law and fundamental rights. It is here—where discretionary cultural valuation meets rigid fiscal classification—that SFACs most clearly crystallise. As examined in Chapter 2 (§2.2.2), national tax-administration practice routinely operationalises eligibility for tax-in-lieu schemes by reference to indeterminate constructs such as "national cultural interest", "recognized artistic value", or formal markers of professional standing (degrees, guild membership, exhibition history). These composite yardsticks vary widely across Member States and are often assessed by non-transparent panels or advisory bodies (§2.2.2). The result is predictable: legal uncertainty for practitioners, administrative entrenchment for incumbents, and cross-border exclusion for those who do not fit domestic templates. For an artist contemplating cross-border practice, the absence of any at least coordinated definition of "professional artist" means that entitlement to fiscal relief depends on a patchwork of discretionary gatekeeping—precisely the kind of legal and administrative asymmetry the five evaluative variables are designed to expose.

Seen through the variable of legal certainty, the problem is fundamental. Legal certainty demands that eligibility criteria be accessible, intelligible and foreseeable so that subjects can organise their affairs in reliance on the law; it is embedded in the rule-of-law guarantees of the Treaties and the Charter (notably Articles 2, 5(2), 52(1), and 266 TFEU and Article 47 of the EU-CFR). The prevailing domestic practice—unstandardised evidentiary lists, *ad hoc* advisory opinions, opaque scoring systems—fails each of these tests. Artists cannot predict how a mixed dossier of exhibitions, residencies, academic credentials, affiliations, and community practice will be weighed in France, Spain or Austria (§2.2.2). That unpredictability within cultural-creative tax incentives produces chilling effects: mobility is discouraged, collaborative projects are foreclosed by fiscal risk, and the internal market for cultural labour becomes segmented by national gatekeeping. From an EU-law perspective, this is not a marginal regulatory inconvenience but a textbook SFAC: legal uncertainty generated by divergent administrative practice that undermines the Treaty aim of free circulation and comparable treatment.

Rights-based enforcement reframes these administrative practices as rights problems. The Charter's guarantees create an interpretive matrix in which denial of professional status can be litigated not merely as an error of administrative discretion but as an infringement of enforceable rights. Article 21 EU-CFR enshrines a self-standing right to non-discrimination applicable both vertically and horizontally, ensuring that no public authority or private intermediary may arbitrarily deny access to legally conferred advantages[94]. Article 22 EU-CFR reinforces this protection by mandating respect for cultural diversity, a commitment that

[94] Eklund and Kilpatrick (n 81); Hanna Eklund and Claire Kilpatrick, 'Discrimination, Equality and the EUCFR: Shadows, Silver Linings and Future Prospects' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart 2015) ch 6.

extends beyond rhetoric to require that fiscal measures promoting cultural creation be accessible to all artistic forms and actors on equal terms. Further, Articles 15, 34, and 47 EU-CFR respectively guarantee the freedom to choose an occupation, access to social benefits, and an effective remedy[95]. When arbitrary or inconsistent recognition criteria prevent visual artists from qualifying for tax-in-lieu schemes or related deductions, they are effectively denied these rights. The aggregate effect of these provisions is to transform cultural eligibility from a matter of administrative policy into a field of rights-based accountability. The Court's case-law supplies doctrinal tools to litigate such claims. The comparability logic in *Schumacker*[96], the citizenship-based protections in *Baumbast*[97], the proportionality and necessity tests found in *Gebhard*[98] and *Bachmann*[99], and the emphasis on objective, evidence-based administration in decisions such as *eVigilo*[100] and *Flos*[101] together require that national distinctions be justified by concrete aims and narrow means. When recognition regimes systematically privilege determinate categories or formal markers of professional standing both assessed by non-transparent panels or advisory bodies, they risk running afoul of these principles: differential treatment becomes not only administratively arbitrary but constitutionally contestable. Critically, rights-based enforcement does not demand prior harmonisation of definitions; it requires that national procedures meet the minimum constitutional standards of objectivity, proportionality and access to judicial review. In the absence of such safeguards, professional-status requirements produce a double injustice: they exclude deserving actors and place an intolerable evidentiary and litigation burden on those seeking redress.

Conditioned sovereignty reframes the problem as one of bounded discretion. Article 167(4) TFEU reserves cultural policy to Member States but requires that its exercise respect other Treaty values. Once a fiscal measure falls within the scope of EU law—by affecting the internal market or fundamental freedoms—Member States must comply with the principles of non-discrimination, proportionality, and effectiveness. National discretion in defining "professional artist" therefore operates under supranational constraint. The CJEU's proportionality-driven balancing—in *Gebhard*, *Centros*, *Commission v Italy*, *CHEZ Razpredelenie*, *Groener*, and

[95] *Explanations Relating to the Charter of Fundamental Rights* [2007] OJ C303/18.
[96] *Schumacker* (n 84).
[97] *Baumbast* (n 85).
[98] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECR I-4165, para 37.
[99] *Bachmann* (n 91).
[100] Case C-538/13 *eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos (PAGD)* [2015] ECLI:EU:C:2015:166, para 41.
[101] Case C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA* [2011] ECR I-0000, para 29.

related jurisprudence—shows that cultural objectives can justify distinctions only where they are genuinely necessary and proportionate[102]. Thus, Member States retain formal competence to define "professional artist", but that competence is conditioned: it must be exercised through instruments that do not frustrate free movement or disguise protectionism. Where recognition mechanisms are used to favour determinate categories of professionals assessed by non-transparent panels or advisory bodies, or where evidentiary thresholds are formulated so as to privilege established domestic careers, sovereignty is being exercised in a way that is arguably incompatible with the Union's internal market commitments. Conditioned sovereignty therefore functions as a corrective: it does not erase domestic discretion but disciplines it. The problem in practice is that many Member States treat cultural policy as a zone of political discretion and fail to adapt administrative practices to these supranational constraints—producing SFACs that are political as much as legal.

Functional integration exposes how institutional fragmentation converts doctrine into dysfunction. Recognition decisions are commonly split across ministries of culture, finance ministries, tax administrations, and quasi-independent expert panels; procedural responsibilities, evidentiary requirements and appeal routes differ across bodies. This institutional siloing generates several pathologies identified in Chapter 2 (§2.2.2). Artists face duplicative certification processes (cultural recognition for funding, tax recognition for fiscal relief), each with different evidentiary expectations. Moreover, evidentiary weightings used by cultural juries (curatorial prestige, artistic innovation) may not align with tax authorities' preferences (invoicing records, market transactions), producing inconsistent outcomes. Besides, the lack of a common data architecture or mutual-recognition mechanism prevents cross-validation of status across borders. The Court's requirement that administrative discretion be grounded in objective criteria and transparent procedure—seen in *eVigilo*[103], *RAAP*[104], *Flos v Semeraro*[105], and the FNV *Kunsten*[106] reasoning about economic dependency

[102] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECR I-4165, para 37; Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ECR I-1459, paras 19-20; Case C-531/06 *Commission v Italy* ECR I-8785, paras 51-53; *CHEZ Razpredelenie* (n 92); Case 379/87 *Groener v Minister for Education* ECR 3967, paras 34-38.
[103] *eVigilo* (n 100).
[104] Case C-265/19 *Recorded Artists Actors Performers Ltd v Attorney General and Others (RAAP)* [2020] ECLI:EU:C:2020:677; see also Jørgen Blomqvist and Morten Rosenmeier, 'International Protection of Performers in the EU—Points of Attachment and National Treatment vs. Material Reciprocity after the RAAP Decision by the CJEU' (2024) *RIDA - Revue internationale du droit d'auteur*, *269*(7), 33-71.
[105] *Flos SpA* (n 101).
[106] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2015] ECLI:EU:C:2015:282, para 37.

and the realities of artistic labour—imposes a duty of procedural coherence. These cases collectively articulate a logic that transfers seamlessly to cultural-fiscal instruments: that the allocation of incentives must be based on objective and equivalently applied criteria. Yet in practice, procedural fragmentation remains the norm, and functional incoherence becomes an SFAC: the institutional design itself blocks predictable, equitable access.

Mutual supportiveness links these domestic dysfunctions to broader normative goals. The EU (Article 22 EU-CFR) and the UNESCO 2005 Convention (see Chapter 5) both proclaim commitment to cultural diversity. Their normative architectures converge on the need to protect plural forms of expression and to facilitate cultural participation by guarantying that diversity of expression is not curtailed by economic, fiscal or administrative barriers. When national recognition systems operate opaquely or with excessive reliance on nationally or professionally-bound indicators, they contradict this shared aim and erode the Union's legitimacy as a protector of cultural rights. The principle of mutual supportiveness thus supplies an interpretive scaffold—one that invites domestic authorities and courts to read eligibility criteria in a manner that advances the joint ends of cultural diversity and market openness. From a normative point of view, then, aligning professional-status regimes with mutual supportiveness would mean privileging flexible, functionally meaningful indicators of professional practice (regular creative output, recognised peer evaluation, demonstrable public engagement) over narrowly-national proxies (contravening principles of equality, proportionality, or cultural diversity). Failure to do so not only perpetuates SFACs but undermines the normative coherence of EU law and its international commitments (Chapter 5).

In sum, professional-status regimes for tax-in-lieu schemes exemplify a systemic failure of integration: doctrinally constrained by EU rights and proportionality tests, yet functionally distorted by administrative discretion and institutional siloing. The central claim advanced here is that only a coherent and normatively predictable framework for determining artistic status can ensure that tax incentives operate as genuine instruments of cultural-fiscal policy—supporting artistic production, enriching public collections, and safeguarding both national and European cultural patrimony. The correct legal posture is not normative nominalism (insisting that the Treaties require a single European definition of "artist") but discipline: national recognition mechanisms must be re-designed so that they satisfy both the Treaties and the Charter's rights standards, rest on transparent, objective criteria, and operate within coherent inter-agency procedures that enable cross-border comparability. Absent that re-engineering, tax-in-lieu schemes will continue to produce SFACs—not as accidents of policy design but as structural outcomes of misaligned legal, administrative and institutional orders.

4.4.3 Artwork Exclusions—When Cultural Classification Becomes a Fiscal Barrier

Deciding which physical objects qualify as "artworks" for the purposes of cultural–creative tax incentives is not a parochial curatorial question but a constitutional one. As demonstrated in Chapter 2, states typically vest cultural ministries, expert panels or tax administrations with the authority to assess whether a work possesses sufficient cultural, aesthetic or heritage value to attract special fiscal treatment (§2.2.3). At the EU level, those discretionary assessments operate at the intersection of two legal logics: culture (where sovereignty and plural value judgments prevail) and the internal market (where predictability, non-discrimination and free circulation dominate)[107]. It is precisely at that junction that artwork-based exclusions crystallise as SFACs: opaque criteria, inconsistent administrative practice and institutionally fragmented decision-making convert cultural classification into an instrument of exclusion—affecting mobility, valuation, and access to fiscal relief across the Union.

Viewed through the prism of legal certainty, the current landscape is unstable. Artworks occupy a dual legal status: cultural objects (deserving of protection), and goods or capital for market purposes. This duality engages cultural policy and internal-market law. The internal market prohibitions on quantitative restrictions and measures having equivalent effect (Articles 34–35 TFEU) and the limited derogation in Article 36 TFEU for the protection of "national treasures possessing artistic, historic or archaeological value" [108]. The CJEU's case-law insists that such derogations be interpreted narrowly and subjected to strict proportionality: measures that operate as disguised restrictions on trade under the pretext of cultural protection will be struck down, as in *Commission v Italy*[109]. When domestic fiscal schemes exclude artworks on indeterminate aesthetic grounds, those exclusions risk operating as arbitrary barriers to the cross-border circulation and commercial transaction of cultural goods. The same logic applies to tax-in-lieu exclusions based on indeterminate artistic judgments: when the classification of

[107] Craufurd-Smith (n 80); J Mark Schuster, 'Tax Incentives in Cultural Policy' in Victor A Ginsburgh and David Throsby (eds), *Handbook of the Economics of Art and Culture*, vol 1 (Elsevier 2006) 1253.
[108] Commission Notice, 'Guide on Articles 34–36 of the Treaty on the Functioning of the European Union (TFEU)' [2021] OJ C100/03, 38–39; Rene Barents, 'The Single Market and National Tax Sovereignty' in Sjaak JJM Jansen (ed), *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future* (Kluwer Law International 2011) 51.
[109] Case 7/68 *Commission v Italy* [1968] ECR 423, para 10.

a work functions as a gatekeeping device that restricts the fiscal or commercial circulation of artworks, it risks violating Articles 34–36 TFEU[110]. If artworks are treated as commercial goods capable of fiscal-transaction, then excluding them from tax incentives based on subjective evaluations could amount to arbitrary discrimination or disguised restrictions on trade, which Article 36 explicitly forbids. This is particularly relevant because artworks, while culturally significant, often enter commercial transactions (and fiscal-transactions in tax-in-lieu schemes) and thus fall within the scope of goods protected by the internal market rules. Likewise, the service and capital dimensions of the art market mean that Articles 56 and 63 TFEU can be engaged where classification limits brokerage, financing or cross-border acquisitions[111]. Where tax-in-lieu or tax-deduction schemes exclude artworks on indeterminate aesthetic or thematic grounds, the measures must survive proportionality review: they must be suitable for a genuine cultural objective, necessary, and applied through predictable standards that avoid arbitrariness or domestic favouritism—otherwise, these schemes could be challenged under the Articles 56 and 63 TFEU[112]. Legal certainty in this context therefore requires transparent, objective and publicly accessible standards for eligibility: without them the classification process becomes unpredictable and administratively discretionary, generating chilling effects for curators, collectors and creators alike.

Rights-based enforcement reframes the classification problem as one of fundamental freedoms and cultural rights. Article 13 EU-CFR guarantees the freedom of the arts and binds Member States when implementing EU law, requiring them to respect, protect, and fulfil artistic freedom in the exercise of public power (Article 51 EU-CFR)[113]. Articles 21 and 22 EU-CFR protect equality and cultural diversity. This rights-centred reading is reinforced by Kälin, Künzli, Eide, and Ivey's analysis of cultural participation and non-discrimination as core obligations of contemporary human-rights law, and by Stamatopoulou and Meyer-Bisch, who

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[110] European Parliament, *Free Movement of Goods* (Fact Sheet 2025) 3.

[111] Case C-384/08 *Attanasio Group Srl v Comune di Carbognano* [2010] ECR I-0000, para 51—firmly establishing that economic protectionism is not an acceptable justification for restricting EU freedoms, reinforcing the Court's role in maintaining the integrity of the internal market; see also Jukka Snell, 'Economic Justifications and the Internal Market' (2013) 40 European Law Review 106; Wulf-Henning Roth, 'EU Law and Economic Protectionism' (2012) 49 Common Market Law Review 87.

[112] Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions [2018] OJ L173/25, recital 3; European Review of Private Law, 'Public Policy and General Interest Exceptions in the Jurisprudence of the European Court of Justice' (1996) 4(1) ERPL 1, 5.

[113] European Commission, *2010 Report on the Application of the EU Charter of Fundamental Rights* COM(2011) 160 final, 3; European Union Agency for Fundamental Rights, 'Article 13 – Freedom of the Arts and Sciences' (FRA, 2019) https://fra.europa.eu/en/eu-charter/article/13-freedom-arts-and-sciences; European Commission, *Fact Sheets on the European Union – The Charter of Fundamental Rights* (2017) 3.

conceptualise cultural participation as a constitutive dimension of human dignity and democratic agency[114]. Their work supports the thesis's claim that fiscal classifications governing access to cultural-creative tax incentives must be examined not merely for administrative rationality but for their distributive effects on cultural participation. Equality-based scholarship—particularly De Schutter's proportionality framework—underscores that fiscal distinctions must satisfy exacting scrutiny[115]. Cultural-policy scholarship similarly demonstrates the risks of exclusion: Finney and Schlesinger show how Member States rhetorically invoke 'European cultural diversity' while operationally reinforcing nationally bounded conceptions of culture, and Iordanova, Mamula, and Patti argue for reform of cultural content tests to accommodate multilingual and cross-cultural narratives, aligning them with the Union's broader commitment to a pluralistic cultural space[116]. The Charter's guarantees protect against both direct censorship and structural filtering that operates through cultural-fiscal incentives: where a taxonomy of "eligible" artworks systematically disfavours particular genres or communities, affected creators can plausibly argue that their fundamental cultural and equality rights are being impaired. The CJEU's demand for objective, evidence-based administration—seen across rulings that require transparent justifications for economic advantages and restrictions—supplies the doctrinal tools for such challenges[117]. In practice, however, rights-based enforcement is frustrated by the non-justiciable character of many judgments and the procedural opacity of advisory bodies, leaving artists and buyers with limited remedial routes and a consequential SFAC.

Conditioned sovereignty reframes Member State discretion as bounded rather than absolute. Article 167 TFEU leaves cultural policy and direct taxation (Articles 110–113 TFEU) to national competence, but that competence is exercised within the framework of the Treaties and must yield where it conflicts with internal market freedoms or fundamental rights. When domestic cultural measures interfere with internal market freedoms or undermine fundamental rights, EU law intervenes to restore normative balance. The CJEU's proportionality jurisprudence—*Gebhard*, *Centros*, *Commission v Italy*—requires that legitimate cultural aims be pursued by measures that are suitable, necessary and proportionate[118]. Transposed to

[114] Kälin and Künzli (n 16); Eide (n 16); Ivey (n 16); Stamatopoulou (n 16); Patrice Meyer-Bisch, 'Cultural Rights within the Development Grammar' (Agenda 21 for Culture 2004–2014, research commissioned by United Cities and Local Governments (UCLG)).
[115] De Schutter (n 82).
[116] Finney (n 33); Schlesinger (n 46); Iordanova (n 47); Mamula and Patti (n 47).
[117] Case C-291/05 *Irish Souvenirs* EU:C:2007:772, para 37.
[118] *Gebhard* (n 102); *Centros* (n 102); *Commission v Italy* (n 109).

artwork classification, this jurisprudence means that national schemes must demonstrate that exclusionary categories genuinely serve narrowly framed cultural objectives and cannot be achieved by less restrictive means. Case-law from related fields (e.g. *Flos v Semeraro*, *Cofemel*) underlines the requirement of interpretive coherence across Member States for legal concepts that have cross-border significance; fiscal recognition of artworks should therefore not be a vehicle for disguised protectionism[119]. National discretion thus operates within the limits of EU legality, not outside it. When Member States invoke cultural-fiscal sovereignty to justify indeterminate exclusions, they test the limits of conditioned sovereignty and produce SFACs precisely because the exercise of sovereignty is deployed in a way that conflicts with EU constitutional guarantees.

Functional integration exposes the institutional mechanics by which doctrine either realises or frustrates access. Artwork classification typically involves a dispersed architecture—ministries of culture establishing curatorial criteria, tax authorities applying fiscal rules, and expert committees issuing often unpublished opinions (§2.2.3). These actors operate with different logics, evidentiary cultures and temporalities. The CJEU's insistence that administrative discretion rests on objective criteria and clear reasoning (illustrated in *eVigilo*, *RAAP* and other administrative-law focused rulings) implies a duty of procedural coherence: advisory bodies must articulate the factual and legal bases for their decisions and tax administrations must adopt standards that permit review[120]. In absence of mutual recognition or cross-validation mechanisms, identical objects may be deemed eligible in one Member State and excluded in another—producing measurable distortions in valuation, ownership transfer and the flow of capital. Thus, institutional fragmentation—disparate mandates, opaque procedures, weak inter-agency data-sharing—constitutes an SFAC: the architecture of decision-making itself prevents the predictable and non-discriminatory treatment of artworks.

Finally, the principle of mutual supportiveness connects domestic practice to the Union's broader normative commitments. Article 22 EU-CFR and the UNESCO 2005 Convention (which the EU and its Member States have both ratified, see Chapter 5) jointly prioritise cultural pluralism; their combined logic militates against classification regimes that privilege dominant national narratives at the expense of diversity. Mutual supportiveness therefore

[119] *Flos v Semeraro* (n 101) para 34; Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw* [2019] CV EU:C;2019:721, para 38.
[120] *eVigilo* (n 100); *RAAP* (n 104).

supplies an interpretive orientation: fiscal rules should be read and applied so as to advance both the internal market and cultural pluralism. Where national schemes erect aesthetic gates that produce exclusion, they not only distort the market but also erode the EU's external credibility as a promoter of cultural rights. Operationalising mutual supportiveness would mean, in practice, prioritising flexible, functionally meaningful criteria (public dissemination, peer recognition, demonstrable cultural contribution) over rigid, nationally particularist proxies; requiring reasoned, published decisions by advisory panels; and creating administrative channels for cross-border verification. Without these measures, the latent compatibility between EU internal-market norms and cultural-rights obligations will remain unrealised and SFACs will persist.

Ultimately, the five variables together expose the multi-dimensional nature of artwork-based exclusions: legal uncertainty, rights deficits, conditioned sovereignty exercised as protectionism, institutional fragmentation and the neglect of mutual supportiveness jointly explain why artworks become objects of fiscal exclusion rather than instruments of cultural access. The EU effect here is therefore not only normative: it is a test of systemic functionality. To reduce SFACs, Union principles must be made operational—through transparent standards, reasoned administrative processes, and inter-institutional coordination—so that the fiscal classification of artworks advances, rather than undermines, the freedoms, diversity and market coherence enshrined in the Treaties and the Charter.

4.5 EU-level Reforms

As demonstrated throughout this chapter, fiscal competence remains constitutionally anchored in the Member States, yet the EU exerts a decisive, if indirect, influence over the legal and operational design of cultural–creative tax incentives. This influence is exercised through internal market disciplines, the gatekeeping function of State aid control, and the horizontal effect of fundamental rights obligations. Too often, these mechanisms have been interpreted restrictively—treating transnational cultural–fiscal cooperation as a potential distortion of competition rather than as a legitimate expression of the Union's cultural and development commitments. However, when read in conjunction with the Union's Treaty-based objectives—particularly those enshrined in Articles 167, 207, 208, and 212 TFEU—and its international obligations, notably the preferential treatment clause under Article 16 of the UNESCO 2005

Convention (see Chapter 5), these same mechanisms can operate as normative enablers of cooperative cultural governance.

The examples of *The Queen* and *Elizabeth* epitomise the practical consequences of this ambivalence. *The Queen*—a cross-border production with evident cultural value—faced fragmented eligibility conditions across states, each requiring distinct thresholds of territorial expenditure, domestic incorporation, or nationality-based staff quotas (§§1.1.3, 2.4, and 4.2.3). *Elizabeth*, in turn, could not deduct donations to museums abroad, reflecting the EU's deliberate non-interference in cross-border philanthropy and the persistence of territorial restrictions in national law (§§1.1.2, 2.3, and 4.2.2). These barriers are not merely technical: they reflect structural features of EU law's implementation. DG COMP continues to interpret cultural State aid narrowly under Article 107(3)(d) TFEU, while Member States design their schemes defensively to avoid potential infringement with competition law[121]. Cultural ministries and DG EAC (cultural objectives) remain marginal within these deliberations, and DG TAXUD (fiscal policy) and DG INTPA (international cooperation) operate with minimal cross-sectoral coordination[122]. Courts, meanwhile, hesitate to interpret EU law in the light of non-EU instruments unless authoritative interpretive guidance exists[123]. The result is a governance architecture in which the EU's commitment to cultural cooperation is normatively affirmed but institutionally under-implemented, producing legal uncertainty, procedural opacity, and persistent SFACs that obstruct equitable access to cultural–creative tax incentives.

To address these systemic deficiencies, four complementary reform pathways are proposed. Each seeks to enhance legal certainty, rights-based enforceability, functional integration, and mutual supportiveness within the EU's multilevel governance structure, while respecting Member State sovereignty over fiscal policy.

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[121] As showed in the current chapter, the Cinema Communication (2013) is the primary, explicit statement of DG COMP practice for audiovisual cultural aid (paras 1–4 and 18–22)—the Commission's decision files (SA.49294, SA.109768, and the consolidated decision collection) show that DG COMP sets the cultural-test / proportionality rules for compatibility of fiscal support to film/audiovisual sectors and strict internal-market assessment.

[122] European Commission (DG EAC), "Directorate-General for Education, Youth, Sport and Culture — responsibilities" shows DG EAC's policy/programmatic remit (Creative Europe, cultural diplomacy), but not primary competence for state aid or tax; cultural ministries notify schemes to DG COMP and DG COMP applies a competition-style analysis weighting of cultural objectives vs market effects (§4.2).

[123] CJEU/domestic courts are cautious about treating non-EU international instruments or soft-law as directly decisive unless there is clear, authoritative interpretive guidance or self-executing language, Chapter 5 (§§5.2-5.3).

The first reform measure is the adoption of an Interpretive Notice clarifying that Article 107(3)(d) (authorising aid for cultural promotion and heritage conservation), Article 208(2) (mandating the mainstreaming of development objectives across EU policies), and Article 212 (preferential treatment toward developing countries) TFEU form a coherent normative framework that legitimises asymmetrical cultural–fiscal measures aligned with international obligations. Rather than viewing preferential or cooperation-based incentives as distortive, this Notice would recognise them as proportionate and necessary instruments for advancing the Union's cultural and development objectives—provided that such measures remain proportionate, transparent, and directed towards legitimate public-interest objectives. By linking State aid control with Article 16 of the UNESCO 2005 Convention (see Chapter 5, §§5.2-5.3), the Notice would provide a clear interpretive bridge between EU and international law, operationalising mutual supportiveness and reducing interpretive discretion in Commission and national practice. In doing so, it would foster a more predictable regulatory environment, enhance functional integration across DGs, promote mutual supportiveness by aligning fiscal governance with the Union's and Member States external cultural commitments, and provide a normative benchmark for both administrative and judicial authorities when assessing cultural–creative tax incentives.

A second reform concerns the amendment of the GBER to introduce a Cultural Cooperation Presumption within Articles 53 and 54 (§4.2). The absence of such presumption produces a structural gap leaving transnational cooperation vulnerable to discretionary interpretation and procedural opacity. Under this approach, schemes demonstrably implementing Article 16 of the UNESCO 2005 Convention—which mandates preferential treatment for cultural goods, services, and professionals from developing countries through appropriate legal and institutional mechanisms (§§5.2-5.3)—would benefit from a rebuttable presumption of compatibility with Article 107(3)(d) TFEU. This amendment would not weaken competition rules but translate existing international commitments into EU secondary law, thereby internalising preferential treatment within the Union's legal framework (remembering that Article 212 TFEU already deal with preferential treatment). The presumption would reinforce proportionality and transparency obligations while reducing notification burdens and administrative uncertainty. Recitals accompanying such an amendment could clarify that cooperation-based cultural measures advance the dual objectives of Articles 167 and 208 TFEU—promoting cultural diversity and mainstreaming development cooperation. Such a reform would enhance legal certainty by grounding cultural–creative tax incentives in an explicit interpretive logic, and strengthen functional integration by aligning competition, cultural, and development policies within a unified regulatory framework.

The third reform measure proposes the creation of a Joint Directorate-General Taskforce composed of DG COMP, DG EAC, DG TAXUD, and DG INTPA, mandated to ensure procedural coherence and interpretive convergence across these policy domains. At present, these Directorates-General operate largely in isolation, each governed by distinct regulatory logics, policy priorities, and interpretive criteria (§4.2). The Taskforce would function as an internal coordination mechanism—issuing joint interpretive guidelines, establishing procedural benchmarks, and monitoring the implementation of cultural–creative tax incentives across legal, procedural, and institutional dimensions. It would not harmonise cultural-fiscal policies but embed administrative coherence within the Commission's architecture, reducing discretionary inconsistencies and enhancing predictability for Member States and stakeholders. By institutionalising inter-DG cooperation, the Taskforce would embody the principle of mutual supportiveness and strengthen both functional and procedural integration, ensuring that cultural cooperation objectives are not subordinated to narrow interpretations of fiscal or competition law.

The fourth reform concerns the judicial dimension, specifically strengthening Preliminary Reference pathways to the CJEU. National courts should be encouraged to rely on the UNESCO 2005 Convention as an interpretive aid when balancing proportionality and non-discrimination in cross-border cultural–fiscal measures. Since both the EU and its Member States are Parties to the Convention—and its objectives align with Articles 167, 207, 208, and 212 TFEU as well as the Charter of Fundamental Rights (see Chapter 5, §§5.2-5.3)—its interpretive authority can mediate tensions between market integration and cultural autonomy. Judicial reliance on the Convention would enhance rights-based enforcement by enabling courts to reconcile cultural–fiscal differentiation with EU internal market principles. It would also promote legal certainty by generating authoritative interpretations from the CJEU that integrate international cultural cooperation norms into the Union's jurisprudence.

Each reform addresses a distinct but interconnected dimension of EU-level SFACs: normative ambiguity, administrative fragmentation, institutional siloing, and judicial insulation. Their combined effect would progressively embed a normative-functional logic within EU governance, turning soft coordination into structured coherence. Implementation should follow a pragmatic sequence. Beginning with the Interpretive Notice (soft-law guidance), requiring no Treaty amendment but providing authoritative guidance to Member States and national authorities on how to apply State aid and internal market rules in light with international commitments. Followed by the GBER amendment (regulatory codification), during its next review cycle to include a Cultural Cooperation Presumption, creating rebuttable presumptions of compatibility for cooperation-based measures. Then the establishment of the Joint Taskforce (administrative convergence-COMP, EAC, TAXUD, INTPA), by internal mandate, tasked with developing interpretive guidelines, procedural toolkits, and best-practice benchmarks for Member States. Finally, the judicial reinforcement of interpretive coherence, through targeted training programmes for national judges, Commission amicus submissions in Preliminary Reference cases, and recital references in EU secondary law. This sequence maximises feasibility, fosters cumulative institutional learning, and ensures that legal integration proceeds without encroaching upon national fiscal sovereignty.

Resistance is foreseeable. DG COMP may guard the internal consistency of competition law, Member States may resist perceived encroachments on fiscal autonomy, tax authorities may fear that presumptions of compatibility could invite abuse, and courts may hesitate to engage with non-EU treaties. Yet these concerns can be mitigated by framing the reforms not as harmonisation but as procedural clarification. Interpretive Notices and Taskforces clarify existing obligations rather than create new ones; GBER amendments rely on rebuttable presumptions, preserving Member State discretion; and judicial reliance on non-EU treaties remain interpretive, ensuring sovereignty is respected. Then, each measure operates within existing competences, translating established principles into operational guidance. Pilot schemes—for instance, audiovisual co-productions with developing-country partners—could further demonstrate the reforms' capacity to enhance predictability and efficiency without compromising sovereignty or distorting competition.

Indicators of success should track both administrative and judicial uptake. For *The Queen*, the relevant metric would be the number of co-productions recognised across multiple Member States without dispute over expenditure thresholds. For *Elizabeth*, progress could be measured by the number of cross-border cultural donations recognised under the Cultural Cooperation Presumption. For *Paul*, it would be the number of national schemes where EU guidance enabled broader recognition of transnational contributions. More broadly, the indicators include the number of Member State schemes adopting cooperation-based eligibility rules, publication of joint interpretive guidelines by the Taskforce, and the frequency of judicial references to the UNESCO 2005 Convention in CJEU and national judgments.

Table 4.1: EU-level Reform Assessment

Reform Proposal	**Legal Certainty**	**Rights-Based Enforcement**	**Conditioned Sovereignty**	**Functional Integration**	**Mutual Supportiveness**
Interpretive Notice referencing the Convention Art 16 *(Recognition & Equivalency)*	++	+	+	+	++
GBER amendment with Cultural Cooperation Presumption *(Substantive Eligibility Standards)*	++	+	+	++	++
Joint DG Taskforce (COMP, EAC, TAXUD, INTPA) *(Procedural Safeguards)*	+	+	++	++	++
Strengthened preliminary reference pathways *(Cooperative Governance)*	++	++	+	+	+

Scoring[124]:

++ = **High normative and functional potential**: The reform strongly advances the relevant criterion. It significantly enhances consistency, transparency, and cross-border coherence; reduces discretion-induced exclusion; and fosters alignment between domestic, EU, and international obligations. Such reforms exhibit both normative depth and operational viability, with clear pathways for institutional uptake and legal effect.

\+ = **Partial or moderate potential**: The reform shows targeted value in advancing the criterion but remains limited in scope or effect—typically due to its soft-law character, dependency on Member State discretion, lack of binding enforcement, or insufficient institutional architecture. While capable of improving specific dimensions, it lacks either the enforceability, systemic integration, or scale needed to fully realize the criterion.

– = **Limited or no potential**: The reform remains too vague, symbolic, or structurally fragmented to meaningfully advance the criterion. It may replicate existing barriers, generate only rhetorical commitments, or fail to overcome the institutional and normative obstacles that sustain SFACs.

[124] The scoring applied in this EU-Level Reform Assessment Table provides a prospective, heuristic tool for national and international stakeholders to assess the reform potential of various EU legal mechanisms in light of the five normative-functional evaluative criteria. The matrix aims to support comparative analysis and structured decision-making by legislators, tax authorities, negotiators, and judicial or administrative bodies engaged in EU-based cultural-fiscal governance.

Together, these EU-level reforms reposition the Union from a neutral or negative regulator into an integrative actor capable of reconciling internal market discipline with international cultural cooperation. By combining interpretive clarification, regulatory presumption, administrative coordination, and judicial engagement, the EU can operationalise the principle of mutual supportiveness across its legal order without overstepping subsidiarity. For *The Queen*, *Elizabeth*, and *Paul*, this transformation means that cooperative cultural practices would no longer be foreclosed by fragmented eligibility rules, territorial exclusions, or formalist interpretations detached from international commitments. Instead, EU law would serve as a normative and functional bridge between domestic fiscal frameworks and international cultural commitments, ensuring that access to cultural–creative tax incentives becomes transparent, predictable, and equitably distributed.

4.6 Conclusions

This chapter has demonstrated that Structural Fiscal Access Constraints are not marginal distortions within cultural–creative tax incentives but systemic manifestations produced at the intersection of national fiscal sovereignty and the constitutional authority of EU law. Their persistence cannot be explained by legislative drafting deficiencies or isolated administrative discretion. Rather, SFACs crystallise where supranational norms and domestic fiscal governance interact without full normative or functional convergence. The structural misalignment between the EU's constitutional principles—non-discrimination, proportionality, free movement, and cultural pluralism—and their uneven internalisation across Member States produces recurrent access barriers that undermine the inclusive and integrative objectives of cultural–fiscal policy.

EU law has not harmonised cultural–creative tax incentives nor conferred a transnational entitlement to them. Its intervention remains primarily corrective and delimiting: it constrains national discretion where exclusionary or disproportionate measures arise but rarely mandates positive inclusion. This reactive posture allows SFACs to endure, especially where restrictive eligibility criteria are justified under cultural policy autonomy or administrative manageability. For artists, donors, and producers navigating multiple jurisdictions, the "EU effect" is therefore ambivalent—it establishes a constitutional vocabulary that may be invoked, yet provides limited procedural traction and fragmented enforcement in practice.

This ambivalence was traced through three domains. Tax-credits on expenditure for audiovisual co-productions revealed the limits of State aid control as a mechanism of cultural integration, given its lack of engagement with restrictive cultural tests and fragmented expenditure thresholds. Tax-deductions for cross-border cultural philanthropy exposed the persistence of residence-based and recipient-based exclusions despite the liberalising potential of the free movement of capital and services. Tax-in-lieu schemes for visual artists highlighted nationality-linked exclusions, inconsistent recognition of professional status, and arbitrary classifications of eligible artworks. Across these regimes, administrative opacity and interpretive discretion persist, indicating that EU-level constitutional constraints have yet to be operationalised into coherent access guarantees.

Accordingly, EU law currently conditions national sovereignty rather than displaces it. Eligibility rules remain rigid; interpretive practices vary widely; and judicial oversight, while constitutionally robust, operates within procedural and jurisdictional limits. Supranational doctrines—particularly proportionality and the fundamental freedoms—function as interpretive parameters rather than as enforceable entitlements. As a result, EU law constitutes not a direct guarantee of fiscal access but a layered framework of corrective influence whose effectiveness depends on the legal culture, administrative transparency, and interpretive fidelity of national authorities.

At the national level, meaningful access can emerge through administrative adaptation, interpretive alignment, and judicial review, provided that procedural transparency and rights-based literacy are reinforced. At the supranational level, infringement procedures, preliminary references, and direct actions reaffirm the authority of EU law but remain reactive, often inaccessible to individuals and limited in scope. Complementary mechanisms—such as rights-based entitlements, mutual-recognition logics, and state liability—expand potential enforcement avenues but operate unevenly across Member States. These dynamics expose a central paradox: EU law is constitutionally dense yet functionally fragmented—its principles are rich in normative substance but weak in operational reach.

The broader implication is that to dismantle SFACs, the "EU effect" must be reconceptualised as a continuum of functional influence rather than a binary of enforceability. Its impact should be understood through its capacity to condition administrative discretion, orient judicial reasoning, and embed shared constitutional values within domestic cultural-fiscal governance.

From this reconceptualisation emerge three strategic trajectories: operational convergence, through shared benchmarks, interpretive coordination, and administrative mutual recognition; normative integration, by treating EU constitutional principles as binding interpretive obligations rather than optional references; and rights reconfiguration, by recognising CC operators as holders of enforceable procedural and substantive entitlements that constrain fiscal discretion and compel proactive compliance. Only through such a functional orientation can EU law fulfil its constitutional promise of equity, mobility, and cultural pluralism within the cultural–fiscal domain.

By reframing the "EU effect" as both a constraint and an enabler, the chapter has proposed a lens through which SFACs appear not as isolated anomalies but as structural expressions of an interdependent legal order. Their resolution demands not harmonisation but cooperative recalibration: procedural convergence, interpretive coherence, and normative reciprocity. The EU-level reforms advanced—ranging from interpretive guidance and GBER refinements to inter-DG coordination and enhanced judicial dialogue—illustrate how this recalibration could occur through procedural integration rather than substantive uniformity, transforming the EU from a negative regulator into a positive integrator capable of reconciling fiscal sovereignty with constitutional pluralism.

Yet the governance of cross-border cultural–creative tax incentives does not end within the EU legal space. Beyond it lies an international normative framework, centred on the UNESCO 2005 Convention, which articulates preferential treatment, cultural rights, and respect for national policy space as complementary principles of governance. The next chapter turns to this multilateral interface, assessing whether the Convention's commitments can be operationalised to guide discretion, mitigate SFACs, and advance the plural, equitable cultural order that EU law alone has been unable fully to deliver.

Chapter 5
UNESCO 2005 Convention, Cultural-Creative Tax Incentives, and EU Law

5.1 Introduction

This chapter addresses the fourth sub-question of the thesis: *What role can the UNESCO 2005 Convention play in mitigating SFACs in cultural-creative tax incentives in cross-border situations, and what mechanisms could enhance their normative and institutional limitations within EU and national systems?* Despite the growing international recognition of cultural rights and preferential treatment as normative pillars of global cultural governance, the interaction between the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the design of cultural–creative tax incentives remains critically under-theorised. Both international cultural law and fiscal governance scholarship have largely neglected to ask whether, and to what extent, the Convention's legal and institutional framework can shape the design, implementation, and accessibility of tax-based measures sustaining the cultural and creative ecosystems. This chapter addresses that gap by analysing the Convention's normative and functional effects across national and EU legal orders. As established in earlier chapters, SFACs are not isolated technical anomalies but structural manifestations of systemic incoherence across overlapping legal regimes—where fiscal, cultural, and trade logics collide without sufficient normative or functional coordination.

Within this fragmented terrain, the UNESCO 2005 Convention—ratified by 152 States—including all Member States of the EU and the Union itself (Council Decision 2006/515/EC)[1]—and endorsed by the United Nations General Assembly as the first legally binding international instrument devoted to cultural diversity, assumes a dual normative function. It codifies cultural rights as part of the international legal order and provides a coordination framework for linking national sovereignty with international solidarity. Yet, as this chapter demonstrates, this potential remains under-realised. While the Convention articulates robust commitments—ranging from obligations of support for cultural diversity and preferential treatment for

[1] Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2006] OJ L 201/15, recitals (1), (3), (5).

developing countries to the recognition of cultural rights—its translation into the cultural–fiscal domain has been sporadic, uneven, and institutionally fragile[2].

Following the methodological architecture developed in Chapters 2 to 4, the present analysis examines the "UNESCO effect" on cultural–creative tax incentives through two interrelated analytical dimensions: normative and functional interactions. The normative dimension captures the legal commitments arising from the Convention's provisions. Although the Convention does not directly regulate taxation, several of its provisions provide relevant normative guidance. Article 1 establishes the Convention's objectives to protect and promote the diversity of cultural expressions and to strengthen international cooperation and solidarity; Article 2 enumerates its guiding principles, including respect for human rights, sovereignty, international cooperation and solidarity, complementarity of economic and cultural aspects of development, and equitable access; Article 6(f) affirms the right of Parties to adopt measures providing public financial assistance; Articles 12 to 15 reinforce obligations to enhance international cooperation for sustainable development; and Article 16 introduces the principle of preferential treatment for artists, cultural professionals, and cultural goods and services from developing countries. While expressed in cooperative language, these provisions embody hybrid normative quality: they combine soft-law flexibility with hard-law expectation, generating legitimate interpretive obligations under the general principles of international law—particularly *pacta sunt servanda* and the duty of consistent interpretation[3].

Functional interaction, by contrast, concerns the translation of these commitments into operational practice—how they are implemented through national measures and EU law, administrative cooperation, and institutional procedures[4]. It examines the extent to which the Convention's obligations are internalised through the actions of its institutional mechanisms—

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[2] UNESCO 2005 Convention has issued various global reports, see, for example: *Re|Shaping Policies for Creativity: Addressing Culture as a Global Public Good* (2022); *Re|shaping Cultural Policies: Advancing Creativity for Development, 2005 Convention Global Report* (2018); *Re|shaping Cultural Policies: A Decade Promoting the Diversity of Cultural Expressions for Development* (2015); *Reflection Group on the Implementation of Article 16 on: Preferential Treatment for Developing Countries*, *Preliminary Proposals*, Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, 17th Paris, 2024, DCE/24/17.IGC/9 Rev.2.

[3] Lilian Richieri Hanania, 'The UNESCO Convention on the Diversity of Cultural Expressions as a Coordination Framework to Promote Regulatory Coherence in the Creative Economy' (2016) 22(4) International Journal of Cultural Policy 574.

[4] Vincent Bohnenblust, 'The EU's Representation at the UNESCO and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (2017) https://ssrn.com/abstract=3033204; Delia Ferri, 'The EU and the UNESCO Convention on Cultural Diversity' (2005) 3 European Diversity and Autonomy Papers (EDAP) 1.

the Conference of Parties, the Intergovernmental Committee, and the Secretariat (Articles 22–24)—as well as through the periodic reporting system (Article 9) and the Operational Guidelines adopted by the Parties. These instruments define the Convention's functional reach, determining whether its commitments are transformed into enforceable standards capable of mitigating SFACs or remain aspirational and declaratory. The interaction between these normative and functional dimensions forms the analytical matrix through which this chapter evaluates the Convention's influence on cultural–creative tax incentives.

In continuity with the thesis-wide analytical framework, the chapter applies five evaluative variables—each serving as both a diagnostic tool and a normative benchmark. Legal certainty assesses the textual precision and interpretive coherence of the Convention's obligations, particularly their integration into domestic and EU fiscal frameworks and the extent to which Operational Guidelines and Committee decisions provide normative clarity for States' cultural-fiscal measures. Rights-based enforcement examines whether the Convention's recognition of cultural rights and preferential treatment is capable of generating justiciable entitlements or remains programmatic and non-enforceable. Conditioned sovereignty analyses how the Convention redefines sovereignty within cultural–fiscal governance, balancing policy autonomy with the duties of international cooperation and solidarity. Functional integration evaluates the institutional and procedural linkages between the Convention's mechanisms and national or EU systems, especially whether reporting, monitoring, and coordination processes influence fiscal policymaking. Finally, mutual supportiveness operationalises Articles 20 and 21 of the Convention, which require consistency with other international obligations, testing whether fiscal policy can simultaneously respect trade disciplines and advance cultural diversity through systemic integration. Together, these variables provide the structured lens through which this chapter classifies and evaluates SFACs at the UNESCO level and formulates reform proposals aimed at reducing them—thereby extending the reform logic developed in the national, bilateral, and EU analyses.

The chapter is structured as follows. Section 5.2 analyses the interaction between the Convention and EU legal orders. Interrelated dimensions structure this analysis: cultural diversity and cultural rights—global and regional paradigms (§5.2.1); UNESCO's aspirational and substantive obligations (§5.2.2); and the layered asymmetries in enforcement and remedies (§5.2.3). Section 5.3 investigates the UNESCO–EU interface through two scenarios: where compliance with UNESCO may confront EU law—Scenario A, and, where compliance with

EU law while neglecting Convention obligations—Scenario B. The five variables structure this analysis: legal certainty, cultural-rights enforcement and the remedial vacuum (§5.3.1); conditioned sovereignty and functional integration (§5.3.2); and mutual supportiveness and the systemic integration of cultural governance (§5.3.3). Section 5.4 advances reform proposals at UNESCO and EU levels aimed reduce SFACs. Section 5.5 synthesize the findings.

5.2 UNESCO and EU Frameworks—Entry Points and Remedy Design

The UNESCO 2005 Convention represents the most comprehensive normative framework linking culture, development, and law. Its near-global ratification and hybrid legal architecture—simultaneously cultural, economic, and rights-based—grant it a distinct constitutional relevance within the EU legal order. Following the Union's ratification in 2006, the Convention became binding upon both EU institutions and Member States under Article 216(2) TFEU[5]. This dual binding effect transforms the Convention from a merely external cultural commitment into an internal interpretive parameter of EU governance, capable of shaping the Union's external action (Articles 3(5) and 21 TEU) as well as its internal regulatory and fiscal policies[6]. Consistent with the Court of Justice's jurisprudence, once ratified, such international agreements form an integral part of EU law and guide both institutional decision-making and national interpretation[7].

Yet, despite this formal incorporation, the Convention's influence on cultural–fiscal governance remains largely underdeveloped[8]. Its transformative potential is mediated by domestic transposition, administrative uptake, and judicial interpretation—domains where legal discretion, bureaucratic inertia, and institutional fragmentation persist. These systemic constraints dilute the Convention's operational reach, confining its commitments to the realm of policy aspiration rather than enforceable obligation. This pattern reflects the broader problem identified by Nollkaemper and Klabbers in relation to international obligations within multilevel governance: incorporation pathways and administrative practice, rather than treaty

[5] Katja Schmalenbach, 'Interpretation of EU International Agreements: Article 216 TFEU and the Vienna Convention on the Law of Treaties' (2020) 57 Common Market Law Review 517.
[6] Ferri (n 4); Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 323.
[7] Case 181/73 *Haegeman v Belgium* EU:C:1974:41; Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400; Case C-61/94 *Commission v Germany (International Dairy Agreement)* EU:C:1996:313; Case C-266/03 *Commission v Council* ECLI:EU:C:2006:345, para 71; Case C-308/06 *Intertanko* EU:C:2008:312.
[8] UNESCO (n 2).

text, determine functional effectiveness[9]. As a result, the Convention's normative commitments—cultural diversity, equitable access, and preferential treatment—remain structurally vulnerable to the same SFACs that permeate domestic, bilateral, and EU cultural–fiscal regimes.

Accordingly, this section identifies the primary entry points through which the UNESCO and EU frameworks interact, setting the foundation for the evaluative analysis developed in § 5.3. It establishes the legal and institutional junctures—normative, procedural, and remedial—through which cultural–fiscal coordination may occur, and against which the five evaluative variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—are subsequently applied.

5.2.1 Cultural Diversity and Cultural Rights—Global and Regional Paradigms

The 2005 UNESCO Convention situates cultural diversity at the confluence of human rights, sustainable development, and governance. Articles 1 and 2 (objectives and guiding principles), together with Article 3 (scope of application), Article 4 (definitions), and Articles 5-19 (rights and obligations of Parties), transform cultural participation from a matter of policy discretion into a constitutive element of human dignity and democratic agency. Drawing upon the *Universal Declaration of Human Rights* (Articles 22 and 27)[10] and the *International Covenant on Economic, Social and Cultural Rights* (Articles 2 and 15)[11], the Convention conceptualises access to and participation in cultural life as universal entitlements[12]. Its Preamble (Recital 1) recognises "cultural diversity as a defining characteristic of humanity," elevating what was once a moral or aspirational value to a normative principle of global governance. This interpretation is supported by von Schorlemer and Stoll, who situate the Convention squarely within the human-rights architecture; by Stoll, Mißling and Jürging, who highlight its legally

[9] André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) ch 7; Jan Klabbers, 'The Duality of Direct Effect of International Law' (2014) 25(1) EJIL 105.
[10] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[11] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[12] Articles 27 UDHR and 15 ICESCR, for example, recognize the right to participate in cultural life; see United Nations, Office of the High Commissioner for Human Rights, *Commentary on the Universal Declaration of Human Rights, Article 27: Right to Cultural, Artistic and Scientific Life* (2012).

operationalising dimension[13]; and by various cultural-policy scholars such as Obuljen, Bernier, Schlesinger, Finney, and Iordanova, who demonstrate that the Convention's rights-based structure is designed to guide and discipline domestic cultural-fiscal regimes, not simply to inspire them. Taken together, these accounts confirm that the Convention embeds cultural diversity and cultural participation within a binding normative framework, positioning them as enforceable commitments rather than discretionary cultural-policy aspirations.

This global paradigm re-orders the equilibrium between levels of sovereignty and solidarity. Article 2(2) affirms that States retain the sovereign right to formulate cultural policies and adopt measures, yet explicitly conditions that discretion on the Charter of the United Nations and on general principles of international law[14], while Article 5(2) links sovereign rights with correlative duties: "When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions, its policies and measures shall be consistent with the provisions of this Convention[15]." In the fiscal domain—where distributive justice and public-finance priorities are embedded in tax law—this duality becomes operational. National authorities must reconcile fiscal autonomy with global obligations to ensure equality of cultural opportunity, both domestically and transnationally[16]. This dynamic reflects the broader international-law scholarship on relational sovereignty, which emphasises that sovereign prerogatives in fields such as taxation or sectorial policy are increasingly exercised within normative frameworks that generate both rights and reciprocal duties[17].

Articles 6, 7, and 12 give this normative balance institutional form. Article 6 authorises Parties to adopt a spectrum of supportive measures, including subsidies and tax incentives[18], while the Operational Guidelines require that such measures ensure transparency and equitable access

[13] Peter-Tobias Stoll, Sven MiBling, and Johannes Jurging, 'Preamble' in Sabine von Schorlemer and Peter-Tobias Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 23.
[14] Toshiyuki Kono, 'Article 2: Guiding Principles' in Sabine von Schorlemer and Peter-Tobias Stoll (n 13) 83; for the Convention's definitional and conceptual architecture, see Nina Obuljen, 'Article 4: Definitions' in von Schorlemer and Stoll (n 13) 133.
[15] Jukka Liedes and Kimmo Aulake, 'Article 5: General Rule Regarding Rights and Obligations' in von Schorlemer and Stoll (n 13) 163.
[16] Véronique Guèvremont and Ivana Otasevic, 'Implementing the 2005 Convention on Cultural Diversity: Challenges and Perspectives' (2017) 3 *Cultural Pluralism and Legal Globalization* 201, 206; Véronique Guèvremont, 'Preliminary Reflection on the Implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the Digital Age' (2013).
[17] Abram Chayes, Antonia H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998); Rajiv Biswas, *International Tax Competition: Globalization and Fiscal Sovereignty* (Commonwealth Secretariat 2002).
[18] Ivan Bernier, 'Article 6: Rights of Parties at National Level' in von Schorlemer and Stoll (n 13) 179.

—an obligation widely recognised in cultural-rights scholarship[19]. Article 7 strengthens the obligation by requiring Parties to "endeavour to create an environment" conducive to the production and dissemination of cultural expressions[20]. Article 12 further internationalises these duties, mandating that cooperation "shall be strengthened" through bilateral, regional, and global exchange and cooperation[21]. Collectively, these provisions embed cultural diversity within the logic of public finance, transforming it from a matter of cultural discretion into a coordinated legal framework that generates both rights and obligations within and beyond national borders. This interpretation aligns with the literature conceptualising the Convention as a constitutionalising instrument of global cultural governance, where cultural diversity is treated as both a public good and a legally grounded normative commitment.

By contrast, the EU's constitutional treatment of culture, enshrined in Article 167 TFEU, operates within a more circumscribed regional paradigm. It affirms respect for "national and regional diversity" and promotes cooperation among Member States, yet primarily through complementary and supporting competences (Chapter 4). While both frameworks share a pluralist ethos, their normative scale differs: the Convention casts cultural diversity as a global public good anchored in human-rights law; the EU conceives it as an internal-market value mediating integration and subsidiarity. The global paradigm prescribes positive obligations of solidarity and distributive fairness, whereas the regional paradigm privileges neutrality, competition, and proportionality.

When Member States deploy cultural-creative tax incentives, they therefore operate within dual normative logics: one global and solidaristic, the other regional and market-oriented. This tension—between fiscal autonomy and international cooperation commitments, between global cultural rights and regional market discipline—provides a critical testing ground for the evaluative variables of conditioned sovereignty and mutual supportiveness examined in § 5.3.

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[19] Véronique Guèvremont, 'Operational Guidelines and the Implementation of the 2005 Convention: Between Flexibility and Effectiveness' in Nina Obuljen and Joost Smiers (eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (Institute for International Relations 2006) 63; von Schorlemer and Stoll (n 13).

[20] Sven MiBling and Bernard M Scherer, 'Article 7: Measures to Promote Cultural Expressions" in von Schorlemer and Stoll (n 13) 199.

[21] Robert Palmer and Kathrin Merkle, 'Article 12: Promotion of International Cooperation' in von Schorlemer and Stoll (n 13) 353.

5.2.2 Aspirational and Substantive Obligations

The Convention's legal architecture hinges on the distinction between aspirational and substantive obligations—between provisions that authorise or encourage action and those that compel it. The textual variance between "may adopt" and "shall endeavour" or "shall facilitate" determines both the degree of legal certainty and the possibility of rights-based enforcement. Articles 6, 7, 8, 13, 14, and 15 illustrate the aspirational layer: Parties may adopt measures "aimed at protecting and promoting the diversity of cultural expressions" (Article 6); they shall endeavour to "create an environment" that enables individuals and groups to produce and disseminate cultural expressions (Article 7); to "protect cultural expressions" (Article 8)[22]; to "integrate culture in their development policies" (Article 13)[23]; to "support cooperation for sustainable development" (Article 14)[24]; and to "encourage partnerships" (Article 15)[25].

Despite the use of the verb "shall", its combination with "endeavour or encourage" renders these clauses essentially aspirational. They establish a normative expectation rather than a legally enforceable duty[26]. Their functional value lies in legitimising domestic initiatives—such as cultural-creative tax incentives—within an internationally sanctioned policy space. In doing so, they reinforce the articulation of recognised standards of conduct, even as they fall short of generating rights-based enforcement. At this level, the Convention functions as a coordination framework: it disciplines policy discretion by embedding transparency, equity, and accountability requirements into the cultural-fiscal governance.

By contrast, Article 16 establishes a genuinely substantive obligation: "Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals, as well as to cultural goods and services from developing countries." This provision crystallises the Convention's most concrete manifestation of conditioned

[22] Lilian Richieri Hanania and Hélène Ruiz Fabri, 'Article 8: Measures to Protect Cultural Expressions' in von Schorlemer and Stoll (n 13) 223.
[23] David Throsby, 'Article 13: Integration of Culture in Sustainable Development' in von Schorlemer and Stoll (n 13) 361.
[24] Edna dos Santos-Duisenberg, 'Article 14: Cooperation for Development' in von Schorlemer and Stoll (n 13) 371.
[25] Jens Kare Rasmussen and Laura Gomez Bustos, 'Article 15: Collaborative Arrangements' in von Schorlemer and Stoll (n 13) 393.
[26] Bernier (n 18); MiBling and Scherer (n 20); Hanania and Fabri (n 22); Throsby (n 23); Santos-Duisenberg (n 24); Rasmussen and Bustos (n 25).

sovereignty: it preserves national autonomy over policy instruments yet subjects it to binding duties of cooperation and non-discrimination[27]. The Operational Guidelines (para. 2.1) explicitly confirm that "Article 16 creates an obligation for developed countries in favour of developing countries." In normative terms, it transforms solidarity from a rhetorical principle into a distributive justice mechanism.

Academic interpretation converges on this binding reading. Aboudi identify Article 16 as a capacity-building duty that re-conceptualises cultural development as a legal entitlement[28]; Sinha highlights its market-access dimension, linking preferential treatment to fiscal and mobility-facilitation instruments[29]; Nurse emphasises its equity rationale, mandating inclusion of under-represented groups[30]; and Bourcieu calls for innovative cooperation frameworks to remove financial and legal barriers to mobility[31]. Collectively, these views recognise Article 16 as a bridge between the aspirational ethos of cultural cooperation and enforceable commitments capable of mitigating SFACs.

Institutional practice reinforces this binding interpretation. The EU-CARIFORUM Protocol on Cultural Cooperation (2008) explicitly implements Article 16 within the EU's external relations, translating the Convention's normative content into an operational framework for preferential access[32]. Likewise, Decision 4.COM of the Intergovernmental Committee urges Parties to remove legal and financial barriers to mobility and professional recognition—further confirming Article 16's normative density[33]. When viewed through the evaluative variables, Article 16 enhances functional integration between UNESCO, the EU, and national levels: it guides administrative cooperation, fiscal inclusion, and the alignment of incentive regimes with international equity principles.

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[27] Xavier Troussard, Valérie Panis-Cendrowicz and Julien Guerrier, 'Article 16: Preferential Treatment for Developing Countries' in von Schorlemer and Stoll (n 13) 405 — the scholars researched the drafting history of Article 16, including the genesis of preferential treatment in WTO Agreements, in EU Trade Policy, outside the UNESCO negotiations and within UNESCO.
[28] Bilel Aboudi, *CE/08/2IGC/8 Annex* (UNESCO 2005 Convention).
[29] Madhukar Sinha, *CE/08/2IGC/8 Annex* (UNESCO 2005 Convention).
[30] Keith Nurse, *CE/08/2IGC/8 Annex* (UNESCO 2005 Convention).
[31] Edouard Bourcieu, *CE/08/2IGC/8 Annex* (UNESCO 2005 Convention); Edouard Bourcieu, 'Preferential Treatment under the UNESCO Convention: The Case for Cultural Cooperation' in Nina Obuljen and Joost Smiers (n 15) 167; Edouard Bourcieu, 'Operationalizing Preferential Treatment under the 2005 Convention' in Nina Obuljen and Jordi Pascual (eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (UIC 2008) 105.
[32] Section 3 of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007.
[33] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, Decision 4.COM (2011) para 10.

The Convention thus establishes a layered matrix of discretion and obligation. Aspirational provisions generate coherence benchmarks and transparency norms; Article 16 imposes enforceable duties of preferential treatment and access. Together they define the Convention's normative spectrum—from programmatic guidance to binding commitment—and delimit its capacity to produce meaningful remedies. This layered structure leads directly to the next subsection, which examines how these asymmetric obligations translate into uneven enforcement and remedial mechanisms across global and regional levels.

5.2.3 Layered Asymmetries in Enforcement and Remedies

Despite its normative ambition, the Convention's enforcement and remedial architecture remains institutionally fragile. Article 25 provides for inter-State dispute settlement regarding the Convention's "interpretation or application" through negotiation, mediation, or conciliation—entirely on a voluntary basis[34]. No Party has ever invoked this procedure, whether concerning cultural-creative tax incentives or the preferential treatment under Article 16[35]. Non-State actors—the principal beneficiaries of the Convention's cultural-rights logic—lack standing altogether. Enforcement therefore depends on peer review, periodic reporting, and reputational pressure exercised through the Intergovernmental Committee and the Quadrennial Periodic Reports under Article 9[36]. While "naming and shaming" can generate political pressure, the Committee lacks adjudicatory authority, cannot issue binding interpretations, and remains limited to the adoption of operational guidelines and comments on national reports[37]. Scholars such as von Schorlemer, Stoll, Bourcieu, Obuljen and Smiers have underscored that UNESCO's treaty mechanisms historically rely on persuasion, cooperative monitoring, and soft-law elaboration rather than coercive enforcement—placing the Convention squarely within the tradition of international cultural law as a "coordination-through-consensus" regime rather than a rights-enforcement system[38].

This remedial minimalism is not accidental but structurally embedded in the Convention's design. Article 20, governing its relationship with other treaties, rejects both supremacy and

[34] Ivan Bernier, 'Article 25: Setlement of Disputes' in von Schorlemer and Stoll (n 13) 599.
[35] UNESCO (n 2); UNESCO, *Report on the Implementation of Article 16 on "Preferential Treatment for Developing Countries"*, approved by the Conference of Parties to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 9th session, Paris, 2023 [103].
[36] Christine M Merkel, 'Article 9: Information Sharing and Transparency' in von Schorlemer and Stoll (n 13) 245.
[37] Roland Bernecker, 'Article 23: Intergovernmental Committee', in von Schorlemer and Stoll (n 13) 571.
[38] von Schorlemer and Stoll (n 13); Obuljen and Smiers (n 19); Bourcieu (n 31).

subordination, replacing hierarchy with the principle of mutual supportiveness[39]. Unlike WTO or EU law, the Convention neither claims precedence over other legal regimes nor subjects itself to their primacy. This open-textured clause preserves systemic compatibility but sacrifices enforceability: it prevents formal invalidation in case of conflict, yet deprives the Convention of status as a binding benchmark in adjudication. This dynamic aligns with pluralist governance theory, which explains why norms may coexist without hierarchical ordering but also without clear conflict-resolution pathways[40]. In practice, UNESCO's mechanisms function through diplomacy, persuasion, and reputational monitoring rather than judicial or administrative remedies[41]. The result, as Hill observes, is "procedural visibility without substantive accountability[42]."

These weaknesses are magnified in the EU context. Although both the Union and its Member States are bound by the Convention under Article 216(2) TFEU, competence fragmentation obscures responsibility[43]. Cultural policy is a shared but supportive competence; taxation remains national; and market regulation—including State-aid control, internal-market freedoms, and cross-border tax coordination—is supranational (Chapter 4)[44]. Consequently, when a cultural-creative tax incentive engages both the Convention and EU law, accountability becomes diffuse and reciprocal[45]. This problem is a textbook example of the responsibility issues identified by Nollkaemper, Klabbers, and Tzanakopoulos: when multiple actors hold overlapping competences, enforcement becomes diluted unless explicit attribution mechanisms

[39] Peter-Tobias Stoll, 'Article 20: Relationship to Other Treaties: Mutual Supportiveness' in von Schorlemer and Stoll (n 13) 519.
[40] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) chs 7-8; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317; John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2020) Part III; Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421.
[41] Ibid.
[42] Christopher Hill, 'The UNESCO Convention and the Limits of Diplomatic Dispute Resolution' (2016) 27 European Journal of International Law 1043.
[43] Sergio Marchisio, 'EU Membership in International Organizations' in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) 231; Ernst-Ulrich Petersmann, 'International Activities of the European Union and Sovereignty of Member States' in Cannizzaro (n 43) 321.
[44] TFEU, Article 3 (exclusive competence of the EU), Article 4 (marginal competence of the EU), Article 6 (supporting competences); Paul Craig, 'National Actions', in *EU Administrative Law* (OUP 2020) ch 7; Stephan W Schill and Armin von Bogdandy, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48(5) Common Market Law Review 1417.
[45] Piet Eeckhout, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* (Report to the 22nd FIDE Congress, Limassol 2006); Christian Tomuschat, 'The International Responsibility of the EU' in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) 177.

exist[46]. Under general international law, neither the internal allocation of competences nor the participation of a regional organisation as co-party absolves either level from responsibility, unless expressly delimited[47]. The EU's accession to the Convention lacked a disconnection clause separating the obligations of the Union from those of its Member States. Both remain fully bound, and both may incur international responsibility for non-compliance. The *ILC Draft Articles on the Responsibility of International Organizations* (Articles 17–19) and the *Vienna Convention on the Law of Treaties* (Articles 26–27) support this concurrent attribution[48]. In practice, however, the Commission's internal-market oversight dominates, while UNESCO supervision remains reputational. The Convention therefore lacks an effective interface with the EU's legally binding remedial mechanisms.

These dynamics produce three interrelated asymmetries: access and standing, institutional competencies, and normative hierarchy. First, access and standing: when the affected rights-holders are non-EU actors, the CJEU and Commission lack a standing role as direct adjudicatory fora for claims by such actors. It because CJEU jurisdiction is tied to EU legal relationships and procedural channels[49]. Non-EU actors cannot directly bring claims before the CJEU in most situations[50]. Even when a preliminary reference is made by a national court, that route is only open where EU law must be interpreted in relation to a dispute before a national court, and that dispute must involve a domestic measure or implementation of EU law. A third-country entity typically is not party to the national proceeding that triggers the reference[51]. The Commission's infringement powers under Article 258 TFEU permit it to bring actions only against EU Member States for failing to comply with EU law. Third countries are not subject to these procedures. As a consequence, a third-country CC operator cannot compel the Commission to initiate an infringement solely on its behalf, nor can it be the direct beneficiary of a Commission order or judgment in that context. Under the *Francovich* principle, individuals

[46] Nollkaemper (n 9); Klabbers (n 9); Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 133, 140.
[47] Jan Wouters and Cedric Ryngaert, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States' (2019) 16 International Organizations Law Review 339; Christoph Herrmann, 'Shared Responsibility in the EU External Agreements' (2019) 17 German Yearbook of International Law 121; Case C-658/11 *Zambrano* ECLI:EU:C:2012:124.
[48] International Law Commission, *Draft Articles on the Responsibility of International Organizations, with commentaries* (2011) UN Doc A/66/10; Vienna Convention on the Law of Treaties 1969.
[49] Rafał Mańko, *Procedures before the Court of Justice of the EU* (Citizens' Policies Unit, European Parliamentary Research Service, 2025).
[50] Ibid.
[51] Ioanna Hadjiyianni, 'The CJEU as the Gatekeeper of International Law: The Cases of WTO Law and the Aarhus Convention' (2021) 70(4) International and Comparative Law Quarterly 895.

(or entities) may invoke state liability to seek damages from a Member State for breach of EU obligations[52]. However, this principle is confined to relationships between Member States and natural or legal persons established under national law. It does not extend to non-EU entities unless they can successfully argue they fall within the class protected by the relevant EU measure. Thus, while a national court might order reparations to a domestic entity harmed by a Member State's breach, it would rarely do so in favour of a third-country operator. This reality limits the practical reach of EU legal protections for non-EU actors and necessitates alternative pathways—such as bilateral treaties, external dispute resolution mechanisms or national courts—to address cross-border disputes involving cultural-fiscal issues. Second, institutional competence: when EU competences are engaged, Member States are generally precluded from unilaterally litigating under conventions (e.g. Article 25 of UNESCO 2005 Convention) in a manner that undermines the EU's external representation[53]. This constraint arises from the duty of sincere cooperation under Article 4(3) TEU, which obliges Member States to align their actions with Union external policy and refrain from measures that would compromise the unity of the EU's external stance. However, this rule is not absolute: in domains of shared competence, Member States retain a limited margin of autonomous external action so long as they do not conflict with the Union's position and respect the principles of coordination and institutional balance. Third, normative hierarchy: while Article 20 of the Convention enshrines a principle of mutual supportiveness, expressly denying that the Convention "modifies rights and obligations under any other treaties to which they are parties," it provides no clear rule of legal precedence in the event of conflict[54]. Within the EU legal order, however, the doctrine of primacy (supremacy) of EU law means that, in areas where the Union holds competence, EU law must prevail over conflicting national measures, and—where binding on the EU—over international agreements concluded by Member States or by the EU itself, absent an explicit and valid derogation from the Treaties[55]. This means that even though the UNESCO Convention aims to foster complementarity with other treaties, in practice EU law can displace or override conflicting provisions of external treaties insofar as they fall within

[52] Joined Cases C-6/90 & C-9/90, *Francovich v Italy* ECLI:EU:C:1991:428.
[53] Ioanna Hadjiyianni and Athena Herodotou, 'The EU's Representation in International Organizations: Case C-161/20 Commission v. Council (International Maritime Organization)' (2023) 28(1) European Foreign Affairs Review 30; CJEU, Opinion 2/13 EU:C:2014:2454; Case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345; Case C-161/20 *Commission v Council (IMO)* ECLI:EU:C:2022:53; Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263; Opinion 1/03 [2006] ECR I-1165; Opinion 2/15 *EU-Singapore Free Trade Agreement (EUSFTA)* ECLI:EU:C:2017:376; Case C-274/11, *Commission v Ireland*, ECLI:EU:C:2013:42; Case C-459/03, *Commission v Ireland* (State Aid) [2006] ECR I-4635.
[54] Stoll (n 39).
[55] C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66 (formulating primacy doctrine).

EU competence—especially where they conflict with directly applicable or binding EU norms[56]. This reading is consistent with Craig, de Búrca, and Micheau on primacy and on the constitutional effects of international agreements within the EU legal order[57].

These architectures expose the functional mismatch between normative density and enforcement capacity. EU law offers binding but internally oriented remedies; UNESCO law provides global legitimacy but limited justiciability. Legal certainty and rights-based enforcement are thus weakest precisely where distributive effects are most acute—across transnational cultural-creative interactions. The Convention operates as a normative reference rather than a remedial regime.

Yet this institutional architecture retains latent potential for functional integration and mutual supportiveness. As explored in Chapter 4, the EU Treaties already embed cultural diversity and international cooperation within their constitutional framework (Articles 3(3) and 6(d) TEU; Article 167 TFEU; Articles 13 and 22 EU CFR) and authorise preferential treatment for developing countries (Articles 207 and 212 TFEU)[58]. These provisions constitute legal conduits through which Convention-aligned objectives and principles (Articles 1 and 2 Convention), the consistent cultural policies and measures adopt by its Convention Parties (Article 5 Convention) can coexist with internal-market law. The challenge is institutional rather than normative: aligning DG TAXUD's fiscal governance with DG EAC's cultural-diversity mandate, and embedding Convention objectives and principles into the administrative design of cultural-creative tax incentives.

Within these overlapping normative, operational, and remedial dimensions, the UNESCO 2005 Convention embodies both promise and paradox. It aspires to transform cultural diversity into

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[56] Andreas Schöpgens, 'The "European Multilevel Constitutional Review Composite" Between "Primacy / Precedence" and "Supremacy": European Legal Integration After the Judgments by the German Bundesverfassungsgericht in "ECB-PSPP" and the Polish Trybunał Konstytucyjny in "K 3/21"' (2023) 31(4) European Review of Private Law 723; Julianna Sára Traser et al, 'The Principle of the Primacy of EU Law in Light of the Case Law of the Constitutional Courts of Italy, Germany, France, and Austria' (2020) 1(2) Central European Journal of Comparative Law 151.

[57] Craig (n 44); de Búrca (n 6); Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, vol 45 (part III, chapters 5 and 6, Wolters Kluwer Law & Business 2014) 301.

[58] The EU's development cooperation policy under Articles 207(1) and 212 TFEU explicitly aims to include sustainable economic, social, and environmental development objectives alongside trade facilitation, with a primary focus on poverty reduction but also broader development goals (Article 208 TFEU). According to the Court in *Case C-377/12, Philippines v Council* EU:C:2014:200, paras 22–43, this includes non-economic objectives embedded in external action.

a principle of fiscal and administrative governance, yet functions through instruments of persuasion and coordination rather than coercion. Within the EU, this hybridity produces tension between binding internal-market obligations and programmatic international duties. The capacity of the Convention to mitigate or exacerbate SFACs thus depends on how its principles are interpreted and operationalised across multilevel governance.

The following section (§5.3) applies the five evaluative variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—to two contrasting scenarios: Scenario A, where a Member State implements the Convention's preferential treatment obligations and thereby encounters potential conflict with EU law; and Scenario B, where compliance with EU law results in the neglect of the Convention obligations.

5.3 The UNESCO–EU Interface: Dual Scenarios of Compliance and Neglect

The relationship between the UNESCO 2005 Convention and the EU legal framework epitomises the structural tension between global normative ambition and regional constitutional autonomy. Building upon the preceding analysis, three elements shape this interface. First, the Convention's recognition of cultural rights as collective entitlements endows Parties with both discretion and distributive responsibility (§5.2.1). Second, its blend of aspirational and substantive obligations—where the verbs shall endeavour coexist with the binding shall facilitate of Article 16—creates a multilayered matrix of duties (§5.2.2). Third, layered asymmetries in enforcement and remedies ensure that while EU obligations are judicially enforceable, UNESCO commitments remain politically persuasive (§5.2.3). Together, these dimensions generate a system in which cultural-rights protection depends less on legal hierarchy than on the functional integration of coexisting regimes—a point underscored in pluralist governance theory, which explains how overlapping legal orders interact without a unified supremacy rule[59].

Within this fragmented landscape, states that are simultaneously Parties to the Convention and Members of the Union navigate two overlapping normative orders—one global and cooperative, the other regional and constitutionalised. The absence of an explicit rule of precedence leaves their interaction governed by the principle of "mutual supportiveness" in

[59] Krisch (n 40); Walker (n 40); Braithwaite & Drahos (n 40); Abbott and Snidal (n 40).

Article 20 of the Convention and Article 216(2) TFEU's duty of good faith. Yet, as Nollkaemper, Klabbers, and Tzanakopoulos note in their analyses of multi-level responsibility and treaty implementation, such clauses rarely resolve tensions between coexisting regimes[60]. In practice, this neither hierarchical nor subordinated coexistence produces uncertainty over the territorial reach of legality: does compliance primarily mean alignment with the EU's internal-market disciplines or with UNESCO's global commitment to cultural-rights and equitable access? The tension is not merely normative but operational, shaping the design, eligibility, and interpretation of cultural-creative tax incentives across multiple governance levels.

To illustrate this duality, the section examines two inverse but complementary configurations. **Scenario A—Complying with UNESCO, Confronting EU Law:** a Member State seeks to fulfil its substantive duty under Article 16 of the Convention by granting preferential fiscal treatment to artists and cultural professionals as well as cultural goods and services from developing countries, only to face potential conflict with EU internal-market matrix.

Scenario B—Comply with EU Law while Neglecting Convention Obligations: a Member State adheres to EU market and competition disciplines, thereby preserving internal legality but defaulting on its external duty to promote global cultural equity under the Convention.

Viewed together, these scenarios expose two faces of the same structural pathology. In Scenario A, compliance with the Convention risks EU infringement; in Scenario B, EU compliance legitimises UNESCO neglect. The outcome is a conflict of non-compliance—a condition in which neither regime is inherently contradictory; EU law itself recognises the legitimacy of cultural and developmental differentiation: Articles 167(4), 207(1), 208, and 212 TFEU explicitly allow for the integration of cultural cooperation and preferential treatment toward developing countries within the Union's external action. Yet the mutual implementation of EU and UNESCO is impeded by interpretive isolation, procedural compartmentalisation, and asymmetric enforcement. The resulting SFACs undermine both legal certainty and the effective realisation of cultural-rights commitments.

[60] Nollkaemper (n 9); Klabbers (n 9); Tzanakopoulos (n 46).

The following subsections analyse these dual configurations through the five evaluative variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—to determine whether the UNESCO–EU interaction mitigates or reproduces SFACs in cultural-fiscal governance.

5.3.1 Legal Certainty, Cultural-Rights Enforcement and the Remedial Vacuum

Across both scenarios, legal certainty emerges as a prerequisite and a paradox of cultural-fiscal governance. The Convention conceptualises cultural rights as collective entitlements whose fulfilment depends on predictable and transparent regulatory environments (§5.2.1). Yet when these aspirational and substantive obligations (§5.2.2) meet the layered asymmetries of access, competence, and hierarchy (§5.2.3), legal certainty ceases to operate as a neutral principle. It becomes a site of structural tension—mediating, and often amplifying, the imbalance between the EU's enforceable market disciplines and UNESCO's aspirational commitments to substantive equality and global cultural cooperation.

In Scenario A, a Member State that seeks to honour its substantive obligation under Article 16 of the Convention must navigate a dense matrix of EU internal-market norms: free movement, non-discrimination, cultural mainstreaming, and State-aid control. The design of preferential fiscal treatment for CC operators from developing countries—an expression of global cultural cooperation and substantive equality under UNESCO law—risks reclassification as a selective fiscal advantage or a protectionist measure under Articles 107–108 TFEU, incompatible with EU internal-market. This legal indeterminacy mirrors what scholars of EU constitutionalism identify as the tension between supranational market integration and domestic cultural policy autonomy[61]. Here, beneficiaries are eligible under international law yet vulnerable under EU law. This territorial friction embodies a SFAC in its purest form, where overlapping normative orders generate contradictory compliance incentives and where administrations and operators remain uncertain about the lawful scope of preferential treatment.

By contrast, in Scenario B, legal certainty operates as a shield of exclusion. To avoid conflict with EU law, Member States restrict their cultural-fiscal measures to formally neutral rules that apply equally to all Union operators. Predictability and administrative consistency are

[61] de Búrca (n 6); Craig (n 44); Micheau (n 57).

preserved, but the substantive dimension of cultural rights is effaced. EU institutions reinforce this logic: neither DG COMP nor DG TAXUD interprets Article 16 as self-executing or directly justiciable, while the CJEU's case law has remained silent on the Convention as an interpretive parameter[62]. The result is interpretive exclusion: the duty to provide preferential treatment is acknowledged abstractly yet denied concretely. Legal certainty thereby stabilises administrative inertia—ensuring bureaucratic comfort at the expense of international cultural cooperation.

Both configurations expose the same structural fault line. The problem is not an absolute normative incompatibility between EU and UNESCO specific provisions, but in the absence of interpretive integration. When read coherently, Article 16 of the Convention—requiring preferential treatment through "appropriate institutional and legal frameworks"—aligns with multiple EU Treaty provisions that already accommodate differentiated cultural or developmental treatment: Article 107(3)(d) TFEU (permitting aid to promote culture and heritage conservation); Article 167(4) TFEU (mandating cultural mainstreaming obligation across Union actions); Articles 207(1), 208(2), and 212 TFEU (authorising preferential measures in trade and cooperation toward developing countries)[63]. These provisions articulate convergent teleology that can be cumulatively applied. As Marceau and Hawkins have note in the broader trade-culture debate, a true legal conflict presupposes mutual exclusivity between binding norms, not mere regulatory tension[64]. Yet normative fragmentation, interpretive isolation, and the lack of a recognised hierarchy transform potential coherence into jurisdictional uncertainty overreach—whether legality should be assessed primarily within the regional frame of the EU internal market or the global frame of the Convention's cooperative obligations. The consequence is a floating legality, whose regional and global dimensions remain uncoordinated.

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[62] European Commission, *Directorate-General for Taxation and Customs Union, Management Plan 2015*, Ref Ares(2015)3186093 (29 July 2015) 3–12; Karl P Sauvant, 'International Tax Governance and the European Union' (2018) 21(1) Journal of International Economic Law 45.

[63] The EU's development cooperation policy under Articles 207(1) and 212 TFEU explicitly aims to include sustainable economic, social, and environmental development objectives alongside trade facilitation, with a primary focus on poverty reduction but also broader development goals (Article 208 TFEU). According to the Court in Case C-377/12, *Philippines v Council* EU:C:2014:200, paras 22–43, this includes non-economic objectives embedded in external action.

[64] Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) Journal of World Trade 1081; Gabrielle Marceau and J K Hawkins, 'Panel Requests: What's The Problem?' in Marise Cremona and others (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2012).

The CJEU's jurisprudence illustrates this impasse. In *Haegeman v Belgium* and subsequent decisions (notably *Portugal v Council*, *FIAMM*, and *Racke*), the Court affirmed that international agreements concluded by the Union form an integral part of EU law[65]. However, their provisions may be invoked before domestic or Union courts only if they are unconditional, sufficiently precise, and not dependent on further implementing measures. Scholars such as Craig & de Búrca emphasise that this doctrine, while recognising the legal integration of international treaties, simultaneously preserves the EU's constitutional autonomy[66]. The UNESCO 2005 Convention, dominated by programmatic and cooperative clauses—"shall endeavour," "may encourage," "shall facilitate"—does not meet this precision threshold. Consequently, it occupies an ambiguous position: part of EU law in principle, yet devoid of direct effect in practice. The CJEU's silence on Article 16 of the Convention thus reflects not disregard but the structural limits of justiciability within the EU's hierarchical legal order.

This autonomy doctrine produces a multi-level asymmetry in enforcement. At the national level, courts and fiscal authorities treat the Convention as a policy compass rather than a binding yardstick; no litigation has compelled governments to extend preferential fiscal treatment to developing-country artists or cultural professionals. At the EU level, enforcement is even narrower: infringement proceedings under Article 258 TFEU address only breaches of EU obligations, while failure to implement UNESCO commitments remains legally invisible[67]. The preliminary-reference procedure under Article 267 TFEU likewise cannot be used to contest non-implementation of external conventions[68]. As a result, cultural-rights protection is trapped between a binding but inward-looking EU legality and a global yet aspirational UNESCO legality. This imbalance constitutes a core rights-based SFAC, where the right to cultural participation and equitable access collapses into a rhetorical promise.

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[65] Case 181/73 *R & V Haegeman v Belgian State* ECR 449 (CJEU); Case C-149/96 *Portuguese Republic v Council of the European Union* ECR I-8395 (CJEU).
[66] de Búrca (n 6); Craig (n 44).
[67] The Commission has employed Article 258 TFEU in only a limited number of cases that involve an international agreement, see J Smith, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) 55 Common Market Law Review 1097, 1105; Opinion of AG Sharpston in Case C-619/18 *Commission v Ireland* EU:C:2020:167, paras 38–42.
[68] Case C-61/94 *Commission v Germany* EU:C:1996:313; Stefan Griller, 'Judicial Enforceability of WTO Law in the European Union – Annotation to C-149/96, *Portugal v Council*' (2000) *Journal of International Economic Law* 470; Noreen Burrows, 'Interpreting the International Dairy Agreement' (1997) 22(3) European Law Review 263.

The UNESCO regime itself offers only symbolic or diplomatic remedies. Articles 9 and 19 establish a periodic reporting and peer-review mechanism[69]; Article 25 provides for voluntary conciliation—without compulsory jurisdiction or individual standing[70]. Non-state actors, including those whom Article 16 is meant to empower, lack any access to adjudicatory fora. The Convention's transformative ambition—to recalibrate global asymmetries in cultural exchange through preferential treatment—thus dissolves at the enforcement stage. Institutionally, the diffusion of responsibility across legal orders renders compliance unenforceable; epistemically, cultural rights remain conceptualised as policy aspirations rather than legal entitlements.

Nevertheless, interpretive convergence remains legally available. Under Article 31(3)(c) VCLT, relevant rules of international law must be considered when interpreting treaty provisions. EU and national courts could therefore invoke the Convention as a contextual interpretive source in assessing proportionality and public-interest objectives under Articles 107(3)(d) and 167(4) TFEU—a method consistent with systemic-integration scholarship[71]. Such systemic integration would recast legal certainty from a mechanism of segregation into one of coherence, ensuring that predictability serves both the internal-market rationale and the external cultural-rights mandate.

Operationalising this approach would enhance rights-based enforcement without formal hierarchy. Domestic courts could raise preliminary references (Article 267 TFEU) to prompt CJEU guidance on reconciling market compatibility with cultural diversity (Articles 3(3) and 6(d) TEU; Articles 13 and 22 CFR; Article 167 TFEU) and with the preferential-treatment obligations of Articles 207–212 TFEU. The Commission could adopt interpretive guidance clarifying that compliance with Article 16 of the Convention constitutes evidence of compatibility under the "common interest" test in State-aid assessments. National administrations could issue circulars embedding Convention principles into fiscal decision-making.

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[69] Merkel (n 36) and Christine M Merkel, 'Article 19: Exchange, Analysis, and Dissemination of Information' in von Schorlemer and Stoll (n 13) 481.
[70] Bernier (n 34).
[71] Campbell K McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024); Dennis Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (IBFD 2010); Richard Lyal, 'State Aid, Tax Integration and State Sovereignty' in Rupert Lex (ed) *Research Handbook on European Union Taxation Law* (Edward Elgar 2020) 410; Throsby (n 23); Griller (n 68).

Absent such interpretive bridges, both scenarios remain trapped in dual compliance paralysis: in Scenario A, states fear EU infringement if they implement UNESCO obligations; in Scenario B, they invoke EU legality to justify inaction. The Convention's transformative potential thus collapses at the enforcement interface—not because its norms lack legitimacy or conflict with EU law, but because institutional design forecloses their integration.

The persistence of this pattern confirms the diagnosis developed in §5.2: the fragmentation of cultural-fiscal governance stems less from formal legal conflict than from institutional choices of non-integration. Without pathways for invocation, interpretation, or remedy, the Convention's obligations remain suspended between law and aspiration. Section 5.4 will return to this deficit, proposing reforms aimed at converting the Convention's latent rights into justiciable and operational guarantees within both national and EU frameworks.

5.3.2 Levels of Sovereignty and Functional (Dis)Integration

The interaction between the UNESCO 2005 Convention and the EU's internal-market and State-aid disciplines exposes not only a normative overlap but a deeper layering of sovereignties that operates simultaneously across vertical, horizontal, and relational dimensions and occasionally collide in the governance of cultural-fiscal policies. UNESCO structures sovereignty relationally: Articles 1(h), 2(2) and 5 codify the sovereign right to design and implement cultural policies and measures for the promotion and protection of the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of the Convention. Yet this sovereignty is neither absolute nor solitary: it is conditioned by the Convention's relational structure, which couples national discretion with obligations of human rights, international cooperation, solidarity, and proportionality. This understanding aligns with Chayes & Chayes's theory of sovereignty as participation in cooperative regimes and with Krasner's depiction of sovereignty as a set of contingent authority claims shaped by international commitments[72].

Within the EU, sovereignty becomes vertical and constitutionally mediated: Member States have voluntarily transferred competences to a supranational legal order endowed with primacy

[72] Chayes & Chayes (n 17); Stephen D Krasner, 'Rethinking the Sovereign State Model' (2001) 27 Review of International Studies, JSTOR.

and direct effect (Chapter 4), exemplifying Avi-Yonah's insight that meaningful autonomy is exercised through cooperative structures rather than outside them[73]. When a country is both an EU Member State and a Party to the Convention—as all EU members are—it inhabits dual sovereignty spaces. In the EU order, its autonomy is constrained vertically by EU law and horizontally by obligations owed to third countries through the Convention. In the UNESCO order, its sovereignty is relational—shaped by duties of cooperation toward other Parties, including non-EU States. The result is a structure of shared yet asymmetrical sovereignties, where each level defines the permissible scope of cultural-fiscal action but neither provides a complete framework for implementation.

This dynamic represents the mirror image of Scenario A: there, the fulfilment of the Convention risked a breach of EU law; here, compliance with EU law normalises the neglect of the Convention. Under Article 216(2) TFEU, international agreements concluded by the EU are binding upon both the Union and its Member States. Council Decision 2006/515/EC, which approved the Convention, contains no disconnection clause—hence implementation is a matter of shared legal responsibility. Formally, this dual commitment should foster complementarity: the Convention's cooperative ethos aligns with the Union's external-action framework under Article 167 TFEU, with its development cooperation mandate under Article 208, and with the coherence clause of Article 7. In principle, therefore, the Convention's obligations function as interpretive complements to EU objectives rather than as external constraints. They provide a teleological lens through which EU rules on cultural support, fiscal selectivity, and proportionality could be read in harmony with the Convention's distributive aims.

In practice, however, these obligations within the EU legal order remains attenuated. The Convention lacks direct effect—its provisions are drafted in broad programmatic language requiring further normative elaboration and institutional cooperation, rather than conferring precise, unconditional rights upon individuals. The Court of Justice has consistently held that such agreements may inform interpretation of EU law but cannot be invoked autonomously before national or EU courts (§§4.2-4.4). As a result, the Convention's binding force under Article 216(2) TFEU is formal rather than operative: it integrates the Convention into the EU legal order but without conferring justiciable rights or enforceable obligations—because its provisions lack direct effect and depend upon further institutional elaboration. This doctrinal

[73] Reuven S. Avi-Yonah, 'Sovereignty and International Tax Law' (2017) 35 Florida Tax Review 789.

gap converts what should be a shared competence into a fragmented field of interpretive discretion, where EU institutions remain the ultimate arbiters of compatibility and Member States bear diffuse responsibility for compliance—in such architecture, obligations are vertically shared between the EU and its Member States but without coordinated mechanisms to ensure UNESCO compliance. Such fragmentation reflects the weaknesses identified by Chayes & Chayes regarding regimes without effective institutional follow-through[74]. The resulting dispersion of responsibility—vertical, horizontal, and relational—constitutes an archetypal SFAC: an institutional landscape in which each level possesses partial competence but none provides a complete or coherent framework for operationalising cultural-fiscal commitments.

Within this asymmetric framework, the Commission's centralised authority in State-aid control and internal-market surveillance dominates the field. UNESCO's cooperative norms, by contrast, are treated as soft-law considerations—acknowledged rhetorically but devoid of procedural traction. Member States retain nominal sovereignty to shape their cultural-fiscal instruments, yet the Commission effectively determines legality through proportionality and selectivity analysis, applying economic criteria largely insulated from cultural-diversity considerations[75]. The result is accountability without enforceability: the Union and its Members are jointly bound by the Convention, but neither possesses an institutional mechanism to ensure its realisation[76]. This diffusion of authority constitutes an archetypal SFAC—a sovereignty fragmented into overlapping yet uncoordinated spheres of obligation.

The weakness of compliance mechanisms reveals the functional limits of two foundational EU principles. First, sincere cooperation (Article 4(3) TEU) obliges Member States to facilitate the Union's external action and respect its international commitments, but it operates procedurally rather than substantively when applied to treaties lacking direct effect (Chapter 4). It prevents conduct that undermines EU objectives, yet does not compel proactive fulfilment of UNESCO obligations. Second, subsidiarity—intended to balance competences—has evolved into a shield for discretion rather than a conduit for integration[77]. As Ferri and Craufurd-Smith observe, it legitimises national inertia by framing international cultural obligations as optional policy

[74] Chayes & Chayes (n 17).
[75] Petersmann (n 64); Hadjiyianni (n 53).
[76] Scholars have discussed the shared responsibility of the EU and its Member States in external agreements, see, for example, Eeckhout (n 45); Tomuschat (n 45); Wouters (n 47); Herrmann (n 47).
[77] Schöpgens (n 56).

choices[78]. Within this logic, the Convention's Article 16 duty of preferential treatment is reframed as aspirational soft law, not a binding redistributive commitment. Sovereignty thus becomes a rationale for insulation, not a bridge for cooperation.

The consequence is a systemic failure of functional integration. While normative compatibility between the EU and UNESCO frameworks exists at the textual level—both endorse cultural diversity, participation, and equitable access—their institutional logics remain fragmented. Effective integration would require procedural mechanisms that translate this textual convergence into coordinated governance: joint assessments, inter-ministerial consultation, and the incorporation of Convention benchmarks into State-aid and fiscal-policy evaluations. Articles 9 and 19 of the Convention envisage precisely such mechanisms through reporting, data collection, and participatory governance—creating a continuous feedback loop between fiscal design, cultural policy, and international cooperation[79]. Yet these instruments are rarely internalised within EU or national administrations[80].

As explored earlier, within the EU architecture, competences are segmented along bureaucratic lines (Chapter 4). DG EAC promotes cultural diversity through soft-law programmes such as *Creative Europe*, but holds no authority over fiscal or competition policy. DG COMP and DG TAXUD, conversely, evaluate cultural measures through economic and fiscal parameters devoid of cultural-diversity metrics. At the Member-State level, ministries of culture champion UNESCO commitments but remain detached from the fiscal levers controlled by finance ministries. The Council of Europe has noted the lack of coherent data on tax incentives and notes the disparity in access and transparency between developed and developing countries[81]. Without inter-directorate coordination, the Convention's Article 16 obligations seldom inform compatibility assessments interpretive guidance, or the design of fiscal instruments[82]. The Commission's 2013 *Cinema Communication* illustrates this disjunction: while it provides

[78] Ferri (n 4); Rachael Craufurd-Smith, 'The Cultural Logic of Economic Integration' in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan 2014).
[79] Merkel (n 36 and 69).
[80] UNESCO (n 2).
[81] Council of Europe, *Impact Analysis of Fiscal Incentive Schemes Supporting Film and Audiovisual Production in Europe* (European Audiovisual Observatory 2021).
[82] Jan Loisen, 'The Implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in EU External Relations' in Evangelia Psychogiopoulou, *Cultural Governance and the European Union. Palgrave Studies in European Union Politics*, Palgrave Macmillan, 2015, ch 15, 210; Lilian Richieri Hanania and Helene Ruiz Fabri (eds), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Brill 2014).

elaborate criteria for assessing audiovisual support under Article 107(3)(d) TFEU, it omits any reference to the Convention's positive obligations toward preferential treatment of developing-country operators. Cultural diversity and international cooperation for sustainable development are thereby acknowledged discursively but excluded from the operational grammar of fiscal governance.

This pattern extends to national administrations, where ministries of culture, typically responsible for international cultural cooperation, articulate normative commitments but remain institutionally detached from the design and supervision of tax measures; and ministries of finance administer fiscal instruments, without normative coordination. The result is non-integration by design: institutional structures that entrench procedural isolation and reproduce the SFACs identified earlier—legal compartmentalisation, administrative inertia, and policy incoherence. In this environment, the UNESCO framework's cooperative logic remains a discursive reference.

Ultimately, the central problem is the functional disintegration that pervades multilevel governance of cultural-fiscal policy. The Convention's potential lies not in re-negotiating the hierarchy of legal orders but in institutionalising mutual responsiveness between them. Sovereignty, in this sense, should be reconceived as distributed responsibility—a capacity exercised within a network of interdependent norms rather than a claim to unilateral authority. Where such coordination is absent, SFACs persist and reproduce themselves: cultural ministries remain normatively engaged yet fiscally marginal; EU institutions remain procedurally dominant yet substantively detached from the Convention's redistributive ethos; and UNESCO lacks the coercive leverage to bridge this divide. The challenge, therefore, is not to reconcile sovereignties in abstraction but to integrate them functionally in practice—to construct a governance framework in which legal orders act in concert rather than in parallel. This task constitutes the focus of the next subsection.

5.3.3 Mutual Supportiveness and the Systemic Integration of Cultural Governance

The principle of mutual supportiveness, codified in Article 20 of the 2005 UNESCO Convention, was designed as a structural safeguard against normative fragmentation in international law[83]. It instructs Parties to implement the Convention "in a spirit of mutual supportiveness, complementarity and non-subordination" with other treaties—an interpretive formula that moves beyond the traditional doctrines of *lex specialis* and *lex posterior* toward a systemic model of coherence[84]. Mutual supportiveness presupposes that plural legal orders can coexist through interpretive convergence that maximises their shared objectives, rather than through hierarchical subordination or neutralisation of difference. In doing so, it transforms diversity of regimes into an opportunity for functional complementarity.

Within the EU legal context, this principle provides a potential bridge between the Convention's positive cultural-rights obligations and the Union's internal-market disciplines. Articles 7 and 8 of the Convention, on measures to promote and protect the diversity of cultural expressions, together with Article 14 on international cooperation for sustainable development and Article 16 on preferential treatment for artists, cultural professionals, and cultural goods and services from developing countries; resonates with Article 107(3)(d) TFEU, which recognises culture and heritage promotion as a legitimate justification for State aid. Similarly, Article 208 TFEU requires that development-cooperation objectives inform all EU policies, offering a normative anchor for cumulative application with the Convention's redistributive aims. Read together, these provisions delineate a normative space of mutual reinforcement.

Yet this latent consonance has rarely translated into practice[85]. Across both Scenarios A and B, EU and national authorities exhibit a lack of effective mutual supportiveness—a failure not of legal compatibility but of institutional integration. Administrative and judicial actors treat the Convention as a rhetorical reference, not a functional norm. Tax authorities and ministries of finance continue to define eligibility criteria for cultural-creative tax incentives according to fiscal prudence, market neutrality, and administrative efficiency, without systematic reference to Article 16's redistributive rationale. Their content tests, territorial expenditure thresholds, and credit caps are framed by internal-market logic rather than by the Convention's developmental or equity-based objectives[86]. The European Commission, when applying State-aid rules, operationalises "promotion of culture" through economic-efficiency parameters, while the CJEU—although recognising culture as a legitimate public interest in *Omega* and

[83] Stoll (n 39).
[84] Ibid.
[85] UNESCO (n 2); Hanania and Fabri (n 82).
[86] Guèvremont et at (n 19); see Chapter 4 (§§4.2-4.4).

Commission v France—has never invoked the Convention as a contextual interpretive source[87]. The result is a pattern of institutional invisibility: legal orders that are normatively compatible but procedurally disconnected, generating uncertainty for policymakers and operators navigating between EU and UNESCO obligations.

This disconnection does not constitute a true legal conflict but rather a systemic conflict of non-compliance—a condition in which specific provisions are not contradictory yet remain unrealised due to institutional inertia and interpretive omission. As Marceau observes, genuine legal conflict presupposes mutual exclusivity between provisions[88]; where compatibility exists but implementation fails, the problem lies in procedural inertia, not norm contradiction. The EU's and UNESCO's respective weaknesses reinforce this dysfunction: the EU offers enforcement mechanisms without substantive cultural-rights content—through infringement actions and preliminary references confined to EU law—, while the Convention offers normative aspiration without enforcement capacity, relying on diplomacy and peer review under Article 25. In combination, they produce a dual deficit: UNESCO's procedural weakness meets the EU's procedural rigidity, leaving developing countries and its artists and cultural professional in a remedial vacuum between rhetorical inclusion and juridical exclusion.

This dual deficit embodies the SFACs diagnosed throughout this thesis: authority fragmented across regimes, accountability diluted among actors, and interpretive capacity immobilised by constitutional pluralism. Doctrinally, however, the principle of mutual supportiveness provides the conceptual technique needed to overcome these constraints. Under Article 31(3)(c) VCLT, "any relevant rules of international law applicable in the relations between the parties" must be taken into account in treaty interpretation. The CJEU has employed analogous reasoning in the environmental and human-rights domains—*Intertanko*, *Kadi*, and subsequent jurisprudence—where even non-self-executing international instruments informed the construction of EU norms[89]. By analogy, Article 167(4) TFEU—requiring cultural mainstreaming across all EU action—can function as a procedural conduit through which the Convention's principles of preferential treatment, substantive equality, and cultural cooperation inform proportionality

[87] Case C-36/02 *Omega* ECLI:EU:C:2004:614; Case C-475/98 *Commission v France* ECLI:EU:C:2004:460.
[88] Marceau (n 64).
[89] Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* ECR I-4057, para 65; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECR I-6351, para 285.

and necessity assessments under Articles 107(3)(d) and 208 TFEU. This approach does not subordinate EU law to the Convention but operationalises their shared teleology: transforming interpretive parallelism into systemic integration.

Properly internalised, mutual supportiveness could mitigate SFACs by generating concrete governance effects. It would enhance legal certainty through clearer interpretive interfaces between EU and UNESCO norms; reinforce functional integration by embedding cultural and developmental commitments within fiscal and competition assessments; and strengthen accountability by legitimising the invocation of Convention principles in administrative and judicial reasoning. It would also temper conditioned sovereignty, reframing external commitments not as constraints but as integral components of domestic and EU-level discretion. In short, mutual supportiveness, if effectively implemented, would evolve from a declaratory principle into a systemic technique of coherence—a method for embedding distributive cultural policy within multilevel governance.

What both scenarios ultimately expose is not a crisis of hierarchy or conflict of provisions but a failure of integration and compliance. The UNESCO 2005 Convention and the EU acquis articulate compatible objectives and principles but not operationalised. The challenge ahead, therefore, is to activate this latent complementarity through concrete interpretive, procedural, and coordination mechanisms capable of transforming compatibility into an operational framework that reduces SFACs across both the EU and UNESCO level.

5.4 UNESCO and EU-level Reforms

The UNESCO 2005 Convention establishes a robust normative framework grounded in cultural rights, international cooperation, and preferential treatment for developing countries. Yet its institutional machinery remains underpowered in the fiscal domain. Reporting mechanisms under Article 9 generate descriptive data but lack reviewability, interpretive authority, or enforcement traction[90]. Article 25, designed for inter-State disputes, is procedurally narrow and excludes CC operators, civil society, and expert review[91]. Article 16, while promising preferential treatment, has not evolved into systematic fiscal practice[92]. The

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[90] Merkel (n 36).
[91] Bernier (n 34).
[92] UNESCO (n 2); Troussard et al (n 27).

result is an accountability vacuum: exclusionary national schemes go unreviewed, EU practice sidelines international obligations, and CC operators—such as *Paul*, *Elizabeth*, and *The Queen's* production—find no procedural channel for redress or interpretive clarity within UNESCO's system.

The political and administrative roots of this underperformance are structural. Parties guard fiscal sovereignty and resist binding oversight, perceiving UNESCO primarily as a normative forum. The Secretariat, though technically equipped, remains politically constrained—limited to information-gathering and facilitation[93]. Reporting by Parties is highly uneven, with fiscal measures underreported or described in vague, non-comparable terms[94]. Meanwhile, the governance environment around culture has evolved. Culture is increasingly recognised as an essential dimension of development cooperation, and soft-law mechanisms across other regimes (OECD, WTO, human rights committees) demonstrate that non-binding instruments can still generate interpretive authority and peer accountability[95]. This shifting landscape provides the momentum and legitimacy for recalibrating UNESCO's procedural capacity without departing from its cooperative ethos.

Each UNESCO- and EU-level reform proposed below addresses a distinct category of SFAC identified in §§5.2–5.3: the absence of interpretive review, the lack of inter-order coordination, and the opacity of preferential treatment. Together, they aim to translate the Convention's latent normative strength into procedural and informational functionality.

A first reform measure should therefore be the revision of Article 25 of the UNESCO 2005 Convention to introduce a soft adjudicatory function as a procedural safeguard, ensuring that exclusionary fiscal practices can be reviewed through advisory opinions and peer-based scrutiny. At present, Article 25 is procedurally narrow and functionally inert; Article 9's reporting mechanism fails to fill this gap, lacking case-specific review, interpretive authority, or remedial capacity necessary to address exclusionary fiscal practices (§§5.2–5.3). A calibrated revision of Article 25 could correct this deficiency without altering the Convention's non-coercive nature or intruding on Parties' cultural-fiscal sovereignty. Had such a mechanism

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[93] Anna Steinkamp, 'Article 24: UNESCO Secretariat', in von Schorlemer and Stoll (n 13) 589.
[94] Merkel (n 36).
[95] Daniel Halberstam, 'Normative Functions of Soft Law in International Tax' (2017) 42 Brooklyn Journal of International Law 563; Hans Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2012) 2 Legisprudence 97.

existed, *Paul*'s exclusion from Mexico's *Pago en Especie* could have been examined against an advisory interpretation of Article 16, compelling authorities to justify why residence, recognised artistic status abroad, and sustained cultural contribution were disregarded. The reform would not transform UNESCO into a tribunal but rather create a structured interpretive mechanism producing advisory opinions, clarifying obligations, and fostering peer accountability. Drawing on practices such as the UN Human Rights Committee's General Comments and the OECD's peer-review system, the revised Article 25 could authorise UNESCO to receive structured communications and advisory requests from Parties, independent experts, and affected stakeholders[96]. Though non-binding, such opinions would carry interpretive authority, elevating the normative weight of Articles 7 and 8 (measures to promote and protect cultural expressions), 14 (cooperation for sustainable development), and 16 (preferential treatment), embedding them within a corpus of reasoned, publicly accessible thematic opinions. To operationalise this function, the Convention's Secretariat could convene an Advisory Panel on Cultural Fiscal Cooperation composed of geographically and disciplinarily diverse experts nominated by Parties and observer entities. By issuing indexed thematic opinions, the Panel would generate interpretive precedents guiding courts, administrative bodies, and treaty negotiators on the Convention's fiscal implications. These opinions would reduce fragmentation, enhance transparency, and exert reputational and procedural pressure on Parties to justify or adjust exclusionary practices inconsistent with the Convention's objectives.

A second reform measure should involve the creation of a UNESCO–EU Joint Interpretive Committee on Preferential Treatment (JIC-PT) embedding a cooperative governance benchmark, inter-order dialogue and shared interpretive responsibility between supranational and multilateral institutions. The JIC-PT would not adjudicate disputes or issue binding rulings; rather, it would operate as a structured governance mechanism promoting interpretive convergence, procedural transparency, and policy coherence between the UNESCO and EU legal orders. Its threefold mandate would be: (i) to produce authoritative interpretive guidance on the application of Article 16 within the EU context; (ii) to institutionalise cooperation

[96] *United Nations General Assembly, Resolution 54/160: Human Rights and Cultural Diversity* UN Doc A/RES/54/160 (2000); Kasey McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2017) ch 2, 27; Leslie A Pal, 'Standard Setting and International Peer Review: The OECD as a Transnational Policy Actor', in Diane Stone, and Kim Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration*, Oxford Handbooks (OUP 2019) ch 28, 491.

between UNESCO bodies and EU directorates on cultural, fiscal, and cultural-trade matters; and (iii) to promote exchange of best practices, peer learning, and coordinated oversight of cultural-creative tax incentive design. Membership would include representatives of DG COMP (State aid), DG EAC (culture), DG TAXUD (fiscal policy), DG INTPA (international cooperation), the UNESCO Intergovernmental Committee, rotating Party delegates, and selected academic and civil-society experts. Its outputs—joint interpretive statements, thematic policy guidelines, and technical briefs—would clarify how preferential treatment obligations align with EU internal market rules, notably regarding eligibility criteria for cultural-creative tax incentives, recognition of non-EU cultural philanthropy, and expenditure-based incentives for audiovisual production. In *Elizabeth*'s case, such a mechanism could have clarified how donations to foreign museums with public-benefit recognition should be treated under EU rules and Convention-based preferential treatment, preventing arbitrary foreclosure of cross-border philanthropy. The JIC-PT would generate value along three axes. Initially, it would promote interpretive convergence by bridging EU legal norms—market integration, fundamental freedoms, cultural diversity, preferential treatment toward developing countries under the TFEU, the EU-CFR, and CJEU jurisprudence—with the Convention's principles of international cultural cooperation for sustainable development and cultural rights. This would reduce legal fragmentation and mitigate the risk of Convention norms being neutralized in EU proceedings. Then, it would enhance procedural transparency by institutionalizing a forum for structured dialogue, giving national authorities, CC operators, and non-EU actors clearer visibility on their rights and obligations under overlapping regimes. Finally, it would advance mutual legitimation by embedding the Convention's preferential treatment norm as a functional interpretive principle within EU law, translating symbolic commitments into operational guidance for competition, fiscal, and development policies. Beyond the EU, the JIC-PT could serve as a replicable model for other regional legal orders—MERCOSUR, the African Union, ASEAN—broadening the Convention's capacity for inter-order coordination[97]. By formalising interpretive dialogue between UNESCO and the EU, the reform transforms the Convention from a symbolic repository of cultural principles into an operational platform mediating legal pluralism in the governance of cultural-creative tax incentives.

[97] Similar as the current EU-CARIFORUM Protocol on Cultural Cooperation concluded in 2008 implementing the Convention by the EU in external relations, see Section 3 of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007.

A third reform measure would introduce a Party notification mechanism under Articles 7, 8, and 16 of the Convention, translating substantive eligibility standards and recognition-equivalency principles into transparency tools requiring states to document how their tax incentives confer preferential treatment and under what conditions equivalency is recognised. Article 9 of the Convention currently requires Parties to report on measures taken to promote and protect the diversity of cultural expressions, yet these reports remain underdeveloped in scope and specificity (§§5.2–5.3). Fiscal instruments are rarely reported and almost never with the institutional clarity needed to assess compliance with the Convention's aims[98]. As a result, Article 16 remains aspirational rather than operational. Its normative force is weakened by the absence of structured, reviewable documentation of implementation. To address this informational and accountability gap, this thesis proposes the creation of a notification mechanism requiring Parties to disclose cultural-creative tax incentives adopted under Articles 7, 8, and 16. Notifications would be triggered whenever a Party introduces a preferential fiscal measure—such as tax-deductions for donations to developing-country cultural organisations or tax-credits for co-production expenditure located in developing countries. Each notification would specify eligibility criteria, procedural safeguards, transparency measures, and the rationale linking the incentive to the Convention's principles of human rights and fundamental freedoms, international solidarity and cooperation, complementarity of economic and cultural aspects of sustainable development, equitable access, and openness and balance (Article 2 of the Convention). This mechanism would not amount to legal review or multilateral approval; fiscal sovereignty would remain intact. Instead, it would serve three governance functions. To start, it would enable cross-border benchmarking through a Registry of Preferential Fiscal Measures, allowing Parties to compare eligibility and safeguard design, fostering institutional reflexivity and policy learning. Such benchmarking is particularly relevant considering the asymmetries and interpretive divergences mapped throughout this research. Then, the notification would generate reputational accountability: underreporting or exclusionary schemes would attract peer and civil-society scrutiny, while inclusive and transparent incentives would gain normative visibility, shaping interpretive practice. Finally, the notification would create a minimum layer of informational certainty for CC operators—particularly in developing countries—by providing verified data as *prima facie* evidence of a Party's intent to align its fiscal policy with Article 16. Structurally, the mechanism could be integrated into the Article 9 reporting cycle through a fiscal annex to each Party's quadrennial

[98] UNESCO (n 2); Guèvremont et at (n 19).

report, thereby embedding cultural-fiscal cooperation within the Convention's monitoring framework.

Implementation of the three reform measures requires careful sequencing. A protocol revising Article 25 could be adopted by the Conference of Parties, establishing an Advisory Panel on Cultural Fiscal Cooperation with balanced geographic representation. The UNESCO–EU Joint Interpretive Committee could be created via a Memorandum of Understanding between the European Commission and the Convention's Intergovernmental Committee, following precedents of UN–EU joint bodies in other sectors. The Article 16 notification mechanism could be incorporated into the existing Article 9 reporting cycle as a fiscal annex detailing eligibility, safeguards, and justifications for preferential treatment. This sequencing reflects political realism: begin with transparency (notifications), proceed to inter-order dialogue (JIC-PT), and culminate in interpretive authority (revised Article 25).

Resistance is foreseeable. Some Parties might fear sovereignty erosion; others may worry about administrative burdens. To mitigate this, each reform is deliberately soft-law in character: advisory opinions rather than binding rulings; notifications rather than approvals; joint statements rather than harmonisation. Yet reputational incentives—visibility in public registries, positive signalling through UNESCO reports, and alignment with EU law—provide a counterweight to reluctance. Piloting could begin, for example, with audiovisual tax incentives linked to co-productions with developing-country partners before expanding to philanthropy and tax-in-lieu schemes.

Indicators of success are measurable. For *Paul*, advisory opinions clarifying that residence and recognised artistic contributions should not be excluded on nationality grounds would provide interpretive support before domestic authorities. For *Elizabeth*, inclusion of her donation scenario in JIC-PT guidance would clarify recognition of foreign DGRs, securing legitimate expectations. For *The Queen*, notifications would generate transparency on how Articles 7, 8, and 16 interact with GBER provisions, reducing the risk of multi-jurisdictional exclusion. Quantitatively, indicators include: number of Parties submitting fiscal notifications; advisory opinions or thematic guidance issued under revised Article 25; frequency of UNESCO 2005 Convention references in EU or national judgments; and increased cross-referencing between UNESCO reports and EU State-aid assessments.

Table 5.2: UNESCO and EU-level Reform Assessment

Reform Proposal	Legal Certainty	Rights-Based Enforcement	Conditioned Sovereignty	Functional Integration	Mutual Supportiveness
Protocol Revising Article 25 *(Procedural Safeguards)*	+	++	++	+	++
Joint Interpretive Committee EU-UNESCO *(Cooperative Governance Benchmarks)*	++	+	+	++	++
Articles 7, 8, 16 Notification Requirement (*Substantive Eligibility Standards* and *Recognition & Equivalency Principles)*	++	+	++	++	+

Scoring[99]

++ = **High normative and functional potential:** The reform strongly advances the relevant criterion. It significantly enhances consistency, transparency, and cross-border coherence; reduces discretion-induced exclusion; and fosters alignment between domestic, EU, and UNESCO obligations. Such reforms exhibit both normative depth and operational viability, with clear pathways for institutional uptake and legal effect.

\+ = **Partial/moderate potential:** The reform shows targeted value in advancing the criterion but remains limited in scope or effect—typically due to its soft-law character, dependency on Parties discretion or lack of binding enforcement. While capable of improving specific dimensions, it lacks either the enforceability, systemic integration, or scale needed to fully realize the criterion.

– = **Limited or no potential under current design:** The reform remains too vague, symbolic, or structurally fragmented to meaningfully advance the criterion. It may replicate existing barriers, generate only rhetorical commitments, or fail to overcome the institutional and normative obstacles that sustain SFACs.

Together, these reforms reposition the 2005 Convention from a static repository of aspirational norms into a dynamic platform of interpretive guidance, peer accountability, and inter-order coordination. Unlike the EU, UNESCO does not regulate national tax incentives through binding oversight; its authority lies in structuring expectations, embedding transparency, and mobilising reputational and cooperative pressure. The proposed protocol revising Article 25

[99] The scoring in this matrix reflects an evaluative synthesis based on the five normative-functional variables. The ratings constitute a structured appraisal of each proposed reform's ability to mitigate SFACs, as analyzed in Chapters 2 through 5. These evaluations are designed to guide both policy design and future assessments by stakeholders engaging with the operationalization of the Convention's fiscal dimensions.

introduces quasi-adjudicative interpretive guidance without encroaching on sovereignty. The Joint Interpretive Committee institutionalises supranational–multilateral dialogue, aligning EU State-aid control with the Convention's cultural-fiscal obligations and preventing international cultural cooperation for sustainable development from being neutralised by market logic. The Articles 7, 8, and 16 notification mechanism closes the informational and accountability gap by making preferential treatment visible, comparable, and procedurally robust. Collectively, these reforms reduce structural barriers to access while preserving sovereignty, reframing UNESCO not as a regulator but as a central node of coordination and legitimacy in the multilevel governance of cultural-creative tax incentives. For *Paul*, *Elizabeth*, and *The Queen*, this recalibration translates into tangible channels of recognition, recourse, and predictability; for the Convention itself, it secures a more structured, reflexive, and accountability-oriented role within the evolving architecture of international cultural-fiscal cooperation.

5.5 Conclusions

This chapter has critically examined the legal and institutional position of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions within national and EU governance frameworks, assessing its potential and limitations as a corrective instrument for mitigating Structural Fiscal Access Constraints (SFACs) in cross-border cultural-creative fiscal ecosystems. The analysis revealed that the Convention occupies a paradoxical position: it is the most comprehensive global framework for promoting and protecting the diversity of cultural expressions, yet its influence over fiscal governance remains normatively under-defined and functionally constrained.

Across national and EU contexts, the inquiry demonstrated that the Convention's obligations—particularly the mandate of preferential treatment under Article 16—retain formal legal weight but limited operational traction. Domestic implementation remains heterogeneous and is frequently subordinated to fiscal discretion or administrative convenience. Some Parties interpret the Convention as a source of soft guidance, while others treat it as peripheral to national development strategies. Consequently, the Convention's normative vocabulary—cooperation, solidarity, and diversity—rarely translates into binding administrative or judicial criteria for eligibility, recognition, or classification in cultural-creative tax incentive schemes. Its normative influence is therefore primarily symbolic, capable of informing policy but seldom of constraining discretion or producing enforceable rights.

At the EU level, this asymmetry is magnified. While the Convention and EU law share convergent objectives—promoting cultural diversity and supporting international cooperation—their institutional architectures remain structurally unequal. EU law benefits from constitutional status, hierarchical remedies, and a fully developed judicial system; the Convention relies instead on peer review, reputational accountability, and voluntary reporting. As a result, normative convergence does not produce functional integration: EU primacy and internal market rules dominate interpretive space, while the Convention's external commitments are relegated to procedural margins. This imbalance produces what may be described as conflicts of non-compliance: not contradictions between norms, but gaps of unrealised obligation where compatibility in principle coexists with ineffectiveness in practice, driven by institutional opacity and fragmented accountability.

The chapter also traced the remedial consequences of this asymmetry. When a Member State acts consistently with the Convention but risks infringing EU State-aid or market disciplines—or conversely, complies with EU compatibility rules while neglecting Article 16 of the Convention—the result is a remedial vacuum. The Convention's dispute-settlement mechanism under Article 25 remains voluntary and inaccessible to non-state actors, while the CJEU does not recognise direct justiciability of Convention-based claims. Cultural-creative operators from developing countries—those most in need of preferential treatment—thus remain legally invisible. The situation is compounded by divided responsibility: under international law, both the EU and its Member States share compliance obligations, yet the allocation of competences diffuses accountability, leaving neither level directly answerable before UNESCO or EU fora. These structural conditions perpetuate SFACs by disabling both enforcement and remedy.

Nonetheless, this diagnosis also delineates a feasible path for reform. The Convention's authority, though non-coercive, can be strengthened through interpretive, procedural, and cooperative innovations that enhance coherence across legal orders. Three complementary reforms were proposed. (i) Doctrinal Integration. UNESCO and the European Commission should jointly elaborate interpretive guidance clarifying the Convention's relevance for cultural-fiscal measures—including State-aid control, tax incentive design, and eligibility criteria. Incorporating references to the Convention within EU soft-law instruments, such as cultural guidelines or the Creative Europe framework, would operationalise the principle of mutual supportiveness and restore normative visibility. (ii) Institutional Coordination.

Establishing a Joint Interpretive Committee would align UNESCO's cultural-rights mandates with the EU's internal-market oversight, providing a forum for pre-litigation dialogue and cooperative standard-setting. Complemented by a Notification Mechanism for Articles 7, 8, and 16, such a structure would close informational gaps, enhance transparency, and convert the principle of preferential treatment into a monitored governance practice. (iii) Procedural Strengthening. A protocol revising Article 25 could introduce quasi-adjudicative advisory opinions, issued at the request of Convention Parties or inter-organ bodies, offering authoritative interpretive guidance without infringing sovereignty. This would inject predictability and accountability into a regime presently dependent on diplomacy and peer persuasion.

Collectively, these reforms reposition the Convention from a static repository of aspirational norms into a dynamic framework for interpretive coordination, peer accountability, and policy learning. Unlike the EU's rule-bound architecture, UNESCO's legitimacy derives from its capacity to structure expectations, embed transparency, and cultivate cooperative pressure. When re-oriented toward these strengths, the Convention can perform a relevant mediating role: aligning cultural policy with fiscal governance while respecting the diversity of national models.

For cultural-creative operators, such recalibration would transform symbolic commitments into tangible channels of recognition, recourse, and predictability. For the EU and its Member States, it would deliver legal and reputational certainty, enhance coherence between internal and external cultural obligations, and reduce litigation risk arising from regime inconsistencies. For the Convention itself, it would consolidate a more structured, reflexive, and accountability-oriented position within the architecture of international cultural-fiscal cooperation.

In sum, the chapter has shown that the UNESCO 2005 Convention's transformative potential lies not in competing with EU law but in complementing it—through mechanisms of systemic interpretation, coordinated implementation, and mutual accountability. By converting aspirational commitments into operational principles, the Convention can fulfil its founding promise: to make the protection and promotion of diversity of cultural expressions not merely a moral aspiration but a functional principle of equitable access and shared sovereignty within the evolving global cultural-creative ecosystem.

Chapter 6
From Fragmentation to Coordination:
A Cultural-Creative Tax Incentive Model

6.1 Introduction

This chapter addresses the fifth sub-question of the thesis: *How can a structured coordination model be developed to reduce SFACs in cultural-creative tax incentives in cross-border situations across multiple levels of governance without displacing state sovereignty or undermining the principles of cultural rights and international cultural cooperation?* Building on the analytical framework developed in Chapter 1 and applied throughout Chapters 2 to 5, the chapter proceeds from the established finding that SFACs cannot be attributed solely to restrictive eligibility criteria, administrative malfunction, or technical deficiencies within individual fiscal schemes. Rather, they are governance outcomes produced by the systemic misalignment of overlapping legal orders—national tax systems, bilateral treaty regimes, European Union internal market law, and the international cultural governance framework anchored in the UNESCO 2005 Convention—whose normative objectives, institutional logics, and modes of implementation are only partially coordinated.

The fragmentation identified in the preceding chapters is therefore structural rather than accidental. It reflects enduring tensions between legal entitlement and administrative discretion, between the distinct rationalities of policy mandates (fiscal, cultural, trade, and development), and between domestic implementation practices and weakly internalised international obligations. While earlier chapters proposed targeted reforms at national, bilateral, EU, and UNESCO levels, those reforms remain largely siloed[1]. Those interventions necessarily operate within the existing institutional architecture and thus remain limited in their capacity to disrupt the conditions under which SFACs are reproduced. They mitigate specific legal, administrative, or institutional constraints, but do not address the procedural and coordinative deficits that allow normative ambiguity at the legal level to translate into operational exclusion and institutional fragmentation across governance layers. This chapter

[1] Chapter 2 (§2.5) national, Chapter 3 (§3.7) bilateral, Chapter 4 (§4.5) EU, Chapter 5 (§5.4) UNESCO.

therefore shifts the analytical focus from isolated regulatory adjustments to the governance architecture through which cultural-fiscal norms are interpreted, aligned, and applied, advancing a coordination model aimed at reducing SFACs by addressing their structural causes rather than their symptoms.

Why Fragmentation Persists—Legal Pluralism as a Structural Condition: The chapter adopts legal pluralism, combined with proceduralisation, as its core analytical framework. This choice is neither descriptive convenience nor theoretical eclecticism. Cultural-fiscal governance operates across overlapping legal orders without a centralised hierarchy capable of resolving conflicts through harmonisation or authoritative adjudication. National tax sovereignty, EU internal-market discipline, and UNESCO cultural-rights commitments each advance legitimate but non-commensurable objectives. None can plausibly claim unconditional priority. Legal pluralist scholarship conceptualises this condition not as a transitional deficiency but as a stable governance environment characterised by partial autonomy, functional interdependence, and negotiated authority[2]. Within such a setting, fragmentation is not anomalous but endemic. Cultural-creative tax incentives in cross-border situations exemplify this condition. They are implemented domestically, constrained by bilateral treaty obligations, conditioned by EU free-movement and State-aid rules, and normatively framed by UNESCO's commitments to cultural rights, cooperation, and preferential treatment. Their legal effects therefore depend on the interaction of multiple regimes rather than on any single normative source. Legal pluralism explains why conflicts persist—but it does not, on its own, explain how predictability, accountability, compliance, or rights-protection can be sustained in the absence of hierarchy. If pluralism were the full story, fragmentation would be analytically inevitable and normatively unmanageable. This is precisely the point at which proceduralisation becomes analytically indispensable.

Why Coordination, Not Harmonisation—Proceduralisation as a Mitigation Strategy: Proceduralisation theory, developed in public law and global governance scholarship, shifts attention from substantive uniformity to the design of decision-making processes[3]. It asks how

[2] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 2015); John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2020) Part III; Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421.

[3] Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018) chs 4-9; Paul Craig, 'Shared Administration and Networks: The European Union Perspective' (2015) 37(3) Legal Issues

transparency, reason-giving, reviewability, information-sharing, and structured coordination can stabilise interactions between legal orders without erasing their autonomy. This move is crucial for cultural-fiscal governance. Harmonisation of tax incentives is politically implausible and normatively undesirable in culturally sensitive domains. Conversely, unstructured deference to domestic discretion has proven insufficient, producing SFACs that undermine legal certainty, restrict access, and hollow out cultural-rights commitments. Procedural coordination occupies the middle ground: it does not dictate outcomes, but disciplines how discretion is exercised, how equivalence is assessed, and how conflicts are managed across governance levels. The combined framework of pluralism and proceduralisation therefore performs three analytical functions: it explains why fragmentation is structurally persistent; it identifies procedural coordination as the most plausible mitigation strategy short of harmonisation; it supplies criteria for critically evaluating coordination mechanisms rather than assuming their legitimacy or effectiveness.

Positioning the CCTIM—A Governance Architecture, Not a New Regime: Against this background, the Cultural-Creative Tax Incentive Model (CCTIM) is introduced not as a new legal regime, nor as a normative solution, but as a procedural coordination architecture designed to mitigate SFACs within an irreducibly pluralist legal environment. Its ambition is deliberately limited. The model does not seek to resolve substantive disagreements about cultural value, redistribution, or tax policy design. Instead, it seeks to reduce the extent to which fragmentation translates into unpredictability, exclusion, and rights-deficit outcomes. Importantly, the chapter does not proceed on the assumption that procedural coordination is inherently benign. Pluralist and critical scholars caution that proceduralisation can entrench power asymmetries, privilege well-resourced administrations, and generate compliance without substantive equity[4]. These risks are particularly acute in cultural-fiscal governance, where developing-country actors and non-institutionalised creators often lack access to administrative fora[5]. The CCTIM is therefore treated as a contingent governance choice, whose legitimacy depends on transparency, inclusiveness, and reviewability.

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of Economic Integration 267, 281; Mariolina Eliantonio, 'Judicial review in an integrated administration: the case of composite procedures' (2014) Review of European Administrative Law, 7(2), 65; Mariolina Eliantonio, 'The Proceduralisation of EU Administration: The Rise of Judicial Review and Accountability Mechanisms' (2016) 22 European Law Journal.

[4] Asif H Qureshi, 'International Tax Administration and the Administrative State: Some Institutional Criteria for Evaluating Procedural Consistency' (2005) International Tax and Public Finance 11(6) 947.

[5] Christine M Merkel, 'Article 9: Information Sharing and Transparency' in Sabine von Schorlemer and Peter-Tobias Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 245; Chapter 5 (UNESCO).

Analytical Commitments and Evaluation Criteria: The CCTIM is anchored in three analytical commitments that guide its institutional design[6]: Interpretive Coordination – requiring courts, tax administrations, and cultural authorities to interpret domestic rules through a multi-level hermeneutic lens that internalises relevant obligations arising from bilateral treaties, EU law, and UNESCO instruments. Institutional Redistribution of Responsibility – addressing the asymmetrical allocation of authority by fostering structured collaboration among fiscal, cultural, and international actors. Procedural Infrastructure – establishing concrete mechanisms (registries, guidance bodies, peer-learning platforms) that translate coordination principles into operational administrative practice. These three analytical commitments are not ends in themselves. They are evaluative lenses through which the model is assessed against the five variables developed throughout the thesis: legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness[7]. The three commitments are operationalised through four modular components: (i) Substantive Eligibility Standards; (ii) Recognition and Equivalency Principles; (iii) Procedural Safeguards; and (iv) Cooperative Governance Benchmarks. Subsequent sections do not promote these components uncritically. Rather, they test whether—and under what conditions—they enhance or undermine the five variables within the pluralist legal environment they seek to navigate.

The chapter proceeds as follows. Section 6.2 introduces the CCTIM as both theoretical and operational anchor, unpacking the conceptual architecture and practical mechanisms through which the Model seeks to address SFACs. Section 6.3 synthesises the conclusions, evaluating the normative, institutional, and practical implications of the CCTIM and reflecting on its contribution to the broader discourse on multi-level cultural governance and fiscal cooperation.

6.2 The Cultural-Creative Tax Incentive Model (CCTIM)

The CCTIM is introduced as a non-binding, procedurally oriented coordination framework, designed to address SFACs within an irreducibly pluralist cultural–fiscal governance environment. It is not advanced as a solution that displaces existing legal regimes, nor as a

[6] The Model's analytical foundation resonates with Braithwaite and Drahos's theory of nodal governance (n 2) Part III, chs 20-26, according to which regulatory order in complex domains does not emerge through hierarchical control but through iterative coordination among multiple nodes—sites of capacity, knowledge, and authority.
[7] Chapter 1 (§1.5) for the general workable definitions of these five variables that were explored across the thesis.

substitute for binding international obligations. Rather, it is proposed as a structured reference framework whose plausibility and legitimacy depend on its capacity to improve coordination, transparency, and accountability across governance levels without undermining fiscal sovereignty or diluting cultural-rights commitments.

The CCTIM's normative ambition is therefore deliberately constrained. It does not seek to harmonise cultural-fiscal substance, redefine national tax bases, or impose uniform eligibility criteria. Instead, it operates at the level of procedural alignment and interpretive coordination, addressing the governance conditions through which cultural-creative tax incentives are designed, applied, and contested in cross-border situations. The central claim tested in this section is not that coordination is inherently desirable, but that—given the structural persistence of fragmentation identified in Chapters 1–5—procedural coordination represents the least intrusive and most institutionally realistic mode of mitigation short of harmonisation.

Formally, the CCTIM is a soft-law construct. Its potential influence does not derive from coercive authority or direct justiciability, but from its capacity to function as a shared interpretive point of reference for policymakers, administrative bodies, and courts. In this respect, it draws inspiration from—but is not equated with—the interpretive role played by instruments such as the OECD, UN, and U.S. Model Tax Conventions and their Commentaries[8]. As international tax scholarship has shown, such instruments acquire practical authority not because they bind states, but because they structure expectations, reduce interpretive variance, and facilitate coordination among autonomous administrations[9]. Their effectiveness, however, is contingent: they succeed only insofar as domestic actors perceive them as legitimate, usable, and compatible with domestic institutional constraints[10].

The relevance of this experience for cultural-fiscal governance lies not in substantive analogy, but in functional logic. In a pluralist legal environment lacking hierarchical ordering, soft frameworks can operate as anchor norms—points of convergence that stabilise interpretation

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[8] Chapter 3 (§3.5).
[9] Allison Christians, 'Hard Law & Soft Law in International Taxation' (2007) 25(2) Wis Int'l LJ 325; David Zaring, 'Informal Procedure, Hard and Soft' (2005) Chicago J Int'l L.
[10] Abbott and Snidal (n 2); Benedict Kingsbury, Nico Krisch & Richard B Stewart, *The Emergence of Global Administrative Law* (CUP 2005) — several chapters (e.g. on monitoring, accountability, the role of epistemic actors) address how global administrative bodies are undermined by asymmetries and the need for rotating / plural oversight.

without collapsing diversity[11]. The CCTIM applies this logic cautiously to the cultural-creative domain, where governance is inherently dispersed, culturally sensitive, and resistant to uniform regulatory solutions. Unlike international tax coordination, however, cultural-fiscal governance engages additional normative dimensions—cultural rights, diversity, and development—that heighten the risks of procedural exclusion and technocratic capture. This makes the evaluation of coordination mechanisms especially critical.

Accordingly, the CCTIM is assessed here not as a neutral technical instrument, but as a normatively loaded governance choice. Its design choices—what is coordinated, by whom, and through which procedures—have direct implications for legal certainty, access to rights, and the distribution of administrative power. The Model's claim to legitimacy therefore depends on whether it can mitigate SFACs without reproducing the very access constraints it seeks to address.

Consistent with the pluralist and procedural framework developed in §6.1, the CCTIM embeds national discretion within a transnationally informed procedural matrix rather than constraining it through substantive rules. Multiple legal and institutional nodes—national administrations, bilateral treaty bodies, EU institutions, and UNESCO mechanisms—retain their autonomy, but are invited to coordinate through shared standards, equivalency principles, and procedural safeguards. Whether this architecture enhances predictability and accountability, or instead risks entrenching administrative complexity and informal hierarchy, is an open question that this section addresses directly.

The analysis proceeds in three steps. Subsection §6.2.1 examines the four modular components of the CCTIM, evaluating their capacity to translate abstract coordination principles into operational governance tools. Subsection §6.2.2 assesses UNESCO's potential institutional role as a facilitative forum for coordination, while critically engaging with the limits of its mandate, authority, and enforcement capacity. Subsection §6.2.3 then interrogates the risks, safeguards, and accountability mechanisms necessary to prevent procedural coordination from

[11] Daniel Halberstam, 'Normative Functions of Soft Law in International Tax' (2017) 42 Brooklyn Journal of International Law 563, 571; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) International and Comparative Law Quarterly 957.

undermining sovereignty, marginalising cultural rights, or insulating administrative discretion from effective review.

Together, these subsections do not presume the success of the CCTIM. They test whether a procedurally oriented coordination model can operate credibly within the pluralist legal environment it seeks to navigate—and whether its contribution lies in reducing fragmentation, or merely reconfiguring it.

6.2.1 The Four Components of the CCTIM

The CCTIM comprises four interdependent components: Substantive Eligibility Standards, Recognition and Equivalency Principles, Procedural Safeguards, and Cooperative Governance Benchmarks. These components are presented as procedural coordination devices whose capacity to mitigate SFACs must be assessed against the five analytical variables developed throughout this thesis. Consistent with the pluralist and procedural framework established in §6.1 (and earlier chapters), each component is evaluated not by reference to normative ambition alone, but by its ability to stabilise expectations, discipline discretion, and facilitate coordination without displacing sovereignty.

Substantive Eligibility Standards: The first component of the CCTIM addresses one of the most persistent sources of SFACs identified throughout this research: the reliance on formalistic and restrictive eligibility criteria that operate through formal legal proxies rather than substantive cultural contribution. As demonstrated in earlier chapters, exclusionary outcomes frequently arise not because applicants lack cultural value or public-interest orientation, but because eligibility is anchored in nationality, incorporation, and territorially bounded expenditure requirements[12]. These criteria function as administratively convenient boundary devices, allowing domestic authorities to delimit fiscal exposure while avoiding engagement with external cultural determinations.

From a pluralist perspective, this fragmentation is neither accidental nor aberrational. Cultural-creative tax incentives exist at the intersection of multiple legal orders—domestic tax law, bilateral tax treaties, EU internal-market and fundamental-rights law, and UNESCO's cultural-

[12] See, for example, Chapter 2 (§§2.2-2.4).

rights framework—none of which enjoys clear hierarchical authority[13]. Eligibility criteria therefore become a privileged site at which administrations can reassert domestic control in the face of overlapping and sometimes competing normative expectations. Proceduralisation theory helps explain why such criteria persist[14]: in the absence of shared interpretive procedures, administrations default to rigid formal categories that minimise discretion, litigation risk, and administrative burden, even where such categories undermine cultural-policy objectives and international commitments.

The CCTIM's Substantive Eligibility Standards intervene precisely at this procedural juncture. Rather than harmonising eligibility definitions or imposing uniform classifications, the Model advances a more modest but analytically consequential proposition: domestic eligibility rules should be interpreted through a multi-level hermeneutic lens that treats recognition by a competent foreign authority as rebuttable evidence of substantive eligibility. This mechanism operationalises the Model's first analytical commitment—Interpretive Coordination—by embedding domestic discretion within a transnational interpretive network spanning bilateral, EU, and UNESCO-level obligations. The central claim is not that foreign determinations are binding, but that they are normatively relevant and cannot be ignored without reasoned justification.

Assessed against the variable of legal certainty, Substantive Eligibility Standards offer conditional but non-trivial gains. Where administrations internalise shared interpretive reference points and engage seriously with foreign recognitions, materially comparable cultural-creative operators are less likely to be treated divergently on purely formal grounds. Predictability improves not because discretion is eliminated, but because it is structured by justificatory expectations. However, pluralist governance theory cautions against assuming convergence[15]. In the absence of robust duties to give reasons, publish interpretive guidance, and allow meaningful review, interpretive openness may itself become a new source of uncertainty, enabling selective deviation under the guise of flexibility. Legal certainty is

[13] See analysis in Chapter 5 (§§5.2-5.3).
[14] Qureshi (n 4); Sabino Cassese, *The Global Polity: Global Dimensions of Democracy and the Rule of Law* (Global Law Press 2012) chs 2-3; Sabino Cassese, *A World Government?* (Global Law Press 2018) ch 3, 109.
[15] See, for example, Yannis Papadopoulos, 'Accountability and Multi-Level Governance', in Mark Bovens, Robert Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) ch 17, 273; Peter L Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010) 251; Zürn (n 3) chs 4-9; Craig (n 3) 281.

therefore enhanced where openness is paired with procedural discipline; without it, the Model risks reproducing the very unpredictability it seeks to mitigate.

The implications for rights-based enforcement are similarly ambivalent. By shifting eligibility assessment away from rigid formal proxies toward substantive cultural contribution, the Model lowers structural barriers faced by non-national artists, transnational organisations, and non-institutionalised creators. This aligns eligibility more closely with principles of non-discrimination and participation in cultural life embedded in EU law and the UNESCO framework. Yet the rights-enhancing effect remains indirect. The Standards do not generate enforceable entitlements; they reshape administrative reasoning. Rights-based enforcement is strengthened insofar as applicants can challenge departures from recognised foreign determinations through accessible review mechanisms. Where such mechanisms are weak or inaccessible—particularly for operators with limited resources—the rights potential of this component remains fragile and unevenly distributed.

From the perspective of sovereignty, Substantive Eligibility Standards exemplify a relational and conditioned exercise of fiscal autonomy. States retain full competence to define cultural priorities and tax design, but are expected to justify exclusions in light of shared external commitments. This reflects cooperative sovereignty accounts in international tax scholarship and interface-based understandings of authority in post-national public law—developed in earlier chapters[16]. Sovereignty is neither displaced nor diluted; it is proceduralised. However, this recalibration is not normatively neutral. Interpretive baselines may be disproportionately shaped by jurisdictions with greater administrative capacity or cultural-export influence, embedding asymmetries within ostensibly cooperative structures. The Model therefore risks reproducing power imbalances unless complemented by safeguards that ensure plural participation and counter-hegemonic visibility.

Functionally, Substantive Eligibility Standards seek to reduce interpretive disjunctions between fiscal administrations, cultural authorities, treaty bodies, and UNESCO-derived principles. By encouraging reliance on external determinations as interpretive inputs, the

[16] See, for example, Chapter 1 (§1.3), Chapter 3 (§3.4.5), Chapter 5 (§5.3.2); Krisch (n 2); Peter B Musgrave, 'Sovereignty, Entitlement, and Cooperation in International Taxation' (2001) Brooklyn Journal of International Law 24, 777; Reuven S. Avi-Yonah, 'Sovereignty and International Tax Law' (2017) 35 Florida Tax Review 789, 810.

Model promotes administrative interoperability without institutional merger. This responds directly to the compartmentalisation diagnosed earlier in the thesis, where fiscal and cultural authorities operate in parallel rather than in dialogue[17]. Yet integration remains contingent[18]. Without supporting procedural infrastructure—shared documentation standards, registries, and channels for consultation—external recognition risks remaining symbolic. Functional integration is therefore not an automatic outcome of interpretive coordination but a dependent variable conditioned on the effective operation of the Model's other components.

Finally, Substantive Eligibility Standards are designed to promote mutual supportiveness between fiscal governance and cultural-rights commitments. By grounding eligibility in shared cultural principles rather than domestic formalism, the Model reduces the likelihood that tax incentives undermine cultural diversity or international cooperation. At the same time, fiscal integrity is preserved through rebuttability, proportionality, and review. Yet mutual supportiveness is not guaranteed. Where fiscal risk aversion dominates administrative reasoning, cultural considerations may be acknowledged rhetorically while marginalised in practice[19]. The Standards therefore test, rather than assume, the capacity of fiscal administrations to internalise cultural commitments as operative norms rather than external policy aspirations.

Taken together, Substantive Eligibility Standards illustrate both the promise and the limits of procedural coordination as a response to structural fragmentation. They enhance legal certainty, functional integration, and mutual supportiveness insofar as discretion is paired with justification, transparency, and review. They preserve sovereignty by conditioning, rather than eliminating, national autonomy. And they strengthen rights-based enforcement indirectly, by reshaping administrative reasoning rather than creating enforceable claims. This component does not resolve eligibility conflicts; it reframes how those conflicts are managed. Whether this reframing reduces SFACs in practice depends on its interaction with the remaining components of the CCTIM—particularly Recognition and Equivalency Principles and Procedural Safeguards—to which the analysis now turns.

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[17] See, for example, Chapter 2 (§§2.2.-2.4), Chapter 3 (§§3.3.-3.5), Chapter 4 (§§4.2-4).
[18] For iterative coordination among dispersed nodes of authority, see Braithwaite and Drahos (n 2).
[19] Chapter 1 (§§1.1.1-1.1.3) and Chapter 2 (§§2.2-2.4), explored cases where policymakers and tax authorities resist open eligibility criteria due to fears of abuse, fiscal indeterminacy, or politicisation of cultural claims.

Recognition and Equivalency Principles: The second component of the CCTIM addresses a structurally distortive feature of cultural-fiscal governance identified consistently throughout this research: the systematic reluctance of national administrations to recognise foreign public-benefit or cultural designations. As demonstrated in earlier chapters, refusals of equivalency frequently rest not on demonstrable substantive divergence, but on jurisdictional distrust, administrative self-containment, or the absence of shared classificatory frameworks[20]. The resulting fragmentation is not merely technical. It undermines the mobility of cultural-creative operators and philanthropic capital, frustrates bilateral and EU non-discrimination commitments, and hollow out UNESCO's cooperative aspirations by rendering foreign cultural status legally invisible in domestic fiscal practice.

From a pluralist perspective, these refusals are structurally intelligible. In a governance environment characterised by overlapping authority without hierarchy, equivalency determinations become a critical site at which administrations can reassert unilateral control. Absent shared procedures for recognising external determinations, domestic authorities default to exclusionary practices that minimise fiscal exposure and administrative risk, even where such practices generate systemic SFACs. Recognition failures thus reflect not legal incompatibility, but institutionalised non-engagement—a pattern that proceduralisation theory identifies as a predictable response to fragmented authority[21].

The CCTIM confronts this dysfunction through a rebuttable presumption of equivalency, under which determinations of public-benefit or cultural eligibility made by a competent foreign authority are treated as valid unless the domestic administration can demonstrate a material divergence from its own standards. Crucially, this presumption does not mandate recognition; it redistributes justificatory responsibility. The normative shift is procedural rather than substantive: the burden moves from applicants—who currently must navigate unfamiliar legal systems and evidentiary regimes—to administrations, which must explain why equivalency cannot be accepted in a given case[22]. This logic reflects Zürn's and Eliantonio's insight that, in multi-level governance, proceduralisation operates as a substitute for hierarchy: transparency

[20] On the importance of equivalency clauses and mutual recognition mechanisms for addressing SFACs, see Chapter 1 (§ 1.1.2), Chapter 2 (§2.3.2) national; Chapter 3 (§3.4) bilateral; Chapter 4 (§4.3.2) EU; Chapter 5 (§5.3.1) UNESCO.

[21] As Krisch and Walker (n 2) argue, authority in overlapping legal orders is legitimate when exercised through reciprocal engagement and transparent justification, not unilateral assertion.

[22] See empirical illustrations in Chapter 2 (§2.3.2) and Chapter 3 (§3.4).

and reason-giving perform the legitimating function that coercive authority cannot[23]. States may deny equivalency where material divergences implicate legitimate public-interests, including fraud prevention, fiscal integrity, or incompatibility with fundamental constitutional values such as equality or secularism[24]. A rejection grounded in such public-interests becomes more defensible before courts or peer-review bodies. Yet, as comparative evidence from competition and tax law shows, broad public-interest exceptions can easily devolve into instruments of protectionism[25].

Assessed through the lens of legal certainty, the presumption of equivalency offers a significant but conditional stabilising effect. Where applicants can reasonably anticipate recognition absent demonstrable divergence, expectations become more predictable and cross-border planning less speculative. However, this benefit is contingent on the articulation of clear criteria for rebuttal. If administrations retain broad discretion to define “material divergence” without transparent standards, equivalency risks becoming formally presumed yet practically hollow[26]. Legal certainty is therefore enhanced where rebuttals are narrowly framed, publicly reasoned, and subject to review. Otherwise, the presumption may obscure rather than eliminate uncertainty, shifting unpredictability from eligibility thresholds to justificatory margins.

Recognition and Equivalency Principles also reshape the terrain of rights-based enforcement. By lowering evidentiary barriers and requiring administrations to justify refusals, the Model strengthens the procedural position of cross-border applicants. Cultural-fiscal entitlements become more contestable, not because equivalency creates enforceable rights, but because it structures the conditions under which denials can be challenged. Rights-based enforcement thus operates indirectly, through reason-giving and reviewability. Yet this effect remains uneven. Applicants with limited access to legal representation or administrative review may still find it difficult to contest refusals, particularly where proportionality assessments involve

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[23] Majone Eliantonio, ‘Judicial Review in an Integrated Administration: The Case of Composite Procedures’ (2014) 7(2) Review of European Administrative Law 65; Zürn (n 3); see also the logic of mutual recognition in EU internal-market law and bilateral treaty practice, extending it to the cultural-fiscal domain, where interpretive coherence has been conspicuously absent as addressed in Chapter 3 (§3.4) bilateral and Chapter 4 (§4.3.2) EU levels.

[24] For example, see *C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* [2006] ECR I-8203, where the CJEU recognised that restrictions to deductibility must be proportionate and justified by legitimate public interests.

[25] Joanne Scott, ‘Mutual Recognition as a Mode of Governance in the Single Market’ (2011) 68 Current Legal Problems 237; Christians (n 9).

[26] For further development on risks and safeguards, see §6.2.3.

complex cultural or fiscal judgments[27]. The rights-enhancing potential of equivalency is therefore dependent on the accessibility and effectiveness of procedural safeguards rather than on the presumption itself.

From a sovereignty perspective, Recognition and Equivalency Principles exemplify the Model's relational conception of authority. States retain the power to deny recognition where legitimate public interests are at stake—fraud prevention, fiscal integrity, or incompatibility with constitutional principles—but are required to justify such denials in light of shared external commitments. Sovereignty is conditioned, not curtailed. This aligns with cooperative sovereignty accounts in international tax scholarship and interface-based understandings of authority in post-national public law, where autonomy is exercised through accountability rather than insulation[28]. However, this conditioning introduces new asymmetries. Administrations with greater technical capacity, normative influence, or reputational capital may shape the contours of "acceptable" equivalency more effectively than smaller or developing jurisdictions. In this sense, equivalency risks re-centralising interpretive authority under the guise of cooperation. The Model acknowledges this risk but does not eliminate it; it merely renders it visible and contestable through proceduralisation[29].

Functionally, the presumption of equivalency seeks to reduce duplication, fragmentation, and administrative isolation by treating foreign determinations as meaningful interpretive inputs rather than external anomalies. Where effectively implemented, this promotes interoperability between tax administrations, cultural authorities, treaty frameworks, and UNESCO-derived norms. Functional integration improves as administrations shift from unilateral reassessment toward coordinated interpretation[30]. Yet integration remains fragile. Without shared documentation standards, registries, or consultative channels, equivalency determinations may still be rejected reflexively or inconsistently. The component's effectiveness therefore depends on its interaction with the Model's procedural infrastructure and cooperative benchmarks. In isolation, equivalency principles risk remaining aspirational; embedded within broader coordination mechanisms, they can recalibrate administrative practice.

[27] Ibid.
[28] Krisch (n 2); Musgrave (n 16); Avi-Yonah (n 16); Chapter 1 (§1.3), Chapter 3 (§3.4.5), Chapter 5 (§5.3.2).
[29] For further development on risks and safeguards, see §6.2.3.
[30] See, for example, Chapter 3 (§3.3.4 and 3.5.4) and Chapter 5 (§5.3.2).

Recognition and Equivalency Principles explicitly operationalise the variable of mutual supportiveness by requiring fiscal authorities to weigh cultural cooperation as an independent normative consideration within proportionality assessments. Fiscal autonomy and cultural rights are not treated as competing claims but as co-constitutive elements of legitimate governance. This represents a significant normative shift: cultural cooperation is no longer merely a background objective but a factor that must be engaged with explicitly when equivalency is denied. Nonetheless, mutual supportiveness is not guaranteed. Broad public-interest exceptions—particularly those framed in terms of fiscal risk or administrative burden—can easily eclipse cultural considerations[31]. Comparative evidence from tax and competition law demonstrates how proportionality tests, if weakly enforced, may legitimise exclusion rather than constrain it[32]. The effectiveness of this component therefore hinges on whether cultural cooperation is treated as a genuine normative weight rather than a rhetorical add-on.

Taken together, Recognition and Equivalency Principles represent a demanding test case for the CCTIM's procedural ambitions. They promise gains in legal certainty, rights-based enforceability, functional integration, and mutual supportiveness, but only under stringent conditions: narrow rebuttability, robust reason-giving, accessible review, and sustained peer scrutiny. They preserve sovereignty by conditioning rather than eliminating discretion, yet expose new power asymmetries inherent in transnational coordination.

Rather than resolving equivalency disputes, this component reframes them. It shifts the focus from whether foreign determinations should be recognised to how refusals are justified, scrutinised, and contested. In doing so, it exemplifies both the potential and the limits of procedural coordination as a response to structural fragmentation. Whether equivalency functions as a genuine conduit for cooperation or devolves into symbolic compliance depends on its entanglement with the remaining components of the CCTIM—particularly Procedural Safeguards, to which the analysis now turns.

[31] For further development on risks and safeguards, see §6.2.3.

[32] Or Brook and Barry Rodger, 'Comparative Report: National Judicial Review of Competition Law Enforcement in the EU and the UK' in Barry Rodger, Or Brook, Maciej Bernatt, Francisco Marcos, Annalies Outhuijse (eds) *Judicial Review of Competition Law Enforcement in the EU Member States and the UK* (Edward Elgar 2022) ch 31 – demonstrate that reasoned justification and proportionality operate as stabilising principles that reconcile local discretion with overarching normative frameworks; Peter Whelan, *Parental Liability in EU Competition Law: A Legitimacy-Focused Approach* (Oxford Law Pro 2023) ch 21, 547 – highlights that accountability arises from transparent, reason-giving processes.

Procedural Safeguards: The third component of the CCTIM—Procedural Safeguards—addresses a recurring source of structural failure identified throughout this thesis: the gap between formally inclusive cultural-creative tax frameworks and their exclusionary administrative operation. As demonstrated across Chapters 1 to 5, SFACs frequently arise not from restrictive statutory design but from opaque procedures, unreasoned discretion, and fragmented decision-making practices. Schemes that are nominally open to foreign applicants—such as donation-deduction regimes or audiovisual tax-credits—often become effectively closed when eligibility decisions are issued without explanation, applied inconsistently, or insulated from meaningful review[33]. Procedural fragility thus operates as a systemic exclusion mechanism, converting discretion into de facto denial.

From a pluralist governance perspective, this pattern is neither accidental nor anomalous. In the absence of hierarchical coordination, administrations exercise authority within bounded institutional rationalities that prioritise fiscal risk management and administrative economy. Where procedural constraints are weak, discretion expands to fill the coordination vacuum. Procedural opacity therefore functions as a structural substitute for substantive exclusion: it allows administrations to preserve formal openness while retaining unilateral control over outcomes. The literature has demonstrated that in transnational settings, proceduralisation replaces hierarchy by creating reviewable expectations that structure discretion through reason-giving rather than coercion[34]. The central ambition of the Procedural Safeguards component is not to eliminate discretion, but to render it visible, reasoned, and contestable within a fragmented legal order.

The CCTIM responds by embedding transparency, predictability, and accountability into the governance cycle of cultural-creative tax incentives[35]. It operationalises the Model's third analytical commitment—Procedural Infrastructure—by translating abstract cultural and fiscal principles into structured expectations of fair process. The safeguards include: publication of interpretive guidance clarifying eligibility standards; predictable timelines for processing applications; a duty to provide written reasons for adverse decisions; access to non-binding advisory opinions from recognised cultural bodies in cases of interpretive uncertainty; and

[33] For the centrality of remedies—especially in enabling implementation of tax incentives across fragmented legal orders, see Chapter 2 (§§2.2-2.4); Chapter 3 (§§3.3-3.6); Chapter 4 (§§4.2-4.4); Chapter 5 (§§5.2 and 5.3).
[34] Eliantonio (n 23); Cassese (n 14).
[35] Literature, such as Ostrom (n 2) and Zürn (n 3) chs 4-9, has shown that in the absence of hierarchical authority, legitimacy must be generated through transparency and participation.

structured inter-ministerial coordination to ensure that fiscal authorities draw on cultural expertise when adjudicating complex claims[36]. Collectively, these mechanisms seek to transform discretion from an opaque administrative privilege into a procedurally disciplined practice.

Evaluated through the lens of legal certainty, Procedural Safeguards offer a significant stabilising effect, but only insofar as they are consistently internalised by administrations. Predictable timelines, published guidance, and reason-giving reduce informational asymmetry and allow applicants to form legitimate expectations about how eligibility criteria will be interpreted. However, proceduralisation does not automatically eliminate uncertainty; it redistributes it. Where guidance is vague, updated irregularly, or selectively applied, procedural openness may generate false confidence rather than genuine predictability[37]. Legal certainty is therefore enhanced not by the existence of safeguards alone, but by their routinised and good-faith application.

Procedural Safeguards also reshape the conditions of rights-based enforcement. They do not create substantive entitlements to tax incentives, but they strengthen the procedural standing of applicants by ensuring that adverse decisions are reasoned and reviewable. This indirect rights effect is particularly significant in the cultural-creative field, where access to incentives often determines the practical feasibility of cross-border participation in cultural life. Nonetheless, enforcement remains uneven. Review mechanisms may be formally available yet practically inaccessible due to cost, complexity, or evidentiary burdens[38]. Proceduralisation thus enhances contestability, but does not guarantee effective remedy—highlighting the dependence of this component on broader administrative justice infrastructures.

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[36] For duties anchored in constitutional principles of due process and good administration, see, for example, Charles T Kotuby Jr, Luke A Sobota, Center for International Legal Education (CILE) University of Pittsburgh School of Law, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017); for interpretive guidance or advisory opinions, see Hans Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2012) 2 Legisprudence 97.
[37] For further development see §6.2.3.
[38] Empirical studies on international tax dispute settlement have shown that procedural predictability lowers compliance costs and increases voluntary cooperation, see, for example, Qureshi (n 4); Brook and Rodger (n 32); Julien Chaisse and Xueliang Ji, "Shaping the Future of Transnational Tax Dispute Settlement: The Path to Mediation" (2023) 14 Colum J Tax L 1; Céline Braumann, "The Settlement of Tax Disputes by the International Court of Justice" (2023) 36(4) Leiden J Int'l L 907.

From a sovereignty perspective, Procedural Safeguards exemplify a shift from unfettered administrative autonomy toward conditioned discretion. States retain full competence over fiscal design and eligibility outcomes, but their exercise of authority is constrained by obligations of transparency, justification, and consistency. Sovereignty is not diminished; it is proceduralised. This recalibration aligns with relational accounts of authority in pluralist systems, where legitimacy derives from accountability rather than insulation[39]. Within international tax governance, analogous effects are observed in the Model Tax Conventions and peer-review frameworks, where soft procedural norms acquire de facto binding force through reputation and administrative expectation[40]. The CCTIM extends this logic into the cultural-fiscal field, constructing a multi-level accountability network that sustain legitimacy across dispersed governance.

Functionally, Procedural Safeguards aim to reduce the compartmentalisation between fiscal and cultural authorities that has characterised the governance failures identified earlier in the thesis. By encouraging inter-ministerial coordination and reliance on cultural expertise, the safeguards seek to align interpretive practices across domains without institutional merger. Where effective, this enhances administrative coherence and reduces contradictory reasoning. However, functional integration remains contingent. Advisory opinions that are routinely ignored, or coordination mechanisms that operate only formally, risk degenerating into symbolic compliance[41]. Without incentives for meaningful engagement, procedural channels may exist without influencing outcomes. The safeguards thus function best as part of a broader ecosystem of accountability—interacting with equivalency principles and cooperative benchmarks—rather than as standalone solutions.

Procedural Safeguards also operationalise the variable of mutual supportiveness by embedding cultural considerations within fiscal decision-making processes. By requiring authorities to engage with cultural expertise and to justify departures from culturally informed guidance, the Model seeks to ensure that fiscal governance does not systematically marginalise cultural-rights commitments. Because participation in cultural life constitutes a right under domestic

[39] For a European context, see, for example, Herwig Hofmann and Alexander Türk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar 2009); the European Parliament, *Tax Incentives and Investments in the EU* (Study No 772636, 2025) highlights features to enhance administrative efficiency and credibility.
[40] Chapter 3 (§3.5); Juliane Kokott, Pasquale Pistone and Robin Miller, 'Public International Law and Tax Law: Taxpayers' Rights' in *The International Law Association's Project on International Tax Law—Phase 1(52)* (2021) 381.
[41] For further development on risks and safeguards, see §6.2.3.

and international law, applicants are entitled not merely to apply for incentives but to expect transparent, reasoned, and fair assessment. As Merkel's commentary on Article 9 of the UNESCO 2005 Convention highlights, information-sharing and transparency are not optional virtues but structural duties necessary to the Convention's legitimacy and effectiveness[42]. In this way, soft procedural norms acquire normative traction through the "duty to consider"—a doctrine widely recognised in comparative administrative jurisprudence whereby decision-makers must take relevant non-binding norms into account in good faith[43]. Yet mutual supportiveness remains fragile. Where fiscal risk aversion dominates administrative reasoning, cultural inputs may be acknowledged procedurally while discounted substantively. Proceduralisation can ensure that cultural considerations are heard, but it cannot guarantee that they will prevail.

Taken together, Procedural Safeguards represent both the most technically developed and the most dependency-laden component of the CCTIM. Their promise lies in their capacity to convert diffuse international laws into administratively actionable expectations, enhancing legal certainty, contestability, and legitimacy without imposing substantive harmonisation. Their limits lie in their reliance on administrative culture, capacity, and review mechanisms that vary significantly across jurisdictions.

Rather than resolving SFACs, Procedural Safeguards reframe them. They shift the analytical focus from whether administrations may exclude to how exclusions are justified, documented, and scrutinised. In doing so, they expose proceduralisation as a governance technique that is neither neutral nor self-executing. Its effectiveness depends on iterative reinforcement through review, peer scrutiny, and cooperative governance structures.

The Procedural Safeguards therefore exemplify the central claim of this thesis: in a pluralist legal order, legitimacy and coordination emerge not from substantive uniformity but from disciplined procedures that render discretion accountable. Whether this procedural discipline produces genuine inclusion or merely formalised exclusion depends on its interaction with the remaining component of the CCTIM—the Cooperative Governance Benchmarks—to which the analysis now turns.

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[42] Merkel (n 5) 245.
[43] Christopher Forsyth, *Judicial Review and the Duty to Consider* (Hart 2016).

Cooperative Governance Benchmarks: The fourth and final component of the CCTIM addresses one of the most pervasive yet least visible sources of SFACs: the absence of sustained, routinised cooperation across the governance levels at which cultural-creative tax incentives operate. As demonstrated throughout this research, national administrations continue to approach cross-border cultural-creative activity as an exceptional phenomenon. Fiscal and cultural authorities operate within compartmentalised mandates, with limited communication, divergent interpretive logics, and little incentive to align decision-making practices[44]. At the bilateral level, treaties frequently affirm cooperation without embedding mechanisms capable of shaping domestic administrative behaviour[45]. At the EU level, cultural-fiscal questions remain fragmented across competing institutional priorities, with cultural cooperation often subordinated to internal-market and competition disciplines[46]. Within UNESCO, cooperation is articulated as a normative commitment, yet remains weakly institutionalised[47]. The cumulative effect is a governance environment in which exclusionary outcomes arise not primarily from deliberate protectionism, but from the absence of cooperative infrastructure capable of translating international cultural commitments into domestic administrative practice.

The Cooperative Governance Benchmarks proposed under the CCTIM seek to respond to this structural deficit. These benchmarks target the systemic conditions under which such determinations are made. The benchmarks articulate procedural expectations for how authorities should interact, learn, and justify their practices across governance levels. They include: (i) joint interpretive platforms—such as bilateral commissions, EU–UNESCO liaison mechanisms, or regional peer-review panels—where administrators and judges can deliberate on contested questions of eligibility and equivalency; (ii) periodic reporting mechanisms, through which states disclose the operation and effects of cultural-creative tax incentives, enabling peer comparison and learning; and (iii) structured stakeholder participation, designed to counteract bureaucratic abstraction by incorporating the lived realities of cultural-creative ecosystems into interpretive guidance.

[44] Chapter 2 (§§2.2-2.4).
[45] Chapter 3 (§§3.3-3.6).
[46] Chapter 4 (§§4.2-4.4).
[47] Chapter 5 (§§5.2-5.3).

From the perspective of legal certainty, Cooperative Governance Benchmarks operate indirectly but potentially with significant systemic effect. By fostering shared interpretive understandings and exposing divergent administrative practices to sustained peer scrutiny, they can attenuate the fragmentation that currently produces unpredictable and often exclusionary outcomes for cultural-creative operators. Legal certainty is enhanced where interpretive convergence narrows the range of administratively plausible outcomes across jurisdictions, even in the absence of formal harmonisation. For applicants, this does not entail uniform results but a more intelligible decision-making environment in which expectations become legible and comparable. This effect, however, is inherently contingent. Cooperative platforms do not generate binding norms; they generate expectations, narratives of good practice, and reputational reference points. Where participation is uneven, reporting cursory, or cooperative outputs ignored in domestic administrative reasoning, convergence remains aspirational rather than operative[48]. Legal certainty therefore depends not on the formal existence of cooperative mechanisms, but on their iterative credibility—on whether cooperative processes are sufficiently embedded, visible, and taken seriously to influence routine administrative discretion. In this sense, certainty emerges as an institutional property rather than a doctrinal guarantee.

In terms of rights-based enforcement, the contribution of cooperative benchmarks is necessarily mediated. They do not create justiciable rights, nor do they directly alter individual administrative decisions. Their rights-enhancing potential lies instead in strengthening the broader accountability ecosystem within which rights claims are articulated, assessed, and adjudicated. Through transparency, peer review, and public deliberation, cooperative benchmarks supply comparative reference points against which administrative discretion can be evaluated by applicants, civil society actors, and courts. Transgovernmental networks such as the International Competition Network (ICN), the OECD's Forum on Harmful Tax Practices, and the Global Forum on Transparency exemplify how dialogue-based systems can produce convergence through persuasion, emulation, and reputational pressure rather than coercion[49]. These networks produce what may be described as soft precedents: non-binding interpretive outputs that national authorities increasingly treat as persuasive guidance in their

[48] For further development on risks and safeguards, see §6.2.3.

[49] OECD, *Forum on Harmful Tax Practices: Peer Review Reports* (OECD Publishing 2019); International Competition Network (ICN), *About the ICN* (2024) https://www.internationalcompetitionnetwork.org/.

domestic reasoning[50]. Adapting this logic to the cultural-fiscal sphere, the Cooperative Governance Benchmarks seek to cultivate analogous "interpretive communities," within which learning, comparison, and public justification progressively narrow the gap between international cultural commitments and domestic administrative practice. Yet this translation is neither automatic nor equitable. Less-resourced administrations and affected cultural-creative operators may lack the capacity to mobilise cooperative outputs effectively, while courts may remain hesitant to rely on soft transnational guidance. Cooperative governance thus enhances the conditions for rights-based contestation without guaranteeing its effectiveness.

The central conceptual contribution of this component lies in its operationalisation of the CCTIM's second analytical commitment: the Institutional Redistribution of Responsibility. Rather than concentrating interpretive authority within any single institution, the benchmarks distribute it horizontally across national, bilateral, regional, and global levels. This reflects the pluralist and polycentric conception of governance advanced by Krisch, Walker, and Ostrom, in which authority is constituted not through hierarchy but through overlapping and interacting sites of decision-making[51]. Coherence, on this view, is not imposed from above but emerges through iterative coordination among dispersed "nodes"—the connective tissue of global regulation described by Braithwaite and Drahos[52]. This redistribution of responsibility is not normatively neutral. It reconfigures where interpretive power is exercised and how accountability is shared. While cooperative fora can mitigate institutional isolation and informational asymmetries, they may also privilege administrations with greater resources, technical expertise, and agenda-setting capacity. Smaller or developing states risk becoming norm-takers rather than norm-shapers within ostensibly horizontal structures. The institutional redistribution of responsibility thus carries an inherent asymmetry risk—one that cooperative design can mitigate through procedural inclusivity and capacity-building, but not eliminate.

Functionally, Cooperative Governance Benchmarks aim to address the compartmentalisation diagnosed throughout the thesis. They create structured channels for consultation and justification that reduce the binary choice currently confronting tax administrations faced with foreign cultural classifications: uncritical acceptance or outright rejection. Cooperative platforms introduce intermediate spaces for deliberation, comparison, and reason-giving,

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[50] Zaring (n 9).
[51] Krisch and Walker (n 2); Ostrom (n 2).
[52] Braithwaite and Drahos (n 2).

thereby lowering uncertainty, administrative friction, and litigation risk. They also facilitate incremental norm development. Through recurring reporting and peer interaction, voluntary practices may gradually crystallise into shared expectations—a process often described as soft convergence[53]. Over time, these expectations can acquire practical authority, shaping administrative reasoning even absent binding law. Yet such functional integration remains fragile. Without sustained political and administrative commitment, cooperative mechanisms risk becoming episodic, symbolic, or decoupled from everyday decision-making.

The Cooperative Governance Benchmarks are also the primary vehicle through which the CCTIM seeks to advance mutual supportiveness between fiscal governance and cultural-rights commitments at a systemic level. By embedding cultural cooperation within routine administrative dialogue, the benchmarks resist the marginalisation of culture as an external or exceptional concern. Reporting and peer require oblige states to articulate how fiscal measures interact with cultural diversity, participation, and international cooperation. These practices align with Raustiala's account of soft convergence, whereby repeated transparency and justification generate normative expectations that exert real influence despite the absence of formal obligation[54]. Sabel and Zeitlin's theory of experimentalist governance similarly demonstrates how recursive reporting, peer review, and revision can produce accountability and learning across multiple levels of authority without hierarchical command[55]. Within EU and international law, scholars such as Schäfer and Raustiala have shown how transparency and deliberation transform voluntary cooperation into structured accountability[56]. This resonates with multi-level governance theory (global, nodal, and polycentric)[57] and reflexive accountability: legitimacy is generated not through centralisation, but through the continuous justification and adaptation of national decisions within transnational deliberative settings[58]. Concerns about confidentiality and data protection—central to any cooperative platform—are addressed through procedural differentiation. The CCTIM benchmarks envisage the exchange of interpretive practices, anonymised case studies, and administrative guidance, rather than

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[53] For redistribute interpretive responsibility, see, for example, Robert O Keohane and Joseph S Nye, *Power and Interdependence* (4th edn, Longman 2012) 189; Qureshi (n 4).
[54] Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 American Journal of International Law 581.
[55] Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 European Law Journal 271.
[56] Armin Schäfer, 'A New Form of Governance? Comparing the Open Method of Coordination to Multilateral Surveillance by the IMF and the OECD' (2006) 13 European Law Journal 19, 28; Raustiala (n 54).
[57] Krisch and Walker (n 2); Braithwaite and Drahos (n 2); Ostrom (n 2).
[58] Zürn (n 3) chs 4-9; Craig (n 3) 281; Qureshi (n 4); Lindseth (n 14).

taxpayer-specific data, consistent with OECD confidentiality standards and the operational logic of the Forum on Tax Administration[59]. Cooperation thus operates at the level of experience and reasoning, not data transfer.

Sovereignty concerns inevitably arise in relation to cooperative governance. As Avi-Yonah has argued, in an interdependent legal order sovereignty is increasingly sustained through cooperation rather than isolation[60]. Legitimacy derives from transparency, responsiveness, and peer evaluation, not from unilateral insulation. The CCTIM's benchmarks embrace this relational conception of sovereignty by relying on non-binding but visible accountability. Reporting obligations are framed as transparency measures rather than legal duties, yet publication generates reputational effects capable of imposing real political costs. Similarly, interpretive guidance, though formally non-binding, may acquire persuasive authority through iterative citation by administrations and courts—a familiar soft-to-hard dynamic in EU and international law[61]. This model nevertheless exposes a core tension: cooperation without enforcement depends on sustained political will. Where that will dissipates, cooperative structures may persist institutionally while losing practical influence. The risk of symbolic compliance—participation without behavioural change—thus remains endemic. This risk can be mitigated, though not eliminated, by embedding the benchmarks within existing monitoring frameworks. At the global level, UNESCO's periodic reporting under the 2005 Convention and the data-gathering functions of the Institute for Statistics can amplify transparency and reputational pressure (§6.2.2)[62]. At the EU level, similar effects can be achieved through Commission Communications and Interpretive Notices, which, although non-binding, structure national discretion and influence judicial reasoning[63]. At the bilateral level, standing interpretive commissions can function as *ex ante* dispute-prevention mechanisms, reducing adversarial escalation while fostering early coordination[64].

Taken together, the Cooperative Governance Benchmarks represent the most explicitly systemic and the most normatively ambitious component of the CCTIM. They do not promise

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[59] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2nd edn, OECD Publishing 2017); OECD, *Forum on Tax Administration: Working Methods* (2022) https://www.oecd.org/tax/forum-on-tax-administration/.
[60] Avi-Yonah (n 16); Chapter 3 (§§3.3.1, 3.4.5, 3.5.3); Chapter 4 (§4.2); Chapter 5 (§5.3.2).
[61] Zaring (n 9); Christians (n 9); Abbott and Snidal (n 2).
[62] UNESCO Institute for Statistics (UIS) https://uis.unesco.org/; Merkel (n 5) 245; Chapter 5 (§5.4).
[63] Chapter 4 (§4.5); see, for example, European Commission, *Notice on the Application of Articles 87 and 88 of the EC Treaty to State Aid in the Form of Guarantees* [2008] OJ C155/10.
[64] Chapter 3 (§§3.6-3.7).

uniform outcomes or immediate reductions in SFACs. Instead, they seek to reshape the governance environment within which cultural-fiscal decisions are made, by embedding coordination, transparency, and learning into administrative practice.

Ultimately, the benchmarks aim not to impose external control but to institutionalise a culture of accountability and interdependence. For cultural-creative operators, this translates into greater predictability of access grounded in substantive contribution and contextual assessment, anchored in shared cultural principles rather than arbitrary categorisation. For states, sovereignty is exercised through cooperation that enhances both legitimacy and administrative efficiency, aligning fiscal decision-making with international principles of cultural rights, fundamental freedoms, proportionality, and cooperation. For the broader cultural-creative ecosystem, the benchmarks situate fiscal measures within an evolving network of mutual recognition, transparency, and shared learning.

Their effectiveness, however, remains conditional. It depends on administrative capacity, political commitment, and interaction with the CCTIM's other components—particularly Procedural Safeguards and Recognition and Equivalency Principles. Absent these supports, cooperation risks remaining rhetorical. With them, Cooperative Governance Benchmarks can function as a stabilising force, progressively aligning domestic practice with international cultural commitments without resorting to hierarchy.

In this sense, the benchmarks crystallise the thesis's central insight: in a pluralist legal order, the mitigation of structural access constraints depends less on substantive harmonisation than on the institutionalisation of accountability, justification, and interdependence. Whether UNESCO can provide an institutional setting capable of sustaining such benchmarks, standards, and safeguards across national, bilateral, regional, and global frameworks is the question to which the analysis now turns in §6.2.2.

6.2.2 Why UNESCO Is the Appropriate Forum

The institutional viability of the CCTIM depends not only on its conceptual coherence but on the existence of a legitimate and capable forum to steward its development, dissemination, and iterative refinement. Structural coordination cannot occur in a normative vacuum: it requires an institutional *locus* that commands trust and normative legitimacy; possesses sufficient procedural flexibility to accommodate cultural-fiscal logics from multi-relational systems; and operational capacity to operates through mechanisms that promote convergence without coercion. In this sense, the CCTIM's feasibility turns on finding a forum that can sustain the three analytical commitments outlined in Section 6.1—Interpretive Coordination, Institutional Redistribution of Responsibility, and Procedural Infrastructure—without provoking sovereignty-based resistance or duplicating existing regimes.

At first glance, the EU might appear a plausible candidate. Its dense legal order, administrative capacity, and regulatory sophistication provide a ready-made framework for cultural-fiscal governance. Yet, as Chapters 4 and 5 demonstrated, the EU's epistemic architecture is anchored in market-integration rationality. Cultural-creative tax incentives are assessed through the lens of competition and State-aid control, which reduces cultural cooperation to an exception within an otherwise economic *calculus*[65]. This constrains the interpretive flexibility necessary for cross-border cultural participation and undermines the Interpretive Coordination the CCTIM requires. Moreover, the EU's reliance on binding legislation and judicial enforceability, while a strength in other domains, clashes with the Model's preference for soft coordination and iterative learning—features essential to sustaining legitimacy across diverse jurisdictions. Its geographical scope compounds this limitation: while institutionally sophisticated, it remains regional, encompassing twenty-seven Member States and excluding many countries central to global cultural exchange. The very attributes that give the EU its strength—legal hierarchy, enforcement power, and market coherence—render it normatively incompatible with a pluralist, dialogic model such as the CCTIM.

Other international economic organisations present equally significant shortcomings. The OECD, despite its global influence in tax policy, approaches taxation through the lens of anti-avoidance, base erosion, and efficiency. Its technocratic orientation leaves minimal conceptual space for culture as a legitimate domain of fiscal cooperation[66]. The WTO, rooted in liberalisation and trade neutrality, has historically subordinated cultural diversity to market access, as shown by the contentious treatment of audiovisual services under the GATS[67]. WIPO, though culturally adjacent, remains confined to intellectual property protection and

[65] Chapter 4 (§§4.2-4.4); Chapter 5 (§§5.2-5.3).
[66] OECD, https://www.oecd.org/en/publications.html.
[67] WTO, https://www.wto.ilibrary.org/content/reports.

lacks distributive orientation or fiscal competence[68]. Even recent efforts to establish a UN-level International Tax Organization remain embryonic and disconnected from cultural or developmental mandates[69]. These institutions are not antagonistic to cultural objectives, but their functional mandates and epistemic communities are misaligned with a model that seeks to link fiscal sovereignty to international cultural cooperation. Their governance logics—efficiency, trade neutrality, and regulatory uniformity—cannot easily accommodate the relational sovereignty on which the CCTIM depends.

Creating an entirely new body would not solve these structural tensions. Diplomatically, states' attachment to fiscal sovereignty renders a new treaty-based organisation politically implausible. Institutionally, duplicating existing architectures would generate fragmentation and legitimacy deficits; as experience in global tax and environmental governance shows, institutional credibility cannot be engineered *ex nihilo*.[3] An effective forum must build on an institution already endowed with normative legitimacy in the field of cultural cooperation and capable of supporting the CCTIM's procedural infrastructure without overreach.

Against this backdrop, the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions offers the most suitable institutional home for the CCTIM. Its foundational premise—that Parties both enjoy the sovereign right and bear the cooperative duty to design cultural policies promoting and protecting the diversity of cultural expressions—mirrors precisely the CCTIM's underlying logic of relational and interdependent sovereignty. Where the EU exercises regulatory control and the OECD enforces fiscal orthodoxy, UNESCO's strength lies precisely in not being a regulator or an enforcer. UNESCO operates through normative governance: it shapes expectations, articulates standards, embeds monitoring and reporting obligations, and mobilises reputational accountability rather than legal coercion[70]. This mode of governance directly advances the Model's commitment to Interpretive Coordination (by establishing shared normative reference points), Institutional Redistribution of Responsibility (by engaging multiple administrative and cultural actors in

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[68] WIPO, https://www.wipo.
[69] ITO, https://www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html.
[70] As explored in Chapters 4 and 5, unlike the EU, UNESCO does not impose binding legal disciplines on Parties' cultural or fiscal policies. Its authority derives instead from norm-shaping: it structures expectations, articulates standards, embeds reporting and monitoring obligations, mobilises reputational accountability, creating the procedural scaffolding in which states can voluntarily align their domestic measures with international commitments. This is an institutional advantage: because fiscal sovereignty remains politically and constitutionally sensitive, a non-coercive, soft-law forum can credibly foster cross-border convergence in cultural-fiscal domain.

cooperative implementation), and Procedural Infrastructure (by providing a structured forum for transparency, reporting, and peer learning).

Critically, UNESCO's non-coercive nature is not a design weakness but a condition of feasibility. Cultural-fiscal policy is among the most sovereignty-sensitive areas of domestic governance; only a forum that operates through persuasion, peer review, and reputational mechanisms can elicit sustained engagement. This soft-law modality—often criticised for lacking enforcement—is precisely what allows UNESCO to foster voluntary convergence across heterogeneous fiscal systems. Yet, as later sections acknowledge, this same softness demands careful procedural reinforcement if the CCTIM is not to reproduce the descriptive inertia that has limited previous UNESCO mechanisms.

Articles 12 to 16 of the 2005 Convention provide the textual and normative foundation upon which the CCTIM can be institutionally anchored. Critically, these Articles (analysed in Chapter 5), do more than legitimise the use of cultural-fiscal instruments; they embed them within a relational framework of duties. Article 12 is devoted to international cooperation at any level (bilateral, regional, international), while Article 13 reframes sustainable development to include cultural sustainability, thus situating economic measures within a multidimensional conception of value[71]. Cooperation for development, Articles 14–15, depends less on redistribution and more on reciprocal arrangements that mobilise both financial and normative resources[72]. Article 16 aims to improve cultural exchanges with developing countries, by facilitating the access of artists, cultural professionals, their cultural goods and services to the territory of developed countries[73]. In this sense, the Convention provides the CCTIM not only with textual anchoring but with a normative grammar of reciprocity, consistent with the Model's analytical commitments to Institutional Redistribution of Responsibility and Interpretive Coordination.

[71] Robert Palmer and Kathrin Merkle, 'Article 12: Promotion of International Cooperation' in von Schorlemer and Stoll (n 5) 353; David Throsby, 'Article 13: Integration of Culture in Sustainable Development' in von Schorlemer and Stoll (n 5) 361.
[72] Edna dos Santos-Duisenberg, 'Article 14: Cooperation for Development', in von Schorlemer and Stoll (n 5) 371; Jens Kare Rasmussen and Laura Gomez Bustos, 'Article 15: Collaborative Attangements', in von Schorlemer and Stoll (n 5) 393.
[73] Xavier Troussard, Valérie Panis-Cendrowicz and Julien Guerrier, 'Article 16: Preferential Treatment for Developing Countries' in von Schorlemer and Stoll (n 5) 405.

Yet, textual anchoring alone is insufficient. States comply not merely because they have consented to an instrument but because compliance yields visible benefits—political, administrative, and reputational. The UNESCO global reports and the 2024 Reflection Group on Article 16 confirm that participation in UNESCO's monitoring cycles enhances a state's cultural-policy visibility and international standing[74]. For finance ministries, the CCTIM's procedural design offers concrete administrative dividends: presumptions of recognition and shared interpretive templates reduce audit burdens, litigation, and uncertainty, aligning with Lang's and Narotzki's analyses of international tax coordination as an exercise in efficiency through cooperation[75]. For cultural ministries, the Model provides normative leverage in domestic negotiations, allowing them to invoke UNESCO-endorsed standards to counterbalance fiscal scepticism—a form of functional integration that redistributes interpretive power across sectors.

This interaction between normative legitimacy and administrative utility mirrors what Brewster conceptualises as the reputational theory of compliance: states internalise norms that enhance their credibility and predictability in transnational regimes[76]. Berry and Berry's model of policy diffusion complements this logic, showing that once a small group of early adopters demonstrate measurable benefits, soft coordination can generate emulative dynamics that transform voluntary standards into quasi-customary expectations[77]. Applied to the CCTIM, these insights imply that UNESCO's cooperative and reputational mechanisms—peer review, transparency, and reporting—can convert cultural-fiscal coordination from a normative aspiration into a self-reinforcing governance process.

Nonetheless, the same soft-law character that facilitates participation also carries structural risks. As Palmer and Merkle note, the Convention's cooperative duties often remain aspirational because of weak enforcement and limited integration into domestic administrative

[74] UNESCO 2005 Convention's global reports: *Re|Shaping Policies for Creativity: Addressing Culture as a Global Public Good* (2022); *Re|shaping Cultural Policies: Advancing Creativity for Development, 2005 Convention Global Report* (2018); *Reflection Group on the Implementation of Article 16 on: Preferential Treatment for Developing Countries*, *Preliminary Proposals*, Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, 17th Paris, 2024, DCE/24/17.IGC/9 Rev.2.
[75] Michael Lang, 'International Tax Cooperation and Administrative Practice by Tax Authorities' (2016) 22 World Tax Journal 103; Doron Narotzki, 'Tax Treaties in the Wind', 13 Penn St JL & Int'l Aff 85 (2025).
[76] Rachel Brewster, 'Unpacking the State's Reputation' (2009) 50 Harv Int'l L J 231.
[77] Frances Stokes Berry and William D Berry, 'State Lottery Adoptions as Policy Innovations: An Event History Analysis' (1990) 84(2) Am Pol Sci Rev 395.

routines[78]. Without procedural reinforcement—clear reporting templates, peer-learning mechanisms, and monitoring by the Secretariat—the Convention risks reproducing the very fragmentation the CCTIM seeks to overcome. Here, the Model's emphasis on Procedural Infrastructure becomes indispensable: by operationalising Articles 12–16 through concrete mechanisms such as reporting cycles, interpretive guidance, and capacity-building networks, UNESCO could transform declaratory obligations into iterative, reviewable practices.

UNESCO's institutional architecture reinforces its normative suitability for hosting the CCTIM by combining pluralist legitimacy with operational flexibility. The Convention's tripartite structure—the Conference of Parties, the Intergovernmental Committee, and the Secretariat—embodies the multi-level logic of governance on which the Model depends[79]. In line with the CCTIM's commitment to Interpretive Coordination, these bodies collectively mediate between principle and practice, linking international norms to national implementation through iterative, dialogic mechanisms rather than hierarchical control.

The Conference of Parties provides the Convention's highest deliberative forum, capable of setting strategic orientations and adopting operational guidelines[80]. Within the CCTIM framework, it would function as the *locus* of normative endorsement: translating the Model's principles—mutual recognition, procedural safeguards, and cooperative benchmarks—into formally adopted interpretive guidance. By doing so, it would signal a collective understanding of cultural-creative tax incentives as legitimate instruments of cultural cooperation, a step crucial to their international normalisation. Yet, consistent with the pluralist framework articulated by Krisch and Walker, the Conference's authority remains relational rather than coercive: its resolutions derive legitimacy from shared deliberation, not from hierarchy[81]. This form of non-binding, deliberative authority is precisely what enables coordination in sovereignty-sensitive domains such as cultural-fiscal policies.

The Intergovernmental Committee, composed of eighteen rotating Parties, already performs functions central to Institutional Redistribution of Responsibility[82]. Its deliberative and peer-based character makes it uniquely suited to act as a forum for interpretive convergence, mutual

[78] Palmer and Merkle (n 71).
[79] For the operational side of the UNESCO system see https://www.unesco.org/pt.
[80] Sylvia Maus, 'Article 22: Conference of Parties', in von Schorlemer and Stoll (n 5) 555.
[81] Krisch and Walker (n 2).
[82] Roland Bernecker, 'Article 23: Intergovernmental Committee', in von Schorlemer and Stoll (n 5) 571.

review, and soft standard-setting. Through regular sessions and working groups, it could serve as the venue for peer learning and the articulation of interpretive coherence across jurisdictions, facilitating what Zürn calls "reflexive accountability": legitimacy generated through transparency, reason-giving, and iterative justification rather than formal enforcement[83]. By incorporating finance ministries and revenue administrations alongside cultural ministries, the Committee could evolve from a primarily cultural forum into a genuinely cross-sectoral governance node[84]—one that bridges fiscal and cultural expertise and thereby mitigates the siloed decision-making that produces SFACs.

The Secretariat constitutes the Convention's operational core and, under the CCTIM, the primary engine of Procedural Infrastructure. Its formal mandate—coordination, expert consultation, and inter-agency liaison—already positions it to perform orchestration functions[85], but in practice this potential remains under-realised. Three structural constraints explain the gap between formal capacity and practical impact. First, the Convention's intentionally broad discretion means that Article 9 reporting has functioned largely as a descriptive exercise: an inventory of national measures rather than a platform for normative convergence or administrative learning. The Secretariat's compilations, while valuable for documentation, have lacked the mandate or political backing to translate patterns into prescriptive or technical guidance. Second, institutional asymmetry has limited the Secretariat's reach: engagement has historically centred on cultural ministries and civil-society stakeholders, while the decisive actors for tax implementation—finance ministries and revenue authorities—remain peripheral[86]. Advice that is culturally sound but fiscally unintegrated inevitably loses traction within domestic bureaucracies. Third, resource constraints impede sustained engagement with technically complex fields like fiscal policy[87]. Periodic conferences and reporting cycles cannot substitute for the iterative networks and stable technical infrastructures that cross-border cultural-fiscal governance requires.

The CCTIM therefore reimagines the Secretariat's role as that of an orchestrator—a concept drawn from Abbott and Snidal's theory of international organisational orchestration, where indirect steering through agenda-setting, coordination, and information provision substitutes

[83] Zürn (n 3).
[84] Braithwaite and Drahos (n 2).
[85] Anna Steinkamp, 'Article 24: UNESCO Secretariat', in von Schorlemer and Stoll (n 5) 589.
[86] Ibid.
[87] UNESCO Doc CE/07/1.CP/CONF/209/10 Rev of July 2007, 22.

for coercive command[88]. In this model, the Secretariat would leverage its convening legitimacy to curate modular tools and pilot projects that facilitate adoption: templates for rebuttable presumptions of recognition, model administrative circulars, bilateral annexes, and guidance for procedural safeguards. It would convene practitioner networks linking cultural and fiscal officials, national statistical offices, and judicial training academies, thereby institutionalising iterative learning and mutual accountability. This reorientation represents a change in practice rather than in mandate. The Secretariat already possesses the procedural instruments—expert meetings, voluntary funds, and reporting mechanisms—required to sustain such orchestration; what is needed is a recalibration of priorities and the inclusion of fiscal actors in its epistemic community.

~~have constrained the Secretariat's capacity to sustain technically demanding, long-term interventions in cultural-fiscal policy[89]; one-off conferences and reporting cycles are insufficient to build the kinds of inter-agency relationships and technical infrastructures that complex fiscal questions require.~~

This institutional architecture embeds UNESCO within the multi-level governance system envisioned in §6.1: a structure of nested yet autonomous decision centres linked through coordination rather than control. A joint UNESCO–EU liaison platform, or a standing coordination channel between the Secretariat and regional organisations, could ensure horizontal coherence across governance levels without hierarchical subordination[90]. This configuration operationalises the CCTIM's pluralist ethos: instead of centralising authority, it distributes interpretive responsibility across nodes, fostering a form of accountable interdependence. By transforming the Secretariat from a passive repository of reports into an active orchestrator of administrative learning, UNESCO could bridge the divide between cultural commitments and fiscal practice—addressing, rather than reproducing, the institutional fragmentation that sustains SFACs.

Equally important is UNESCO's executive and analytical capacity, particularly through the UNESCO Institute for Statistics (UIS). Within the Convention's ecosystem, the UIS functions as the empirical backbone of evidence-based governance. It currently generates data on sustainable development, cultural employment, international trade in cultural goods and

[88] Abbott and Snidal (n 2).
~~[89] UNESCO Doc CE/07/1.CP/CONF/209/10 Rev of July 2007, 22.~~
[90] Chapter 5, §5.4.

services, culture satellite accounts, and audiovisual industries[91]. Yet, it conspicuously lacks fiscal data concerning cultural-creative tax incentives—a gap that constrains both the visibility and accountability of states' fiscal engagement with cultural cooperation[92].

This absence is not a failure of mandate but a reflection of the methodological and institutional asymmetries between cultural and fiscal data systems. Cultural statistics, developed under frameworks such as UNESCO's Framework for Cultural Statistics (FCS), rely on activity- and occupation-based classifications (e.g. ISIC and CPA codes), designed to measure production, employment, and trade[93]. Fiscal statistics, by contrast, operate under legal-administrative taxonomies, oriented around statutory forms (deductions, credits, exemptions, in-kind measures), fiscal magnitude (revenue forgone), and eligibility modalities (residency, nationality, recognition, procedural obligations). These two epistemic logics—cultural measurement and fiscal administration—rarely intersect. Without systematic crosswalks linking legal tax forms to cultural classifications, comparative evaluation of cultural-fiscal measures remains impossible.

Developing tax-specific cultural datasets therefore faces interlocking constraints—methodological, legal, and political[94]. Methodologically, it requires technical mapping between fiscal categories and cultural activities, identification of common metadata standards, harmonisation of definitions of eligible beneficiaries, and develop crosswalks between ISIC/CPA and national tax laws. This is feasible but technically demanding; it cannot be done without careful pilot testing and the development of standard metadata and definitions. Legally, fiscal data are subject to stringent confidentiality provisions: tax returns and revenue administration records are protected by national secrecy laws and institutional norms that

[91] UNESCO Institute for Statistics (UIS), see https://uis.unesco.org/ - shows the Institute's mandate and current scope, explaining why expanding to fiscal datasets is feasible but not automatic—it requires targeted resourcing and demand from Parties.
[92] The UIS's indicator work on cultural and natural heritage (Sustainable Development Goal - SDG 11.4.1) collects public and private monetary expenditure on heritage, but its metadata explicitly notes that "policies could take the form of fiscal incentives such as tax benefits for donations or sponsorship" and that such policy instruments are not what the indicator measures.
[93] UNESCO's *Framework for Cultural Statistics* (FCS), launched at MODIACULT 2025 (https://www.unesco.org/en/mondiacult), maps cultural activities to ISIC and CPA categories. ISIC stands for the *International Standard Industrial Classification*—a UN-developed system that classifies economic activities in a consistent way across countries. CPA stands for the *Classification of Products by Activity*. It is the EU's statistical classification that categorises goods and services according to the activity in which they are produced.
[94] Interlocking methodological axes emerge repeatedly in OECD, IMF and fiscal transparency research and are particularly relevant to cultural-creative incentives, see, *Tax Expenditures in OECD Countries* (OECD Publishing 2010) https://www.oecd.org/tax/tax-policy/tax-expenditures-in-oecd-countries.htm; IMF, *Fiscal Transparency Handbook* (IMF 2014/2019) and *Fiscal Statistics* (IMF BPM7/2025).

restrict disclosure, particularly to international bodies. Politically, data on tax incentives are sensitive instruments of domestic policy, closely linked to budgetary priorities and distributive choices. As such, administrations may resist disclosing even aggregated data absent robust legal safeguards and demonstrable reciprocal benefit.

In this context, the CCTIM's reliance on the UIS must be anchored in a pragmatic, staged strategy that respects these sensitivities while progressively expanding the UIS's analytical scope[95]. This operational logic reflects the Model's commitment to Procedural Infrastructure: building legitimacy through transparent, incremental, and reviewable processes rather than prescriptive imposition. Initially, methodological harmonisation should focus on a small set of low-cost, high-trust indicators that can be compiled without breaching confidentiality. These might include: (i) the number of approved international beneficiaries (particularly from developing countries); (ii) the range and typology of cultural-creative tax incentives; (iii) the frequency of equivalency recognitions or rejections; and (iv) basic process indicators—average decision times, incidence of appeals, and publication of interpretive guidance. These data points, though modest, establish a foundation for comparability and transparency while avoiding the politically prohibitive demand for microdata.

Once feasibility is demonstrated, Memoranda of Understanding (MOUs) between the UIS, national statistical offices, and revenue administrations should formalise the conditions of cooperation. These instruments—aligned with the CCTIM's principle of Institutional Redistribution of Responsibility—would specify aggregation levels, anonymisation protocols, metadata standards, and confidentiality safeguards, creating a legally secure scaffolding for data exchange. The UIS's role would thus evolve from data collector to coordination hub, harmonising reporting practices and ensuring consistency across jurisdictions without direct access to sensitive fiscal records.

To ensure credibility, this methodological expansion must be matched by targeted resourcing and governance safeguards. A dedicated CCTIM Seed Fund, supported by voluntary contributions or through the International Fund for Cultural Diversity under Article 18 of the

[95] See resources on using administrative data, capacity building and piloting within UN: United Nations Economic Commission for Europe (UNECE), *Using Administrative and Secondary Sources for Official Statistics: A Handbook of Principles and Practices* (UNECE 2011); United Nations Statistics Division (UNSD), *Admin Data Collaborative* (UNSD platform).

Convention, could finance pilot studies, develop classification crosswalks, and provide technical assistance to national counterparts[96]. Early pilot projects—implemented in a coalition of willing states representing diverse administrative capacities—would test methods, refine definitions, and generate proof-of-concept outputs. As in other areas of international governance, demonstration effects matter: successful pilots can create reputational incentives for participation, transforming technical reporting into a norm of good practice.

Critically, trust and confidentiality must remain central. The UIS cannot and should not request access to individual tax records or disaggregated financial data[97]. Instead, a tiered data architecture—combining publicly accessible aggregates with restricted internal datasets under binding confidentiality agreements—can balance transparency with legal compliance[98]. Oversight mechanisms are essential. An independent technical advisory panel, composed of UIS statisticians, revenue-agency representatives, and academic experts, should periodically review methodologies, assess data quality, and recommend improvements. Parallel to this, an oversight subcommittee could monitor adherence to confidentiality protocols, ensuring that the data governance framework itself embodies the transparency and accountability principles that underpin the CCTIM.

This staged, cooperative approach is not merely technocratic; it reflects the deeper theoretical logic of multi-level governance. Institutional innovation in complex domains succeeds when multiple decision centres engage in recursive learning—experimenting, sharing results, and refining standards through iterative feedback[99]. The UIS, under a reconfigured mandate, could thus act as the epistemic interface of the CCTIM, where national fiscal authorities, cultural ministries, and international bodies engage in structured data dialogue rather than hierarchical reporting.

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[96] Roland Bernecker, 'Article 18: 'International Fund for Cultural Diversity', in von Schorlemer and Stoll (n 5) 465.

[97] United Nations Statistical Commission / UN Statistical Papers, 'Sharing Confidential Microdata for Research and Statistical Purposes: Legal and Institutional Arrangements' (UNSD background papers and StatCom materials); Pew Charitable Trusts, *How States Can Gather Better Data for Evaluating Tax Incentives* (June 2018) https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/06/how-states-can-gather-better-data-for-evaluating-tax-incentives — though US-oriented, this policy brief directly discusses how returns and revenue administration records are often protected by confidentiality laws, impeding evaluation.

[98] OECD Centre for Tax Policy and Administration (Seán Kennedy), *The Potential of Tax Microdata for Tax Policy* (OECD Taxation Working Paper No 45, 2019); OECD, *Institutional Arrangements for Access to Confidential Micro-level Data in OECD Countries* (OECD 1998).

[99] Qureshi (n 4); Lindseth (n 14).

Feasibility, however, must be judged soberly. Expanding the UIS portfolio into cultural-fiscal indicators demands sustained political will, inter-ministerial coordination, and financial investment. Without visible support from finance ministries, technical progress will stall. Nonetheless, the comparative advantage of the UIS lies in its established legitimacy as a neutral, capacity-building institution. Unlike the OECD or IMF, it is perceived not as a disciplinary authority but as a facilitator of equitable cooperation—an image that aligns with the CCTIM's ethos of cooperative sovereignty.

If implemented through phased pilots, rigorous confidentiality safeguards, and balanced legal frameworks, the UIS could supply the empirical infrastructure necessary for reflexive cultural-fiscal governance. It would transform descriptive reporting into analytical monitoring, converting scattered national data into a coherent evidence base for policy evaluation and coordination. In doing so, the UIS would not only reinforce UNESCO's procedural and normative legitimacy but also operationalise the CCTIM's broader ambition: to make the governance of cultural-creative tax incentives transparent, accountable, and empirically grounded without undermining the fiscal sovereignty of states.

To operationalise this data strategy, the CCTIM proposes the development of an inventory, presented below as Table 6.1: Cultural-Fiscal Data Dictionary Template. The template serves as a practical tool to standardise how information on cultural-creative tax incentives is collected, classified, and shared across jurisdictions. It transforms abstract reporting obligations into concrete, replicable procedures—linking the Model's commitment to Procedural Infrastructure with UNESCO's capacity for coordinated data governance.

Table 6.1: Cultural-Fiscal Data Dictionary Template

Field	Description/Definition	Values/Format	Metadata/Notes	Legal/Access
Tax Incentive	Unique identifier (ID) for each tax incentive	Alphanumeric (e.g. CX-TI-22-Credit)	Country code, year of enactment	Public field; no confidential risk
Country	State or subnational unit offering the incentive	ISO country code; subnational name	Comparing legal/ administrative	Public field
Year/Amendment	When the incentive came into force and last amendment	YYYY-MM-DD	Longitudinal tracking	Public field
Legal Reference	Statute, regulation, legal source of the incentive	Name + citation + link if available	For verification and legal detail	Public or limited/

Field	Description/Definition	Values/Format	Metadata/Notes	Legal/Access
				depend on source
Instrument Type	Form of the tax incentive	Deduction, credit, in-kind etc.	Format consistent across countries	Public field
Baseline	What would be the normal treatment without the tax incentive	Definition/normal credit & deduction norms	Estimating revenue forgone	Confidential revenue authority input
Eligibility Criteria	Who may use the tax incentive	Visual artists, non-profit orgs, foreign /nationals etc.	Use consistent categories; map sector taxonomy	Public or require verification
Conditions	Conditions based on residency, citizenship, or location of activity/costs	Nationals only, foreign recognised if equivalent etc.	For cross-border eligibility analysis	Legal texts public; records in admin files
Sector / Activity Covered	What cultural sector or activity is covered	Visual arts, philanthropy, audiovisual etc.	Enables sectoral disaggregation	Public field
Cap/Threshold/ Ceiling	Maximum or minimum limits (monetary, percentage, time etc.)	Monetary values; % of tax base; phase-in periods	For fiscal magnitude estimation	Public field; may require revenue data
Requirements	Certifications, reporting, recognition, application process, timeline etc.	Text or coded checklist of procedures	Access; administrative burden	Public field; may require authority input
Estimations	Annual cost to govern; revenue loss due to this tax incentive	Currency amount, methodology note, fiscal year etc.	Evaluating fiscal sustainability	Authority cooperation; aggregate data
Usage / Uptake	Number of beneficiaries and claims; amount claimed	Credit claimed, average per beneficiary etc.	Tracking equity and access	Admin data; possibly confidential
Monitoring Reporting Source	What document or agency provides the data (statute, ministry report)	Source; date; public vs internal document	Ensures traceability and reproducibility	If source is internal, note access level
Data Quality / Confidence Level	Assessment of data's reliability / completeness	High to Low; notes on missing fields / pilot status	Understanding limits; cautious interpretation	Public field; require internal assessment
Phasing Status	Whether the instrument is in pilot phase or full operation	Yes / No; if Yes, pilot start/end dates; scope	Comparing early implementation vs mature phase	Public field; internal during development
Restrictions	Legal restrictions on data disclosure and access, non-public procedures	Confidentiality's statements, access protocols etc.	Assessing public vs restricted parts of dataset	Public limited confidentiality or restrictions

Data Dictionary Template[100]

[100] This Data-Dictionary Template helps make the collection of cultural-fiscal data systematic, transparent, and usable.

Piloting the template in a limited group of states would allow the UIS to test its methodological soundness and legal safeguards. Over time, an anonymised, aggregated dataset—publicly accessible by beneficiary categories while preserving confidentiality through restricted access protocols—could be maintained by UNESCO or the UIS, turning cultural-fiscal transparency into a durable component of international cultural governance.

Ultimately, UNESCO is uniquely positioned to steward the CCTIM. Its mandate affirms culture as a legitimate domain of economic and fiscal cooperation, its institutions provide mechanisms for soft-law governance, and its data infrastructures enable reflexive monitoring. By embedding the CCTIM within UNESCO, the governance of cultural-creative tax incentives can move beyond fragmented discretion toward a more integrated, transparent, and rights-sensitive system. Acknowledging UNESCO's past limitations, the CCTIM explicitly addresses them by converting descriptive reporting into actionable administrative guidance and transforming statistical data into a reflexive monitoring cycle capable of steering incremental reform. This alignment connects existing actors in a coherent framework, translating the abstract commitments of the 2005 Convention into tangible administrative practice.

Yet, any attempt to embed a new governance model within an existing international institution entails risks—of overreach, capture, and normative dilution. The next subsection therefore examines these potential vulnerabilities and the safeguards designed to ensure that the CCTIM strengthens, rather than destabilises, UNESCO's cooperative mandate.

6.2.3 Risks and Safeguards

The viability of the CCTIM ultimately depends on its ability to reconcile three baseline conditions: the preservation of fiscal sovereignty, the protection of cultural rights, and the assurance of institutional accountability. These are not ancillary considerations but prerequisites for legitimacy, feasibility, and uptake. States will not internalise a model that appears to erode core fiscal prerogatives, and no framework can claim authority if it lacks transparency or reviewability. The literature has observed that legitimacy in multi-level governance depends on institutions' ability to reconcile authority with accountability through participatory and transparent procedures[101]. The challenge, therefore, is not to constrain

[101] Kingsbury, Krisch, Stewart (n 10); Abbott and Snidal (n 2); Keohane and Nye (n 53).

sovereignty but to organise it—to design a model that functions as a catalyst for persuasion, learning, and convergence rather than as an instrument of coercion or bureaucratic overreach.

The CCTIM addresses this challenge through a set of interlocking safeguards that embody its three analytical commitments—Interpretive Coordination, Institutional Redistribution of Responsibility, and Procedural Infrastructure.

The first safeguard is the Model's opt-in structure. In international tax governance, voluntariness is a condition of credibility rather than a sign of weakness. Soft-law instruments such as the OECD, UN, and U.S. Model Tax Conventions have demonstrated how non-binding frameworks can generate compliance through coordination by operating as interpretive reference points and facilitating convergence through use, not enforcement[102]. The CCTIM follows this logic. It does not impose obligations but creates interpretive, procedural, and cooperative benchmarks. Adoption becomes rational not because it is mandatory, but because it yields administrative efficiency, reputational capital, and diplomatic reciprocity[103]. Ministries of finance gain predictability and reduced litigation; ministries of culture gain policy leverage and visibility; and CCIs benefit from clearer eligibility. Policy diffusion theory suggests that such modularity facilitates incremental uptake through learning, emulation, and competitive adaptation[104]. In this sense, voluntariness operationalises conditioned sovereignty: states remain autonomous yet coordinate through shared interpretive frameworks.

A second safeguard lies in the establishment of an inclusive, rotating, and epistemically plural oversight mechanism. International institutions often suffer from technocratic capture or regional asymmetry[105]—problems particularly acute in domains where cultural value and fiscal prudence intersect[106]. The CCTIM's legitimacy therefore depends on redistributing interpretive responsibility across a broader epistemic base. Its oversight mechanism should combine fiscal and cultural expertise, balance regional representation, and include structured participation from non-state actors from the CCIs. This plural composition advances two objectives. First, it

[102] Chapter 3, (§3.5).
[103] Zaring (n 9).
[104] Barelli (n 11); Ian Higham, 'Early Adoption of International Policy Innovations: A Theoretical Framework – with Evidence on Business and Human Rights in Colombia and Ecuador' (2024) Review of International Studies.
[105] Kingsbury, Krisch, Stewart (n 10).
[106] Chapter 2 (§§2.2-2.4); Maria O'Brien, *Tax Credits for Cultural Production in Europe: The Irish Example* (Palgrave Macmillan 2025) — includes case study material showing how cultural/audiovisual tax credit policy debates in Ireland are not merely economic but turn on contested definitions of what is "culturally valuable," how "national character" is preserved, etc.

anchors institutional redistribution of responsibility, ensuring that interpretive authority is not monopolised by a single institutional constituency. Second, it enhances accountability through cross-sectoral dialogue: fiscal authorities are compelled to consider cultural rationales, while cultural actors must engage with fiscal constraints. Beyond monitoring, the oversight body should provide technical assistance and peer learning, particularly for low-capacity administrations. This addresses the "capacity trap" that often inhibits smaller or developing states from operationalising complex fiscal instruments[107]. In doing so, the oversight body becomes not a site of constraint but a forum for shared problem-solving—an embodiment of pluralist accountability within cooperative sovereignty.

The third safeguard is procedural transparency—the Model's primary mechanism for generating authority in the absence of coercive enforcement. In soft-law regimes, normative force does not derive from binding command, but from structured deliberation, documentation, and reason-giving that progressively shape administrative expectations and peer evaluation[108]. However, transparency alone does not explain adherence. Its effectiveness depends on the political, economic, and reputational incentives surrounding the regime. The OECD's *Base Erosion and Profit Shifting (BEPS)* project illustrates this conditional dynamic. While BEPS relied formally on non-binding instruments, state adherence was driven by a combination of factors extending well beyond procedural openness[109]. First, BEPS responded to an acute legitimacy crisis in international taxation following public scandals (e.g. LuxLeaks, Panama Papers), which generated domestic political pressure to be seen as "acting" against corporate tax avoidance. Second, participation became strategically rational: non-adherence increasingly carried reputational costs, particularly for states seeking continued access to capital markets, treaty networks, and investment flows. Third, the project was embedded in dense peer-review and monitoring mechanisms—most notably the Inclusive Framework—which transformed transparency into a mechanism of mutual surveillance and comparative assessment. Finally, BEPS benefited from institutional asymmetry: the OECD's technical authority, agenda-setting capacity, and linkage to market access created indirect compliance incentives that compensated for the absence of formal coercion. These factors are critical because they demonstrate that BEPS did not generate authority through transparency alone. Rather, transparency functioned

[107] Zaring (n 9); Christians (n 9).
[108] Abbott and Snidal (n 2).
[109] OECD official website pages and reports about BEPS, illustrate the participatory and procedural integrity underpinning the authority of these soft law outputs, see, for example, https://www.oecd.org/en/topics/policy-issues/base-erosion-and-profit-shifting-beps.html.

as an enabling condition within a broader ecosystem of reputational pressure, economic interdependence, and institutional centrality. Voluntary guidance became de facto standardised because deviation was politically visible, administratively costly, and strategically disadvantageous. Similarly, the European experience with "guided discretion" under the European Securities and Markets Authority (ESMA) illustrates how transparency and stakeholder engagement can legitimise non-binding norms[110]. Unlike BEPS or the EU internal market, cultural-fiscal governance lacks a comparable crisis narrative, market-access leverage, or centralised institutional hub with sanctioning capacity. Transparency within the CCTIM therefore cannot be assumed to generate convergence automatically. Its authority must instead rest on sustained visibility, reason-giving, and the gradual internalisation of justificatory expectations within domestic administrations. For this reason, transparency within the CCTIM is conceived not as a compliance mechanism but as procedural infrastructure—a meta-rule that structures trust, contestation, and review. Each revision of the Model should be accompanied by explanatory memoranda and public consultation reports, clarifying interpretive rationales, options for contextual adaptation, and points of divergence. This documentation does not compel adoption, but it constrains arbitrariness by making departures visible and intelligible. In parallel, UNESCO's Article 9 reporting cycles could be expanded to include a "CCTIM Annex," requiring states to disclose how—if at all—they integrate the Model's principles into domestic law or administration, whether through legislative reform, administrative circulars, or interpretive guidance. While such reporting would remain non-binding, it would generate structured visibility. Domestic stakeholders could scrutinise national choices, while peer states could assess patterns of convergence or resistance through comparative review[111]. Transparency thus operates as a substitute for coercion only in a qualified sense. It does not force compliance, but it transforms persuasion into a disciplined, reviewable practice by exposing administrative reasoning to horizontal and vertical accountability. In the absence of reputational incentives comparable to BEPS, the CCTIM's reliance on transparency must therefore be understood as incremental and fragile—effective only insofar as it is embedded within broader procedural safeguards and cooperative benchmarks capable of sustaining justificatory pressure over time.

[110] Marloes van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law* (Edward Elgar 2021).

[111] Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (UNESCO Publishing 2003), CI/FED/2003/PI/1; Del Federico Lorenzo, Sigrid Hemels, José-Andrés Rozas, and Silvia Giorgi (eds), *Taxation and Cultural Heritage* (IBFD 2021)—this collection includes sections on how countries report / do not report on tax incentives for cultural heritage, and the challenges of measurement, transparency.

A fourth safeguard is sequencing. Attempting to embed the CCTIM wholesale would overburden administrations and trigger sovereignty-based backlash. The literature on experimentalist governance shows that reform in multi-level governance succeeds when change is phased, monitored, and recalibrated[112]. The CCTIM therefore emphasises phased adoption: starting with a UNESCO working group to refine benchmarks; followed by pilot projects—such as bilateral annexes on recognition equivalency or judicial training modules—and culminating in periodic review cycles. Sequencing transforms reform from an event into a process. It distributes the cognitive and administrative load over time, reduces veto power from resistant bureaucracies, and creates opportunities for learning by doing[113]. This iterative process reinforces interpretive coordination, as pilot experiences feed back into revised guidance and updated templates. Incremental diffusion thus becomes a governance method.

The final safeguard concerns the CCTIM's reliance on persuasion rather than coercion. As Abbott and Snidal argue, soft-law instruments derive power from orchestration: they create focal standards, mobilise intermediaries, and harness reputational dynamics to induce compliance[114]. The CCTIM's persuasive strength lies in its ability to reshape domestic cost–benefit calculations. It provides ready-made templates—model statutory clauses, administrative circulars, interpretive protocols—that lower the implementation burden. Besides, it embeds reputational incentives through UNESCO's reporting and peer-review cycles: visible alignment enhances credibility, while non-alignment carries reputational costs. Moreover, it empowers domestic reform coalitions—ministries of culture, civil society, and CCIs—to invoke an international benchmark in domestic policy negotiations. Over time, demonstration effects consolidate legitimacy: as early adopters reap administrative and diplomatic benefits, others follow through emulation. Persuasion is thus not rhetorical but structural—linking normative alignment with administrative efficiency.

These safeguards anchor the architecture through which pluralist governance can function. They ensure that the CCTIM's cooperative ethos does not collapse into symbolic rhetoric or drift into institutional overreach. By aligning voluntariness with transparency, plural oversight with accountability, and persuasion with iterative learning, the safeguards provide the political and procedural scaffolding necessary for sequenced implementation.

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112 For example, Higham (n 104); van Rijsbergen (n 110).
113 Ibid.
114 Abbott and Snidal (n 2); Halberstam (n 11); Gribnau (n 36).

Ultimately, the CCTIM demonstrates that sovereignty, accountability, and cultural rights are not zero-sum. Through calibrated coordination—anchored in interpretive principles, redistributed responsibility, and robust procedural infrastructure—the Model redefines how international institutions can govern sensitive policy domains without coercion. In doing so, it embodies a form of reflexive multilevel governance capable of mitigating the SFACs diagnosed throughout this thesis while remaining faithful to the cooperative spirit of the UNESCO 2005 Convention.

6.3 Conclusions

This chapter has reconceptualised the governance of cultural-creative tax incentives in cross-border situations by shifting the analytical focus from isolated doctrinal conflicts and sector-specific reforms to the structural conditions under which fragmentation persists. Building on the findings of earlier chapters, it has shown that Structural Fiscal Access Constraints (SFACs) are not primarily the product of irreconcilable normative tensions between national, bilateral, supranational, and multilateral regimes. Rather, they arise from cumulative institutional failures: restrictive and inconsistently applied eligibility criteria; opaque and discretionary administrative practices; compartmentalisation between fiscal and cultural authorities; and, most critically, the weak internalisation of international cultural commitments within domestic fiscal administration. What appear, at first sight, as conflicts of principles or provisions are more accurately understood as conflicts of implementation—rooted in governance design rather than normative incompatibility.

Against this diagnosis, the chapter has examined the Cultural-Creative Tax Incentive Model (CCTIM) as a procedural coordination architecture capable of mitigating SFACs within an irreducibly pluralist legal environment. The CCTIM has not been advanced as a new legal regime, nor as a normative solution that resolves substantive disagreement over cultural value, redistribution, or tax policy design. Instead, it has been treated as a contingent governance choice: a framework designed to test whether structured coordination—rather than harmonisation or unstructured deference to domestic discretion—can reduce unpredictability, exclusion, and rights-deficit outcomes without displacing state sovereignty or undermining legitimate cultural-fiscal autonomy.

The analytical contribution of the chapter lies in translating pluralist and proceduralist theories into evaluative criteria for governance design. By anchoring the CCTIM in three analytical commitments—Interpretive Coordination, Institutional Redistribution of Responsibility, and Procedural Infrastructure—the chapter has provided a disciplined framework for assessing coordination mechanisms rather than assuming their legitimacy or effectiveness. These commitments have been operationalised through four modular components—Substantive Eligibility Standards, Recognition and Equivalency Principles, Procedural Safeguards, and Cooperative Governance Benchmarks—each of which has been evaluated against the five variables developed throughout the thesis: legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness.

That evaluation has deliberately avoided celebratory conclusions. The analysis has shown that the CCTIM can enhance legal certainty where interpretive openness is coupled with justificatory discipline and reviewability; that rights-based enforcement is strengthened indirectly through proceduralisation rather than through the creation of new entitlements; that sovereignty is preserved not by insulation but by conditioning discretion within transparent and reciprocal frameworks; and that functional integration and mutual supportiveness depend on sustained institutional cooperation rather than formal commitments alone. In each case, the Model's potential gains are explicitly conditional. Where procedural safeguards are weak, access to review is uneven, or coordination mechanisms become symbolic, the CCTIM risks reproducing—rather than mitigating—the very fragmentation it seeks to address.

The chapter has also underscored the structural risks inherent in procedural coordination. Pluralist and critical scholarship cautions that proceduralisation can entrench power asymmetries, privilege well-resourced administrations, and generate compliance without substantive equity. These risks are particularly acute in cultural-fiscal governance, where developing-country actors and non-institutionalised operators often lack access to administrative fora. The CCTIM therefore does not resolve fragmentation; it reframes how fragmentation is governed. Its legitimacy depends on transparency, inclusiveness, and the availability of meaningful review, rather than on formal adoption or rhetorical alignment.

Situating the CCTIM within the institutional ecosystem of the UNESCO 2005 Convention reflects this cautious approach. UNESCO's non-regulatory yet norm-shaping authority provides a forum capable of hosting procedural coordination without imposing binding harmonisation. Its reporting cycles, peer-review practices, and informational infrastructures offer visibility and reputational accountability rather than coercive enforcement. Anchoring the Model in this context does not guarantee behavioural change, but it creates the conditions under which voluntary convergence may occur incrementally, through transparency, comparison, and reflexive learning.

Pragmatically, the CCTIM consolidates the targeted reforms proposed in earlier chapters—national (§2.5), bilateral (§3.7), EU (§4.5), and UNESCO (§5.4)—into a single coordination architecture. Measures previously developed within siloed legal orders are reconfigured as interlocking mechanisms of interpretive alignment and procedural discipline. National reforms gain external reference points; bilateral mechanisms acquire procedural symmetry; EU initiatives are reconnected to cultural-rights commitments; and UNESCO's soft-law authority gains operational relevance. The originality of the chapter lies not in proposing new reforms, but in integrating existing ones into a coherent analytical and institutional framework capable of sustaining coordination across governance levels.

At a deeper level, the chapter advances an epistemic reorientation. Cultural-creative tax incentives in cross-border situations are not merely domestic statutory instruments; they function as shared transnational legal objects whose effects depend on the interaction of multiple legal orders. What impedes access is less the incompatibility of specific rights, obligations or principles, but because those norms are not embedded in the procedural infrastructures of fiscal administration. By targeting this operational space—between norm and function—the CCTIM illustrates how international cultural commitments can be rendered administratively actionable without collapsing pluralism into hierarchy.

The chapter therefore closes not with a claim of resolution, but with a qualified proposition: reducing SFACs requires that international law speak through the routines, procedures, and justificatory practices of fiscal administration. Whether the CCTIM succeeds in doing so remains contingent on political will, administrative capacity, and sustained institutional engagement. Its value lies in making visible the governance conditions under which coordination is possible—and the risks that arise when those conditions are ignored. Chapter 7 builds on this insight, synthesising the thesis's doctrinal, institutional, and normative findings to reflect on how aligning cultural rights with transnational fiscal governance reshapes the contemporary international legal order.

Chapter 7

Conclusions

7.1 Overview of the Thesis

This thesis examined the legal, administrative, and institutional architecture governing cross-border access to cultural-creative tax incentives, with a particular focus on the exclusionary effects conceptualised as Structural Fiscal Access Constraints (SFACs). Anchored in the field of transnational law and situated at the intersection of cultural rights, international tax law, and global governance, the inquiry investigated how cultural-creative tax incentives—despite their potential to foster international cooperation and cultural mobility—often reproduce or deepen existing inequities, especially for operators in developing countries or from structurally marginalised contexts. Through a multi-level legal analysis across national, bilateral, EU, and UNESCO frameworks, the thesis sought to understand not only why SFACs persist, but how they might be meaningfully mitigated without requiring legal harmonisation or the surrender of fiscal sovereignty.

Structured around six central research questions and seven interlinked chapters, the thesis advanced both a critical diagnosis and a constructive reform agenda. Chapters 1 and 2 established the conceptual foundation, defining SFACs as manifestations of deeper governance fragmentation and introducing the five analytical variables—legal certainty, rights-based enforcement, conditioned sovereignty, functional integration, and mutual supportiveness—as tools for identifying structural barriers through a comparative case-study method. Chapters 3 through 5 analysed the legal anatomy of cultural-creative tax incentives across the bilateral, EU, and UNESCO layers, revealing recurrent misalignments between legal norms and administrative practice, interpretive divergences in eligibility and equivalency standards, and procedural gaps that systematically frustrate cross-border cultural access. Each chapter offered targeted reforms appropriate to its governance level. Yet, taken individually, these interventions proved insufficiently connected, highlighting the need for a framework capable of coordinating across institutional and normative domains.

Chapter 6 addressed this systemic deficit by developing the Cultural-Creative Tax Incentive Model (CCTIM)—a voluntary, multi-level coordination architecture grounded in commitments to interpretive coherence, shared responsibility, and procedural intelligibility. The Model operationalises these commitments through four modular components: Substantive Eligibility Standards, Recognition & Equivalency Principles, Procedural Safeguards, and Cooperative Governance Benchmarks. Rather than imposing uniformity or eroding domestic autonomy, the CCTIM provides a structured pathway for aligning national, bilateral, EU, and UNESCO practices around common interpretive and procedural reference points.

Across its chapters, the thesis advanced a shift from norm-centric analysis—focused on formal commitments—to function-aware analysis, attentive to how entitlements are implemented in practice. It argued that meaningful access to cultural-creative tax incentives cannot be guaranteed by normative affirmations alone, whether expressed in bilateral treaties, EU freedoms and State aid rules, or international cultural rights instruments. Instead, such access depends on institutionally embedded mechanisms that bridge the gap between rights and realisation, eligibility and recognition, and sovereignty and solidarity.

This concluding chapter synthesises those findings, evaluates the proposed reforms, and reflects on the broader implications of the research for transnational legal scholarship, cultural-creative tax policy, and the evolving architecture of international legal cooperation.

7.2 Key Findings

The research conducted in this thesis demonstrates that the exclusionary effects produced by cultural-creative tax incentives in cross-border settings are not primarily caused by explicit legal prohibitions or unavoidable conflicts between legal regimes. Instead, they stem from a constellation of interlocking legal, administrative, and institutional deficits that systematically frustrate access, distort equity, and hinder the realisation of international cultural cooperation for sustainable development. The central insight is that SFACs arise from a structural mismatch between normative aspiration and institutional practice: while national, bilateral, EU, and multilateral frameworks affirm cultural cooperation, preferential treatment, and equitable access, the mechanisms required to implement these commitments remain opaque, discretionary, and unevenly embedded. Four core findings emerged as foundational to the persistence of SFACs.

7.2.1 Fragmented Normativity and Procedural Exclusion

Across governance levels, the thesis documented a proliferation of norms affirming cultural rights, promotion and protection of diversity of cultural expressions, international cooperation, and non-discrimination—from UNESCO's Article 16 on preferential treatment to EU internal market provisions and treaty-based cultural clauses. However, these norms operate in isolation rather than in concert. They are interpreted through different institutional logics, subject to distinct procedural standards, and rarely integrated into a coherent cross-border framework. The result is a persistent norm–function gap: commitments are articulated but not operationalised; entitlements exist in theory but remain procedurally inaccessible. This fragmentation generates uncertainty for cultural-creative operators and undermines the very objectives these instruments seek to advance.

7.2.2 Conditioned Sovereignty and Asymmetric Fiscal Autonomy

The thesis further shows that sovereignty over cultural-creative tax incentives is neither absolute nor exercised in a vacuum. It is conditioned by participation in cooperative regimes at bilateral, regional, and multilateral levels. This does not dissolve sovereignty but reshapes it: states exercise fiscal and cultural autonomy within networks of reciprocal commitments, interpretive expectations, and cooperative duties. Yet this conditioning is uneven. EU Member States face dense and enforceable constraints; bilateral treaty partners operate within negotiated but variable limits; UNESCO Parties commit to broad obligations that lack procedural mechanisms for realisation. These asymmetries affect cultural-creative operators most directly: they confront inconsistent eligibility standards, jurisdictional gaps, and interpretive divergences produced by differently conditioned forms of sovereignty across regimes.

7.2.3 Administrative Gatekeeping and Discretionary Fragmentation

A central finding of this thesis is that the practical operation of cultural-creative tax incentives is determined less by statutory language than by administrative interpretation. Eligibility criteria—relating to nationality, residency, cultural classification, or qualifying expenditure—are routinely shaped by opaque administrative practices, siloed institutional mandates, and case-by-case discretion. Tax administrations, cultural agencies, and foreign-affairs bodies often apply divergent standards without coordination, creating procedural bottlenecks that exclude operators de facto even when they are not disqualified de jure. This discretionary gatekeeping intensifies legal uncertainty, produces inconsistent outcomes, and reinforces systemic inequities, particularly for operators with fewer resources to navigate complex administrative interfaces.

7.2.4 Rights without Remedies—The Structural Absence of Accountability

Finally, the thesis identifies a systemic accountability gap. Even where normative commitments are breached—whether at national, bilateral, EU, or UNESCO level—effective remedial pathways are scarce. Domestic courts often treat international cultural commitments as non-self-executing; EU institutions prioritise internal market rules over external cultural obligations; and UNESCO's mechanisms rely on political dialogue and reputational pressure rather than enforceable remedies. This leaves individuals, organisations, and many Global South states without standing, without recourse, and without any meaningful mechanism to contest exclusionary fiscal practices. The result is a domain in which rights are proclaimed but rarely enforceable, and where accountability is structurally absent.

Taken together, these findings demonstrate that SFACs are not episodic anomalies but systemic features of contemporary cultural-fiscal governance. They arise from the cumulative effect of fragmented normativity, discretionary administration, institutional siloing, and weak accountability. Mitigating these constraints requires more than doctrinal clarification or isolated policy adjustments. It demands a governance model capable of integrating normative commitments with procedural enforceability and inter-institutional coordination across the plural legal orders in which cultural-creative tax incentives operate.

7.3 Evaluating the Reform Architecture: The Promise and Limits of CCTIM

At the centre of this thesis's reform agenda stands the Cultural-Creative Tax Incentive Model (CCTIM), a soft-governance architecture designed to translate dispersed normative commitments into operational practices across fragmented legal regimes. Unlike harmonisation strategies grounded in binding legislation or supranational oversight, the CCTIM seeks coherence through procedural convergence, interpretive consistency, and voluntary institutional coordination. It is constructed as a governance tool for plural legal orders, where cultural rights, tax autonomy, and transnational mobility coexist without a shared hierarchy of norms. This section synthesises the CCTIM's coherence, feasibility, and political traction while acknowledging its limitations. In doing so, it responds directly to the research questions by assessing whether the Model can meaningfully reduce SFACs and under what conditions. The discussion proceeds across three dimensions: structural coherence, institutional feasibility, and political viability.

7.3.1 Structural Coherence and Normative Alignment

The CCTIM directly addresses the legal, administrative, and institutional deficits identified throughout this thesis. It provides a structured yet adaptable framework for embedding cultural considerations into tax policy by proposing shared definitions, equivalency mechanisms, eligibility templates, interpretive guidance, and procedural safeguards. These elements are designed to enhance, rather than diminish, national fiscal autonomy while enabling states to meet cross-border obligations more coherently.

Doctrinally, the Model achieves a high degree of normative alignment. It operationalises core commitments of the UNESCO 2005 Convention—equitable access, cooperation, preferential treatment—without requiring states to undertake formal legal incorporation. It builds on existing soft-law infrastructures, such as Model Tax Conventions, interpretive commentaries, and human-rights guidance, demonstrating that non-binding instruments can shape cross-border expectations and administrative practice.

However, structural coherence does not eliminate all interpretive tension. The CCTIM cannot fully resolve deeper normative conflicts between cultural objectives, tax policy priorities, and broader economic governance tools such as State aid control or national anti-abuse frameworks. It offers coordination tools, but it cannot eliminate the structural pluralism that characterises the governance of cultural-creative tax incentives. Its success therefore lies not in removing normative diversity but in organising it more coherently.

7.3.2 Feasibility and Institutional Pathways

The Model's architecture is deliberately modular. Its components can be adopted incrementally—through bilateral negotiations, national administrative guidelines, EU soft-law instruments, or UNESCO monitoring processes. This flexibility enhances political viability and accommodates significant variation in states' administrative capacities and cultural policy priorities.

Yet feasibility does not guarantee implementability. Several structural challenges must be acknowledged. First, the Model's soft-law nature means it lacks coercive force. Without adoption by influential actors—Member States, EU institutions, UNESCO bodies—it risks remaining advisory rather than transformative. Second, administrative integration is resource-intensive. Many states, particularly in the Global South, may lack the capacity to participate fully in equivalency assessments, monitoring cycles, or interpretive coordination without external support. Third, differences between tax administrations and cultural agencies—often siloed, institutionally distant, and governed by distinct legal cultures—pose a real obstacle to operationalising cross-sectoral procedures.

These limitations do not undermine the CCTIM's feasibility, but they reveal that its implementation requires sustained commitment, technical assistance, and coalition-building. Without these conditions, the Model risks being applied unevenly or interpreted inconsistently, thereby reproducing some of the structural asymmetries it seeks to resolve.

7.3.3 Political Traction and the Limits of Voluntarism

The CCTIM's political viability depends on whether states and institutions perceive cross-border cultural-fiscal coordination as valuable, necessary, or strategically beneficial. The Model is deliberately non-coercive, enabling broad alignment without threatening fiscal sovereignty. Yet this same characteristic exposes it to political risks: voluntarism may dilute traction, especially in contexts marked by fiscal protectionism, cultural nationalism, or geopolitical tension.

Moreover, cultural rights occupy a marginal position within many states' fiscal policy agendas. Even where cultural ministries endorse cooperation, tax administrations may perceive the Model as peripheral, administratively burdensome, or insufficiently aligned with revenue-protection mandates. This institutional mismatch is a genuine practical obstacle. The Model also depends on mobilisation by actor coalitions—CCIs, civil society, development-oriented states—whose influence varies significantly across jurisdictions.

Political traction may also be affected by the uneven distribution of benefits. For some states, particularly those without large audiovisual sectors or significant philanthropic flows, the incentives to embrace coordination may appear limited. Without credible demonstration of mutual advantages—reduced administrative burden, increased cultural mobility, or enhanced investment flows—voluntarism may fall short of catalysing systemic uptake.

In short, the CCTIM offers a structurally coherent and doctrinally grounded response to the systemic deficits identified in this thesis. It does not seek to dissolve normative pluralism but to organise it—providing interpretive, procedural, and institutional scaffolding capable of reducing SFACs across governance levels. Its principal promise lies in its ability to operationalise principles long affirmed but rarely implemented: cultural rights, fundamental freedoms, solidarity, equitable access, and international cooperation.

Yet the Model's limitations must be understood with equal clarity. As a voluntary framework, it cannot compel compliance; as a capacity-dependent structure, its uptake may be uneven; as a cross-sectoral tool, it depends on institutional cultures that do not always communicate. The CCTIM can reduce SFACs only where states and institutions are willing to embed its mechanisms within their administrative and treaty practices, and where political commitment is sustained over time.

In this sense, the CCTIM is both a realistic and an aspirational model. It is realistic in the sense that it builds on existing practices, relies on available institutional platforms, and respects sovereign autonomy. It is aspirational in that its full potential requires a level of coordination and cross-sectoral engagement that remains uneven across jurisdictions. Recognising these constraints is essential: transparency about the Model's limits strengthens, rather than weakens, its credibility as an innovative and practicable pathway for reimagining cultural-fiscal governance.

7.4 Cultural-Transnational Legalism: A New Paradigm of Rights and Governance

The legal and political project developed in this thesis extends beyond institutional design or doctrinal analysis. It signals a broader reconfiguration in how authority, rights, and cooperation are conceptualised within contemporary international law. Through the examination of cultural-creative tax incentives, the thesis identifies the emergence of a normative orientation—

here termed cultural-transnational legalism—that challenges inherited assumptions about the locus of legal authority, the boundaries of sovereign discretion, and the modalities through which rights become actionable in polycentric legal environments.

This paradigm neither promotes the internationalisation of domestic cultural-creative tax policy nor calls for harmonisation through centralised rule-making. Instead, it advances a governance rationality premised on the interdependence of cultural rights, fiscal measures, and cross-border mobility. It proceeds from the insight that no single legal order—national, bilateral, EU, or multilateral—can independently guarantee equitable access to cultural-fiscal benefits in an interconnected cultural economy. Cultural-transnational legalism therefore conceptualises governance as a relational and cooperative practice. It foregrounds that rights are realised through institutional interactions; that sovereignty is exercised within webs of reciprocal commitments; and that legal order emerges as much through procedural convergence as through hierarchical norm-setting.

In resisting the binary between non-binding aspiration and coercive obligation in international law, the paradigm proposes an alternative governance ethos—rights-sensitive, procedurally anchored, and institutionally distributed. The CCTIM, developed in this thesis, embodies this orientation. It does not override national fiscal autonomy but organises normative pluralism through shared definitions, interpretive tools, and cooperative procedures capable of reducing SFACs while respecting constitutional and fiscal boundaries.

Cultural-transnational legalism therefore redefines the relationship between cultural rights and fiscal governance. It positions accessibility, predictability, and cross-border equity as core evaluative criteria and illustrates how international law can advance cultural diversity not by multiplying commitments but by facilitating their operational realisation. Through this lens, cultural participation becomes not merely a normative aspiration but an institutional practice that multi-level governance systems can—and should—secure.

7.4.1 From Cultural Sovereignty to Relational Governance

At the centre of this paradigm lies a reconceptualisation of sovereignty. Rather than treating cultural openness and fiscal autonomy as competing imperatives, cultural-transnational legalism frames them as jointly produced within a web of interdependent legal relations.

Authority over cultural-creative tax incentives in cross-border situations is not an exclusive national prerogative but a shared responsibility mediated through bilateral treaties, EU law, UNESCO commitments, and administrative cooperation.

This does not diminish the importance of national discretion in cultural-fiscal policy. Instead, it recognises that in a globalised creative economy, sovereignty is conditioned by the structural interdependence of legal orders and by the normative expectations attached to cultural rights and international cooperation. Cultural-transnational legalism views this conditioning not as a constraint but as an opportunity: a basis for designing systems of governance that are more equitable, predictable, and responsive to the mobility and diversity of cultural-creative operators themselves.

7.4.2 Rights as Institutional Practice

A second defining feature of this paradigm is its approach to rights. Whereas traditional models focus primarily on the textual articulation or judicial enforcement of rights, cultural-transnational legalism treats rights as institutional practices realised across administrative, procedural, and interpretive routines. This perspective shifts analytical attention from formal compatibility to functional effectiveness: how entitlements are recognised, accessed, and implemented by tax authorities, cultural agencies, courts, and intergovernmental bodies.

Under this framing, cultural rights—particularly the right to participate in and benefit from cultural life—function as operational benchmarks for designing eligibility rules, structuring procedures, and coordinating cross-border cooperation. Rights thus become embedded in the everyday governance of cultural-creative tax incentives, shaping the normative expectations that underpin legal and administrative decision-making.

7.4.3 Governance without Centralisation

Cultural-transnational legalism also challenges the assumption that effective governance in fragmented legal domains requires centralisation. It instead demonstrates that coherence can be produced through connective institutions—shared processes, interpretive interfaces, and cooperative mechanisms that align legal orders without imposing uniformity. Instruments such as the CCTIM embody this logic: they cultivate mutual recognition, procedural convergence, and interpretive alignment while preserving domestic discretion and legal diversity.

This approach reflects a broader reimagining of international legal order as a network rather than a hierarchy. Cultural-transnational legalism is therefore both pluralist and principled. It valorises diversity not only as a cultural value but as a legal method capable of accommodating asymmetries in capacity, power, and development trajectories, while still advancing commitments to human rights, fundamental freedoms, solidarity, equitable access, and international cooperation for sustainable development.

7.4.4 A Normative-Functional Horizon for Reform

Finally, the paradigm offers a normative horizon for rethinking transnational cultural governance. The struggle against SFACs is reframed not as a narrowly technical challenge, but as a legal and ethical imperative tied to cultural rights, participatory democracy, and equitable development. Cultural-transnational legalism aligns with broader movements in international law that advocate context-sensitive, structurally aware, and actor-responsive governance models—models attentive to the lived realities of cultural-creative operators, particularly in the Global South, navigating multi-relational and often exclusionary legal regimes.

This paradigm is not advanced as a utopian solution. Its promise lies in providing a realistic and critical framework for understanding how law mediates culture, economy, and fiscal support across borders. Its limits lie in the political contingencies of implementation and the institutional unevenness that characterises global cultural governance. Yet it draws attention to the fact that the legal order capable of supporting cultural cooperation is already emerging—through interpretive interfaces, hybrid instruments, and institutional practices that translate rights into meaningful access. Cultural-transnational legalism gives conceptual form to this emerging order and, in doing so, offers a generative path forward for scholars, policymakers, and practitioners focused on cultural rights and fiscal governance in a global context.

7.5 Implications for Cultural Rights and International Legal Commitments

The analytical and normative inquiries pursued in this thesis do not remain confined to cultural-creative tax incentives. They speak to broader issues concerning how cultural rights are realised, how fiscal support reflects (and sometimes contradicts) international legal commitments, and how cross-border legal mobility is enabled or obstructed. The operational shortcomings identified across national, bilateral, EU, and UNESCO frameworks reveal deeper systemic patterns: gaps between rights and access; between formal sovereignty and practical constraint; and between normative commitments and the institutional architectures required to implement them. If left unaddressed, these patterns risk reinforcing structural exclusion within transnational cultural-fiscal governance.

7.5.1 Cultural Rights—From Symbolic Recognition to Procedural Realisation

A central implication of this thesis is that cultural rights—particularly those embedded in EU law and the UNESCO 2005 Convention—are consistently weakened by limited incorporation into fiscal governance, high administrative discretion, and the absence of enforceable pathways for cross-border applicants. Although states affirm cultural rights normatively, the governance of tax incentives frequently results in what may be described as procedural denial by design: rights are recognised in principle yet rendered ineffective in practice.

Two conclusions follow.

First, cultural rights must be understood as having distributive and administrative dimensions. Eligibility for tax incentives, the clarity of classification rules, and non-discriminatory access across borders materially shape who can participate in cultural life. Fiscal support is thus one of the mechanisms through which cultural rights acquire legal substance—not merely symbolic value.

Second, the realisation of cultural rights cannot rely solely on judicial review or legislative restatement. It requires institutional redesign: administrative procedures that incorporate rights-sensitive standards; cross-border cooperation mechanisms that prevent arbitrary exclusion; and interpretive practices that align cultural-fiscal measures with international commitments. Within this architecture, cultural rights become operational through everyday institutional behaviour, not solely through formal declarations.

7.5.2 Addressing Asymmetries in Legal and Economic Power

The thesis also highlights how cultural-fiscal governance, even when formally neutral, often reproduces material and legal hierarchies—particularly disadvantaging cultural-creative operators in the Global South or in structurally marginalised settings. SFACs exacerbate inequalities by restricting eligibility, creating information asymmetries, and imposing administrative burdens that disproportionately affect non-resident or resource-constrained actors. These asymmetries are not incidental; they are structurally embedded in systems that privilege: domestic over foreign participation, nationals over non-nationals (even if residents), and often Northern over Southern operators.

The failure to operationalise Article 16 of the UNESCO 2005 Convention illustrates this clearly. Preferential treatment for developing countries remains largely declaratory, resulting in a structural inequity that undermines the Convention's core commitments. The implication is that fiscal governance must be evaluated through a dual lens: economic rationality and cultural rights. A coherent cultural-fiscal regime must ask whether its structures reduce or amplify systemic exclusion, and whether it meaningfully facilitates cross-border cultural engagement.

This reframing requires a shift from evaluating "revenue impact" to assessing "equitable access"—a shift that has yet to be internalised in most national, bilateral, or EU regimes.

7.5.3 Legal Mobility: Rethinking Transnational Legal Interoperability

A further implication concerns the concept of legal mobility. As the thesis shows, cultural-creative operators often face fragmented procedures, conflicting definitions, and inconsistent administrative interpretations when attempting to access tax incentives across borders. This is not the product of legal absence, but of legal disconnection: regimes exist, but they do not communicate.

Legal mobility, therefore, must be understood not merely as the portability of rules but as the capacity of individuals and organisations to navigate overlapping legal systems without prohibitive uncertainty or exclusion. The CCTIM—and the broader paradigm of cultural-transnational legalism—respond directly to this challenge. They propose an infrastructure for interoperability: shared definitions, equivalency mechanisms, cooperative procedures, and interpretive tools enabling regimes to connect rather than collide.

Yet this reconceptualisation also reveals limitations. Legal mobility requires administrative capacity, political will, and cross-sectoral engagement. It demands transparency, mutual intelligibility, and a commitment to reduce the informational and procedural burdens disproportionately borne by the least advantaged. These conditions cannot be assumed; they must be constructed.

The implications of this research thus extend well beyond its initial analytical domain. By interrogating how cultural rights are realised through fiscal mechanisms, how fiscal support is shaped by administrative structures, and how legal mobility depends on institutional interoperability, the thesis calls for a normative realignment in global cultural governance. It demonstrates that meaningful cultural cooperation requires more than legal commitments: it requires institutional practices that connect legal regimes to one another and to the lived experiences of those they are meant to serve. In this sense, the findings point toward a legal order in which cultural rights and fiscal policy are mutually reinforcing, and in which transnational cultural participation becomes not an exception but an attainable, procedurally grounded reality.

7.6 Directions for Future Research and Policy Engagement

The findings and proposals developed in this thesis open several promising avenues for further academic inquiry and institutional practice. While the Cultural-Creative Tax Incentive Model provides a conceptual and procedural scaffold for reducing Structural Fiscal Access Constraints, its viability ultimately depends on sustained research, iterative refinement, and active engagement across cultural, fiscal, and international cooperation domains. Three broad trajectories merit particular attention.

A first trajectory concerns empirical and comparative research into the operational realities of cultural-creative tax incentives. This thesis has offered a normative, doctrinal, and institutional analysis across selected national, bilateral, supranational, and multilateral frameworks; however, more granular empirical work is needed to understand how cultural-creative operators—especially those from developing countries or structurally marginalised groups—experience access barriers in practice. Ethnographic studies of administrative behaviour, implementation audits, and comparative regulatory mapping could expose informal norms, procedural bottlenecks, and interpretive practices that remain invisible in formal legal texts but crucially shape real-world accessibility. Such work would also test, refine, or challenge some of the assumptions embedded in the SFAC framework.

A second trajectory relates to the further elaboration and contextualisation of the CCTIM. Designed to be modular and adaptable, the Model invites a wider community of legal scholars, cultural-policy experts, international organisations, and regional bodies to critique, adjust, and expand its components. Future research may explore how regional frameworks—such as the African Union, ASEAN, Mercosur, or the Council of Europe—could adapt, translate, or co-develop parallel models responsive to their own institutional and normative environments. There is also significant potential for cross-fertilisation with ongoing UN, OECD, and WTO initiatives on cultural cooperation, development finance, global tax governance, and creative economy frameworks. Such engagements would test the Model's flexibility and illuminate how its mechanisms interact with diverse political economies and regulatory cultures.

A third trajectory concerns the theoretical relationship between cultural rights and fiscal governance. The thesis has treated SFACs as a site where norm-function disjunctions become visible, but further work is required to articulate a more robust account of "fiscal justice" in cultural terms. What normative criteria should guide the design of tax incentives when they serve cultural-rights objectives? How might distributive principles, participation, diversity, and self-determination shape fiscal structures? Addressing these questions requires interdisciplinary engagement—bridging legal theory, political economy, and cultural sociology—to build a more coherent jurisprudence of cultural entitlements within fiscal and administrative systems.

Parallel to academic research, there is a strong imperative for policy experimentation. Pilot implementations of the CCTIM—whether at national, bilateral, or regional levels—could be undertaken in cooperation with ministries of culture and finance, tax administrations, audiovisual agencies, and civil-society organisations. Such pilots would enable institutions to test the Model's procedural tools, identify political and bureaucratic resistances, and adjust its mechanisms for practical feasibility. International forums—including UNESCO's Intergovernmental Committee, the EU's Open Method of Coordination on Culture, and the UN High-Level Political Forum—could serve as platforms for peer learning, benchmarking, and gradual model diffusion.

Ultimately, reforming cultural-creative tax incentive governance is not an isolated technical exercise. It forms part of a broader project to strengthen cultural rights and international cultural cooperation through legally sound and operationally coherent institutions. Future research and policy initiatives must remain attentive to this dual imperative: integrating doctrinal analysis with empirical insight, normative aspirations with administrative practice, and legal design with political realities. In doing so, they can build upon the conceptual foundations laid in this thesis while contributing to a more inclusive, coordinated, and functionally integrated global cultural-fiscal governance landscape.

7.7 Concluding Reflections: Closing the Gap between Norm and Function

This thesis began with a central question: Why do cultural-creative tax incentives in cross-border situations—designed to support cultural rights through fiscal relief—so often fail to reach those they are intended to benefit? The answer lies not simply in the exercise of sovereign fiscal discretion, but in a deeper structural dysfunction: a persistent and systemic gap between normative aspiration and institutional implementation. Structural Fiscal Access Constraints do not arise because commitments to cultural cooperation, diversity of cultural expressions, or preferential treatment are absent. They arise because existing legal and administrative systems do not operationalise these commitments in ways that are coherent, predictable, or accessible across borders.

Across the preceding chapters, the analysis traced this dysfunction through national design choices, bilateral treaty asymmetries, EU-level regulatory tensions, and the soft but significant normative frameworks of UNESCO. These layers revealed a common pattern: fragmented normativity, discretionary administration, and institutional siloing combine to preclude the portability and practical realisation of cultural-fiscal entitlements. In response, the thesis developed not only a critique but a constructive proposal. The Cultural-Creative Tax Incentive Model (CCTIM) seeks to remedy these deficits without eroding fiscal sovereignty or legal diversity. It does not promise harmonisation or global enforcement; instead, it offers a procedural grammar of cooperation—shared definitions, interpretive guidance, equivalency mechanisms, and connective institutional practices capable of reducing SFACs through incremental yet systemic coordination.

The deeper insight emerging from this research, however, is not merely institutional or technical. It concerns the legal sensibility required to govern cultural-creative tax incentives in a plural, interdependent legal order. The challenges identified throughout the thesis—interpretive fragmentation, unequal access, and the disconnect between rights and remedies—mirror enduring tensions in international law: between fragmentation and coherence, sovereignty and solidarity, rights proclamation and rights realisation. The gap between norm and function in cultural-fiscal governance is thus symptomatic of a broader structural question: Whose mobility is enabled, whose participation is recognised, and whose rights are rendered actionable within a multi-level legal system?

Closing that gap requires more than doctrinal refinement. It demands a reorientation in how legal actors understand cultural cooperation—not as a soft or peripheral domain, but as a site where human rights, economic mobility, and international solidarity converge. It calls for a shift from formalistic reliance on high-level commitments to a focus on functional effectiveness: how rules are implemented, how decisions are made, and how cross-border access is facilitated or foreclosed. It also requires acknowledging that sovereignty in this domain is relational; that rights become meaningful through institutional practice; and that international cooperation must be built through coordinated procedures rather than top-down control or rhetorical declaration.

The closing argument of this thesis is therefore straightforward but ambitious: reducing Structural Fiscal Access Constraints is not only a matter of improving cultural-fiscal policy—it is a matter of developing legal infrastructures capable of delivering cultural rights in a transnational context. To make cultural rights credible, international commitments must be translated into administrative routines, interpretive interfaces, and cooperative mechanisms that connect rather than isolate legal systems. Only then can cultural-creative tax incentives operate as vehicles of genuine access rather than exclusion; only then can the promise of cultural cooperation move from aspiration to institutional reality.

In this sense, the thesis calls for a new legal sensibility—one that begins not with abstract norms but with the lived realities of those navigating across legal borders. Closing the gap between norm and function requires laws that not only proclaim commitments, but structure their delivery. It is in this practical transformation—linking rights to procedures, sovereignty to responsibility, and cultural commitments to operational design—that meaningful international cultural cooperation for sustainable development becomes possible.

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