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Cultural Goods and Services in International Trade Law

Ivan Bernier

If biodiversity is fundamental then certainly diversity of cultures is.[*]

Sylvia Ostry

Introduction

Contrary to what might have been expected at the end of the Uruguay Round of multilateral trade negotiations, the debate over the cultural exception, and more generally over the place of cultural goods and services in international trade law, far from being settled, has recently reached a new level of intensity. One has only to consider the number of conflicts about cultural industries that have arisen in recent years, the growing number of articles published on the subject, and the numerous conferences organized around that theme to realize that indeed the debate is far from over.[1]

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[*] "Trade negotiator fears sovereignty at risk," April Lindgren, *The Ottawa Citizen*, June 28, 1997.

[1] From 1995 to 1998, seven complaints concerning cultural products were brought before the World Trade Organization (WTO), three of which were resolved by common agreement between the parties, the fourth one ending with a decision of the Appellate Body, and the last three being at the stage of consultation. The cases in question are discussed below. Since the end of the Uruguay Round of negotiations, over 30 articles and chapters of books have addressed the same issue from a legal perspective. Among the most recent titles, one finds: Oliver R. Goodenough, "Defending the Imaginary to the Death: Free Trade, National Identity and Canada's Cultural Preoccupation," *Arizona Journal of International and Comparative Law* 15 (1998), pp. 203-253; Aaron Scow, "The Sports Illustrated Canada Controversy—Canada 'Strikes Out' in Its Bid to Protect Its Periodical Industry from US Split-Run Periodicals," *Minnesota Journal of Global Trade* 7 (1998), p. 245, Amy E. Lehman, "Note: The Canadian Cultural Exemption Clause and the Fight to Maintain Identity," *Syracuse Journal of International Law and Commerce* 23 (1997), p. 187; Judith Beth Prowda, "US Dominance in the 'Market Place of Culture' and the French 'Cultural Exception'," *New York University Journal of International Law and Politics* 29 (1996-97), pp. 193-210; T.W. Chao, "GATT's Cultural Exception of Audiovisual Trade: The United States May Have Lost the War but Not the Battle," *University of Pennsylvania Journal of International Economic Law* 17 (1996),

To understand how this has come about, it is necessary to go back briefly to the 1920s, when European countries began resorting to screen quotas in order to protect their film industry from an influx of American films considered as a threat to their culture. The American motion picture industry responded by developing closer relations with the Department of State and American embassies and by the end of the Second World War in 1945, the protective legislation enacted by many European countries had been overturned.[2] In 1947, a temporary solution to that conflict was presented in Article IV of the General Agreement on Tariffs and Trade (GATT) which recognized the specificity of cultural products, at least in the case of films, without subtracting them from the disciplines of the agreement.[3] However, in the early 1960s, the dispute resumed when the United States asked the GATT to investigate the restrictions imposed on its television programs by a number of countries, including Canada; a special group was constituted to look at the matter but was unable to reach an agreement.[4]

Again in the early 1970s, the United States complained in the Tokyo Round catalogue of non-tariff barriers about the subsidies employed by not less than 21 countries in order to protect their cinema and television industry.[5] A new conflict arose with Europe towards the end of the 1980s concerning the "Television without Frontiers" directive. A request for consultation with the European Community was addressed to the GATT by the United States, but after a lively debate, the matter was later dropped to become part of a wider debate in the context of the Uruguay Round negotiations on services. [6]

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pp. 1127-1154; M.G. Hahn, "Should a Cultural Exception Be Included into the Law of the WTO?" *Zeitschrift für ausländisches öffentliches Recht und Volkerrecht* 56 (1996), p. 351; J.D. Donaldson, "'Television without Frontiers': The Continuing Tension between Liberal Free Trade and European Cultural Integrity," *Fordham International Law Journal* 20 (1996), p. 96.

2 On this development between the two wars, see T. Guback, "Non Market Factors in the International Distribution of American Films," *Current Research in Film: Audiences, Economics and Law* 1 (Norwood, New Jersey: Ablex Publishing Corporation, 1985), pp. 111, 114-115.

3 Article IV of GATT, as explained below, exceptionally authorizes screen quotas.

4 GATT Doc. L/1741 (1962).

5 GATT Doc. MTN/3B1. The countries in question were Argentina, Austria, Belgium, Brazil, Canada, Chile, Denmark, Egypt, France, Germany, Greece, Indonesia, Israel, Italy, Japan, the Netherlands, Norway, Pakistan, Portugal, and the United Kingdom.

6 For a detailed analysis of this exchange of views, see Jon Filipek, "'Culture Quotas': The Trade Controversy over the European Community's Broadcasting Direc-

In 1990, a working group was set up in the context of the negotiations on services to consider the feasibility of having a specific annex on audiovisual services.[7] Two conflicting views characterized the discussions: that of the United States, completely opposed to any kind of exception for audiovisual services, and that of the European Economic Community (EEC), willing to commit itself in that area only if a cultural specificity clause, more or less along the lines of what Canada had obtained in the Canada-US Free Trade Agreement (FTA), was included.[8] After a few sessions, the group discontinued its activities for lack of agreement on the content of the proposed annex. The question of audiovisual services was largely ignored until the spring of 1993, when it took a new turn, and a much greater degree of visibility, with the involvement of artists from all over Europe. It remained unsolved until the very end of the Uruguay Round negotiations when the EEC, after presenting without success amendments that would have introduced formally a cultural specificity clause and guaranteed the right of member states to subsidize their audiovisual industry, announced that it would make no specific commitments with regard to the audiovisual sector.[9] With the question having been put on the back burner, the debate remained completely open.

This brief review of events leading up to the post-Uruguay Round, post-North American Free Trade Agreement (NAFTA) period is important to understand the present situation with regard to the place of cultural goods and services in international trade agreements. We are obviously confronted here with a long-standing conflict about what could be termed, for lack of a better expression, the specificity of cultural products envisaged from an international trade perspective. The main actors are few and well-identified. Essentially, the

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tive," *Stanford Journal of International Law* 28 (1992), pp. 340-342. See also Laurence G.C. Kaplan, "The European Community's 'Television without Frontiers' Directive: Stimulating Europe to Regulate Culture," *Emory International Law Review* 8 (1994), pp. 225, 311-318.

7 *GATT Focus*, no. 73 (1990), pp. 10-11.

8 John Peterson, "International Trade in Services: The Uruguay Round and Cultural and Information Services," *National Westminster Bank Quarterly Review*, August 1989, p. 62.

9 According to Karl F. Falkenberg of the European Commission, however, the EEC attempt to have a cultural specificity clause adopted failed by only a small margin, and this was due to the fact that the Community presented its position late in the negotiations. See Karl F. Falkenberg, "The Audiovisual Sector" in Jacques H.J. Bourgeois, Frédérique Berrod, and Eric Gippini Fournier, eds., *The Uruguay*

request for a totally free and open market in cultural products comes from the United States, while the proponents of some form of cultural exception are to be found in Europe, more particularly in France, and in Canada. But there are also a large number of supporting as well as purely passive actors that could potentially influence the debate, but are satisfied for the moment to remain on the sidelines, making sure that their own interests are not threatened. More recent events, such as the World Trade Organization (WTO) decision against Canada in the periodicals case and the Organisation for Economic Cooperation and Development (OECD) negotiations on a multilateral agreement on investment, have made it clear that the conflict has reached a new level where important decisions will have to be taken in this matter.

The purpose of this paper is to provide a general picture of the way cultural goods and services are presently treated in international trade agreements so as to facilitate the search for new directions. Because of the fundamental difference that exists in the legal treatment of cultural goods and services, we shall proceed by looking first at the treatment of cultural goods in the context of the WTO and NAFTA; this will be followed by a second section looking at the treatment of cultural services under the same arrangements, a third considering the treatment of cultural goods and services under the investment provisions of the OECD, WTO, and NAFTA, as well as under the Canadian bilateral investment treaties; and finally, a fourth considering the same under the intellectual property rights provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the NAFTA.

Trade in Cultural Goods

In looking at the treatment of cultural goods under the WTO and NAFTA agreements, we shall proceed under the assumption that such goods are covered except as otherwise provided. For each of these agreements, therefore, we shall examine first whether there are indications that cultural goods warrant a specific treatment, and then look at the basic obligations of the parties under each of them.

Round Results: A European Lawyers' Perspective (Brussels: European Interuniversity Press, 1995), p. 432.

The World Trade Organization (WTO)

Not all the agreements included in Annex IA (Multilateral Agreements on Trade in Goods) of the WTO Agreement are equally applicable to trade in cultural goods. Some must be excluded because they deal with specific sectors of economic activity that have nothing to do with culture, such as textiles and clothing, agriculture, or sanitary and phytosanitary measures, others because they deal with problems that are not frequently associated with culture, such as technical barriers to trade, licensing procedures, and pre-shipment inspection. In fact, the agreements that are of interest to us, either because they clearly apply to cultural goods, or could apply to them, or have been invoked in relation to them, are first and foremost the GATT 1994, followed by the Agreement on Subsidies and Countervailing Measures, the Agreement on the Implementation of Article VI of GATT 1994 (Antidumping Agreement), and the Safeguards Agreement.

To say that these agreements are applicable to cultural goods as opposed to cultural services implies at the outset that there is a clear distinction between cultural goods and cultural services. Unfortunately, that is not always the case. Thus, although cinema is specifically mentioned in Articles III and IV of GATT 1994 and duty concessions have been made in relation to films, the fact is that cinema has been considered as a service in the General Agreement on Trade in Services (GATS), in the OECD Code on Invisible Current Transactions, and in the United Nations Classification of Industries.

The possibility of conflict in the application of GATT and GATS raises a fundamental problem that was examined in the WTO decision of June 1997 in *Canada—Certain Measures Relating to Periodicals*, the first decision to deal with cultural products as such. The finding of the Panel, supported by the Appellate Body, that "[t]he ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that the obligations under GATT 1994 and GATS can co-exist and that one does not override the other" was not entirely devoid of ambiguity.[10] With

[10] WTO Doc. WT/DS31/AB/R, June 30, 1997, p. 19. Canada was arguing in that case that the provision of the *Excise Tax Act* challenged by the United States was not a measure regulating trade in goods but rather a measure regulating trade in services (access to the advertising market). Interestingly, on July 29, 1998, Canada announced that it was taking four specific actions to comply with the 1997 ruling (including elimination of the excise tax on split runs distributed in Canada); but at the same time it announced its intention to introduce a new measure limiting the sale of advertising to Canadian publishers, the legislation applying this time exclusively

exactly the same question having been raised in the case of *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, the Appellate Body, in a decision handed out barely two months later, attempted to explain more fully its view on the subject. It wrote:

> Given the respective scope of the two agreements, they may or may not overlap, depending on the measure at issue. Certain measures could be found to fall exclusively within the scope of GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or of the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.[11]

But this still leaves open the possibility that the exercise of a right under one agreement becomes the negation of a right under the other. To remain in the field of culture, for instance, could India's limitations on film distribution in its specific commitments under GATS, although in full conformity with the agreement and accepted by all the parties to it, be challenged successfully under GATT?[12] Similarly, although film dubbing is considered as a service in

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to the transaction of selling services. See Canada, Canadian Heritage, News Release, July 29, 1998. This is bound to raise again the problem of the relationship between GATT and GATS. On the same day, United States Trade Representative Charlene Barshefsky denounced the Canadian initiative as "every bit as inconsistent with Canada's international trade obligations as its current discriminatory practices." See USTR, Press Release 98-78, July 29, 1998. See also Aaron Scow, supra note 1, pp. 277-278.

[11] *European Communities—Regime for the Importation, Distribution and Sale of Bananas* (WT/DS27/AB/R), Appellate Body Report no. AB-1997-3, September 9, 1997, p. 87.

[12] Concerning the Indian exceptions in the film distribution sector, see below, note 49.

GATS[13] and the EEC has assumed no specific commitments in the audiovisual sector, would France's prohibition against the screening of a film dubbed in French outside France be vulnerable to a challenge under GATT?[14] Unless a line is traced somewhere between what pertains to trade in services and what pertains to trade in goods, conflicts of that nature appear bound to multiply.

GATT 1994

There are two Articles in GATT 1994 that specifically refer to cultural goods. The first one, Article IV, which was made an exception to national treatment through Article III:10, provides that a member may maintain or establish screen quotas requiring the exhibition of films of national origin during a specified minimum portion of the total screen time in the commercial exhibition of all films of whatever origin; such screen quotas, however, were to be subject to negotiations for their limitation, liberalization, or elimination. This provision, according to John H. Jackson, was inserted because it was perceived as being "more related to domestic cultural policies than to economics and trade."[15] Beyond its technical language, one finds a compromise between two quite different objectives, one of which is to eliminate discrimination between foreign and domestic products, the other to guarantee a minimum national production in the film sector.

The other article that specifically refers to cultural products is Article XX(f) which includes, among the general exceptions to GATT, measures which are imposed for the protection of national treasures of artistic, historic, or archeological value and are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. Article XX(f) is interesting in that it clearly recognizes the relationship between culture and national identity.

Leaving aside these two provisions, cultural goods are subject to all the usual GATT disciplines, the most important of which is the most-favoured-nation (MFN) treatment of Article I, the national treatment of Article III and the prohibition against quantitative restrictions of Article XI. The WTO deci-

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[13] Hong Kong's commitments in the field of audiovisual services, for instance, include film dubbing (GATS/SC/39, p. 12).

[14] See Article 17 of the French decree No. 90-174 of February 23, 1990, as modified by decrees No. 92-446 of May 15, 1992, and No. 96-776 of September 2, 1996.

[15] John H. Jackson, *World Trade and the Law of GATT* (Indianapolis, Kansas City, New York: The Bobbs Merrill Co. Inc., 1969), p. 293.

sion in *Canada—Certain Measures Relative to Periodicals*, alluded to before, is particularly instructive with regard to the application of Article III.[16]

The case raised two interesting questions, the first one concerning the difference between periodicals with foreign content and periodicals with domestic content, and the second concerning the use of preferential postal rates to support domestic periodicals. In response to the US argument that the new provision of the *Excise Tax Act* introduced by Canada in support of its periodical industry was a discriminatory tax applying to "like" products contrary to Article III:2, Canada had submitted that Article III:2 could not apply because imported split-run periodicals containing foreign content and Canadian magazines developed specifically for a Canadian readership were not "like" products:

> Content for the Canadian market will include Canadian events, topics, people and perspectives. The content may not be exclusively Canadian, but the balance will be recognizably and even dramatically different from that which is found in foreign publications which merely reproduce editorial content developed for and aimed at a non-Canadian market.[17]

The Appellate Body's approach to the problem, procedurally speaking, was peculiar to say the least. The Appellate Body first found that "as a result of the lack of proper legal reasoning based on inadequate factual analysis...the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals can be "like."[18] It therefore decided to proceed on its own to examine whether these two products could be considered as "directly competitive or substitutable products" under the second sentence of Article III:2. Essentially on the basis of admissions by Canada that English-language consumer magazines faced significant competition from US magazines in Canada, the Appellate Body found that imported split-run periodicals and domestic non-split-run periodicals were directly competitive or substitutable products insofar as they were part of the same segment

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[16] WTO Doc. WT/DS31/AB/R, June 30, 1997. With regard to Article XI of GATT 1994, the Panel found that a prohibition to import special edition periodicals, including split-run or regional editions, that contain advertisements primarily directed to a Canadian market was a clear violation of Article XI:1 that could not be justified under any of the general exceptions of Article XX. This finding was not appealed by Canada.

[17] Ibid., p. 6.

[18] Ibid., p. 22.

of the Canadian market for periodicals.[19] But having established that, it went on to answer the question of whether periodicals could be distinguished on the basis of their intellectual content, as argued by Canada. The answer was as follows:

> Our conclusion that imported split-run periodicals and domestic non-split-run periodicals are "directly competitive or substitutable" does not mean that all periodicals belong to the same relevant market. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine. But newsmagazines, like *Time*, *Time Canada*, and *Maclean's*, are directly competitive or substitutable in spite of the "Canadian" content of *Maclean's*.[20]

However, the Appellate Body did not explain why domestic as opposed to foreign content in the particular case was not a distinguishing factor. Was it because it considered that domestic content in general was not a significant factor in the choice of a newsmagazine so that Canadian consumers—or for that matter Italian or Japanese consumers—would not mind substituting an American or a German newsmagazine for one of their own country? Would the Appellate Body have similarly found that American newspapers and Canadian newspapers are "directly competitive or substitutable products"? Was it because of the admission by Canada that American and Canadian newsmagazines were in competition in the Canadian market? Using the same type of reasoning, one would be justified to conclude that foreign films and American films are not "directly competitive or substitutable products" in the American market, because it is widely recognized there is no real competition between the two in that market, but are "directly competitive or substitutable" in the French market, in the German market, etc., because they are in competition in those markets. The truth of the matter is that the Appellate Body, instead of addressing squarely the issue of the specificity of cultural products as vehicles of information, has simply applied to news periodicals the same type of reasoning as was applied in the *Japanese Alcoholic Beverages* case to foreign vodka and Japanese vodka.[21]

The second question of particular interest with regard to the interpretation of Article III had to do with the use of preferential postal rates to support domestic periodicals. The Appellate Body, reversing the decision of the

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[19] Ibid., p. 29.
[20] Ibid., p. 28.

Panel in favour of Canada, held that the "funded" postal rates maintained by Canada could not be justified by Article III:8(b) of the GATT 1994. Relying on a textual as well as a contextual interpretation of that provision, and taking into consideration its object and purpose as confirmed by its drafting history, it found that Article III:8(b) was "intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government,"[22] and it went on to quote with approval the following comments of the Panel in *United States—Malt Beverages*:

> Article III:8(b) limits, therefore, the permissible producer subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g., on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the taxes due. The separation of tax and subsidy rules contributes to greater transparency.[23]

Seeing no reason to distinguish a reduction of tax on a product from a reduction in transportation or postal rates, the Appellate Body finally concluded that the postal subsidy was incompatible with Canada's obligations under Article III of GATT 1994. It is difficult to quarrel with its decision from a purely legal point of view. However, the interpretation given of Article III does mark the triumph of form over substance. This is why it is important now to examine the practical consequences, for cultural products, of this finding.

For Canada, the immediate consequence is that if it wants to go on subsidizing producers of periodicals for their postal expenditures, it will have to make payments directly to them instead of offering a reduction on postal rates. Whether this method, more complicated than the existing one, will bring more transparency into the process remains to be seen; but it will be, at least, GATT-compatible. More important, however, are the potential consequences of the reasoning used by the Appellate Body, not only for Canada but also for all members. The view that practically any form of subsidy that is not granted directly in the form of payments to domestic producers is not compatible with GATT Article III:8(b) means that a serious look will have to be taken at the way financial help is granted to producers of cultural goods. Tax remittance, in

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[21] *Japan—Taxes on Alcoholic Beverages*, July 11, 1996 (Panel), October 4, 1996 (Appellate Body).

[22] *Canada—Certain Measures Relative to Periodicals*, WTO Doc. WT/DS31/AB/R, June 30, 1997, p. 34.

[23] GATT, *BISD*, 39S/206, par. 5.10 (June 1992).

particular, is a method of subsidizing cultural producers that is frequently used. In Canada, for instance, it is used in the film sector by Canada as well as by Quebec, Ontario, Nova Scotia, and New Brunswick.[24] It is also largely used abroad, particularly in Europe.[25] No matter how it is used, however, if it entails some form of discrimination against foreign cultural goods, it runs the risk of being challenged on the basis of Article III of GATT 1994.

Article III of GATT 1994 was at the root of another complaint in the cultural sector brought before the WTO by the United States in June 1996. The complaint concerned Turkey's imposition of a tax on the showing of US and other foreign films that was not similarly imposed on the showing of domestic films.[26] Following unsuccessful consultations, a panel was constituted in February 1997 to hear the case. Canada reserved its third-party rights to the dispute. However, on July 14, 1997, both parties notified the Dispute Settlement Body (DSB) of a mutually agreed solution.[27] According to the US Trade Representative (USTR), "Turkey agreed to equalize any box office tax imposed in Turkey on the showing of domestic and foreign films."[28]

The Agreement on Subsidies and Countervailing Measures

Even if a subsidy is compatible with Article III of GATT 1994, it remains subject to the provisions of the Agreement on Subsidies and Countervailing Duties, which gives effect to Articles VI and XVI of GATT 1994. Article 1.1 of the agreement provides a detailed definition of a subsidy that leaves very few financial contributions by a government or public body outside the scope of the agreement, provided they are, in law or in fact, specific. Subsidies subject to the agreement fall into one of three categories: *prohibited subsidies* (export subsidies and subsidies contingent upon the use of domestic over imported goods); *non-actionable subsidies* (subsidies that are not specific or relate to

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[24] See, for instance, for the Canadian scheme, *Income Tax Act*, Chap. 1 (5th Supp.), R.S.C. 1985, as amended, Art. 125.4 and *Income Tax Regulations*, 1978, C. 945 as modified; for the Quebec scheme, see *Income Tax Act, Revised Statutes of Quebec*, C. I-3, Art. 1029.8.34 to 1029.8.36 as modified.

[25] See Charles Brown, "The Future of Film and TV Funding: Confrontation or Collaboration?" (London: Financial Times Telecoms & Media Publishing, 1996), chapters 3, 4, and 7-14.

[26] *WTO Focus*, no. 16, February 1997, p. 6.

[27] *Turkey—Taxation of Foreign Film Revenues*, complaint by the United States (WT/DS43), June 1996: Overview of the State-of-Play of WTO Disputes, Settled or Inactive Cases at <http://www.wto.org/wto/dispute/bulletin.htm>.

research, regional development, and environmental requirements); and *actionable subsidies*, which are allowed but can be challenged if they cause serious prejudice (basically all other subsidies).

The possibility of subsidized cultural goods being challenged under this agreement is not to be dismissed. In the GATT Catalogue of Non-Tariff Barriers of 1970, as mentioned previously, the United States complained about the subsidies granted by various states to their national film industry. During the Uruguay Round negotiations, they also demanded that their producers benefit from the audiovisual subsidies granted by a number of European governments as these subsidies were based on the proceeds of taxes on videotape purchases and box-office revenues where US films largely dominated.[29] Although the matter was finally dropped in the very last days of the negotiations, it is quite obvious that the United States does not see favourably an increase in this type of subsidy. The fact is that cultural goods in many countries benefit from a wide variety of subsidy programs. In most instances, the programs in question would be considered as non-specific or, if specific, as not important enough to create serious prejudice. But this might not be true of the film industry, for instance, where the amounts given are sometimes quite important and of benefit to a limited number of producers (which makes it all the more important to determine whether films are goods or services as there are no constraints as yet on subsidies in the Service Agreement). As of September 1998, no panel decision had been issued under this agreement, although a number of complaints had been lodged.[30]

The Antidumping Agreement

Paradoxically, whereas just about any kind of goods can be the object of an antidumping procedure, cultural goods appear to stand in a category of their own; for various reasons, they apparently cannot easily be the object of such a procedure. One of the arguments put forward by the Canadian Magazine Publishers Association in support of the Canadian prohibition to import split-run

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[28] US, Office of the USTR, Press Release 97-108, December 19, 1997.

[29] See W. Ming Shao, "Is There No Business like Show Business? Free Trade and Cultural Protectionism," *Yale Journal of International Law* 20 (1995), pp. 105, 114.

[30] Two of these complaints concern export financing of civilian aircraft; see *Canada—Measures Affecting the Export of Civilian Aircrafts*, complaint by Brazil, March 10, 1997, case WT/DS 70, and *Brazil—Export Financing Program for Aircraft*, complaint by Canada, July 10, 1998, case WT/DS 46.

editions of foreign magazines was precisely that "American publishers could engage in editorial 'dumping' of content already cost-recovered in the United States, providing them with an unfair advantage over Canadian magazines competing in the same market."[31] The same argument has also been made regarding American film producers who are often accused of dumping their films in foreign markets.[32]

Whether such situations can really be described as dumping has been questioned by many commentators. Colin Hoskins, Adam Finn, and Stuart McFadyen, for instance, convincingly argue that in matters of dumping, "the relevant reference cost is not the production cost of the original but the incremental cost of supplying the additional market." But having said that, they immediately add: "For most traded products, this is not an important distinction, but for audiovisual products, it is crucial."[33] Whatever the explanation given for that particularity of audiovisual products (and of all cultural goods in general), be it their public-good characteristics or what has been called the "cultural discount"[34] that characterizes trade in such products, the fact remains that, from that point of view, cultural goods appear different from other goods.

If an antidumping procedure involving cultural goods was nevertheless launched,[35] another problem would arise—that of determining to what ex-

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31 See Canadian Magazine Publishers Association, *Split-Run Editions: The Danger to the Canadian Magazine Industry and the Implications of Tariff Item 9958*, December 12, 1992, p. 3. See also Val Ross, "Sports Illustrated tackles Canada: Time Warner plan assailed as 'dumping'," *The Globe and Mail*, January 13, 1993, pp. C1-C2.

32 Ming Shao, supra, note 29, p. 122.

33 Colin Hoskins, Adam Finn, and Stuart McFadyen, "Television and Film in a Freer International Trade Environment: US Dominance and Canadian Responses," in Emile G. McAnany and Kenton T. Wilkinson, *Mass Media and Free Trade—NAFTA and the Cultural Industries* (Austin: University of Texas Press, 1996), pp. 63, 70.

34 This term "captures the notion that a particular program (or feature film) rooted in one culture and thus attractive in that environment, will have diminished appeal elsewhere as viewers find it difficult to identify with the styles, values, beliefs, institutions and behaviour patterns being portrayed." Colin Hoskins and Stuart McFadyen, Guest Editors' Introduction, *Canadian Journal of Communication* 16, no. 2 (1991), p. 186. The notion was originally developed in Colin Hoskins and Rolf Mirus, "Reasons for the US Dominance of the International Trade in Television Programmes," *Media, Culture and Society* 10, no. 4 (1988), pp. 499-515.

35 Such a possibility is not to be discarded. The basic requirement of the WTO antidumping agreement is that the export price of the product exported should be less than the comparable price, in the ordinary course of trade, of the like product when

tent dumped products are causing injury to domestic products. Antidumping duties can only be applied to imported products if it can be demonstrated that the dumped imports are, through the effects of dumping, causing injury to the domestic production of like products.[36] But in the case of cultural goods, this demonstration appears practically impossible. It would be necessary to establish that the imported and domestic goods are "like products," something that is not particularly obvious in the case of films, books, magazines, or television programs. Such goods are characterized by their artistic and intellectual content, and for that reason cannot easily be compared one to another, even when they are in the same category of goods, such as books, for instance.

The Agreement on Safeguards

The idea of adapting the Safeguards clause of Article XIX of GATT 1947 to fit the particular case of cultural goods is not something entirely new. In a protocol annexed to the United Nations Educational, Scientific and Cultural Organization's (UNESCO's) Convention on the Importation of Educational, Scientific and Cultural Goods (Florence Agreement), the United States, as a condition of its signature, effectively obtained for itself a safeguard clause that was in essence a reproduction of Article XIX of GATT, but without any explicit reference to compensation.[37]

The new Agreement on Safeguards, from that point of view, does not treat cultural goods differently from other goods. Nevertheless, it should not be overlooked as a means of helping cultural industries seriously injured by the importation of like or directly competing products.[38] The requirement of Article XIX of GATT 1947 that the injury should occur "as a result of unforeseen developments and the effect of the obligation incurred...under this agreement" has not been repeated in Article 2.1 of the agreement, which makes it somewhat easier to use. It must still be demonstrated, however, that the injury is the result of an increase in quantities of imports, absolute or relative to domestic

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destined for consumption in the exporting country. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 2.1.

36 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 3.5 and 3.6.

37 UNESCO, Protocol Annexed to the Convention on the Importation of Educational, Scientific and Cultural Goods, 1950.

38 Such is the suggestion made by Stacie I. Strong in "Banning the Cultural Exclusion: Free Trade and Copyrighted Goods," *Duke Journal of Comparative and International Law* 4 (1993), p. 105.

production. This last requirement, unfortunately, can raise problems in the case of cultural products because their intellectual content can easily be separated from their material support. Thus, supposing that, as a consequence of the WTO decision in *Canada—Certain Measures Concerning Periodicals,* a significant number of Canadian periodicals were forced to close down, not so much because of an increase of imported split-run periodicals—in the actual facts of the case, the intellectual content of *Sports Illustrated* was imported electronically into Canada and printed there—but rather because of the loss of publicity revenue that would ensue, recourse to the Agreement on Safeguards in order to alleviate what could be considered as a "significant overall impairment in the position of the domestic industry"[39] would be impossible. Even if it was possible to have recourse to the agreement because of an actual increase of imported split-run editions, Canada would still have to offer adequate trade compensations to the United States as it would have a duty to maintain a substantially equivalent level of concessions; in the absence of an agreement, the United States could suspend substantially equivalent concessions. The right of suspension, however, is itself subject to the important limitation that it may not be exercised for the first three years that a safeguard measure is in effect, provided the latter is taken as a result of an absolute increase in imports and otherwise conforms to the agreement.[40]

NAFTA

Annex 2106 of NAFTA provides that any measure adopted or maintained with respect to cultural industries and any measure of equivalent commercial effect taken in response shall be governed under the agreement exclusively in accordance with the provisions of the Canada-US Free Trade Agreement and that the rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States. Therefore, in order to understand the reach of Annex 2106, it is necessary to first take a look at Article 2005 of the FTA. The first paragraph of that article states that "cultural industries are exempt from the provisions of this agreement except as specifically provided..." Leaving aside the exceptions, it is clear that the Parties, under Article 2005(1), remain free to intervene in favour of their cultural industries as they wish. The second paragraph

[39] Article 4.1(a), definition of "serious injury."
[40] Article 8.3.

of Article 2005, however, introduces a serious limitation to that exemption when it provides that, notwithstanding any other provision of the agreement, "a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1." Taken literally, this contradicts the affirmation of paragraph 1 in that it penalizes the non-respect of obligations from which the Parties are exempted. As a matter of fact, in order to determine whether measures of equivalent commercial effect can be used, one must necessarily proceed as if cultural industries were covered by the agreement and consider whether measures applicable to them are in violation of the agreement. What Article 2005 says, in reality, is that if a Party is ready to pay the price[41] it can maintain cultural measures that are incompatible with the FTA.

Annex 2106 of NAFTA not only maintains in force the cultural exemption of the FTA but expands its reach through a definition of cultural industries that extends not only to enterprises, as in the FTA, but also to natural persons involved in the industries in question.[42] It also extends its reach to Mexico as well as to any other state that could become party to the NAFTA (which assumes that newcomers would have no choice from that point of view).

Since Annex 2106 only applies when there is a violation of the FTA, it is important in any given situation to determine whether there are exceptions

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[41] The price to pay as a consequence of the taking of "measures of equivalent commercial effect" by the other Party must by definition be equivalent to the prejudice suffered by that Party. What happens if measures of equivalent commercial effect go beyond the prejudice suffered is not entirely clear under the Canada-US FTA. Article 2011(2) of the agreement provides that the "nullification and impairment" provision of Article 2011(1) does not apply to Article 2005, which presumably means that measures taken under that article cannot be the subject of the dispute settlement procedure of Chapter 18 (see on this J.R. Johnson and J.S. Schachter, *The Free Trade Agreement—A Comprehensive Guide* (Aurora, Ont.: Canada Law Book Inc., 1988), p. 145). But if a Party takes measures of equivalent commercial effect that go beyond the prejudice suffered, it can also be argued that such measures do not conform to Article 2005 and therefore are subject to Chapter 18.

[42] Jon R. Johnson, in his book on NAFTA, points out that since cultural industries, as defined in NAFTA, are governed under Annex 2106 exclusively by the FTA provision, which includes a more restrictive definition of cultural industries, it is not clear which definition should prevail. *The North American Free Trade Agreement—A Comprehensive Guide* (Aurora, Ont.: Canada Law Book Inc., 1994), p. 472. In our view, however, there is no such ambiguity because the cross-reference to the FTA is itself subject to the NAFTA definition of cultural industries.

in that agreement that could legitimize inconsistent measures of a Party. In the case of cultural goods, such exceptions are to be found essentially in FTA Article 1201 which incorporates by reference the general exceptions of Article XX of GATT. Among these exceptions, the most obvious is that of Article XX(f) concerning the protection of national treasures of artistic, historic, or archeological value. The only other exceptions that could potentially apply are those of Article XX(a), "measures necessary to protect public morals," and Article XX(d), "measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement..." The latter has rarely been used successfully in practice and Canada's attempt to justify its prohibition to import split-run periodicals under that exception in the Canadian periodicals case similarly failed. Another less conspicuous exception that specifically concerns cultural goods is that of FTA Article 501. Article 501 incorporates by reference Article III of GATT 1994, including its paragraph 10 which states that "[t]he provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV." In other words, the screen quotas exception of GATT is incorporated in the FTA, and in NAFTA through Annex 2106.

The view that the Parties specified in Annex 2106 are entitled, with respect to cultural industries, to maintain measures that are not compatible with the obligation of the FTA, provided they accepted to pay the price, was partially called into question by the United States in 1996 when the latter chose to settle its dispute with Canada concerning split-run periodicals before the WTO instead of the NAFTA, as they had the right to do. Under the terms of Article 2005 of NAFTA and of Article 1801(2) of the FTA, disputes arising under both GATT and NAFTA (or between GATT and FTA) can as a general matter be settled in either forum at the choice of the complaining Party. By choosing to go before the WTO, the United States effectively made sure that the exception of Annex 2106 would not be raised. Now that the decision is out, Canada could always attempt to use NAFTA Article 103, which gives priority to NAFTA over GATT in case of inconsistency, in order to force the United States to recognize its rights under Annex 2106; but it would still be left with a WTO decision that it would have to enforce as a member of the WTO, since the NAFTA priority provision has no validity under the GATT and the WTO Agreement.

In practice, Article 2005 of the FTA and Annex 2106 of NAFTA appear to have had a restraining impact on Canada, particularly in the film sector where proposed legislation intended to control the activity of American film distributors in Canada has been first postponed and then finally abandoned, to be replaced, not without some hesitation, by investment controls intended to close the doors on new start-up companies and foreign takeovers of existing companies in the film distribution sector. It has also played an obvious role in the report of the Working Group on periodicals where efforts were made to demonstrate that the measures proposed to prevent the sale of US split-run editions printed in Canada were compatible with the obligations of NAFTA.[43] To make the matter worse, the US government appears quite decided not to let the FTA/NAFTA cultural exemption become an example for other states. In its North American Free Trade Implementation Act, it has introduced a provision, Article 513, that amends Article 182 of the Trade Act of 1974, to incorporate into it the following text that speaks for itself:

> *(f) SPECIAL RULES FOR ACTIONS AFFECTING UNITED STATES CULTURAL INDUSTRIES*
>
> (1) *IN GENERAL*—By no later than the date that is 30 days after the date on which the annual report is submitted to Congressional committees under section 181(b), the Trade Representative shall identify any act, policy, or practice of Canada which:
>
> - affects cultural industries
> - is adopted or expanded after December 17, 1992, and
> - is actionable under article 2106 of the North American Free Trade Agreement
>
> (2) *SPECIAL RULES FOR IDENTIFICATION*
>
> For purposes of section 302(b)(2)(A), an act, policy or practice identified under this subsection shall be treated as an act, policy or practice that is the basis for identification of a country under subsection(a)(2), unless the United States has already taken action pursuant to article 2106 of the North American Free Trade Agreement in response to such act, policy or practice.[44]

What remains of the cultural exemption of Annex 2106 concerning cultural goods is a matter for speculation. This probably explains why Canada, in its bilateral free trade agreements with Chile and Israel, has insisted on and

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[43] Canada, *A Question of Balance*, Report of the Task Force on the Canadian Magazine Industry (Ottawa: Minister of Supply and Services, 1994), p. 66.

[44] North American Free Trade Implementation Act (HR 3450, S 1627). The provision can also be found in *United States Codes*, Title 19, Article 2242, p. 1312.

obtained a cultural exemption clause that is absolute in the sense that it does not allow for measures of equivalent commercial effect.[45]

Trade in Cultural Services

Apart from the European Union with its rules regarding the free movement of services dating back to the Treaty of Rome of 1958, trade in services has only recently become the object of compulsory agreements. The OECD does have a Code on Current Invisible Transactions, but it is not compulsory. The Canada–US Free Trade Agreement, concluded in 1988, was in effect the first international trade agreement to include specific, fairly detailed, and compulsory provisions concerning trade in services. These were further developed in the North American Free Trade Agreement of 1992, benefiting from the GATT negotiations on trade in services, which themselves led to the General Agreement on Trade in Services of 1993.

The General Agreement on Trade in Services (GATS)

Contrary to what was suggested immediately after the conclusion of the Uruguay Round of negotiations in Europe and even in Canada, GATS does not contain a cultural exemption clause. Early in the negotiations, Canada argued in favour of the inclusion of a general clause that would have covered all cultural services, but dropped the idea for lack of support. The proposal made by the EEC in the last days of the negotiations concerned only audiovisual services and, as mentioned before, did not fare better. The proposal in question, described during the negotiations as a "cultural specificity clause" instead of a "cultural exception clause," envisaged in fact three different modifications or additions to the text of the agreement. A first one would have specified that, in future negotiations on services, the specific needs of the member states concerning the preservation of their national culture would be fully recognized. A second one would have amended Article XV on subsidies to provide explicitly

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[45] Free Trade Agreement between Canada and Chile (entered into force July 5, 1997), Article O-06 and Annex O-06; Free Trade Agreement between Canada and Israel (entered into force January 1, 1997), Article 10.5. The cultural exemption clause of the Canada–Chile Free Trade Agreement reads as follows: "Nothing in this agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article C-02 (Market Access—Tariff Elimination)." The wording of the Canada-Israel Agreement is essentially to the same effect.

that the negotiations to be undertaken on that subject following the entry into force of the agreement would take into consideration the flexibility necessary for the member states in the pursuit of their national goals. Finally, an interpretative note added to the Annex to Article II of the GATS would have specified that co-production agreements could be maintained beyond the maximum period of ten years envisaged in the Annex. None of these suggestions were really discussed and the proposal was quickly retired. In the end, the EEC simply decided not to include in their list of specific commitments audiovisual services, and Canada did the same for cultural services in general. At first sight, therefore, no distinction is made between cultural services and other services in the GATS.

However, looking at the fundamental obligations contained in the agreement, one immediately realizes that enough room was made there for those states willing to limit their undertakings in the cultural sector to allow them to do so, and in the end, a good many did exactly that.

The first basic obligation of members of the GATS is that of Article II, paragraph 1, which provides for the granting of most-favoured-nation treatment to all services and service suppliers of all members, whether commitments have been given or not. However, under paragraph 2 of that same Article, a "member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions." The conditions in question provide that all exemptions granted for a period of more than five years should be reviewed and that, in principle, exemptions should not exceed a period of ten years. In practice, no fewer than 27 states, including many Latin American, Nordic, European, and Arabic countries, and naturally Canada, have asked to have cinema and television co-production agreements inscribed in the Annex on Article II Exemptions for motives having to do essentially with national and regional cultural identity.[46]

Despite this broad exception for non-conforming measures of the members that are listed in the Annex on Article II Exemptions, the MFN obligation does remain an important constraint on their behaviour. It is precisely on the basis of that provision that the European Community, on January 20, 1998, lodged a formal complaint before the Dispute Settlement Body of the WTO in respect of Canada's measures affecting film distribution services, in-

[46] See, for instance, GATS/EL/82 and GATS/EL/33 for Sweden and Finland, and GATS/EL/92 for Venezuela.

cluding the 1988 Policy Decision on film distribution and its application to European companies.[47] The EC, more precisely, argues that Canada treats US distribution companies that were allowed to continue to operate in Canada under the 1988 Policy Decision more favourably than European companies which, as newcomers, are not allowed to distribute films in Canada. As Canada has taken no exemption for such measures affecting film distribution, it is clearly bound by the MFN obligation of Article II:1. What will become of this complaint, presently at the stage of consultations, remains to be seen, as the film distribution company concerned in this case (Polygram) has been bought by a corporation whose headquarters are in Montreal (Seagrams).

But the most important provisions of GATS are to be found in Part III of the agreement that deals with the specific commitments of members. Following the pattern originally developed in the GATT for trade in goods, GATS provides that its members, beyond the general commitment of Parts I and II (MFN treatment, transparency, etc.) should assume specific commitments concerning national treatment and market access in sectors of their choice in answer to requests from other members. In practice, few states have made such commitments in the cultural sector. A WTO document mentions in this respect that only 13 members have made market-opening commitments in the cultural (essentially audiovisual) sector, including three developed countries (the United States, Japan, and Israel) and ten developing countries, and a number of these commitments include various types of limitations.[48] India, for instance, has included motion picture and videotape distribution services, but import of titles is restricted to 100 per year and subject to the prescribed authority having certified that the motion picture has either won an award in an international film festival, participated in any noted film festivals, or received good reviews in prestigious film journals.[49] Canada, as mentioned previously, made no market-access or national-treatment commitments on any cultural services. It even went to the extent of excluding musical scores, audio and video recordings, books, magazines, newspapers, journals, and periodicals from its commitments in the sector of wholesale trade services.[50] The least that can be said, in view

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47 *Canada—Measures Affecting Film Distribution Services* (DS117/1), January 20, 1998. The European Community also argues that Canada has failed to respect its obligations under the transparency provisions of Article III.

48 GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations—Market Access for Goods and Services: Overview of the Results*, November 1994, p. 80.

49 GATS/SC/42, p. 8

50 GATS/SC/16, p. 47.

of all this, is that there is some reticence on the part of GATS members to undertake obligations in that area.

With regard to the treatment of subsidies in the GATS, Article XV simply recognizes that, in certain circumstances, subsidies may have distortive effects on trade in services and, in consequence, asks that members enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such distortive effects. According to Dr. Mario Kakabadse, counsellor in the WTO Secretariat:

> There is no presupposition as to what they will contain or how different they will be from rules on subsidies in the goods area. Like all GATT/WTO negotiations, they will take place on the basis of consensus, and it would seem unlikely that governments would abandon their explicit right to support film production.[51]

In view of the substantial financial support given by many governments to their cultural industries, this is certainly a negotiation that should be followed with great care. Interestingly, the United States, in one of its few limitations on specific commitments in audiovisual services, has explicitly mentioned grants from the National Endowment for the Arts that are only available for individuals with US citizenship or permanent resident alien status, as if to indicate that such grants, in the absence of a limitation, would be incompatible with national treatment.[52]

With regard to emergency safeguard measures, Article X of the GATS similarly provides that there shall be negotiations on the subject based on the principle of non-discrimination. It is more explicit as to the time frame for such negotiations, the result of which "shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement," but, to date, very little progress has been made. As in the case of cultural goods, it remains to be seen whether the new emergency safeguard measures relating to services will truly be helpful in answering the problems of

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[51] Mario A. Kakabadse, "The GATT/WTO Rules and Cinema: Their Consequences for Europe," conference paper, Centre Jacques Cartier, Lyon, December 6, 1995, p. 5. See also by the same author, "The WTO and the Commodification of Cultural Products: Implications for Asia," *Media Asia* 22, no. 2 (1995), pp. 71-77. Work on subsidies effectively began in 1995 in the context of the Working Party on GATS rules, but many countries, noting the inherent complexity of the subsidy issue in services, have urged a careful and systematic approach to the negotiating mandate. See also the note on conceptual issues relating to subsidies prepared by the Secretariat. See Doc. S/WPGR/W9.

[52] GATS/SC/90, p. 46.

cultural industries in difficulty because of the obligations assumed under the agreement.

Our survey of the cultural impact of the GATS would not be complete without a word about the Annex on Telecommunications, the Ministerial Decision on Basic Telecommunications, and the Fourth Protocol with its commitments in basic telecommunications. Under the Annex on Telecommunications, host governments undertake to provide foreign companies with access to, and the use of, public telecommunications network and services on reasonable and non-discriminatory terms for the provision of scheduled services such as banking services, computer services, and enhanced telecommunications. Most telecommunications commitments contained in the 1994 Schedule covered "value-added" services rather than "basic" services, as negotiations on the latter, according to the Decision on Negotiations on Basic Telecommunications, were to continue up to April 1996.[53] Interestingly, measures affecting the cable or broadcast distribution of radio or television programming were explicitly excluded under paragraph 2(b) of the Annex.

The negotiations on basic telecommunications, after an extension of the deadline of April 1996 in the hope of reaching a "critical mass" of sufficient offers from the key telecommunications markets, eventually led, in February 1997, to the tabling of 55 offers covering 69 governments, with enough substance in the eyes of the US government to have an agreement. These commitments are annexed to a one-page Protocol to the General Agreement on Trade in Services, the Fourth Protocol on basic telecommunications. The formal entry into force of the commitments, originally scheduled for January 1, 1998, took place on February 5, 1998.[54] But where a participant's commitments for particular services are to be phased in, the actual implementation would take place on the date specified in the schedule. Generally speaking, participant governments have made commitments to allow competitive supply (defined as permitting two or more suppliers) on voice telephone service, on data transmission services, in leased circuit services; have granted access for cellular/mobile telephone markets; and have included various other commitments in areas such as satellite-related communications or regulatory disciplines.

What kind of impact can the Annex on Telecommunications and the Fourth Protocol on basic telecommunications have on trade in cultural goods

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[53] Decision on Negotiations on Basic Telecommunications, Article 5.

[54] The date of entry into force is announced in WTO, PRESS/87, January 26, 1998.

and services? Two consequences are immediately apparent, one concerning content requirements, the other investment controls. Though the question of content requirements was not at the agenda of the negotiations that lead to the Annex on Telecommunications and the Fourth Protocol, it is absolutely clear that from the US perspective, the next step in the gradual opening of national markets to foreign telecommunications service suppliers will touch directly upon that question. The US-Mexico DBS Protocol of November 1996, annexed to the US-Mexico Satellite Agreement signed earlier in April, can be seen from that point of view as a prototype of things to come.[55] Similarly, the pressure exerted by the United States on Canada during the basic telecommunications negotiations for the total elimination of its investment controls in the telecommunications sector, although they did not lead to a result that was entirely to their satisfaction, have nevertheless forced Canada to increase substantially the level of foreign investment allowed into Canada in that sector.[56] That in turn will make it definitely more difficult to maintain the existing controls over foreign investment in the communication sector, unless some very clear rationale for doing so is developed and defended at the international level.

The pressure to eliminate content restrictions and investment control restrictions, however, is not tied exclusively to actions undertaken by the United States and various other states at the international level. Technological development, convergence, and the globalization of the economy, more than anything else, are at the root of this movement towards the opening of national telecommunication and communication markets and, as shown by the incredible development of the Internet, it will be difficult to stop that movement. This has led certain Canadian observers to declare, perhaps a little prematurely, that

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[55] Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Service Users in the United States of America and the United Mexican States, signed April 28, 1996, and Protocol Concerning the Transmission and Reception from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States, signed November 8, 1996.

[56] Foreign investment in facilities-based telecommunications services is permitted up to a cumulative total of 46.7 percent of voting shares, based on 20 percent direct investment and $33^1/_3$ percent indirect investment. Canada, *Schedule of Specific Commitments*, Supplement 3 (GATS/SC/16/Supp. 3).

the notion of "Canadian content" is something of the past.[57] Even in the US–Mexico DBS Protocol, there is still room left for domestic program content requirement; and in Europe, the quotas of the "Television without Frontiers" directive, notwithstanding some acrimonious debates on the subject, are still in place. What could happen, however, is a gradual switch from content restrictions to other approaches making use of a variety of financial and regulatory incentives in order to preserve a national presence in the cultural field.

NAFTA

Services are dealt with in Chapter 12 of NAFTA. The cultural exception of Annex 2106, discussed previously in relation to cultural goods, is also applicable to trade in cultural services between Canada and Mexico and between Canada and the United States, but not between Mexico and the United States. The big difference, in the case of cultural services, is that since they are not covered by the services chapter of the FTA,[58] there can be, between the Parties to Annex 2106 of NAFTA, no violation of an obligation concerning such services, and therefore no recourse to measures of equivalent commercial effect.

Under Article 1206, each Party had the possibility of lodging reservations aimed at maintaining existing (at the date of entry into force of the agreement) non-conforming measures in specific sectors, sub-sectors, or activities. These measures had to be listed in Annex I of NAFTA at the date of entry into force of the agreement for federal measures, and in the two years following the entry into force of the agreement for state or provincial measures. Mexico has effectively listed a number of reservations in Annex I that are intended basically to protect the use of the Spanish language in the radio-television industry or, in the case of cinema, to guarantee that a minimum percentage of screen time (30 percent) of every theatre may be reserved for films produced by Mexican persons either within or outside the territory of Mexico.[59] These reservations, being outside the scope of the FTA chapter on services, affect only the United States. The United States has made no reservations respecting cultural services in Annex I and, in the case of Canada, the only

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[57] See, for instance, Jonathan Bestinger, "Mapping the Electronic Highway: A Survey of Domestic and International Law Issues," *University of British Columbia Law Review* 29 (1995), p. 199.

[58] The services chapter of the FTA, Chapter 14, covers only listed services and no reference is made in the list (Annex 1408) to cultural services as such.

[59] NAFTA, Annex I, p. I-M-10, I-M-13, I-M-14.

one related to culture is the Investment Canada Act,[60] which will be discussed below. No reservations concerning cultural services as such were made by Canada and the United States in Annex II (reservations for future measures), but Mexico has one.[61] Under Article 1207, the Parties had also undertaken to set out in Annex V any quantitative restriction that they maintain at the federal level and, within one year, any quantitative restriction maintained by a state or a province. No such restrictions concerning cultural services were mentioned by Canada or Mexico, but the United States has one concerning radio and television cable services.[62]

The basic obligations assumed by the Parties under Chapter 12 relate to the granting of national treatment, most-favoured-nation treatment, or, if both apply, the better of the two.[63] They also accept, under Article 1205, not to require "a service provider of another country to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border provision of a service." As was the case under the FTA,[64] subsidies to services are not covered by Chapter 12 nor by any other provision of NAFTA.[65] With respect to cultural services, these obligations apply exclusively between the United States and Mexico, the relations between Canada and Mexico being governed by Annex 2106 of NAFTA.

The importance of assessing with great care the extent of a Party's obligations with regard to cultural services is clearly illustrated by the Country Music Television dispute that arose between Canada and the United States in 1995. It was explicitly on the basis of the denial of national treatment and market access to US-owned television programming services that the United States Trade Representative announced on February 6, 1996, that he had determined, in the Country Music Television section 301 investigation, that certain Canadian broadcasting policies were, on their face, discriminatory.[66] He also indicated, on the same occasion, that in light of ongoing discussions, no retaliatory action would be announced, but that should the negotiations not be concluded successfully in the coming weeks, a list of proposed retaliatory tar-

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60 NAFTA, Annex I, p. I-C-2.
61 NAFTA, p. II-M-2.
62 NAFTA, p. V-U-2.
63 Articles 1202, 1203, and 1204.
64 Article 1402 (9).
65 Article 1201 (2)d).
66 Office of the United States Trade Representative, Press Release 96-13, February 6, 1996.

gets would be made public. Now, leaving aside the fact that an agreement was eventually reached between the private parties involved in that dispute, one may wonder on what legal basis in international law the United States would have acted if they had decided to go ahead with their retaliatory measures. Unilateral actions are no longer permitted under Article 23.1 of the WTO Dispute Settlement Understanding.[67] The United States could not have invoked the General Agreement on Trade in Services since Canada has not undertaken any specific commitments with regard to cultural products. Nor could they have invoked Article 1202 of NAFTA, which concerns national treatment, since under Annex 2106 of NAFTA, as already seen, any measure adopted or maintained with respect to cultural industries and any measure of equivalent commercial effect taken in response is governed exclusively in accordance with the provisions of the FTA, and cultural services are not included in the FTA list of covered services.[68] From a legal point of view, therefore, the United States did not have a very good case, but its show of strength with the USTR's intervention was enough to bring about a settlement that constituted, in effect, an implicit denial of the reasonability of Canada's broadcasting measures in the particular instance.

The OECD Code on Current Invisible Transactions

The OECD Code on Current Invisible Transactions provides another example of the ambivalence that surrounds the treatment of culture in service agreements. The code covers a wide range of services, including audiovisual services, that are the object of particular rules explicitly authorizing screen quotas and production subsidies. Moreover, signatories of the Code are allowed to make reservations in that sector, an opportunity that Canada did not miss. Summarizing the overall approach of the OECD with respect to audiovisual services in 1993, a senior officer of the Organisation could write that, while the objective was to treat audiovisual services as much as possible as any other services, certain constraints of a non-economic nature had to be recognized.[69]

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[67] In *United States—Tariff Increases on Products from the European Communities* (WT/DS39), April 17, 1996, the European Union had accused the United States of having taken unilateral measures under Section 301 of the Trade Agreements Act of 1974; the matter was settled by common agreement when the United States accepted to put an end to its measures.

[68] FTA, Article 1408.

[69] M.-F. Houde, "The OECD Liberalization Instruments and the Audiovisual Sector," *Bulletin SDIE Bulletin* 6, no. 2, p. 13.

Investments

The Uruguay Round of negotiations did not yield a genuine agreement on investment. There is, to be sure, the Agreement on Trade-Related Investment Measures (TRIMs), but it is limited strictly to a narrow range of trade-related investment measures affecting goods only, in effect clarifying provisions of the GATT (Articles III and XI). In the context of GATS, a number of countries have also undertaken commitments with respect to foreign investment in services. But the fact remains that there does not exist at the moment a truly multilateral agreement on investment, the OECD attempt to negotiate a multilateral agreement on investment having failed after three years of negotiations. NAFTA, for its part, does contain a chapter on investment that offers a comprehensive set of rules governing both inward and outward investment. Also of interest in this context are the bilateral agreements on investment concluded by a growing number of countries. Those concluded by Canada in recent years all contain a provision that excludes cultural industries from the scope of the agreement.

In practice, it is clear that an important number of states, including the United States, maintain at the present time various forms of controls over investment in the cultural sector (mostly in relation to ownership of radio and television stations). One has only to look at the compendium of bilateral investment treaties concluded by states of the Western Hemisphere that was recently prepared by the Organization of American States (OAS) Trade Unit,[70] or at a similar instrument prepared for the members of APEC,[71] to realize the extent of that practice. But there is a growing pressure, particularly on the part of the United States, to have such controls abolished. The Investment Canada Act and the Canadian Broadcasting Act in particular are clearly identified by the United States as barriers to US exports.[72]

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[70] Organization of American States, Trade Unit, *Bilateral Investment Treaties in the Western Hemisphere*, A Compendium prepared for the Free Trade Area of the Americas Working Group on Investment, 1996.

[71] APEC, *Survey of Impediments to Trade and Investment in the APEC Region*, A Report by the Pacific Economic Cooperation Council for APEC, 1995.

[72] Office of the United States Trade Representative, *1997 National Trade Estimate Report on Foreign Trade Barriers*, Canada, Investment <http://www.ustr.gov/reports/nte/1997/contents.html>.

The WTO Agreement on Trade-Related Investment Measures (TRIMs)

Notwithstanding its limited scope, the WTO Agreement on Trade-Related Investment Measures (TRIMs) could be used to challenge investment measures related to trade in cultural goods that are inconsistent with the obligation of national treatment of Article III:4, or with the obligation of general elimination of quantitative restrictions of Article XI:1, of GATT 1994. An illustrative list of such measures, annexed to the TRIPs Agreement, includes:

> 1. ...those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
> (a) the purchase or use by an enterprise of products of domestic origin or from any other domestic source, whether specified in terms of particular products, in terms of volume or value of products or in terms of a proportion of volume or value of its local production...
> 2. ...those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
> (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports...

Investment measures concerning cultural goods that would be particularly vulnerable to an attack under the TRIMs agreement are those that incorporate performance requirements. Such requirements are to be found, for instance, in the Investment Canada Act[73] and the Investment Canada Regulations.[74] An investment subject to review under the Investment Canada Act may not be implemented unless the Minister responsible advises the applicant that the investment is likely to be of net benefit to Canada; among the factors to be taken into consideration for that purpose are "the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services in Canada and exports from Canada."[75] To the extent that they affect trade in cultural goods, such requirements could obviously be challenged under TRIMs.

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[73] R.S.C. 1985, C. 28 (1st Supp.).
[74] *Canada Gazette*, Part II, SOR/85-611.
[75] R.S.C. 1985, C. 28 (1st Supp.), Art. 20.

The OECD Proposed Multilateral Agreement on Investment (MAI)

The prospect of a Multilateral Agreement on Investment (MAI) was not the first endeavour of the OECD in the field of investment. As early as 1961, the OECD had adopted a Code of Liberalization of Capital Movements which, although narrower than the MAI in its scope and not legally enforceable, had the merit of dealing with some of the basic issues concerning the free circulation of investments. Interestingly, the Code, in its Article 2(b), left the door open to reservations, a right that was used by Canada to exclude most of the cultural sector, and by some 12 other states to make various types of reservations in the cultural sector.[76]

The impact of the MAI on national interventions in favour of cultural industries, had the negotiations succeeded, could have been considerable.[77] It was going to be a comprehensive agreement covering all forms of investment coming from MAI investors, including the establishment of enterprises and the activities of established foreign owned or controlled enterprises. Its aim was to apply MAI disciplines to all sectors and at all levels of government. It extended beyond traditional foreign direct investment to encompass portfolio investment and intangible assets. Further work was focusing on intellectual property rights, indirect investment, concessions, public debt, and real estate.

Broad obligations on national treatment and most-favoured-nation treatment were central elements of the MAI. There was an understanding that *de jure* and *de facto* discrimination against foreign investors and their investments were covered, although more work was needed on *de facto* discrimination. National treatment and MFN applied to all investment phases with scope for lodging country specific reservations. Texts were being considered concerning the entry, stay, and work of investors and key personnel, the participation of foreign investors in privatization activities, investment incentives, a prohibition against certain performance requirements imposed on investors, and a prohibition of nationality requirements for senior management positions. Obviously, many national measures concerning cultural goods and services

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[76] These states are Australia, Germany, Greece, Italy, Korea, Mexico, Norway, Portugal, Spain, Switzerland, the United States, and the United Kingdom.

[77] The remarks that follow are taken from the progress report presented by the MAI Negotiating Group to the OECD Council meeting at Ministerial level in May 1997, and from the MAI Negotiating Text and Commentary of April 24, 1998. The decision to put an end to the negotiations was reached in October 1998, after six months of interruption in the negotiations. See the *Globe and Mail*, October 21, 1998, p. A1.

would have been vulnerable to attacks under these proposed rules, such as those limiting foreign investment and those that treat differently foreign investors, whether in terms of access to subsidies or in terms of content.

The MAI would have allowed Contracting Parties to take measures to protect their essential security interests and the fulfilment of their obligations under the United Nations Charter concerning the maintenance of international peace and security. Discussions were continuing on a clause to prevent abuse. There were different views on whether the MAI should contain a general exception for public order. Work was also continuing to identify mechanisms to achieve standstill and rollback.

Views diverged on how to address cultural matters in the MAI. Two basic approaches had been proposed, the first one being through a general exception for cultural measures and the second one through country-specific reservations. France had formally proposed a text arguing in favour of an exception clause for cultural industries and provided a draft of such a clause that read as follows:

> Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity.

Of particular interest in this clause is the reference to "policies designed to promote cultural and linguistic diversity." This is a welcome change from the traditional justification given for cultural exemption clauses, that is the preservation of national culture; but the new formulation does not make it any easier to define the scope of the proposed exception, which for many remained a serious problem. A number of other states, including Australia, Belgium, Canada, Ireland, Italy, Portugal, and Spain, had indicated some degree of support for the idea of a cultural exception clause. However, in view of the strong opposition of the United States to any form of cultural clause, the chances of success of the French proposal appeared uncertain.

Another way of dealing with cultural products would have been to permit existing non-conforming measures to be maintained, or certain types of activities to be excluded, provided they were covered by country-specific reservations. This approach, used in the GATS and NAFTA, appeared to have a greater chance to succeed, although it remained to be seen whether the United States would have accepted a reservation that would exclude cultural services altogether. All delegations involved in the OECD negotiations had already

submitted a preliminary list of specific reservations. Although a majority had not submitted reservations which directly affected culture, most of them did reserve the right to maintain foreign investment restrictions in the media and broadcasting sectors, including the United States, Italy, Turkey, the United Kingdom, and the Netherlands, and four countries had submitted substantial lists of culture-related reservations: Australia, Spain, the Republic of Korea, and Mexico. Canada, along with Australia and Korea, stated that they had prepared their list on the assumption that there would be a general exemption for the cultural industries, which can only be interpreted to mean that in the absence of such a clause they would have made additional reservations for specific measures or even for the whole cultural sector.

It is difficult to say for sure at this stage what will become of the MAI negotiating text. Will it simply become a text of reference for the negotiation of a multilateral investment agreement in the broader framework of the World Trade Organization? Judging by the interest manifested for the subject of investment at the 1996 WTO Ministerial Conference in Singapore, and by the suggestions made by France, Canada, and a number of other states at the October 1998 negotiators' meeting, chances are that this solution will prevail.

NAFTA

With the cultural exemption clause of Annex 2106 applying equally to investment, any measure relating to a cultural industry as defined in Article 2107 can be exempted from the obligations of Chapter 11 (Investment), at least in the relations between Canada and the United States and those between Canada and Mexico. As in the case of goods and services, however, it is essential to keep in mind that under Annex 2106, any measure adopted or maintained with respect to cultural industries, and any measure of equivalent commercial effect taken in response, is governed exclusively in accordance with the provisions of the Canada–US Free Trade Agreement. Since all measures that do not conform to the obligations contained in the FTA chapter on investment are grandfathered under Article 1607, they are legally protected and no measures of equivalent commercial effect can be taken in response to them. But this applies only to non-conforming measures that were in application at the date of entry into force of the FTA, that is, January 1, 1989. Measures adopted after that date would have to conform to the FTA obligations on investment, unless it is decided to resort to Annex 2106 of NAFTA and its reference to FTA Article

2005 to maintain them in force; but in such a case, the other parties to Annex 2106 could in turn take measures of equivalent commercial effect.

Canada, the United States, and Mexico have taken a limited number of reservations in Annex I and II of NAFTA that relate to investment in the cultural sector. Canada's reservation in Annex I concerns the application of the Investment Canada Act and Investment Canada Regulations. Strictly speaking, as Jon Johnson points out, this reservation was not necessary as Canada was already protected by the grandfathering provisions of the FTA.[78] All that was added with this reservation was the grandfathering of the measures relating to cultural investments that would have been adopted between January 1, 1989, and January 1, 1994. Mexico also has a few reservations under Annex I that concern the maintenance of certain performance requirements in the radio-television and cinema industries; and both Mexico and the United States have reservations under Annex II concerning broadcasting services (Mexico) and radio-television cable services and newspaper publishing (United States).[79]

Since any violation of the FTA that would be justified only by Annex 2106 could give rise to measures of equivalent commercial effect, it may be useful to recall the basic obligations undertaken by the member states under that agreement with regard to investment. These obligations consist of the granting of national treatment, most-favoured-nation treatment, and the minimum standard treatment; the duty, in case of expropriation, to act in accordance with the requirements of international law (public purpose, non-discriminatory basis, due process of law, fair, prompt and effective compensation); the interdiction of certain performance requirements; and finally, the requirement to permit all transfers relating to an investment, save where justified by prudential reasons.

Canada's Bilateral Investment Agreements

Canada has a number of bilateral investment agreements that contain a cultural exemption clause that is absolute, in the sense that its use does not open the door to measures of equivalent commercial effect. In the Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, one finds the following provision:

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[78] Jon R. Johnson, supra note 42, p. 474.

[79] NAFTA, p. II-M-2, II-U-2, II-U-8.

> Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:
> (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
> (b) the production, distribution, sale or exhibition of film or video recordings;
> (c) the production, distribution, sale or exhibition of audio or video music recordings;
> (d) the publication, distribution, sale or exhibition of music in print or machine readable form; or
> (e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

As of September 1998, 17 states had accepted to sign an investment agreement with Canada that integrates such a provision: these are (in addition to Thailand) Armenia, Barbados, Costa Rica, Croatia, Ecuador, Egypt, Latvia, Lebanon, Panama, the Philippines, Romania, South Africa, Trinidad and Tobago, Ukraine, Uruguay, and Venezuela. Three more—Guatemala, El Salvador, and Peru—have drafted a similar agreement that should be signed in the near future. One can infer from the conduct of these states that they are not opposed to a distinct treatment of cultural products in international trade law.

Intellectual Property Rights

Intellectual property rights and cultural products are closely associated, so much so that cultural products have sometimes been described as essentially copyrighted goods.[80] The fact is that the remuneration of cultural creators and producers depends largely on the respect of intellectual property rights and that a lack of implementation of those rights will immediately affect them. Until recently, most of the attention in intellectual property rights matters was devoted to the search for common approaches and to the adaptation of basic principles to new situations. Such concerns were mostly addressed in the context of organizations such as the World Intellectual Property Organization (WIPO). But a growing concern for an apparently uncontrollable phenomenon of illegal

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[80] See Hale E. Hedley, "Canadian Cultural Industries and the NAFTA: Problems Facing the US Copyright Industries," *George Washington Journal of International Law and Economics* 28 (1995), p. 655; see also supra, note 38.

copies has prompted the intervention of other international organizations in the field of intellectual property rights, a concern centred on the implementation of property rights. Two important trade agreements, the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and NAFTA have addressed this concern.

TRIPs

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) consolidates the disciplines of the Berne Convention (literary and artistic works), the Geneva Convention (phonograms), the Rome Convention (neighbouring rights), and the Paris Convention (industrial property) into a single undertaking, backed up by enforceable dispute settlement measures. Members are free to determine the appropriate method of implementing the TRIPs Agreement within their own legal system but they must give to the nationals of other members the national treatment required in the Paris, Berne, and Rome conventions, subject to the national treatment exceptions contained in these same treaties. Article 9 of the TRIPs Agreement is of particular interest because, while it requires compliance with the substantive obligations of the Berne Convention, it makes an exception for moral rights, which are not recognized by the United States.

Neighbouring rights are subject to the conditions, exceptions, and limitations authorized by the Rome Convention.[81] This raises no particular problem for most states concerning the rights that are explicitly recognized. What does seem to raise some difficulty, at least in the eyes of the United States, is the case of private copy. The US government has repeatedly asserted its right under the national treatment obligation to share in the benefits of schemes (usually taking the form of a levy on blank audio cassettes) put in place by various governments to compensate private copy, even though nothing similar is offered in the United States.[82] Whether such schemes could effectively be challenged under TRIPs is far from obvious as the Rome Conven-

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[81] Article 14 of the Convention.

[82] In the Fact Sheets concerning the operation of "Special 301" on Intellectual Property Rights and 1996 Title VII Decisions, the Office of the USTR mentions with respect to the European Union: "Denial of national treatment with respect to audio and video levies remains a problem in certain member-states." See <http://www.ustr.gov/reports/special/factsheet.html>.

tion explicitly authorizes reciprocity;[83] moreover, a US attempt to have the question of levies for private copy taken into consideration in TRIPs was rejected.

The importance that the United States attaches to TRIPs as an instrument to protect intellectual property rights in the cultural sector is evidenced by its WTO dispute with Japan on sound recordings and with Greece and the European Communities on motion pictures and television programs. On January 24, 1997, United States Trade Representative-designate Charlene Barshefsky announced that the United States and Japan had resolved their dispute over Japan's protection of US sound recordings, Japan having adopted amendments to the Japanese copyright law to provide protection to US recordings produced between 1946 and 1971. Prior to the adoption of these amendments, Japanese law granted protection only to foreign sound recordings produced on or after January 1, 1971, the date on which Japan first provided specialized protection for sound recordings under its copyright law.[84] On April 30, 1998, the United States lodged two complaints before the Dispute Settlement Body, one against Greece, the other against the European Communities, with respect to the lack of enforcement of intellectual property rights in Greece. The US claims that a significant number of TV stations in Greece regularly broadcast copyrighted motion pictures and television programs without the authorization of copyright owners, in violation of Articles 41 and 61 of TRIPs. Consultations were still pending in these two cases on August 12, 1998.[85]

NAFTA

In a commentary on NAFTA published in 1993 by the American law firm of Paul, Hastings, Janofsky, and Walker, one can read this interesting comment that tells a great deal about the perception in the United States of the cultural exemption of NAFTA with regard to intellectual property rights:

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[83] Article 16 of the Convention.

[84] Office of the United States Trade Representative, Press Release 97-04, January 24, 1997. A demand for consultations on the same facts was made by the European Union, with the same result: *Japan—Measures Concerning Sound Recordings*, May 24, 1996.

[85] *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WTO Doc. WT/DS124/1, and *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WTO Doc. WT/DS125/1.

> Perhaps the greatest failing of the NAFTA intellectual property provisions is the preservation of Canada's so-called "cultural exemption," which originated in Section 2005 of the Canada-US FTA...As a result of Canada's unyielding negotiating posture on this politically sensitive topic, the text of NAFTA proposed by the three governments retains this exemption—even though it is diametrically at odds with the fundamental premise of non-discriminatory treatment of intellectual property rights under NAFTA.[86]

The US government itself has recognized that Annex 2106 authorizes a Party mentioned in the Annex to maintain measures relating to cultural industries that do not conform to Chapter 17 of NAFTA (Intellectual Property). In the Report to Congress presented in 1993 by the United States General Accounting Office, it is said that:

> ...NAFTA permits the parties to exempt themselves from the agreement's obligations (such as national treatment), including those in the services, investment and intellectual property chapters, affecting cultural industries.[87]

However, the same report goes on to say that "the agreement's automatic retaliation provision should serve effectively to deter the Canadians from implementing any adverse measures affecting the intellectual property rights of the US movie, recording and/or publishing industries."[88] This, unfortunately, is a mistaken interpretation of Annex 2106. A literal interpretation of the latter necessarily leads to the conclusion that such measures of "retaliation," governed exclusively in accordance with the provisions of the Canada-US Free Trade Agreement, cannot be used where there is no violation of the FTA. Since there is no chapter on intellectual property rights in the FTA, there can be no violation of the agreement and therefore no right to use measures of equivalent commercial effect.[89] Concretely, this means that with respect to intellectual property rights, Canada benefits from an absolute exemption clause.

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[86] Paul, Hastings, Janofsky, and Walker, *North American Free Trade Agreement, Summary and Analysis* (New York: Mathew Bender, 1993), pp. 98-99.

[87] United States General Accounting Office, *North American Free Trade Agreement—Assessment of Major Issues* 2, September 1993, p. 100 (GAO/GGD-93-137).

[88] Idem, p. 100.

[89] This is also the point of view expressed by the Canadian Government in its *Canadian Statement on Implementation*: see *Canada Gazette*, Part I, January 1, 1994, pp. 218-219. See also, for a more detailed study of this question, Ivan Bernier and Anne Malépart, "Les dispositions de l'Accord de libre-échange nord américain relatives à la propriété intellectuelle et la clause d'exemption culturelle," *Les cahiers de propriété intellectuelle* 6, no. 2 (1994), pp. 139-171. For a different point of view suggesting that Annex 2106 should not be interpreted literally, as argued by

This is not to say that Canada has no intention to implement the intellectual property rights provisions of NAFTA. On the contrary, in the North American Free Trade Agreement Implementation Act, Canada has made not less than 60 amendments to its existing legislation in order to implement the intellectual property rights provisions of NAFTA.[90] Concerning copyright, it has taken all necessary measures to give effect to the Berne Convention (in its 1971 version) and to the Geneva Convention. It has also modernized a number of definitions and introduced a right of location that did not exist previously.

However, situations could arise where Canada considers it necessary, in order to help strengthen Canadian identity and contribute to the cultural sector, to adopt laws or regulations that are not compatible with the obligations of Chapter 17 of NAFTA. In such cases, Canada could be forced to have to resort to Annex 2106; but before relying on that last resort solution, a careful analysis is necessary. Thus, in the months that preceded the adoption by Canada in 1997 of a new Copyright Act that recognizes a public performance right for record producers and performers and implements a levy on the sale of blank audio tapes, the United States had clearly indicated its intention to ensure that these amendments were not at the expense of US copyright interests.[91] But the real question from our point of view is whether such action would be incompatible with Canada's obligations. Under Article 1703(1) of NAFTA, it is clearly stated that:

> Each Party shall accord to nationals of another Party treatment no less favourable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights. In respect of sound recordings, each Party shall provide such treatment to producers and performers of another party, except that a Party may limit rights of performers of another Party in respect of secondary uses of sound recordings to those rights its nationals are accorded in the territory of such other Party.

According to that provision, it is clear that Canada is entitled, in respect of secondary uses of sound recordings, to limit the rights of American performers to those recognized in the United States. In their case, there would

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Canada, but rather functionally, as transposing in NAFTA the FTA provision, see J.A. Ragosta, J.R. Magnus, and K.L. Shaw, "Having Your Cake and Eating It Too: Are There Limits on Cultural Protectionism?" Dewey Ballantine Publications, <http://www.dbtrade.com/publications/180898A. htm>.

90 *Statutes of Canada*, 1993, C. 65.

91 Office of the United States Trade Representative, *1997 National Estimate of Foreign Trade Barriers*, Canada.

obviously be no need to resort to Annex 2106 to justify the Canadian legislation. In the case of producers, however, the absence of any reference to them in Article 1703(1) means that the only way for Canada to justify its requirement of reciprocity would be to rely on Annex 2106. Considering that the US right to retaliate, under that Annex, is limited to measures inconsistent with the FTA and that the FTA does not deal with intellectual property, it is not clear what the United States could do legally to force Canada to change its legislation.

Conclusion

Our survey of the treatment of cultural goods and services in international trade law has shown that there is still a great deal of ambivalence concerning the way they should be treated. Behind this ambivalence lies a fundamental question which is that of the specificity of cultural products. For the United States in particular, cultural products do not differ from other products and therefore should receive exactly the same treatment. But other states consider that they are fundamentally different in certain respects and therefore should not be treated as other products.

Unfortunately, there is no obvious answer to that question. There is always the possibility of arguing that culture "is simply the society-wide summation of the individual choices people make."[92] Therefore, there is no need to treat cultural products differently. But the answer is too simple and says nothing about the various views that have been developed by economists, political scientists, and specialists on the subject. There are those, for instance, who argue that cultural products are public goods that merit some degree of government intervention.[93] There are also those who consider that cultural products, as vehicles of meaning and values, constitute an essential part of the democratic process within a society, and for that reason must be protected.[94] There are again those who make a link between domestic cultural production

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92 Michael Walker, "Comments on the Role of Economics in Understanding Cultural Change," document presented for discussion, Cuernavaca, Mexico, 1992, p. 1.

93 Daniel Schwanen, "A Matter of Choice: Toward a More Creative Canadian Policy on Culture," in *Commentary* No. 91 (Toronto: C.D. Howe Institute, April 1997), p. 10.

94 See Marc Raboy, Ivan Bernier, Florian Sauvageau, and Dave Atkinson, "Cultural Development and the Open Economy: A Democratic Issue and a Challenge to Public Policy," *Canadian Journal of Communication* 19 (1994), pp. 291-315.

and national security.[95] And there are even those, with a long experience of trade negotiations, who do not hesitate to question the headlong rush into international agreements aimed at creating common, global rules for everything, and who affirm "that diversity among nation-states...is a fundamental human value."[96] However, none of these views has succeeded yet in bringing about a consensus on the treatment of cultural products in international trade.

The fact is that in a context where industrial interests are often dressed in national interests, it is not always easy to distinguish between state interventions intended to promote the economic success of cultural undertakings and those intended to promote the cultural development of a community. What is needed in reality is a twin-track approach that would recognize that cultural products, to the extent that they are traded, come under the ordinary rules of international trade agreements, but at the same time would make it possible for states to intervene in order to ensure a viable domestic cultural production and to favour better access to a diversified foreign cultural production. In other words, an approach that would distinguish between the industrial and the cultural objectives of government intervention.

At the international level, this means that efforts should be made, not so much to exclude altogether cultural products from international trade agreements, but rather to find a way to permit derogatory interventions by the state in defined circumstances. One way to do it would be to use the approach of GATT 1994 and of GATS for general exceptions: the listed exceptions are "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,"[97] and should be least disruptive as possible to international trade. If this could be done in the GATT of 1947 for "the protection of national treasures of artistic, historic or archeological value," or for an objective such as "the conservation of exhaustible natural resources," it can arguably be done now for the preservation of cultural and linguistic diversity, including national cultures.

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[95] Franklin Griffiths, *Strong and Free: Canada and the New Sovereignty* (Toronto: Stoddart, 1996).

[96] Sylvia Ostry, former Canadian Ambassador to the Uruguay Round of trade negotiations, in a speech given at the University of Ottawa, "Trade negotiator fears sovereignty at risk," April Lindgren, *Ottawa Citizen*, Saturday, June 28, 1997.

[97] GATT 1994, Article XX, and GATS, Article XIV.

Another way would be to allow for country-specific reservations that could be used, as in NAFTA, to permit the maintenance of existing non-conforming measures (bound reservations), or the adoption of new ones with respect to specific sectors or activities (unbound reservations).[98] Such a country-specific reservations approach, as seen before, has also been used in GATS, in the OECD (Code on Current Invisible Transactions and Code of Liberalization of Capital Movements), and could well find its way in the proposed OECD Multilateral Agreement on Investment. But if bound reservations appear largely accepted now, the same cannot be said of unbound reservations which still raise some serious problems for a number of states.

One way or another, it is clear that the issue of the treatment of cultural products in international trade, which was left unresolved at the end of the Uruguay Round of negotiations, will come back to the forefront very soon in the context of the forthcoming WTO negotiations on services. A growing number of states have expressed their preoccupation with that issue in recent years, as the debate in the context of the MAI indicates. And a surprising number of states have accepted, on a bilateral or regional basis, to enter into trade agreements that contain a cultural exception clause. But there remains to develop a consensus on that issue at the multilateral level. The burden of proof, in the context of trade negotiations, is clearly on those states that advocate a particular treatment of cultural goods. To convince other states of the necessity of such treatment, they will have to work together to develop a compelling rationale, try to bring to their views a maximum number of states, and give some clear indication of how far they are ready to go to defend their views. Canada, in that context, has a crucial role to play as the leading advocate of cultural exception clauses. Unless something like this is done, chances are that internationalization will win the day without even a serious debate on the issue, which would be too bad not only for the preservation of cultural diversity, but also for international trade itself. For diversity, including in a very fundamental way cultural diversity, is the essence of trade.

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[98] To give an example of reservations for future measures, Canada, the United States, and Mexico have made such reservations with respect to aboriginal or minority affairs.