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When “Cultural Identity Was Not at Issue”: Thinking about Canada - Certain Measures Concerning Periodicals

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THINKING ABOUT CANADA—CERTAIN MEASURES
CONCERNING PERIODICALS

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WHEN "CULTURAL IDENTITY WAS NOT AT ISSUE": THINKING ABOUT CANADA—CERTAIN MEASURES CONCERNING PERIODICALS

CHI CARMODY*

ABSTRACT

Comparative advantage is a popular tool for analyzing international economic relations today. Its workings are reflected in the law and structure of the global trading system, now arranged under the institutional framework of the World Trade Organization (WTO). This framework stresses efficiency, yet efficiency is only one goal among many. Freer trade, as the embodiment of efficiency, can therefore be at odds with other goals, particularly in its emphasis on a good or service’s immediate physical qualities and not their value in a broader social context.

Often there is tension between freer trade and cultural autonomy, principally because of how we think and what we think about. This conceptual tension was reflected in a recent case before the WTO’s dispute settlement system, Canada—Certain Measures Concerning Periodicals. On that occasion WTO decision-makers failed to acknowledge a cultural distinction between goods. The result suggests that future decisions will continue to consider WTO rules through an economic prism, meaning there is little room to evaluate the cultural content of goods and services, or the distinct cultural purposes motivating certain national laws. Such an approach is at variance with objectives of the WTO Agreement, as well as with international law, which recognizes that cultural autonomy is inherent in the global legal order.

To better protect cultural autonomy in the world trading system, this Article proposes a carefully defined waiver to the WTO Agreement. The text of the waiver is appended, with the aim of bringing WTO practice into closer conformity with international law.

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Text: A Waiver Regarding Cultural Industries

I. INTRODUCTION: THE DEFICIENCY OF EFFICIENCY

In 1387, an English princess, Philippa of Lancaster, married the
Portuguese king, João I, to cement an Anglo-Portuguese alliance that
was to last for more than 500 years.1 The alliance had important trade
implications. Philippa "provided royal patronage for English commercial
interests that sought to meet the Portuguese desire for cod and
cloth in return for wine, cork, salt and oil shipped through the English
warehouses at Porto."2 In this way, English woolen goods were intro-
duced to Portugal while fortified Portuguese wine, better known as
"port," eventually became the drink of English drawing rooms.

This simple exchange of "wine-for-woolens" persisted for centuries
and was later used by the English economist David Ricardo (1772-

1. See Walter C. Oopello, Jr., Historical Setting, in PORTUGAL: A COUNTRY STUDY 1, 21 (Erie

trade theory is acknowledged today by the inclusion of his portrait on the web site of the WTO's
Economic Research and Analysis Division, Research and Analysis (visited Oct. 9, 1998) <http://
www.wto.org/who/research/research.htm>, He is the only person so honored.

3. See id., supra note 3, at 76.

4. The WTO was established in April 1994 to administer the General Agreement on Tariffs
and Trade (GATT), originally concluded in October 1947 and provisionally applied by its
contracting parties as of January 1948. The organization is headquartered in Geneva, Switzerland.
See generally The Marrakesh Agreement Establishing the World Trade Organization, (hereinafter
WTO Agreement) in Final Act Embodying the Results of the Uruguay Round of Multilateral
Trade Negotiations, Apr. 15, 1994, in RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE
accord of which GATT has now become a part. It formalizes GATT's coverage of the world trading
as adjustment costs, formed part of the bottom line in determining whether Portugal and England traded at all. The model also does not account for "externality," or side effects that international exchange can create. Ricardo's "wines-for-woolens" example fails to consider, for instance, the trade-induced influence that England assumed in Portuguese foreign affairs for several centuries. Simply put, the bigger picture is not addressed. Thus, comparative advantage is attractive when considered from a strictly economic perspective, but when examined more broadly, and particularly in terms of social phenomena that are inherently harder to quantify, the theory's potential repercussions give cause for reassessment of its result.

Despite concern, the efficiency of comparative advantage is a popular idea today. People everywhere are portrayed as happy producing, trading, and consuming. In this slightly Orwellian environment we no other vision of a dominant social goal. The psychology of productivity has become so all-encompassing and successful that we do not think of alternatives. The end of communism removed the last competitor to consumer-based capitalism from our economic imagination, and the relatively swift makeover of former socialist regimes has only reinforced our belief in the essential correctness of capitalism. It is now hard to conceive of the world in any other way.

But there are other ways. A survey of history shows that life has been, and in some places still is, different. Leo Bogart has written:

People exchange and consume goods and services in every society, but [America's] seems uniquely dedicated to that purpose. There are cultures in which sheer existence is so precarious that human beings find it hard to transcend the immediate task of obtaining food and shelter to survive. There are cultures whose members are primarily concerned with the integration of their individual existences into the pattern of nature and tradition. They are preoccupied with spirits, deities, or ancestors. There are cultures that value time, indolence, the warmth of personal relationships, the cultivation, for mere pleasure, of skills that cannot be sold.

These words are an important reminder that national cultures can have values other than economic efficiency and that laws can reflect more than a preoccupation with optimized production and gains from trade. Under the WTO, however, economic efficiency or "wealth maximization" remains the pre-eminent value of international trade rules. Efficiency is clearly referred to in the preamble of the WTO Agreement, which mentions improved living standards, "full employment and a large and steadily growing volume of real income and effective demand" as policy objectives to be achieved through "optimal use of the world's-resources." This pronounced efficiency orientation contributes to the general tendency today to consider public policy in economic terms, including public policy about things non-economic. Over time it may also contribute to a worldwide shift away from culturally determined aims toward those that are more economically optimal.

The standard justification for an efficiency orientation is popular benefit. Through efficient production, more output can be had from the same input and people are considered better off. However, people also benefit from things that do not reflect efficiency, such as variety or a sense of belonging. When governments legislate to protect these inefficient values they are acting for reasons that are no less important to personal fulfillment than all the efficiency that economics generates. For example, Israel prohibits the import of meat considered

10. The Chicago School of economic theory has long been associated with the application of economic analysis to diverse fields. A leading exponent of this School is Judge Richard A. Posner. Posner explains that "[the] efficiency theory of the common law is not that every common law doctrine and decision is efficient" but that "the common law is best (not perfectly) explained as a system for maximizing the wealth of society. Statutory or constitutional is distinct from common law fields are less likely to promote efficiency." Richard A. Posner, Economic Analysis of Law 21 (3rd ed. 1986). Posner is a leader in the application of economic theory and empirical methods to a range of non-market activity. See generally Richard A. Posner, Sex and Reason (1992).


12. At the same time, there is the disquieting habit of seeing trade-driven efficiency in a value-neutral way, as though it has no social impact at all when, in fact, it does. A related concern is that what is considered optimal in economics may be very different from what is considered optimal in society. Making a society more economically efficient may be expensive in terms of other social goals, such as full employment or a clean environment, so that, at some point, the decision is made for that society to remain, economically speaking, inefficient. This often happens
unclean in orthodox Judaism and has reinforced this ban through the free trade agreements it has concluded. It does not matter that pork might be cheaper to raise than other meat, because Judaism, as Israel's state religion, forbids its consumption completely. Efficiency therefore yields to religion. On the other hand, for many years, beer sold in Germany had to be produced according to a centuries-old German recipe designed to guarantee purity. While this recipe ensured that German beer became a symbol of German quality and good cheer, the law based on it potentially impeded foreign beer sales in Germany and was struck down as treating foreign products less favorably than domestic ones. In that case, tradition yielded to efficiency. None of the foregoing would really matter except that free trade is generally meant to promote non-discrimination, not homogenization. In replacing national societies of culture with a global society of efficiency, one risks losing something intangible that is more valuable than economics and that goes to the very heart of human well-being. The tension between trade and culture can be regarded as a modern manifestation of the age-old debate between society (Gesellschaft) and community (Gemeinschaft). A premise of this Article is that the General Agreement on Tariffs and Trade (the GATT) and the WTO reflect a vision of Gesellschaft, which has been described as “an open society of anonymous individuals, related by contract rather than status, engaged in a free market of both goods and ideas, freely pursuing their own aims, and having a light and provisional commitment to cultural background . . .”

This concept is to be compared with that of Gemeinschaft, or “a closed cultural background, where members found fulfillment in its very idiosyncrasy and distinctiveness, and in the effectively suffused, highly personal even if hierarchical relationships which it sustained.” The contrast between these two ideas does not imply that one is necessarily better than the other. There is much good that can come from WTO-directed Gesellschaft. But too much Gesellschaft erodes the familiar Gemeinschaft. In developed countries today we are witnessing the erosion of community and the disturbing drift toward sameness, with serious implications for the cultural autonomy of individuals, groups and countries everywhere.

14. See Commission of the European Communities v. Federal Republic of Germany, (1987) 3 E.C.R. 1287, 1989-72. In that case, the European Court of Justice held that a 450-year-old German law requiring that only beer manufactured from malted barley, hops, yeast, and water could be marketed as “beer” was tantamount to a quantitative restriction on beer imports, because it had the potential to restrict the flow of foreign beer into Germany. See id.
15. See id.
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Not all, or even most, of this process can be attributed to the WTO, yet perhaps some of it can. At this early stage in the history of the WTO, we in developed countries should question why we are promoting a global trading order at all. Is it to make people in the world more like us, or more truly like themselves?

The drive for efficiency through freer trade also raises the question of equity. The WTO Agreement is supposed to promote free trade, but free trade does not necessarily ensure the equality of competitive opportunity that constitutes fair trade. Economic theory posits that free trade should lead to fairer trade over the long run. Often, however, the adjustment required is difficult or does not happen. The gap between theory and reality is especially problematic in the realm of cultural industries such as television programming, where populous countries with large home markets can naturally promote competitive conditions that smaller countries cannot. Competition in a large market means

Collier has described the phenomenon of "hypercapitalism," where society is overly preoccupied with laissez-faire economics and individualism, and insufficiently concerned with communal health and well being. See generally, RUTH COLIER, AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY, AND THE STATE (1998). In the United States, some efforts are being taken to improve communal sentiment through a range of exploratory initiatives in diverse areas such as "slow" cooking and "politeness training." See Florence Fabricant, A Slow Food Revival, N.Y. TIMES, Jan. 7, 1998, at F2 (stating that the Slow Food organization now works to preserve artisinal methods of food production and longstanding culinary traditions); Janet Kishman, Rudeness on the Rise, WASH. POST, Dec. 15, 1997, at B5 (referring to efforts to recenter the concept that civility, manners and well-bred social intercourse are safeguards of a democratic society).

Sameness, sometimes referred to as "monoculture," has traditionally been criticized in biology and environmental law, but has been critically applied by several writers to the standardization of human culture as well. The parallel between environmental and human monoculture has been vividly drawn by Curtis Horton, who has written:

At the current rate of deforestation, one million species may be extinguished in the next 50 years. Proportionately, the loss of cultural diversity is similarly devastating. While habitat loss threatens both species and traditional cultures, indigenous peoples face the additional threat of "being civilized into extinction." An estimated 500 million indigenous peoples belonging to approximately 5,000 groups live in 170 countries around the world. In one country alone—Brazil—experts estimate that one Indian tribe has disappeared each year since 1990. At least 90 percent of the 6,000 languages now being spoken are expected to die out within roughly 100 years.


20. Canadian writer John Ralston Saul described this "cultural effacement" in 1994:

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that the marginal costs of participating cultural industries are generally low, which puts these industries in an advantageous position to sustain the losses necessary to build overseas market share. While such a development might be welcomed by a classical economist, it occurs without any sympathy for the fact that free trade puts the cultural industries of smaller countries, in which an important part of their cultural identity resides, at a corresponding disadvantage. As a result, small country consumers live with the constant threat of cultural effacement, not only in terms of disappearing native cultural goods and services, but also through the influx of foreign cultural imagery that accompanies virtually all finished imports, be it in the contour of an imported automobile or the language of a satellite broadcast.

A case highlighting the tension between free trade and culture came before the WTO’s Dispute Settlement Body (DSB) recently in Canada—Certain Measures Concerning Periodicals. Although what was facially at issue was the compliance of certain Canadian government regulations with the WTO Agreement, what was more fundamentally involved, notwithstanding the panel’s famously self-absorbing language that “cultural identity was not at issue,” was the ability of the WTO’s dispute settlement system to appreciate the cultural aspect of a good. The fact that a Canadian magazine is physically "like" an American magazine, or even that it contains similar news and advertising does not mean that, for all intents, it is the same. The panel failed to acknowledg—

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de this cultural distinction. In so doing, it revealed a bias in its analytic method, a bias inconsistent with protection of cultural identity in the modern world.

The thesis of this Article is that the result of the Periodicals case suggests future panels will view the Uruguay Round results strictly through an economic prism, meaning that there is apparently little room to evaluate the cultural content of goods and services or the distinct cultural purposes motivating certain laws. To regard the WTO Agreement solely as a code of economic conduct is to ignore a great deal about the wider social environment in which the WTO Agreement operates. Such an approach is also at variance with the WTO Agreement’s origins and, more fundamentally, with international law, which recognizes that cultural pluralism is inherent in the global legal order. A waiver is therefore necessary to protect cultural identity in WTO decision-making.

The problem with recognizing culture is that recognition runs counter to a key premise of free trade, namely, that origin does not matter. However, according to the panel in the Periodicals case, origin did matter. Canada’s legislation effectively banned foreign magazines that could substitute for Canadian periodicals. While the adequacy of that substitution is questioned here, the more profound issue presented is how a concept as indeterminate as “culture” can provide a principled basis for distinction in law. This question must be answered with precision before a “cultural waiver” to the WTO Agreement can operate successfully.

Part I of this Article reviews the protection of culture in international law. It examines the evolution of cultural protection and finds that, notwithstanding interpretive difficulties about what “culture” is, cultural autonomy is a norm of the international legal order. Nevertheless, respect for cultural autonomy clashes with the reality of the world trading system, which acknowledges only a good or service’s immediate physical qualities, but not its value as a product of cultural expression. Part III then reviews the treatment of cultural goods and policy arguments under the GATT. The cultural implications of trade were unclear in the early history of the GATT, and although there is evidence that the drafters did not conceive of economic gains as the only value worthy of protection in the world trading system, ambiguity and the tendency to think in quantitative terms have helped to legitimate the economic focus of GATT interpretation. Over time, panels developed the informal rule that social and policy considerations were irrelevant where they conflicted with GATT provisions, meaning that culturally sensitive decision-making was not undertaken.

During the Uruguay Round, the failure to agree on a definition of, or place for, culture in the WTO Agreement left the status quo intact, principally because without a definition no boundary could be drawn to protect culture nor could any panel deal with it meaningfully. These inadequacies were evident in the Periodicals case, which is examined in Part IV. On that occasion, WTO decision-makers refused to regard a product’s Canadian-made content as grounds to distinguish it, implicitly rejecting any consideration of a good’s cultural content.

The result was consistent with other recent panel decisions but avoided any scrutiny of a good’s intangible cultural character or the broader social context in which it is created. In light of this conclusion, Part V critiques two proposals that have been made to provide the WTO with a cultural exception and suggests that a better instrument for implementing cultural protection is a specific cultural waiver to the WTO Agreement. The proposed waiver, a text of which is appended, would bring WTO practice into closer conformity with norms of international law.

II. THE PROTECTION OF CULTURE IN INTERNATIONAL LAW

A. The Protection of Culture in International Law

What is culture? Virtually all work on the subject of identity has struggled with this question, only to acknowledge that formulating an answer is difficult. At the risk of some simplification, culture can be

26. This trend was particularly pronounced in "like product" and substitution analyses, where the exercise of comparing domestic and foreign products was gradually reduced from a comprehensive assessment of both objective and subjective factors to one focusing strictly on quantifiable physical characteristics. A 1970 Working Party on Border Tax Adjustments said that the following factors had been suggested for determining similarity: "the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality." GATT B.I.S.D. (10th Supp.) at 97, 101–02 (1979). The 1987 panel report, Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, adopted three criteria: similar properties and end-uses, and usual uniform classification in tariff nomenclature. GATT B.I.S.D. (34th Supp.) 88, 115–16 (1987). More recently, a WTO panel examining the same topic said that the critical factors were commonality of end-uses coupled with essentially the same physical characteristics. See WTO Panel Report, Japan—Taxes on Alcoholic Beverages, WT/D/SB/R, WT/D/SI/R, WT/D/SII/R, ¶ 6.22 (1996) (hereinafter Japan—Alcoholic Beverages Panel Report).
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defined for the present purpose as expression reflecting the traditions and convictions of an existing community. Another question, and an important one here, is why international law should be concerned about the protection of culture. After all, culture is generally unique to one country. That its preservation should be of concern to other countries is in some sense peculiar.

International law seeks to protect culture for two reasons: sovereign equality and human rights. First, international law recognizes the theoretical equality of sovereign states regardless of their true differ-

29. Many definitions of culture exist. John Froehnmayr has written:

Culture is, on the one hand, the very expression of our soul both individually and collectively, and on the other, the source of criticism, confrontation and discontent. When Louis Armstrong was asked to define jazz, his well-known response was: “Man, if you have to ask, you’ll never know.” So consigning ourselves to those who, in the great trumpeter’s world will never know, let us ask the question anyway. What is culture?

John Froehnmayr, Should the United States have a Cultural Policy?, 38 Yale L. Rev. 195, 196–99 (1995). Froehnmayr, former Chairman of the National Endowment for the Arts, offers three views:

First, culture, to the anthropologist, the folklorist and the archeologist, is part of the immutable web of what a society is and does. It is the tribal dance, the sacred ground, the strain of rice, the herbal remedy, the architecture, the folk wisdom, the flora and fauna and the oral tradition. In short, it is the best manifestation of what a society has created, what a society values and what a society believes. These activities and objects come alive only in the context of a whole society.

A second view is that culture can be defined as what is collected by a country’s museums and libraries. It includes what prior generations have prized enough to preserve and honor, so by this definition, United States’ culture would include Greek vases, Kilkis masks and bronzes from the Ch’in dynasty. It is derivative and collective.

A third view contends that our culture resides in those commodities that we are able to buy and sell, and the greater the price, the more prized the item. Under this view, Van Gogh’s Dr. Gachet, which recently sold for $82.5 million, would be highly prized, as would the tremendous economic horsepower of such people as Madonna and Michael Jackson. Notably, under this theory, one makes no distinction between popular and rising or high and low culture. The marketplace alone defines what is good.

What we mean by “culture” can be continually redefined and expanded. When I was Chairman of the National Endowment for the Arts, we gave grants in a number of different categories such as dance, theater, opera, folk art and literature. But there never seemed to be enough categories to please everyone. I was assailed by a group wanting a category for the martial arts and by another group, I suspect from Detroit, who wanted to establish a category for automobiles as art.

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ence. To the extent that countries are a proxy for a culture or group of cultures, then in a world order based on the rule of international law, there must be respect for the equality of cultures from which sovereignty emanates. Thus, inherent in the international legal system is an ethos of pluralism, an acceptance that different cultures must be accorded regard as an integral part of international legality. This is true despite the fact that “the predominant strain of international law was in its origins largely a product of Western Christian civilization during the 16th and 17th centuries” and that this strain continues to reflect itself in the predominantly Western orientation of international law today. In other words, it would be inconceivable for countries to accept the international order if they foresaw the loss of their culture in doing so.

A second basis for international law’s protection of culture is the recognition of culture as a human right and an essential feature of human relations. Human rights include rights that arise among people collectively as well as those that are inherent to each person. How individuals interact in terms of thought, behavior, language and custom is as essential to human dignity as their fundamental personal rights. Culture must therefore be protected for the full vindication of human liberty.

There are also policy arguments made for the protection of culture in international law. One argument is that there is a need for cultural diversity; in a world increasingly committed to democracy, cultural pluralism comports with, and may be productive of, a marketplace in ideas. Intellectual variety is vital if global democracy is to flourish. Another argument is that, in an era of increasing homogeneity and growing convergence, we need to protect the natural occurrence of culture in the same way that environmentalism has come to emphasize biodiversity. The analogy suggests that traditional cultures have taken thousands of years to evolve their unique forms of existence which, because they cannot be easily replicated or revived, constitute a particularly valued repository for ways of doing things and perceiving them. In this view, culture is seen almost organically, akin to a resource that

31. Id. at 87.
32. See ATHANASIA SPILOPOULOU AERMARK, JUSIFICATION OF MINORITY PROTECTION IN INTERNATIONAL LAW 78–83 (1997).
33. See id.
should be preserved in case it needs to be called upon in the future for the collective good. These perspectives may explain contemporary interest in "otherness" and recurrent fascination with ways in which past civilizations saw their world.

Notwithstanding its status as a fundamental principle, culture has only recently received protection in international law. Most multilateral agreements in the field date from this century. The delay in coverage can be attributed in part to the slow evolution of social awareness. Traditionally culture was identified as "high culture," the preoccupation of an elite with the means to preserve it. This association emphasized the private and inanimate aspects of culture, and therefore excluded the customs of the immediate living world, which were seen as common and unworthy of protection. In former times, human progress was also incremental; the old usually had continuity with the new. In many societies, it was inconceivable that custom could be endangered, or that material forces such as trade could reshape the way people think and express themselves. Thus, there was little perceived need for state-sponsored cultural protection, let alone for cultural


37. For a general review of the development of state sponsored cultural protection and its extension to international law, see Lyndel V. Prott, The International Legal Protection of the Cultural Heritage, in Principles of Cultural Heritage 295 (Frank Fechner et al. eds., 1990).

38. See id. at 302. Ever the elusive concept, "national culture" has evaded the precise definition. It is a concept that might not be the culture of the dominant class, but it is a culture supportive of its domination. See John Sinclair, Culture and Trade: Some Theoretical and Practical Considerations, in Mass Media and Free Trade: NAFTA and the Cultural Industries 30 (Emile G. McNairy & Kenneth T. Wilkinson eds., 1996). At the same time Sinclair justifies national culture as a means of defining identity among subgroups. He has written, "[t]he different division of economic activity in the United States, while it might be true that the defense of national culture is a project in the interest of the dominant sectors of a given nation-state, it is also in the interests of the subordinated groups for there to be a national culture against which to define themselves and as a ground of struggle, as well as an intermediate line of defense against amorphous global cultural influences. It is in this

40. See id.


42. HENDRIK, supra note 25, at 168-9.

43. Id. John Sinclair has written that the term "national culture" glosses over not only ethnic cultural differences within a nation, but other kinds of cultural differences, such as gender and class. As Qijian has pointed out, "a national culture might not be the culture of the dominant class, but it is a culture supportive of its domination." See John Sinclair, Culture and Trade: Some Theoretical and Practical Considerations, in Mass Media and Free Trade: NAFTA and the Cultural Industries 30 (Emile G. McNairy & Kenneth T. Wilkinson eds., 1996). At the same time Sinclair justifies national culture as a means of defining identity among subgroups. He has written, "[t]he different division of economic activity in the United States, while it might be true that the defense of national culture is a project in the interest of the dominant sectors of a given nation-state, it is also in the interests of the subordinated groups for there to be a national culture against which to define themselves and as a ground of struggle, as well as an intermediate line of defense against amorphous global cultural influences. It is in this
both inside national borders and across them. The tragedy of the Holocaust and recent events in the former Yugoslavia and Rwanda also demonstrate that the pre-eminence of one culture can be used as an excuse to oppress others. Thus, if culture is pluralist and ever changing, then the argument can be made that its legal protection should be similarly elastic. Clearly, these many positions are hard to reconcile.

Given the reasons for the protection of culture in international law, it is useful to remember that the easiest way to think about culture has usually been to objectify it. The Elgin Marbles symbolize the glory of Periclean Athens. The stone ramparts of Machu Picchu and the rounded earthen walls of Timbuktu testify to the achievements of the Inca and Songhai empires. In each case, the object or site is an exemplar of the culture that created it and evidences the skill, struggle and ideals of its parent civilization.

International law, as it has conformed to the human tendency to objectify by first extending cultural protection to specific items, as time passed, notions of culture became more sophisticated and expanded to include all prehistoric and important historic remains and eventually fine art, decorative art and architecture. For this reason, the broader term “cultural heritage” was coined and has been applied to encompass culture, such as folklore, crafts, and skills, that are not necessarily

44. The Marbles were acquired by Lord Elgin in the early 1800s and later sold to the British Government. They are now housed in the British Museum, London. Greece made a formal request to Britain for the Marbles’ return in May 1883. See Sir John Lord Elgin TMS, May 15, 1985, at A15. Although the Marbles are not themselves listed in the UNESCO World Heritage List, the site from which they come, the Parthenon, was inscribed in 1987. Its entry notes that the temple complex illustrates “the civilizations, myths and religions that flourished in Greece over a period of more than a thousand years (and . . . can be considered to symbolize the entire ancient world heritage.” The World Heritage List Acropolis, Athens (visited Sept. 5, 1998) [http://www.unesco.org/wcwh/sites/494.htm].

45. Machu Picchu, inscribed on the UNESCO World Heritage List in 1983, sits at 2,430 meters above sea level “on a mountain site of extraordinary beauty, in the middle of a tropical mountain forest.” The World Heritage List: Historic Sanctuary of Machu Picchu (visited Sept. 9, 1998) [http://www.unesco.org/wcwh/sites/274.htm]. “Machu Picchu was probably the most amazing urban creation of the Inca Empire at its height, with its giant walls, terraces and ramps, which appear as though they have been cut naturally in the continuous rock escarpment.” Id. Timbuktu, in Mali, was inscribed on the UNESCO World Heritage List in 1988 and is “home of the prestigious Sankore University and other medersa (kuranic schools).” The World Heritage List: Timbuktu (visited Sept. 9, 1998) [http://www.unesco.org/wcwh/sites/119.htm]. “Timbuktu was in the 15th and 16th centuries an intellectual and spiritual capital and a center for the expansion of Islam throughout Africa. Today its major monuments are threatened by sand.” Id.
ments, 57 non-binding UNESCO recommendations and other soft law expressions of principle, 58 and have been reinforced by the recent reassertion of environmental and indigenous consciousness. 59 In recognizing these cultural rights, countries have implied a derivative right to cultural autonomy. This right, whether explicitly recognized or implic-

Costa Rica, Series A, No. 4 (1984); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Some writers have argued contra that free trade in culture is necessary for cultural development and that this view is embodied in international agreements such as the UNESCO Agreement on the Importation of Educational, Scientific and Cultural Material, 17 U.S.T. 1855, 181 U.N.T.S. 25 (Nov. 25, 1960), arts. I & Il; cf. Robin L. Van Harpen, Masses, Don’t Let Your Babies Grow Up to Be Cowboys: Reclaiming Trade and Cultural Independence, 6 Minn. J. Global Trade 165, 187 (1995) (seizing that governments at times view free trade as a necessary condition for cultural development). The problem with this position is that it interprets terms such as “free circulation of culture” literally, without recognizing the concurrent condition of equity of circulation. Such a condition is expressed in the 1966 UNESCO Declaration of the Principles of International Cultural Cooperation, Article I declares that:

(1) Each culture has a dignity and value which must be respected and preserved.
(2) Every people have the right and duty to develop in culture.
(3) In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.


59. See generally Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 29 I.L.M. 1382; United Nations Working Group on Indigenous Populations, Universal Declaration on the Rights of Indigenous Populations (Adopted in the Indigenous Voice in World Politics, 226 app. (Franke Willner ed., 1995). Other documents have recognized indigenous culture as a means of promoting other goals. For example, article 8(0) of the Convention on Biodiversity seeks to “respect, preserve and maintain knowledge, innovations...
While written instruments naturally tend to emphasize the institutional features of cultural safeguards, what texts and commentators have taken pains to point out is the dynamic nature of cultural autonomy and, consequently, the flexible quality of cultural protection. The accent in literature is upon culture as a process—one which borrows from the outside but should be presumptively free to develop on its own. This realization should promote innovative solutions to the problem of preserving and enhancing cultural autonomy in future.

B. Culture and Trade

Notwithstanding what has been said, a significant component of culture today is embodied in goods and services—perhaps in more ways than we commonly acknowledge. The contour of an imported automobile and the language of a satellite broadcast are examples of intrusive cultural imagery. Imports can also alter the cultural landscape in secondary ways, for example, through a need for service stations or the atrophication of oral traditions.

In order to blunt cultural intrusions, there appears to be a need to regulate trade. However, the traditional emphasis of international economic agreements on efficiency conflicts with this need. International economic dispute settlement under the GATT and the WTO has rarely considered non-economic factors, unless some subject assumes formal importance through explicit "linkage." Cultural protection is particularly ill-suited for linkage because of ignorance and uncertainty over the interaction of trade and culture. Moreover, culture's double aspect is problematic: although in many instances culture possesses "a quantifiable monetary value, it simultaneously represents the essence of national sovereignty and thereby must be treated differently than common tradable goods." This uniqueness makes it difficult to reconcile with the efficiency rationale. Theorists have also observed that "[c]ultural products do not fit well within [a scheme of comparative advantage]. First, price is not always the determinative factor in their purchase, and second, inefficient producers are still motivated to produce despite economic loss." Hence, "treating cultural works as a tradable commodity would force [them] to exist under a theory of economic Darwinism, a fate that would lead to the production of cultural works by a few low cost producers. The result is not only incongruous with numerous treaties protecting culture but also threatens national sovereignty by disabling the country's ability to express itself." Finally, there is legitimate concern about the potential for abuse of a cultural exception in international trade.

Regulating trade for the purpose of cultural protection is also unattractive for geopolitical reasons. Culture is generally not a worry for the large countries that play a leading role in shaping the WTO's agenda. The media of these countries create a kind of critical mass of trade.


The second linkage, that between trade and competition, took the form of the 1979 Tokyo Round Antidumping Code. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT B.I.S.D. (26 Supp.) at 171 (1979). Outside of a few bilateral and regional agreements, this initiative has not, however, resulted in a global competition agreement, largely because countries see antidumping statutes as a useful domestic safety valve. The third linkage, that between trade and development, arose from the independence of many developing countries in the years 1950 to 1980 and calls for a New International Economic Order. Part IV of the GATT was introduced in 1966 to meet this reality, and a special dispute settlement procedure was introduced but has been little used. See GATT, supra note 11, at Part IV. A 1982 report by the Secretary-General of UNCTAD stated that the 1971 "Enabling Clause," which permitted developed countries to grant tariff preferences to developing countries, was "more a matter of form than of substance." SECRETARY GENERAL OF UNCTAD, ASSESSMENT OF THE TRADE RESULTS OF THE MULTILATERAL TRADE NEGOTIATIONS (UNCTAD Doc. T/B/778/Rev.1 at 28), reproduced in LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1117 (John H. Jackson et al. eds., 3rd ed. 1995).

64. Michael Braun & Leigh Parker, Trade in Culture: Consumable Product or Ornamental Articulation of a Nation's Soul?, 22 DENVER J. INT'L L. & POL '95, 157 (1995).
ideas, language and imagery that ensures a secure national identity. Thus, many inhabitants of large countries naturally tend to see identity and culture as things that simply are rather than things that must be purposefully cultivated. According to this view, any attempt to actively promote cultural autonomy is regarded as artificial and something to be contested.

The situation in smaller countries is, in many ways, the reverse. In these countries, a critical mass of culture is either vulnerable or absent. What traditions do survive must compete with foreign thought, language and imagery. Repeated exposure to foreign influence means domestic markets become “softened” to foreign presence. The penetration of domestic markets by foreign industry is consequently easier. Small populations also generally mean smaller industries, which are often at a competitive disadvantage unless they can fill niche markets. Governments may be tempted to take action to protect national culture, but they must do so mindful of the possibility of retaliation by larger, stronger neighbors. All of these factors make the culture of smaller countries difficult to sustain in a living manner.

In light of what appear to be significant barriers to cultural protection and autonomy in a world of freer trade, it is useful to examine the attitude of the GATT and the WTO to culture.

III. THE GATT, THE WTO AND CULTURE

A. Cultural Protection in GATT and WTO Instruments

The GATT is an international treaty aimed at limiting tariffs, controlling the use of non-tariff barriers, and eliminating discriminatory treatment in international commerce. The GATT’s main substantive feature is the tariff bindings of its member countries, undertaken pursuant to GATT Article II. Under that article, countries exchange tariff concessions and agree not to raise their tariffs beyond committed levels. Two other articles directly supplement bindings. Under Article I’s Most Favored Nation requirement (MFN), the tariff reduction extended by one GATT signatory to another is extended to all signatories. Under Article III’s National Treatment requirement, foreign goods must be treated no less favorably than domestic goods. This triumvirate of obligations, bindings, MFN and National Treatment, is mutually reinforcing and has constituted the core discipline of the world trading system since the GATT’s inception in January 1948.

The GATT also developed a method of dispute settlement to interpret its complex trade rules. Due to the members’ original preference for informality, the GATT was vague as to the specific form of conflict resolution. Over time, there developed a series of rulings from the GATT chairman, which subsequently gave way to working parties. These, in turn, were tentatively superseded in October 1952 by a panel system, which was regarded as more objective and as “satisfying the legal instincts of the GATT administrators.” As part of the changes brought about by the Uruguay Round of multilateral trade negotiations in January 1995, a separate Dispute Settlement Body (DSB) was established to administer the panel system, together with a set of reformulated dispute settlement rules known as the Dispute Settlement Understanding (DSU). An Appellate Body was also created to hear appeals of panel decisions. Although Appellate Body panels, known as “divisions,” were supposed to have limited jurisdiction, the enthusiasm of parties to pursue appeals suggests that this additional layer of adjudication has effectively transformed WTO dispute resolution into a two-tiered review.

72. John Jackson wrote in 1969 that “[i]here is no single, sharply defined dispute settlement procedure in GATT that can be readily distinguished from the remainder of GATT activity. Or, in the alternative, one can say that there are over 30 such procedures.” See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 164 (1969). Jackson suggested that the ambiguity of the original GATT dispute settlement arrangements can be attributed to early thinking that the GATT was to be tentative, that there was a need to obtain compliance, and that some mechanism was necessary for ensuring “continued reciprocity and balance of concessions in the face of possibly changing circumstances.” See id. 169–70.

73. ROBERT E. HUEBNER, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 70–79 (2nd ed. 1999). Working parties are still instituted to examine matters for consistency with GATT and are required to render consensus-based advisory opinions on which the WTO membership can subsequently take final action. However, over time panels gradually assumed a more authoritative judicial character and have become the procedure of choice in WTO dispute-resolution. See Understanding Regarding Notification, Consultations, Dispute Settlement and Surveillance, adopted on Nov. 28, 1979, GATT B.L.S.D. (16th Supp.) at 215 (Annex) (1979).

74. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, 35 I.L.M. 1226 (1994) [hereinafter DSU]; World Trade Organization, Overview of the State-of-Play of WTO Disputes (visited Oct. 22, 1998) <http://www.wto.org/wto/dispute/bulletin.htm>. This is not to suggest that all cases take advantage of the entire system. WTO dispute resolution, like the GATT before it, is proving to be highly successful at encouraging countries to settle their trade dispute before formal resolution is required. Among 139 consultations requested on 103 distinct matters since January 1995, there
The evolution of GATT dispute settlement has mirrored, in many ways, development of the trading system's institutional framework. During its first four decades, the GATT operated through a series of interim institutional measures. When the time came to create a formal organization, the GATT proved difficult to amend. This prompted governments at the end of the Uruguay Round to walk away from the GATT and create the WTO, which then carried over the GATT and its precedent by means of a continuity clause.  

The world in which the GATT originally emerged in 1948 was, culturally speaking, more segregated than it is today. The rise of a media-driven global culture had barely begun. Television was in its infancy. Radio was relatively limited. Videos and computer technology did not exist. The international flow of other forms of information, such as newspapers and magazines, was insignificant. International cultural dominance was only evident in the film industry, where Hollywood had enjoyed pre-eminence since the 1920s. It is also true that the concept of national culture was perhaps different in the more provincial world of the late 1940s than it is now. Countries were more isolated, and, therefore, their cultures were more distinct and individually recognizable. Some idea of this distinction can be had from the wording of the Universal Declaration of Human Rights, which by its terms clearly distinguished human rights from culture, whereas today, in a time when communal consensus is hard to achieve, there is perhaps the tendency to see human rights as the foundation of our common modern culture.

These two observations should make us sensitive to the context in which the GATT was drafted and to the thinking that might have guided the drafters' work. The GATT did account for culture in a few discrete ways, but on the whole said little about the subject. In light of the era in which the GATT came into being, the position is tenable that the drafters had no intent to homogenize all cultures through comparativa advantage, principally because they did not foresee the tremendous power of trade to reshape cultures. They believed they were creating a trading system in order to make a better material world, a better world that could be distinguished from, and co-exist with, cultures, rather than change them forever.

This belief, coupled with the drafters' own cultural security, can well explain the limited treatment of culture in the GATT. The GATT's principal cultural provision is the cinema exception of Article IV, which derogates from both the MFN clause of Article I and the National Treatment obligation of Article III. Article IV permits national screen quotas for foreign films, and, where these quotas reserve a minimum proportion of screen time for films of a specified origin, it freezes the proportion at the level existing in domestic law in October 1947 when the GATT was concluded. The exception is conditioned on the proviso that "screen quotas shall be subject to negotiation for their limitation, liberalization or elimination." Notably, the Article IV cinema exception is given a prominent place in the overall GATT scheme. The cinema exception is adjacent to the key substantive provisions of Articles I and III, not tucked away in a little-visited corner of the GATT. This observation in particular lends credence to the view that the cinema exception was important to the drafters and that a certain cultural sensitivity was meant to inform developments in the world trading system generally. It has also been asserted that Article IV was entirely consistent with the drafters' awareness of cultural domination of the film industry by the products of one country. The restricted nature of the exception, therefore, should not imply that the exclusion of cinematographic film necessarily meant GATT coverage for other media. Instead, the form of Article IV was shaped by the awareness of its time.

Another GATT exception, Article XX(f), permits "the adoption or enforcement by any contracting party of measures ... imposed for the protection of national treasures of artistic, historic or archeologic value," notwithstanding that the legislation may be inconsistent with

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76. As a result of the Uruguay Round, GATT, together with its interpretive history was carried over into the WTO Agreement. This continuity is now explicitly recognized in Article XVI.1 of the WTO Agreement. See WTO Agreement, supra note 6, art. XVI.1. As of October 22, 1998, 15 cases had been through the system; all but two panel reports had been appealed, effectively creating a practice of two-tiered review. See World Trade Organization, Overview of the State of Play of WTO Disputes (visited Oct. 22, 1998) [http://www.wto.org/wto/dispute/bulletin.htm].

77. For example, Anthony Smith observes that "[c]ultural dependence first became a talking point in the early days of the talks. In the 1920s, it was noticed that Hollywood products were

78. See WTO Agreement, supra note 6, at 1154.

79. See id. art. IV.

80. Id. art. IV(c).

81. See id. arts. IV, V.

82. "Negotiators in 1947 could not have predicted the current explosion of films, cable television, satellite transmissions, videocassette, and audio works. Cultural content restrictions clearly flow the logic and spirit of Article IV differing only in scope by encompassing works that..."
the GATT. From its “national treasures” language, however, the exception appears to contemplate the protection of discrete items of tangible cultural property, not the safeguarding of culture generally. Its potential ambit is further limited when one considers that the Article XX exceptions are to be interpreted narrowly. This is underscored by the fact that Article XX(f) has never been the subject of direct interpretation by any GATT panel.

A GATT provision directing express consideration of culture is Article 31:6 of the Havana Charter, which was incorporated into the interpretation of GATT Article II:4 by an Interpretative Note. Article II:4 directs that where a country establishes an import monopoly, such monopoly cannot “operate so as to afford protection on the average in excess of the amount of protection provided for” in the country’s tariff concessions generally. This obligation is tempered by consideration of Article 31:6 of the Havana Charter, which provides that “in applying the provisions of [GATT Article II], due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian and revenue purposes.” Presumably, “cultural

83. GATT, supra note 11, art. XX(f).
84. Id.
85. Phillip Nichols notes that a basic doctrine of GATT is that exceptions are to be interpreted narrowly:

Moreover, issues before dispute panels are to be examined in light of the purposes of the General Agreement, which is to facilitate the reduction of tariffs and other barriers to trade. These two doctrines [narrowness and GATT-consistent purpose] have created a third: that a party to the GATT “is bound to use, among measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.”


86. No entry for the provision exists in the GATT Analytical Index. See generally 1 World Trade Organization, Guide to GATT Law and Practice: Analytical Index (6th ed. 1995). In Japan—Taxes on Alcoholic Beverages, the panel noted without discussion the comment of the United States that the Article XX(f) exception only relates to “national” (i.e. one’s own) treasures. See Japan—Alcoholic Beverages Panel Report, supra note 1 at 40, n. 65.


88. See GATT, supra note 11, art. II:4.

89. Id.换个... replace... replace

90. Id.
91. One other GATT provision targeting traditional products is contained in the Uruguay Round Agreement on Textiles and Clothing, Apr. 15, 1994, WTO Agreement, Annex IA, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994). There is a bias in liberal treatment in GATT for properly certified handloom, hand-made and historically traded products as well as silk under paragraph 24 of the 1986 Protocol extending the Multifibre Arrangement (MFA). See Protocol Extending the Arrangement Regarding International Trade in Textiles, July 51, 1986, GATT B.I.D. (38 Supp.) at 7 (1987). A principal aim of the Uruguay Round was “integration” of the textiles and clothing regime within GATT disciplines rather than their continuing derogation under side agreements. Pursuant to the ATC, several sectors were integrated immediately, including those just mentioned. This was done primarily through recognition that their trade was in small quantities and unlikely to compete with existing industries. Instead of the liberal safeguards scheme of ATC Article VI, importing countries were constrained to use the higher “serious injury” threshold of GATT Article XIX and Safeguards Agreement Article IV in relation to these products. See Marcello Raffaelli & Truitt Jenkins, The Drafting History of the Agreement on Textiles and Clothing 72 (1995). The impact of this liberalization in cultural terms is debatable however, because while it makes such custom products more widely available, it could encourage indigenous production of competing goods in importing countries.

Daniel Tarullo has written forcefully that the GATT creates an inappropriate paradigm through "myths" about the equality of member states. 94 Notional equality allows countries to assume GATT obligations without any acknowledgment of their fitness to do so. 95 Only a few countries possess the attributes that enable them to export successfully. These same countries also enjoy a commanding lead when it comes to the introduction of new modes of technology, which these countries export abundantly and which recreate their home cultures indiscriminately. Taking Tarullo's critique one step further, one can argue that these new technologies pose the greatest risk to cultural protection because of the rich cultural imagery associated with them. For example, an imported television set is more culturally disruptive than a kilo of imported sugar. In this way, industrially weak countries are, by virtue of the relentless logic of comparative advantage, overtaken by the products and culture of the industrially strong. Therefore, the GATT offers precious little room for the "other-developed," that is, for other kinds of potential socioeconomic orientations mentioned at the beginning of this Article. The GATT's uneasy experience with the membership of non-market countries bears this point out. 96

The advent of the Uruguay Round of multilateral trade negotiations, the eighth since the GATT's creation, raised the possibility that at least some of these issues might be addressed, but their treatment recalled disagreements long predating the Round. In November 1961, for instance, the United States had requested the formation of a working party to advise whether the GATT covered television programming. Coverage would have allowed the programming, which the United States had then begun to export in large quantities, to take advantage of the GATT's National Treatment obligation in foreign markets. A central argument of the United States was that the existence of the Article IV cinema exception meant that other cultural products such as television programming were, by implication, covered by the GATT. 97

94. See id.
97. Other delegations argued that television programs were like services and therefore were not covered. 98 The working party was unable to come to any consensus and decided to postpone resolution of the matter. 99 When the United States raised the issue again in 1962 and 1964, no working party was formed and no further action taken. 100

At the time of its request in 1961, the United States conceded that governments took a special interest in television because of its importance as a cultural medium. 101 A quarter century later, during the Uruguay Round, the European Community echoed this position, calling for either a general cultural exception for trade in a set of undefined cultural industries, or a specific exemption for trade in audiovisuals alone. 102 The EC, led by France, "argued that such an exception was necessary because 'for many countries, the protection or promotion of indigenous languages, history and heritage depends

International Trade in Television Programmes: Statement Made by the U.S. Representative on November 21, 1961, GATT Doc. L/1646, at 2 (Nov. 24, 1961). In what would seem like a naive comment in the light of recent concern in many countries over "linguistic pollution," the United States' representative on that occasion made the following peculiar reference:

Furthermore, there is no reason why the country concerned should not preserve the purity of its own language [by importing U.S. programming]. U.S. programmes, for example, are being shown in many countries of the world with the language of the viewers dubbed in. If for some perverse reason, an English speaking country prefers its own version of Shakespeare's tongue to that which is current in the mountains of North Carolina, I assume that his version could be similarly applied. If practitioners of one of the other brands of English should be shocked by the thought of Hannibal speaking to his elephants in the language of Hollywood, I know of no reason why he cannot be made to speak in accents that would sound familiar to the accents of southern England.

See id.
99. See id. at 5.
101. The U.S. representative had stated, in November 1961, that "even where television is not government owned, governments have quite properly taken a special interest in it because of its importance as a cultural and information medium." Id. The draft recommendation presented by the United States on that occasion also made reference to the fact that "contracting parties may find it necessary to ensure that television programmes include such a proportion of dometrically

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heavily on national audiovisual output.' 103 Eventually, no agreement was reached, and member countries were left to deal with culture on the basis of bilateral negotiations.104

The stalled Uruguay Round effort is instructive in two respects. Most important is the fact that culture's defaulted position now excludes it from formal consideration in WTO dispute resolution, to the advantage of those seeking maintenance of the status quo. Another point is the European Community's implicit acknowledgment that at least some degree of specificity is necessary for a viable cultural exception.105 Sufficient precision is required for the exception's application to be readily determined.

These observations must be measured against other developments during the Uruguay Round. One is the standard terms of reference now given to panels under the DSU, the principal instrument governing procedure under WTO dispute resolution.106 These terms limit what panels may consider in their deliberations. Prior to the Uruguay Round, individual terms of reference were drafted for each panel. This practice became a potential delay tactic for countries wishing to hinder formal GATT proceedings, because any country could stymie the creation of a panel by objecting to the terms' proposed wording. It was decided during the Uruguay Round that to prevent abuse standard terms of reference would be given to each panel unless parties agreed otherwise.107 DSU Article 7(1)-(2) now directs a panel to consider "covered agreements or agreements cited by the parties to the dispute," meaning that the more informal contexts in which cultural concerns arise cannot be taken into account by panels.108 Although it can be argued that this direction merely embodies the practice of panels before the Uruguay Round, DSU Article 7 is devoid of any flexibility and therefore precludes any role for cultural protection at all, unless such concern can be successfully quartered within the narrow confines of Articles IV or XX(f), or within some other covered agreement.

103. Id. at 139 n.289. French President Mitterand is reported to have said that "what is at stake, and therefore in peril, in the current [Uruguay] negotiations is the right of each country to forge its own image and to transmit to future generations the representations of its identity." Tina W. Chao, GATT's Cultural Exception of Audiovisual Trade: The United States May Have Lost the Battle But Not the War, 17 U. Pa. J. Int'l L. 1127, 1141 (1996).

104. See Donaldson, supra note 60, at 136.

105. See id. at 167.

106. See DSU, supra note 74, art. 7.

107. GATT, supra note 50, at 9.

108. See supra note 50, at 8.


110. Jackson, supra note 72, at 83-88.

111. In this regard, Daniel Tarullo has written:

... [C]onventional categories allow people to understand and function in the world, but they also limit ways in which people can know. Scholars in many disciplines have examined the ways in which these conventional categories reflect a dominant set of norms and, indeed, create concepts of what is "normal." Howard Gardner has challenged the idea that there is a single scale of intelligence upon which we can locate all people as being of "normal," "below normal," or "above normal" intelligence. Carol Gilligan has challenged theories of moral development based upon a norm of male development that ignores the possibility that females follow a path of development grounded in a very different approach to moral decisions. In bodies of work that defy categorization, Michel Foucault and Roland Barthes have examined verbal and non-verbal modes of communication to see what and how we know.
Certain Products from Hong Kong, which involved French quantitative limits on eight categories of products imported from Hong Kong. Beginning in 1944 France maintained restrictions by way of a “regime without limitation,” which in principle subjected the imports to quantitative restrictions “for which no quota amount had been set . . . , [import] permit applications being granted on request.” On France’s accession to the GATT in 1948, it justified the measures under the Article XII balance-of-payments exception, which allows countries to maintain import restrictions to conserve foreign currency; however, in 1960 France withdrew from the exception.

Hong Kong’s principal argument was that France could not justify its measures under any specific article of the GATT, including provisions allowing import restrictions on certain items, and had therefore contravened Article XI:1, which prohibits quantitative restrictions, and Article XIII, which prohibits discriminatory application of certain permitted measures. The European Community, on France’s behalf, countered that the examination of the French restrictions could not take place as a “purely legal exercise,” because the measures were in the nature of “residual restrictions,” these being “measures for which liberalization had not been possible [when France had opened its markets as part of an OECD programme of liberalization of the 1950s].” The European Community went on to argue in favor of a broad socio-cultural approach to the interpretation of France’s obligation. It maintained that:

[a]ccount had to be taken of historical and general factors as well as the specific economic and social situation in each sector, c.g., weak industrial structures and technological adjustment; threat of serious injury to domestic production and employment through increases in imports and competition with low-priced foreign products; sectorial trade imbalances and declin-

113. Id. at 150.
114. See id. at 135.
115. See id. at 135–5, stating that GATT Article XI:2 is an exception to the general elimination of quantitative restrictions articulated in article XI:1. It permits quantitative restrictions to prevent critical shortages of foodstuffs, to assist in regulating the classification, grading or marketing of commodities, and for agricultural and fisheries products subject to government-run

ing shares of the domestic market . . . . The Community believed that it was more useful to pursue a case-by-case approach which would allow the economic implications of each restriction to be examined individually and thus to confirm that these restrictions were necessary to deal with problems at economic and social levels.”

Hong Kong’s response was to maintain that the European Community position was effectively “an attempt to create new GATT rules.” To this, the European Community reiterated that the matter “could not be considered in an isolated legal context without regard to the evolutionary process . . . involving economic, social and historical aspects.”

“The panel considered the arguments put forward by the [European Community] regarding social and economic conditions which prevailed in the various product categories under examination,” but noted that the European Community did not forward “any corresponding GATT provision in justification” of them. No such matters came within the purview of Articles XI or XIII. Therefore, non-GATT considerations lay outside the panel’s jurisdiction, and Hong Kong prevailed.

EEC—Quantitative Restrictions was referred to in Japan—Measures on Imports of Leather, where the social purpose of the restrictions was well highlighted. The case involved Japanese restrictions on certain types of leather, which were first implemented in 1952 and then extended to cover new types of leather in 1979. In the late 1970s, U.S. exports of leather goods to all countries in East Asia other than Japan had increased substantially. However, exports to Japan remained minuscule, prompting the United States to conclude a bilateral agreement

117. Id.
118. Id. at 135.
119. Id. at 136.
120. Id. at 138.
121. GATT Article XIII concerns the non-discriminatory administration of quantitative restrictions, essentially reconfirming that the MFN obligation applies to quantitative restrictions as well, thereby avoiding selective targeting of foreign suppliers in the trade policy of member countries.
122. See EEC—Quantitative Restrictions, supra note 112, at 140.
on the subject with Japan in 1979. When the accord failed to yield results, the United States brought a challenge to portions of the tariff and its 1979 extension.

The principal Japanese justification for the restrictions was what was referred to as the "Dowa problem." The Dowa, or untouchables, were a group of people that had suffered severe institutional and informal discrimination in feudal Japan. Their marginalization had led the Dowa to occupy less-desirable positions, including a heavy presence in slaughtering and tanning industries that were traditionally considered unclean in Buddhism. Japan argued that although they had been emancipated from institutional discrimination in 1871, the Dowa continued to experience unfavorable treatment and lived lives that were not too different from those that they had led formerly. To support its position, Japan tendered evidence demonstrating that this minority population had low education, with many Dowa families subsisting on welfare. Often the Dowa continued to be employed in the leather, shoe and footwear industries.

The crux of the Japanese argument was that the Dowa's situation "constituted more than a minority problem as the phenomenon was unique and relat[ed] to subsistence and survival." If leather and leather good imports were liberalized, Japan forecasted that "the industry would collapse with unmeasurable social, regional-economic and political problems." In light of this possibility, Japan maintained that the only realistic alternative was gradual expansion of its leather quotas, which had been consistently undertaken during the period in question. Japan also distinguished EC—Quantitative Restrictions on the grounds that the import restrictions at issue there were very different from "longstanding historical and social difficulties" motivating the Japanese measures.

The United States, as complainant, argued that the Japanese laws were not being administered in a reasonable manner, contrary to GATT Articles X:1 and X:3; that they constituted unjustifiable quantitative restrictions, contrary to Articles XI:1 and XIII:3; and that the Japanese action effectively nullified or impaired Japan's tariff bindings in contravention of Article II. The United States explained:

[The sole reason claimed by Japan for its retention of quantitative restrictions on leather was the desire to protect the Dowa people. While fully appreciating the sensitive nature of the problem, the United States could not agree that import quotas were an acceptable way of solving domestic social problems. Such problems were irrelevant to the present case, and irrelevant to the terms of reference of the Panel. A finding by the Panel which would in any way support Japan's assertion that import quotas were a necessary and acceptable means to protect minority workers would set a dangerous precedent, completely inconsistent with the GATT. Nearly all contracting parties had domestic social problems that were highly political, emotionally charged issues. Even if protection of the people in question could justify a quota, Japan had not demonstrated that the quotas were necessary to the well-being of this people, less than one percent of which was directly employed in tanning.]

In finding for the United States, the panel remarked on the distinct approaches taken by the parties. While the U.S. position "was based essentially on legal arguments," Japan "had not invoked any provision of the GATT." The difference was thus starkly drawn: the United States' arguments were legal, Japan's were extra-legal. The panel declined to consider the Japanese position on the pretense that "since [the panel's] terms of reference were to examine the matter in light of the relevant the GATT provisions and these provisions did not provide such a [socio-cultural] justification for import restrictions," there was no basis for their consideration. Stripped of any defence, Japan was effectively told to eliminate the leather tariff.

In another case, Japan—Restrictions on Imports of Certain Agricultural Products, the U.S. challenged Japanese restrictions on twelve categories of agricultural imports as contrary to GATT Article X:1. These

125. See id. at 96, 105–106.
126. See id. at 96–97.
127. See id. at 100.
129. Id.
131. Id. at 110.
restrictions were imposed at certain times by formal government order and at other times by an informal method of bureaucratic management known as "administrative guidance," which the United States also challenged as contrary to the general transparency obligation set out in Article X.1. Much like the position adopted by the European Community in EC—Quantitative Restrictions, Japan argued that the panel should take account of "historical realities." It stated:

Japan recalled that the Panel's terms of reference required that it take into account all pertinent elements. In Japan's view these included the historical realities in the GATT and Uruguay Round. A majority of contracting parties maintained protective measures on agricultural products which varied according to their own social and economic circumstances as well as their agricultural conditions and environment. It was particularly noteworthy that a number of the products under review by the Panel were subject to United States import restrictions maintained under the 1955 Waiver on United States Import Restrictions on Agricultural Products. It should not be considered as a generally accepted approach to insist on total elimination of a small number of remaining import restrictions on agricultural products without careful consideration of the economic and social importance of these measures.

More particularly, Japan argued that "[i]n agriculture there existed legitimate 'specific characteristics' which could not be governed solely by economic efficiency," among these being "sound development of rural agricultural economies and sound rural agricultural communities for the nation's stability." The United States' position was that every country had its own particularities and that "whereas social and political circumstances surrounding the quota may have relevance in a negotiation context, previous panels had decided that such special socio-economic characteristics did not justify the maintenance of import restrictions inconsistent with Article XI." Japan, in defence, invoked Article X.2(c)(1), which permits import restrictions in conjunction with managed supply schemes for certain products, and Article XX(d), which permits the adoption of measures necessary to secure compliance with laws or regulations that are not GATT-inconsistent measures.

Again the panel found that socio-cultural considerations were irrelevant. Thus, "[a]s regards the vital role the 12 items under consideration played in Japan's agricultural and regional economies and their underlying social and political background, the panel, while aware of their significance in the Japanese context, found that previous panels had established that such circumstances could not provide a justification for import restrictions under the GATT."

Although the panel did not agree with Japanese arguments regarding cultural distinction, in one important and intriguing respect it did consider culture. As noted, Japan had invoked in its defence Article X.2(c)(1), which allows "governmental measures" implementing import prohibitions in the case of the managed supply of agricultural or fisheries products. The panel acknowledged what it termed "special circumstances" prevailing in Japan in interpreting the exact nature of "governmental measures." On this point, the panel stated:

As regards the method used to enforce these measures the panel found that the practice of "administrative guidance" played an important role. Considering that this practice is a traditional tool of Japanese government policy based on consensus and peer pressure, the Panel decided to base its judgments on the effectiveness of the measures in spite of the initial lack of transparency. In view of the special characteristics of Japanese society the Panel wishes, however, to stress that its approach in this particular case should not be interpreted as a precedent in other cases where societies are not adapted to this form of enforcing government policies.

The result in all of the above cases is understandable if one recalls that panels are charged with applying the GATT in a principled way. At the time the cases were decided, moreover, panels labored under the consensus adoption rule, meaning that they were effectively subject to veto by a single country if their decisions went too far astray. Thus, to

138. Id. at 218.
139. Id.
140. Id. at 217.
141. Id.
143. Id.
144. Id.
145. Id.
146. In particular see the final sentence of GATT Director-General's opening remarks to the panel.
invite them to consider matters outside the strict wording of the GATT
was to ask them to traverse hostile territory, in effect, without guidance.
Be this as it may, justice invariably applied can be justice denied,
particularly where a more sophisticated appreciation of the circum-
cstances is required. Two of the above cases involved government
measures in Japan, a country "imbued with a communitarian sense of self . . .
where societal harmony or 'Awai' is given top priority." 147 The
laws under scrutiny, to protect a disadvantaged minority and to safe-
guard rural communities, are evidence of an underlying value of group
consciousness entirely alien to GATT's efficient individualism. Abso-
lutely no worth was ascribed in GATT decision-making to the social
harmony that a gainfully employed minority or stable agricultural
communities might produce, implying that only the greater good of
efficiency mattered. In a very real sense, this observation recalls the
dichotomy mentioned at the outset of this Article between Gesellschaft
versus Gemeinschaft, society versus community, and the way in which the
GATT adopts an artificially narrow perspective in order to justify one
view of human relations.

Even where "cultural purpose" should be considered, at least one
panel has demonstrated reluctance to deal with it. Canada—Import,
Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing
Agencies involved various mark-up and listing practices imposed on
imported liquor by Canadian provincial liquor monopolies.146 The net
effect of these practices was to decrease, and in some cases remove
entirely, any price advantage that foreign liquor might enjoy in Canada.
To resolve the dispute, the panel considered GATT Article II:4, which
allows countries to establish or maintain import monopolies subject to
Article 31 of the Havana Charter. In particular, Article 31:6 of the

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145. See supra Part IIIA.

146. Havana Charter requires a GATT panel examining such a monopoly to have "due regard . . . for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes." 145 Although Canada did not tender evidence about the monopolies' cultural purpose, the panel attenuated any force for this factor by finding "ambiguity" and referring to the GATT drafting history, which it interpreted as requiring that Article 31 "be applied to the extent that it was relevant to the context of the GATT." 151 This qualification is curious in light of the mandatory language of the Interpretative Note to Article II:4, which states that "the provisions of this paragraph will be applied in the light of . . . Article 31." 152

C. Culture in "Like Product" and Substitution Analyses

Two aspects of the GATT/WTO jurisprudence which merit particular-
ly close examination for the purpose of evaluating the treatment of
culture in the world trading system are "like product" and substitution
analyses. As mentioned, member countries agree to treat all foreign
goods alike under GATT Article I, the MFN clause, and to treat foreign
goods no less favorably than like domestic goods under Article III, the
National Treatment clause. These are important obligations, and the
relevance of comparison should be immediately evident: where
 likeness is found, like treatment must be granted. Conversely where
 likeness is not found, then it is easier for a government to discriminate
 against imports, either by means of a tariff, a quantitative restriction, or
 some other measure. Because of the tremendous stakes involved in
determining likeness, what seems to be a relatively straightforward
exercise has evolved into one of the most complex and contested
analyses in GATT/WTO jurisprudence.

Like product issues have arisen under Article I 148 but they are more
common under the first sentence of Article III:2. 158 Analysis can also take place regarding "directly competitive or substitutable" products under the second sentence of Article III:2. 156 Thus, if a foreign product is not "like" a domestic product, then it may still be directly competitive or substitutable and on this basis eligible for national treatment. Whereas a like product analysis tends towards likeness in the literal sense, a "directly competitive or substitutable" analysis is acknowledge
d to be broader. In this regard GATT panels recently have focused on "elasticity of substitution," this being the sensitivity of demand for a foreign product in relation to price changes in a domestic product, and "the decisive criterion" of end-use. 157

Like product analysis under Article III involves two questions: first, what factors are to be taken into account in determining likeness;


155. Article III:2 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. [first sentence] Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. [second sentence]

GATT, supra note 11, art. III:2. This obligation is supplemented by an Ad Note, which states:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Id. art. III. The net effect of these provisions is to require like treatment for foreign goods found to be "like" domestic goods and like treatment for foreign goods found to be "directly competitive or substitutable" to domestic goods. Cases involving Article III:2, first sentence, are surveyed infra Part II.C.

156. Id. art. III:2.

Id. art. III:2. See supra note 11, "Organoleptic differences" resulting from geographical differences, cultivation methods, the processing of the beans, and the genetic factor as well as the fact that "unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end-use, was universally regarded as a well-defined and single product intended for drinking." Spain—Tariff Treatment of Unroasted Coffee, supra note 154, at 112. The panel also examined the uniqueness of Spain's tariff regime in regard to unroasted coffee. See id. In United


161. In Japan—Taxes on Alcoholic Beverages, the Appellate Body noted that the "Border Tax Adjustments" approach was adopted in all subsequently adopted panel reports. See WTO Appellate Body Report, Japan—Taxes on Alcoholic Beverages, Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p. 46. [hereinafter Japan—Alcoholic Beverages Appellate Report]. On closer examination, however, this statement is not borne out. Panels have frequently focused on "end-use," "the product's properties, nature and quality" and tariff classification, to the detriment of any careful consideration of "consumers' tastes and habits." For example, in EEC—Measures on Animal Feed Proteins, the issue was whether vegetable proteins and denatured skimmed milk powder were like. See GATT Dispute Panel Report, EEC—Measures on Animal Feed Proteins, March 14, 1978, GATT B.I.S.D. (25th Supp.) at 68-64 (1979). The panel noted that "such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different vegetable, animal and synthetic origins of the protein products . . . ." Id. ¶ 4.2. In Spain—Tariff Treatment of Unroasted Coffee, the panel examined "organoleptic differences" resulting from geographical differences, cultivation methods, the processing of the beans, and the genetic factor as well as the fact that "unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end-use, was universally regarded as a well-defined and single product intended for drinking." Spain—Tariff Treatment of Unroasted Coffee, supra note 154, at 112. The panel also examined the uniqueness of Spain's tariff regime in regard to unroasted coffee. See id. In United
addition, there is debate as to whether the “aim and effect” of legislation restricting imports should modify the scope of like products and whether the process by which a good is produced plays a part in the analysis. Panels in two GATT cases used the aim and effect test to recognize that if the reason for according differential treatment was “an acceptable one which did not afford protection to domestic production,” then the foreign good could be held to be dissimilar, and discrimination was permissible. Several cases have also addressed the separate issue of whether the process by which a good is made should be considered. Both “aim and effect” and the consideration of production attributes have now been disavowed. In Japan—Taxes on Alcoholic Beverages, the panel squarely rejected the view that likeness could be conditioned on “aim and effect,” and stressed that the correct likeness test was confined to the physical properties and tariff classification of goods alone, thereby implying that any consideration of the production process was improper.

How have interpretations of “likeness” worked to shape attitudes towards culture under the GATT and the WTO? In balancing the factors discussed, panels have tended to focus on the objective side of the analysis to the detriment of more subjective, culturally-determined features. The examination of one case and its sequel is particularly relevant. In Japan—Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, Japan maintained higher taxes on


164. See Japan—Taxes on Alcoholic Beverages, supra note 161, ¶ 6.18, 6.22.

165. See Japan—Taxes on Alcoholic Beverages, supra note 161, ¶ 6.16, 6.22.

166. See id. The Liquor Tax Law distinguished between Western-style liquors and Japanese traditional alcoholic beverages such as sake, sake (rice wine) and shōkō (grain spirits):

These Japanese products had been differentiated for tax purposes as carefully defined separate product categories on the pretext of their traditional character. As a result, “traditional” had become virtually synonymous with domestic . . . For example, shōkō was similar to vodka, but the shōkō category for tax purposes excluded spirits filtered with a birch charcoal filter, which prevented vodka from qualifying for the favorable shōkō tax rates.

Id. at 88.
regards competition between imported and domestic like products could not be achieved if differential taxes could be used to crystallize consumer preferences for traditional domestic products, the Panel found that the traditional Japanese consumer habits with regard to shochu provided no reason for not considering vodka to be a "like" product.  

And again:

The Panel was of the view that "like" products do not become "unlike" merely because of differences in local consumer traditions within a country (e.g., consumption of shochu mainly in specific regions within Japan) or differences in their prices, which were often influenced by external government measures (e.g., customs duties) and market conditions (e.g., supply and demand, sales margins). The Panel was convinced that such an interpretation would run counter to the objective of Article III:2 to avoid that discriminatory or protective internal taxation of imported products would distort price competition with domestic like or directly competitive products, for instance by creating different price and consumer categories and hardening consumer preferences for traditional home products.

What is bothersome about these passages in the context of cultural protection is their ready preference for economics and tacit devaluation of tradition. Only economic factors capable of quantification, such as price, availability and competitive interrelationships, are examined. More abstract factors such as local consumer culture and "hardening consumer preferences for traditional home products" are referred to as variable or to be avoided. When features can be characterized as elastic, alleged indeterminacy makes them easy to disregard. In such an analysis, therefore, there is no acknowledgment of, or room for, the preservation or separate development of tastes, a key element of cultural autonomy.

In spite of the panel's findings, Japan did not bring its alcohol tax system fully into conformity with the GATT. The United States, Canada and the European Community then brought Japan back before the newly instituted WTO in 1995, essentially to adjudicate on the delin-

quency. That case, Japan—Taxes on Alcoholic Beverages, was only the second time that the WTO dispute resolution procedure was fully used. Accordingly, both the panel and the Appellate Body took time to examine the issues of likeness and substitutability thoroughly, no doubt with an eye to the authoritative nature that their analyses would assume in future decisions. The panel found that likeness had to be given a narrow meaning, because it is a "subset of directly competitive and substitutable products," and "in the Panel's view, the wording makes it clear that the appropriate test to define whether two products are 'like' or 'directly competitive or substitutable' is the marketplace." The language of "marketplace" suggests that a transactional conception dominated the panel's analysis of likeness—a conception reinforced by the finding that like products "must share, apart from commonality of end-uses, essentially the same physical characteristics." This definition has several degrees of difference from the inclusive definition of Border Tax Adjustments. At the same time, the panel was careful to point out that likeness analysis was to be conducted on a case-by-case basis.

The substitution analysis conducted in Japan—Taxes on Alcoholic Beverages, despite being notionally broader, did not show any greater tendency to consider subjective factors. In that instance, the panel found the "decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, inter alia, as shown by the elasticity of substitution." The panel continued:

Flexibility is required in order to conclude whether two products are directly competitive or substitutable. In the panel's view the suggested approach can guarantee the flexibility required, since it permits one to take into account specific characteristics in any single market; consequently two products could be

173. The precedential effect of adopted panel reports in GATT and WTO dispute resolution is not entirely clear. In Japan—Alcoholic Beverages Appellate Report, the Appellate Body stated that while adopted panel reports are not binding except with respect to resolving a particular dispute, they are "an important part of the GATT system" and do create "legitimate expectations among WTO Members." Japan—Alcoholic Beverages Appellate Report, supra note 161, at 14.
175. Id. ¶ 6.22.
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considered to be directly competitive or substitutable in market A, but the same two products would not necessarily be considered to be directly competitive or substitutable in market B.179

Again, the language used is curious, apparently promising some appreciation of the relevant market ("any single market"); market A" versus "market B") but ultimately relying on strictly objective characteristics: end-use and elasticity of substitution. The result emphasizes some of the Border Tax Adjustments factors at the expense of others.179

The two Japan liquor cases illustrate well the increasingly restrictive methodology of likeness and substitution analysis. In reading them, one can almost palpably sense the reluctance of decision-makers to deal with delicate issues of consumer habit and tradition. Instead, the decision-makers focused on tangible, quantifiable factors such as "proprieties, nature and quality." The broader context in which the regulation is administered is therefore entirely ignored and the balance that must be struck between objective and subjective criteria is never achieved.

The point here is not to suggest that disguised restrictions on international trade are to be automatically excused by existing consumption patterns or tradition, but rather that a more comprehensive appreciation of a product's role in a community is required in order for the analysis to be culturally sensitive. It could very well be that shochu could have been treated preferentially for the wrong reasons, namely an impermissibly protective animus. Then again, perhaps a lesser degree of scrutiny would have been necessary if Japan could demonstrate that the beverage was essential to its heritage, for example, if it originated in Japan, was important to some minority, played a unique role in ceremonial or religious practice, or was used in traditional recipes. These possibilities raise the very sensitive question of the form of cultural protection and how we are to assure cultural autonomy consistent with international law—an autonomy increasingly difficult to recognize in an ever more homogenous world. Indeed, any attempt to distinguish goods or services on the basis of culture would seem to contravene the prohibition against "aim and effect" interpretation and possibly the process prohibition as well.180

178. Id.
179. In the Japan—Times on Alcoholic Beverage the Appellate Body agreed, with minor modifications, with the panel's finding on likeness and agreed entirely with its finding on

CANADA—CERTAIN MEASURES CONCERNING PERIODICALS

The above considerations were to play a major role in Canada—Certain Measures Concerning Periodicals.

IV. CANADA, THE UNITED STATES AND CULTURE: THE PERIODICALS CASE

A. Background

From the time of the American Revolution, Canadians have had to contend with the example of the United States as a powerful competing vision of community. Canadians have watched the American experiment unfold as neighbors often do, smugly at times, jealously at others, with an ambiguous sense of their own nationhood, acutely aware that their own efforts at building a country might not be as compelling as those south of their border.

Although there are many similarities between Americans and Canadians, there are also many differences. From a cultural perspective, one of the most important differences is that while the United States was born of revolution and change, modern Canada had its roots in loyalty to the British Crown, which implied an abiding faith in continuity and the status quo. It has often been noted that whereas Americans sought "life, liberty and the pursuit of happiness," Canadians were content with the more restrained formulation of "peace, order and good government." These differences have contributed on the Canadian side to a national psychology of uncertainty, for a Canadian must always ask, much like the hesitant sibling wondering about the more adventurous, "Is that example for me?"181 The dilemma presented by this dialectic of similarity and contrast, of proximity and distance, is so complex that perhaps it can be appreciated only by nationals of similarly situated countries, such as by Austrians in relation to Germany to the cultural aspect of a good or service. Canada arguably made this point in the Periodicals case by asserting that the excise tax promoted the generating of news in Canada. See generally Canada—Periodicals Panel Report, supra note 21; Canada—Periodicals Appellate Body Report, supra note 21.

181. Under the Canadian Constitution, Parliament is vested with a list of enumerated powers as well as all residual legislative power not within provincial jurisdiction. This residual jurisdiction is contained in the constitutional phrase that the federal government shall have power "to make laws for the peace, order and good government of Canada," Peter W. Hogg, CONSTITUTIONAL LAW OF CANADA 456–55 (3d ed. 1992).

182. This feeling is often present in the Canadian psyche. Andre Laurendeau, editor of a leading French-language daily and later Chairman of the Royal Commission on Bilingualism and Biculturalism, wrote in 1964, "I often have the impression that there is a fatigue that comes from being a Canadian—an almost impossible undertaking and a heavy responsibility, given the
or by Taiwanese in relation to China. It is, at its core, a manifestation of profound struggle for a distinct identity.

Although the idea of a cultural identity "under contention" is sometimes greeted with skepticism by inhabitants of older, more secure cultural traditions, as well as by those suspicious of the claim that a national identity can be purposefully shaped, in Canada the issue of "Canadianness" has generated an immense amount of public debate. On an official level, seven inquiries have examined "specific challenges to Canadian culture" since 1929. However, none of these has produced a lasting method of safeguarding Canadian culture. Modern Canadians have thus developed a protective sense of their own culture and identity, an attitude which non-Canadians, who see Canada as a sophisticated, richly endowed country with every reason to feel secure, sometimes find hard to understand.

Notwithstanding a defensive posture about their own culture, Canadians are avid consumers of foreign, mainly American, culture. In the film industry, for example, U.S. studios have controlled about eighty-five percent of the Canadian theatrical film market in recent years, netting some CAN$180 million annually from Canadian audiences. Canadian-made films, by contrast, account for less than five percent of movie theatre screen time in their home market. Due to its proximity and sheer size, the United States also looms large in everyday Canadian thinking. A shared border, common language, parallel history, and the largest trading relationship in the world mean that Canadians are well aware of U.S. current events. The same cannot be said for many Americans about Canada. Their ignorance annoys Canadians, who often perceive it as a sign of arrogance and a reason to be suspicious of the United States. Moreover such unidirectional cultural permeability makes it exceedingly difficult for Canadians to assert their own cultural autonomy. Not only must Canadians struggle to define who they are in the face of constant competition from cultural imagery that is not their own, but Canadian culture does not pose any comparable threat to, and hence cannot be leveraged against, the United States. The overwhelming one-way flow of products, ideas, and interest has served at times to sharpen the perception of cultural invasion among Canadians.

The sense of cultural threat from the United States was particularly acute in Canada during the early 1960s. One cause of this sentiment was U.S. participation in the Canadian publishing industry, specifically in the marketing of "split-run" editions of U.S. magazines, or Canadian editions of U.S. periodicals supplemented with limited amounts of Canadian content and advertising. Canada's concern over split-runs focused on the effect of publications on Canadian advertisers, which was not always easy to quantify. However, official figures trumpet the fact that Canadian "cultural exports" have thrived during the 1990s, less often do they reveal that these exports are often made up of facsimiles of U.S. culture where Canadian scenes and talent stand-in for U.S. sources. Hoskins, Finn, and McFayden have written of this phenomenon:

English Canada is close to the United States in terms of popular culture, topography, architecture, and, perhaps most important of all, a North American accent that in most cases is virtually indistinguishable from that of neighboring U.S. states. Canadian producers have exploited the situation by producing American-style (similar value) at lower cost. An early example, in the mid-1960s, was Night Heat, which was pre-sold to CBS. The story line was American, Toronto was made to look like any big U.S. city, and the differences between Canadian and U.S. legal systems were blurred. Most U.S. viewers probably did not realize they were watching a foreign production. Night Heat was produced for about $650,000 an hour and shown on the 11:00 p.m. late evening time slot, a time slot when the potential audience is insufficient to justify the $1 million plus budget associated with making a U.S. drama. To ensure a comparable product, a marketing approach was adopted by involving a U.S. buyer at all stages of development and production.


186. John Irving observed in 1962 that:

Most of the difficulties that threaten the mass media in Canada are the direct outcome of American economic and cultural imperialism.

The hearings and recommendations of the O'Leary Royal Commission have brought vividly to our attention the predicament of the periodical press in Canada. Ninety-two of the ninety-six periodicals displayed on our newsstands that sell more than 10,000 copies are American. The recent merger of the seventen-year-old Saturday Night with The Canadian, and the transformation of Canadian Homes into a monthly supplement, were attributed by their owners to the relentless competition of American magazines. Consequently, Canadian publishers are under considerable pressure to seek out the kind of material that has proved so successful in the United States. And in order to meet this demand, they are often forced to seek out articles that originate in American periodicals. This is not to say that Canadian publishers cannot compete on the basis of their own material. In fact, they do. But they must compete in a different market, one that is not as easily accessible. And they must do so in a way that is not always easy. (NIIH)

184. See Film and Video: Seldom Showing at a Theatre Near You (visited Sept. 8, 1998) <http://>


184. See Film and Video: Seldom Showing at a Theatre Near You (visited Sept. 8, 1998) <http://>
were allegedly attracted to the superior marketing power and circulation of U.S.-sponsored editions, generally to the detriment of the profitability of Canada's magazine industry. At that time many Canadians argued that measures were necessary to prevent what was perceived to be an anti-competitive abuse, namely the diversion of lucrative Canadian advertising revenue to low-cost publications using "recycled" U.S. editorial content. In 1961, a Royal Commission on Publications appointed by the Canadian government to study the problem expressed the view that "the communications of a nation are as vital to its life as its defences, and should receive at least as great a measure of national protection." As a result of the Commission's conclusions, contained in what became known as the O'Leary Report, the Canadian government implemented two protective measures in 1965. The first was a tariff that implemented a total ban on split-run editions entering the country. This was designated Tariff Code 9958. The second measure was the withdrawal of the deductibility of advertising expenses claimed under the Canadian Income Tax Act by Canadian entities advertising in foreign periodicals. This was enacted by Section 19 of the Income Tax Act.

Tariff Code 9958, which came under scrutiny in the Periodicals case, created an extensive definition of "special edition," which included split-runs. The tariff effectively prohibited imported periodicals that contained advertisements primarily directed to the Canadian market and that did not appear in identical form in all editions of the issue.


187. See id.

188. See Canada—Periodicals Panel Report, supra note 21, ¶ 3.27.


191. Tariff Code 9958 was part of Schedule VII of the Canadian Customs Tariff. Import of goods listed in Schedule VII into Canada is prohibited by article 114 of the Customs Tariff. See Customs Tariff, R.S.C., ch. 41, art. 114, ¶ 9958 (1988) (Can.). [hereinafter Tariff Code 9958].

192. Section 19 permitted deduction of the cost of advertisements directed at the Canadian market placed in Canadian periodicals, these being periodicals that were 75% Canadian-owned. Other contents, excluding advertisements, did not contain more than 20% of the same material as the contents of a periodical published outside Canada. Section 19 was not contested by the United States in the Periodicals case. See Income Tax Act, R.S.C., ch. 63, ¶ 19(1) (1972) (Can.).

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distributed in the periodical's home country. To determine whether an advertisement was "primarily directed" at the Canadian market, a number of factors were considered, including whether the advertisements contained enticements targeting the Canadian market, references to the Canadian Goods and Services Tax, listing of Canadian as opposed to foreign addresses, or specific invitations to Canadian consumers only. The Canadian Department of National Revenue for Customs and Excise notified the periodical's publisher if the periodical was found to be in contravention of the tariff.

Under the protective effect of Tariff Code 9958 and Income Tax Act Section 19, Canadian periodicals "flourished creatively and, to some extent, economically." At the time of the O'Leary Report in 1961, roughly one quarter of the magazines circulating in Canada were Canadian. By 1992, that amount had increased to almost sixty-eight percent. Nevertheless Canadian periodicals continued to face low profitability as well as stiff competition for readers from foreign magazines.

During this period, magazines were not the only U.S. media subject to heightened scrutiny under "Canada First" cultural policies. Other actions included: (1) Canadian restrictions on foreign investment in Canadian book publishing and retailing; (2) a decision by the Canadian Radio and Television Commission to de-list a previously authorized U.S. country-music channel from Canadian airwaves in favor of a Canadian applicant; (3) Canadian efforts to increase the number of domestic firms in the market for film distribution rights in 1992.

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194. See Canada—Periodicals Panel Report, supra note 21, ¶ 2.2.

195. The Importation of Periodicals Regulations, C.R.C., ch. 533 (amended April 30, 1996) (Can.) (describing the review process to be carried out by a Department officer). The Department had adopted and made public guidelines providing details relating to the application and administration of Tariff Code 9958. See Revenue Canada Memorandum D9-1-10 (May 21, 1995).

196. See Canada—Periodicals Panel Report, supra note 21, ¶ 2.4.


198. See id. at 2.

199. See id. at 3.


Canada.\(^2\) An alleged lack of copyright protection for U.S. performers under Canada's proposed copyright legislation,\(^3\) and (5) a longstanding Canadian policy of denying the tax deductions for advertising expenses when the advertising was carried by foreign broadcasters.\(^4\)

The situation annoyed the U.S. government and media industries, which fought several diplomatic skirmishes with Canada over these matters with mixed success.

In the mid-1980s, a new realism began to dawn on Canadians, prompted by a growing sense that the country's economic future lay in North America and in a greater market orientation in the domestic economy. The 1983 MacDonald Royal Commission on the Future of Economic Prospects in Canada confirmed this sentiment, stating that "Canada's position as a global trading partner is ineffectively linked with the United States and, to this end, recognition and formalization of this link should take place through the negotiation of a free-trade agreement."\(^5\)

What followed was the negotiation and conclusion of the Canada-U.S. Free Trade Agreement (CUSFTA) in December 1988.\(^6\)

While many Canadians supported closer economic ties with the United States, a number of them were also deeply ambivalent about the greater American cultural influence they believed these links would bring. During the CUSFTA negotiations, artists' groups, backed by a significant portion of Canadian public opinion, campaigned vociferously for protection of Canada's cultural industries under the deal.\(^7\) Partly because of this pressure, Canada refused to sign the Agreement unless a


203. See Larry Leblanc, Canadian Performance Right Bill Draws Fire From U.S., Broadcasters, BILLBOARD, Jan. 7, 1995, at 6, 6; Jim Stotek, Sorry, But They Won't Be There, TORONTO SUN, Aug. 19, 1996, at 57; Peter Mortson, Lobbyia "Desolate" by Culture Rules, FIN. POST (TORONTO), Sept. 16, 1997, at 6; Larry Leblanc, 'This Brings Canada Closer' Revision Plan Is Changed Pascoed, Music Sales Pick Up, BILLBOARD, Dec. 27, 1997, at 62, 62.

204. "The most significant piece of tax legislation is Bill C-58, the federal law prohibiting tax deductions for advertising on U.S. border radio and television stations and in foreign owned publications." STEVEN GLOBERMAN, CULTURAL REGULATION IN CANADA 16 (1983).


208. "Meanwhile, as Europeans argued over how to keep the Americans at bay, Canadians had been engaged for some years in a debate about the same matter. What brought the discussions out of the universities and policy makers' offices and into the glare of politics was the proposal by the Reagan administration in the late 1980s to promote a free trade agreement between the two nations. One of the most contentious points of the negotiations was Canada's insistence that its cultural industries not be part of the agreement. This was not a sudden decision, nor was it based on political whim." MASS MEDIA AND FREE TRADE: NAFTA AND THE CULTURAL INDUSTRIES 7 (Emile G. McAnany & Kenton T. Williamson eds., 1996).

209. Article 2005(2) of the CUSFTA states that "[n]othing in this Agreement shall be construed to affect in any way the laws of Canada governing the matter of cultural industries as defined in the Canada Trade Agreement, 1988, as revised in 1991, and nothing herein shall take effect or have any force or effect otherwise than as provided in the said Agreement." CUSFTA art. 2005(2).


Canadian Magazine Industry, with a mandate to review federal support of the Canadian magazine industry and make recommendations.214

The Task Force, composed of nine non-Canadian members, conducted several months of hearings across Canada in 1993 and received submissions from trade, arts, and consumer groups, as well as government officials.215 In March 1994 it issued its report, A Question of Balance, which painted a decidedly mixed picture of the Canadian magazine industry. On the one hand, the report detailed a relationship between circulation, advertising revenues and editorial spending. However, most Canadian periodicals could not take advantage of such a relationship because they were "constrained by a small potential circulation base."216 On the other hand, the report described an industry "complex and multifaceted, with a wide range of choice for readers ... [and] no less efficient or profit-conscious than its foreign counterparts."

The principal challenge was "not with ease of access to the products of other cultures, [but] rather with the difficulty of access to our own products."217 In this regard, the report voiced concern about the possibility of market failure should foreign (i.e., American) periodicals be allowed into the country.218 The Task Force's principal recommendation to meet this challenge was the imposition of an excise tax equal to eighty per cent of the total amount charged for advertising in an issue.219 The tax would apply to split-run editions, defined as: (a) periodicals distributed in Canada; (b) with twenty percent or more of the same editorial material as in their home market editions; and (c) containing advertising that did not appear in non-Canadian editions.220 Each element of the definition had to be met before the tax could apply.

The excise tax did not require particular Canadian content per se. There was, for instance, no requirement of coverage of Canadian subjects or themes. Instead, the tax's definition promoted a negative requirement of "original content,"—that is, content from both Canadian and other sources not appearing elsewhere.221 The Task Force justified its recommendation on the basis that such a tax created a means for the everyday interpretation of events by and for Canadians.222 The tax promoted a process of news-gathering, the ultimate product of which would contain a perspective, a balance of articles, and a general orientation in reporting that, though difficult to measure, would be distinctly Canadian. A purely physical comparison of pages and printing processes would not reveal the difference that the tax aimed to achieve.223

The Task Force report also explained how the measure would respect Canada's international trade obligations while protecting Canadian culture. It said:

By focusing on original content, the tax does not violate the national treatment provisions for goods in the GATT, the FTA and the NAFTA. Quite apart from the fact that editorial content beamed into Canada is not a "good" for customs purposes, no discrimination would be taking place under the tax between imported and domestic non-original editorial content. Similarly, the tax is not discriminatory against foreign investment. It would be paid by all printers or distributors of editions falling within the purview of the tax, notwithstanding the national origin of the investor. Nor does the proposed tax impose a domestic content requirement in violation of the FTA and the NAFTA. It promotes original content, regardless of the country of origin. Similarly, the tax is not discriminatory against foreign

214. See id. ¶ 3.25. In A Question of Balance, the Task Force's mandate was described as being "to undertake a review of federal measures to support the Canadian magazine industry with a view to making recommendations that will enable it to carry through effectively on its policy objective of ensuring that Canadians have access to Canadian information and ideas through genuinely Canadian magazines." O'Callaghan & Tassé, supra note 197, at 4.

215. The nine members of the Task Force were Lynn Cunningham (School of Journalism, Ryerson Polytechnical University, Toronto), Neville Gilfoy (Publisher, JPL Publishers Ltd., Dartmouth, Nova Scotia), Doreen Guthrie (Consumers Association of Canada, Ottawa), Hank Inven (McCarthi Tétreault, Barristers and Solicitors, Toronto), Robert Johnstone (consultant, Toronto), Michel Lord (Vice-President, Bombardier Inc., Montréal), John Sinclair (President, Institute of Canadian Advertising, Toronto). The Task Force was re-chaired by J. Patrick O'Callaghan (Toronto) and Roger Tassé (Montréal). See O'Callaghan & Tassé, supra note 197, at 1.

216. Id. at iv.

217. M. at iv.

218. M. at 99.

219. The Task Force Report noted that "if left to market forces alone, a day could arrive when Canadians would no longer enjoy the choice that they have today between foreign cultural products and those developed for the Canadian market. There simply would be no Canadian product because of the relatively small size and the vulnerability of our cultural industries." Id. at 63.

220. See Canada—Periodicals Panel Report, supra note 21, ¶ 2.7.

221. The statutory definition of split-run periodicals defined such an issue as one "in which more than 20 per cent of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals," thereby implying that the legislation sought to encourage the production of original news material. See id.
services. Even if publishing a magazine constitutes a service within the meaning of Canada's international trade rules, which is far from clear, the tax applies only on the basis of whether the non-original content is printed in a magazine that contains advertisements directed at Canadians, regardless of the nationality of the author or the country of origin of the magazine.

Although favoring the development of original editorial content, regardless of the country of origin, goes beyond the narrower focus of promoting only content of Canadian origin, the Task Force is of the view that, on balance, it is better to aim wide and comply with trade obligations by promoting original content than to target a narrow field and end up in protracted disputes with Canada's principal trading partners by promoting Canadian content alone. In other words, although it is quite obvious that the Task Force is concerned with the survival of magazines expressing a Canadian perspective and view of the world, it believes that the best way to achieve that objective is to promote original content, regardless of country of origin.225

The Task Force noted further that its proposal represented "a proportionate response to the problems being faced by Canadian magazines."226 There was, however, no discussion of any GATT precedent that would uphold this criterion of proportionality. Indeed, it was well known at the time that de minimis requirements under the GATT were low.227 As will be seen, the report's conclusion badly misunderstood the standard by which the excise tax would be evaluated under international trade rules.

Sports Illustrated Canada began publication in April 1993.228 After consideration of the Task Force report, the Canadian government enacted the excise tax in December 1995.229 The new measure's effect was draconian: Sports Illustrated Canada ceased publication on December 12, 1995.230 It was evident that Sports Illustrated Canada had been targeted: not only was the Task Force's creation sparked by the Sports Illustrated announcement, but the excise tax was imposed retroactively on all split-run editions as of March 26, 1993, a few weeks before the magazine's inaugural publication.231 In March 1996, pursuant to DSU Article 4(1), the United States requested consultations with Canada over the split-run legislation, thereby setting in motion the WTO's dispute resolution machinery.232

C. The Panel Report

The United States' challenge of the Canadian measures under the WTO Agreement was astute. Action under the WTO Agreement preempted any resort to NAFTA procedures, thereby circumventing NAFTA's cultural exception entirely.233

The United States brought three issues to the DSB in the Periodicals case: (1) Tariff Code 9958; (2) the eighty percent excise tax; and (3) the validity of a preferential postage rate scheme for certain Canadian periodicals.234 In a broad sense, all dealt with cultural protection. However, direct argument about culture and its relationship to trade was made only on one issue. For the sake of brevity, this Article therefore abridges discussion about points that were less relevant to the issue of culture.

225. O'Callaghan & Tarr, supra note 197, at 66.
226. Id. at 64.
227. With regard to "like products" in the first sentence of Article III.2, it has long been held under the GATT that the obligation countries assume are not with respect to any proof of injury. The first sentence of Article III.2 protects the expectation of an equal competitive relationship. Thus, where there is the mere potential for diminished trade, a violation will be found, and there is no de minimis rule respecting "like products." With regard to substitutable products in the second sentence of Article III.2, the prohibition requires that the tax differential be more than de minimis, but again, there is no explicit requirement of actual injury in this category either. See McGovern, supra note 85, at 5.21-5.21-6.
231. See Canada—Periodicals Panel Report, supra note 21, ¶ 5.130. The tax was made retroactive to March 26, 1993, the date the Task Force was created.
232. DSU article 4.3 states that members shall reply to a request for consultations within ten days and shall enter into consultations in good faith within thirty days of receipt of the request "with a view to reaching a mutually satisfactory solution." DSU, supra note 74, art. 4 (3).
233. NAFTA article 2005(1) states that differences under NAFTA "may be settled in either forum [i.e. NAFTA or GATT] at the discretion of the complaining Party." NAFTA, supra note 210, at 694. Articles 2005(3)-6 set out the procedural and substantive components of the preclusion. Id. Noteworthy as well was the absence of third party intervention, a fact at odds with the substantive importance of the Periodicals case and with the trend in GATT/WTO dispute settlement. DSU article 10 permits third party participation by those countries with a "substantial interest." DSU, supra note 74, at 66. Panel reports reveal that this term is elastic and that substantial interest can be actual or prospective, trade-related or abstract, and not necessarily unique to the Member asserting it. Under the WTO Agreement, the trend has been for disputes to
1. Tariff Code 9958

At the outset of the Periodicals case, it was clear that Tariff Code 9958 violated the GATT's prohibition against quantitative restrictions.\(^{235}\) The first question, therefore, was whether Canada could justify the tariff by invoking an exception to the GATT. Canada relied on Article XX(d), which, as noted, allows countries to maintain laws that secure compliance with other GATT-consistent laws.\(^{236}\) The panel in United States—Standards for Reformulated and Conventional Gasoline established three conditions for the Article XX exception to apply: (1) that the complained-of measure was being invoked to secure compliance with GATT-consistent laws; (2) that the complained of measure was necessary for compliance; and (3) that the measure was not applied in a manner that would constitute a means of unjustifiable or arbitrary discrimination or a disguised restriction on international trade.\(^{237}\) Canada's principal argument was that Tariff Code 9958 helped promote compliance with Section 19 of the Income Tax Act. Canada contended that the tariff encouraged Canadian publishers to comply with Section 19 by advertising in Canadian publications, rather than be tempted to advertise in split-run publications and seek income tax deductions to which they were not entitled.\(^{238}\) Furthermore, there were no other reasonable measures that would accomplish the goal of helping the Canadian periodical industry raise revenues.\(^{239}\) The United States countered that Tariff Code 9958 was not meant to enforce Section 19; rather, the two measures advanced the same aim by different means.\(^{240}\)

The panel analyzed this issue by recalling that the onus of claiming an exception lay on the party seeking it.\(^{241}\) The panel found that the phrase "to secure compliance with laws and regulations" in Article XX(d) meant to "enforce [legal] obligations," not to ensure the attainment of the law's objective.\(^{242}\) This distinction arises because the GATT is not about legislative aims, but instead about the manner in which laws are enforced.

Canada argued that this means-based focus should be attenuated because Tariff Code 9958 and Section 19 had always been considered "a single, indivisible package."\(^{243}\) However the panel rejected this position. Relying on EEC—Regulations on Imports of Parts and Components\(^{244}\) the panel reasoned that Canada's argument "inherently lead to a situation where 'whenever the objective of a law consistent with the GATT cannot be attained by enforcing the obligations under that law', the imposition of further obligations inconsistent with the GATT could then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of the law."\(^{245}\) Tariff Code 9958 could not be considered an enforcement measure because its effect—enhanced compliance with the Income Tax Act—was only incidental to the Act's aim of encouraging the placing of advertisements in Canadian, as opposed to non-Canadian, periodicals.\(^{246}\) The panel concluded that, being unable to place Tariff 9958 within the Article XX(d) exception, Canada had failed the first requirement of

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\(^{235}\) GATT Article XI:1 reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, imports or export licenses or other measures shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, supra note 11, art. XI: The import ban was in the form of a duty, but in reality operated as a zero sum quota and therefore in contravention of this provision.

\(^{236}\) See Canada—Periodicals Panel Report, supra note 21, ¶ 3.2.

\(^{237}\) See Canada—Periodicals Panel Report, supra note 21, ¶ 5.7. In addition, parties raising Article XX must meet the language of Article XX’s preamble, or choppens. The preamble reads:

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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .

GATT, supra note 11, art. XX.

The aim of the clause is to prevent abusive application of the Article XX exceptions, but its wording has been criticized as vague and therefore acting as a supervening brake on countries’ legislative capacity. See generally Jeffrey Waincymer, Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedure, in 39 Int’l and Comp. L. Rev. 279 (2006).

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\(^{238}\) See supra note 21, ¶ 5.10.

\(^{239}\) See id., ¶ 3.15.

\(^{240}\) See id., ¶ 3.7.

\(^{241}\) See id.

\(^{242}\) See supra note 21, ¶ 5.9 (applying European Economic Community—Regulation on Imports of Parts and Components, May 16, 1990, GATT B.I.S.D. (57th Supp.) at 192 (1991)).

\(^{243}\) Id.

the Reformulated Gasoline test. Therefore, there was no need to consider further the tariff’s compliance with international trading rules. Tariff Code 9958 clearly contravened the GATT and was not saved by any exception.

2. The Excise Tax

Issue (2) dealt with the GATT consistency of the excise tax. The United States alleged that the tax violated Article III.249 Canada’s preliminary argument was jurisdictional. It asserted that Article III did not apply to the excise tax, because it was a tax on, in reality, advertising services, and these fell properly within the coverage of the General Agreement on Trade in Services (GATS), a services accord within the WTO Agreement but technically outside the GATT.

Canada claimed that because GATS only covers actual sectoral commitments made under it, and because Canada had made no specific commitment to include advertising services, the United States could not seek a benefit under the GATT that it could not obtain under GATS. In other words, the United States could not try to recharacterize the GATT consistency of the excise tax as a trade-in-goods issue when it was fundamentally a trade-in-services issue. Canada’s argument was based on an “exclusive” view of the two accords: to the extent that there was an overlap between the lack of a commitment in services and any obligation assumed in the goods sector, the failure to commit under GATS should preclude all other obligations upon a WTO member, including those that might possibly be linked to the regulation of trade in goods.250 The United States argued that nothing in the GATS modified GATT obligations, that the two agreements were co-equal, and that there was no real conflict between them in this instance.251

247. See id. ¶ 5.11.
248. See id. ¶ 5.20.
249. See id. ¶ 5.13.
250. See id. ¶ 5.14.
251. See id.
252. See id. ¶ 3.86. The United States also raised an additional argument from the language of Article III.2, which prohibits the application of taxes or charges either “directly or indirectly” in excess of those applied to internal goods. Its contention was that the excise tax did, in fact, apply “directly or indirectly” to products, further bolstering its view that the measure was one relating to goods. Canada countered this view, stating that because the tax was in terms of the advertising revenues generated and advertising services were part of the “integrated activities of a publisher,”

254. Article XVI.5 of the WTO Agreement reads, “In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.” WTO Agreement, supra note 6, art. XVI.5.

255. The General Interpretative Note to Annex IA of the WTO Agreement reads:

In the event of any conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA to the Agreement Establishing the World Trade Organization . . ., the provision of the other agreement shall prevail to the extent of the conflict.

Id. at Annex IA.

257. See id. ¶ 5.18–5.19
tween free trade and culture. Canada argued that the "intellectual content of a cultural good such as a magazine must be considered its prime characteristic [and therefore] the 'like product' analysis must be approached in terms of intellectual content as opposed to the traditional approach of examining material or physical characteristics." Canada, therefore, stressed the excise tax's aim of encouraging original content by putting news and events through a Canadian "filter," that is, having them interpreted by and about Canadians. The excise tax did not seek to promote coverage about specific objects, but rather to cultivate a particular perspective on the world. In this way, the legislation sought to protect a process of living culture. It was a subtle point, one hard to convey and one a panel might easily misapprehend.

Canada explained:

The criterion of original versus replicated material might seem abstract at first, but in its practical effect it refers to a dividing line that is very easily recognized. Original material means content for and aimed at the Canadian market—this means Canadian content in terms of subject matter as opposed to authorship or production. The idea that Canadian content is the same as foreign content is simply not tenable. The events, topics and people covered will be Canadian. They may not be exclusively Canadian, but the balance will be recognizably and even dramatically different than in a replicated foreign publication, where articles on Canada are close to non-existent. Foreign magazines are almost devoid of content dealing with Canada, and what little there is quite logically fails to reflect a Canadian perspective.

To provide a concrete example of its point, Canada's counsel made the following factual submission:

The proper basis of comparison is of course Maclean's and Time Canada. Almost every article in Maclean's deals with Canada. This is true of the editorial, the letters, the business news, the entertainment coverage, the arts, crime, people, the law, much of the news everything in fact but the lead international stories.

covering about 8 of 88 pages. Next, a comparative look at Time Canada shows that it has practically no reference to Canada or Canadian subjects. There are two out of 21 letters from Canadian sources. There is a travel advisory on Montreal, but it turns out to be about an exhibit dedicated to an American landscape architect. The difference between Time Canada and Maclean's is striking. It would escape no reader and no consumer. This is about as typical an example as one could find. These are mainstream, mass circulation magazines. Canada suggests there is a significant, objective, discernible difference between a split-run and a magazine created with original content for the Canadian market.

The above passage demonstrates well another abstraction that Canada was trying to convey, namely, that allegedly "like" U.S. periodicals did not cover Canada at all and that, for the purposes of end use, consumer tastes and habits, U.S. periodicals were entirely different from their Canadian counterparts. Likeness under the first sentence of Article III:2 was thus precluded. Canada argued further that because the excise tax was so prohibitive, no split-run publication had been published, and no true comparison could be made. Thus, in Canada's view, there was "an artificial quality to any attempt to assess how Article III applies to a tax that has never been applied to a foreign product."

The United States argued that the actual level of imports was not a basis for assessing whether there was a violation of Article III. Instead, what had to be examined were the "expectations on the competitive relationship between imported and domestic products." Canada had "created an artificial distinction between otherwise entirely like products." This distinction was founded on prohibited "process" differences, such as location of production and publication method, that were essentially "extraneous" to the good itself. The United States also maintained that, under the tax, the editorial content of split-run magazines need not be original at all. Rather, a magazine could avoid the tax and still be identical to what was sold abroad, as

261. Id. ¶ 8:61.
262. Id. ¶ 8:62.
long as it did not advertise to Canadians.\textsuperscript{271} These results suggested that the real distinction Canada sought to make was for the purpose of protecting its own advertising industry.\textsuperscript{272} Furthermore, even if the content of the Canadian periodicals was original, the United States asserted that the "like product" comparison involved an assessment of many more factors than editorial content alone.\textsuperscript{273} The weight that Canada argued should be given to content was disproportionate to the weight mandated by the "likeness" test\textsuperscript{274}.

The panel decided to base its like product determination on the case of a hypothetical import.\textsuperscript{275} In so doing, it departed from any careful review of the Border Tax Adjustments' factors. Instead, the panel focused on the treatment of Harramsmith Country Life, a Canadian magazine with Canadian and American editions before the introduction of the excise tax.\textsuperscript{276} The example's selection itself is instructive because Harramsmith, as a home and gardening magazine, had a limited readership. The greater the editorial specificity, the less a distinctly Canadian outlook was possible. The panel then engaged in an elaborate hypothetical in which it supposed that both the Canadian and American versions of Harramsmith had been published in the United States and that the Canadian edition had then been exported to Canada because it was "somehow exempted" from Tariff 99.8.\textsuperscript{277} If the publisher decided to publish a final issue of the U.S. edition after the introduction of the excise tax, the publisher would have been subject to the tax on the imported Canadian edition. The panel continued:

Now, let us compare the two issues of this hypothetical Harramsmith Country Life (Canadian edition) before and after the continuation of the U.S. edition. These two editions would have common end uses, very similar physical properties, nature and qualities. It is most likely that the two volumes would have been designed for the same readership with the same tastes and habits. In all respects, these two volumes are "like," and yet one is subject to the Excise Tax, while the other is not.\textsuperscript{278}

The panel concluded:

In our view, this provides sufficient grounds to answer in the affirmative the question as to whether the two products at issue are like because . . . the purpose of Article III is to protect expectations of the Members as to the competitive relationship between their products and those of other Members, not to protect actual trade volumes.\textsuperscript{279}

In finding that the excise tax contravened the first sentence of Article III:2, the panel's focus was purely economic. Its opinion about "the product's end uses in a given market, consumers' tastes and habits, and properties, nature and quality" was conclusory, ignoring Canada's extensive submissions about these factors. There was no discussion, for example, about the distinction between Canadian and American products as information vehicles about Canada. Rather, the panel condemned the tax on the basis that the Excise Tax Act "definition (of a split-run edition) essentially relie[d] on factors external to the Canadian market" such as editorial and advertising content, and not on the inherent "Canadianness" of the product involved.\textsuperscript{280}

At the same time, the panel did not acknowledge the difficulty that Canada, as a WTO member, might face in attempting to define such "Canadianness," nor did it articulate any margin of appreciation that a country should be granted in legislating in this regard. Instead the panel seemed to insist on a degree of specificity that the element in

\textsuperscript{271} See id.

\textsuperscript{272} Ibid. 5.72.

\textsuperscript{273} Id. p. 3.178.

\textsuperscript{274} Id. citing WTO Appellate Body Report, Japan—Taxes on Alcoholic Beverages, Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996), 1996 WT 78889, at 121. The United States forwarded two other principal arguments. One was the familiar espressius usus principal, see supra, that Canada's contention of a "cultural good" was contrary to the GATT because only films among cultural goods were given protection under Article IV. "Had the drafters of GATT 1947 sought to treat other intellectual or cultural products differently, they would have done so." Id. p. 3.84. The United States also cited the fact that Canada's tariff binding for split-runs was the same. "[T]he single Harmonized System heading for all kinds of the products does provide support for a finding that split-runs and non-split-runs are the same like product." Id. 5.93. It is observed that "Canada is unique in drawing (tariff) lines . . . based on an artificial distinction such as 'split-run' versus 'non-split-run.'" Canada—Periodicals Panel Report, supra note 21, 5.95.

\textsuperscript{275} See id. 5.25-5.26.

\textsuperscript{276} Id. 5.29.

\textsuperscript{277} The "advertising content" of a split-run was defined, for the purposes of the Excise Tax Act, as containing more than five percent advertising that did not appear in identical form in other editions distributed outside Canada. The "editorial content" of a split-run periodical was defined for the purposes of the Excise Tax Act as where more than "[twenty] percent of the editorial material is the same or substantially the same as editorial material in the

\textsuperscript{278} Id. 5.26.

\textsuperscript{279} The panel.
question—culture—did not have. 281 Indeed, in order to develop in a progressive, living manner, culture could not have such specificity. The panel's net conclusion was that the excise tax violated the first sentence of Article III:2 and was therefore inconsistent with the GATT. There was, thus, no need to determine whether the excise tax violated the second sentence of Article III:2 or Article III:4 concerning differential treatment of like products. 282

3. The Funded Rate

Issue (3) involved a preference. For some time Canada Post, the Canadian postal monopoly, had maintained two categories of postal rates for periodicals. 283 The first was a "funded" rate heavily subsidized by the Canadian government. 284 The second consisted of two subcategories: first, a "commercial Canadian" rate available to Canadian publications ineligible for the "funded" rate; and second, an "international" rate applying to all foreign publications mailed in Canada. 285 To qualify for the funded rate, publications had to meet certain criteria set out by the administering government agency, the Department of Canadian Heritage. 286 A comparison of rates offers some idea of the difference set by the scheme: while the funded rate could be as low as $0.078 per copy, like commercial Canadian rates for national distribution were $0.378 and commercial international rates were $0.436. 287 The margin of preference was evident.

The panel found that these preferential rates violated GATT Article III:4 as "treatment . . . less favourable than that accorded to like products of domestic origin," prompting Canada to invoke GATT Article III:8(b). This subsection, an exception to Article III, allows governments to provide subsidies to domestic producers where payments are made "exclusively" to those producers. 288 The narrow legal issue was whether payments made by Heritage Canada to Canada Post on behalf of the funded Canadian magazines were sufficiently "exclusive" to qualify as a subsidy under GATT Article III:8(b). 289 The United States argued that the term "exclusively" had been interpreted to mean only direct payments to domestic producers and that because Heritage Canada made payments to Canada Post on behalf of the publishers and not directly to them, Canada could not avail itself of Article III:8(b). 290 Notwithstanding this argument, the panel found that Canada had effectively rebutted the presumption of non-exclusivity by demonstrating that Canada Post did not retain any economic benefit from the scheme. 291 The funded rate scheme was therefore justified under Article III:8(b). 292

D. The Appellate Body Report

Following circulation of the panel report in March 1997, Canada appealed the panel's findings on the excise tax to a division of the WTO's Appellate Body; and the United States also filed an appeal regarding the funded rate. Neither party appealed the finding regarding Tariff Code 9958. 293 Oral hearing took place in June 1997. 294 Canada's preliminary jurisdictional argument essentially repeated the argument it had made before the panel. 295 The United States'
counter to these arguments was that nothing within the WTO Agreement caused a measure coming within the scope of the GATS to be excluded from consideration under the GATT. The United States asserted that if Canada’s view prevailed, measures affecting imported goods would be exempt from scrutiny under Article III whenever they took the form of taxation or regulation of services. WTO members could then, consistent with the GATT, impose a wide range of discriminatory taxes and regulatory measures on imported goods. A member could, for example, “impose an exclusive tax on the rental of foreign cars, place a prohibitive surcharge on telephone services carried out using imported telecommunications equipment, or tax medical services using foreign diagnostic machinery.”

In weighing these essentially jurisdictional arguments, the Appellate Body took an approach different from that of the panel. Rather than focus on the legislation’s application, the Appellate Body scrutinized the wording of the Excise Tax Act, noting that the title of the operative part of the Act was “Tax on Split Run Periodicals,” not “[T]ax on [A]dvertising.” From this language, it was clear to the Appellate Body that:

[the Act] is intended to complement and render effective the import ban of Tariff Code 9958. As a companion to the import ban, [the excise tax] has the same objective and purpose as Tariff Code 9958 and, therefore, should be analyzed in the same manner . . . . By its very structure and design, it is a tax on a periodical.

The fact that the measure was related to a good, then, was conclusive. The GATT and the GATS could apply concurrently although, unlike the panel, the Appellate Body left open the issue of their overlap.

The Appellate Body then examined the substantive issue of the consistency of the excise tax with the first sentence of GATT Article III.2. It noted that “the Panel did not base its findings on the exhibits and evidence before it,” but rather upon the inapposite Harwoods hypothesis that “involve[d] a comparison between two editions of the same magazine, both imported products, which could not have been in the Canadian market at the same time.” The Appellate Body, therefore, concluded that “due to the absence of adequate analysis in the Panel Report in this respect, it is not possible to proceed to a determination of like products. We feel constrained, therefore, to reverse the legal findings and conclusions of the Panel on ‘like products.’” Instead of completing its analysis at that point, however, the Appellate Body found it appropriate, over Canadian objection, that it was without adequate factual background and thus without jurisdiction, to determine if foreign periodicals were “directly competitive or substitutable” pursuant to the second sentence of Article III.2. The Canadian objection was founded on the fact that while the panel heard argument on the second sentence of Article III.2, the panel had made no finding in that respect because the excise tax’s violation of the GATT had already been determined on other grounds.

The Canadian objection was a delicate one for the Appellate Body to address, particularly because, under the DSU, appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. Where the Appellate Body had self-admittedly found a “lack of proper legal reasoning based on inadequate factual analysis,” it arguably had no “legal interpretation” to deal with and so had to tread gingerly. The Appellate Body justified its decision to proceed with the analysis on the grounds that there was a “logical continuum” between the first and second sentences of Article

concurrent obligation under the GATT and the GATS, stating “[w]e do not find it necessary to pronounce on the issue of whether there can be potential overlaps between the GATT 1994 and the GATS, as both participants agreed that it is not relevant in this appeal.” Id at 19, *14 (citing Canada’s Appellate’s Submission, 5–14 (May 12, 1997); United States Appellees’ Submission, 13–29 (May 26, 1997)).

204. See id. at 20, *15.
205. Id at 21, *15.
206. Id at 22, *16.
207. Id at 23, *17.
208. See id. at 7, *5.
III:2, and that in a prior appeal, a division had "completed" the analysis. Well aware of the sensitivity of its actions, the Appellate Body cryptically described its task at this point as being to "develop our analysis based on the Panel Report in order to issue legal conclusions."312

Regarding the second sentence of Article III:2, Canada argued that imported split-run and domestic non-split-run periodicals were not comparable because magazine content was so distinct and because readers were looking for something fairly specific.313 In addition, Canada maintained that the issue of substitutability was based on complex questions of fact about the competitive relationship between the products, which the panel had not resolved, thereby implying again that resolution of the issue lay outside the Appellate Body's jurisdiction.314

However, the heart of Canada's culturally motivated criticism was the assertion that the panel decision had failed "to reflect the narrow construction and case-by-case approach required in Japan—Taxes on Alcoholic Beverages."315 The case-by-case approach required an analysis based upon the specific properties of the magazines in the Canadian context, but there was nothing to reveal this in the panel report.316 Canada submitted that because the excise tax did not limit the origin of the product, but merely the origin of its content, the panel did not make any distinction between domestic and imported goods.317 Hence, "the tax is free from any taint of overt discrimination."318

For tactical reasons, the United States contested the Appellate Body's position regarding the first sentence of Article III:2,319 but ultimately sustained the logic of the Appellate Body's decision to deal with the second sentence of Article III, by asserting that this "upheld the judicial economy approach taken by panels."320 There was "a sufficient legal basis for the Appellate Body to apply the law to the facts in the panel record" to analyze the claim.321 The United States then made submissions regarding substitution that were very similar to those it made before the panel.322

The Appellate Body began its substitutability analysis by noting that directly competitive and substitutable products are in competition with each other.323 The focus, therefore, is on "relevant markets," principally because "the GATT is a commercial agreement, and the WTO is concerned, after all, with markets."324 While this observation is true, to some degree, the language used, like that of the panel in Japan—Taxes on Alcoholic Beverages, demonstrated indifference to the fact that the case dealt with a unique product—a cultural good—and that the GATT and WTO function not only within markets, but also in a broader political, social, and cultural environment. Rather than address these broader concerns, the Appellate Body appeared to use this terminology to distinguish the breadth of its inquiry under a substitutability analysis from the limited likeness test.325 To Canada's contention that the market share of imported and domestic magazines had remained remarkably constant over the past thirty years and that this fact was evidence of poor substitutability, the Appellate Body concluded that:

[i]his argument would have weight only if Canada had not protected the domestic market of Canadian periodicals. 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, whatever their editorial content. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess,

footnotes:
311. In United States—Standards for Reformulated and Conventional Gasoline the Appellate Body, having reviewed the panel's conclusions regarding the first part of Article XXI(g), went on to complete the analysis under this article even though the panel had made no factual finding as to the remainder of the article. United States—Standards for Reformulated and Conventional Gasoline, supra note 161. This practice runs counter to the "judicial economy" approach of panels in other cases, but one writer has suggested it is legally necessary. See McGovern, supra note 85, at 2.23-6.

313. See id. at 25, *18.
314. See id. at 6-7, *5.
315. Id. at 5, *4.
316. See id. at 5, *4.
317. See id. at 6, *4.
318. Id. at 6, *4.
319. See id. at 11, *8. The United States argued that the "Excise Tax Act did not draw any distinctions based on the type of editorial content; consequently, under the Excise Tax Act, a

320. Id. at 13, *90.
322. See id. at *10.
323. See id. at 24, *17.
sports, music or cuisine. But news magazines, like *Time, Time Canada* and *Maclean's*, are directly competitive or substitutable in spite of the “Canadian” content of *Maclean's.*

The Appellate Body’s conclusion appeared to ascribe no value to Canadian content. In fact, the use of quotation marks (“‘Canadian content’) suggests a certain disdain for this factor, as if to imply that it did not merit serious consideration.

According to Article III, the Appellate Body was then required to examine whether the tax violated the prohibition against measures taken “so as to afford protection” contained in the preamble of Article III. The examination is achieved through structural analysis of the legislation. The Appellate Body stated that “with respect to [the excise tax], we note that the magnitude of the dissimilar taxation between imported split-run periodicals and domestic non-split-run periodicals is beyond excessive, indeed, it is prohibitive.” In addition it was clear to the Appellate Body from several statements of the Government of Canada’s explicit policy objectives in introducing the measure, as well as the tax’s demonstrable protective effect, that the aim was “clearly to afford protection to the production of Canadian periodicals.” Substitutability was thereby confirmed.

The Appellate Body then went on to deal with the “funded” rate. Despite the United States’ contention that the directness of the Article III:8(b) payment was key, the Appellate Body disavowed reliance on precedent and instead based its interpretation on “the text, content and object and purpose of that provision.” It chose to focus specifically on the type of payment received by Canada Post. Although the wording of Article III:8(b) was clear, the Appellate Body, in somewhat opaque fashion, relied on the drafting history of Article III to liken the funded rate to a prohibited tax reduction rather than a permissible subsidy.

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525. Id. at 20, 220.
526. See id. at 31, *21.
527. According to the analysis laid out in *Japan—Taxes on Alcoholic Beverages*, there must be consideration of “the design, architecture, and the revealing structure of a measure” in order to determine if the measure was applied “so as to afford protection.” *Canada—Periodicals Appellate Body Report*, supra note 21, at 31, *21.
528. Id.
529. Id., at *22.
530. Id. at *22.
531. See id. at 23, *22.
532. Id. at 34, *23.
533. Id. at 24. *23.

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E. Analysis

From the point of view of cultural autonomy, the most disappointing features of the *Periodicals* case were the panel’s finding on likeness and the Appellate Body’s finding on substitutability. While it is true that American magazines can at times be a substitute news source for their Canadian counterparts, Canada’s submissions made clear that they are not substitutes for news about Canada. Keeping in mind “the decisive criterion” of end-use referred to by the Appellate Body in *Japan—Taxes on Alcoholic Beverages*, there was a key distinction that WTO decision-makers failed to make.

Why? One plausible explanation is that in a quantitative analysis demanded by economics, qualitative measures taken for cultural protection are hard to assess because they have none of the comfortable absolutes of numbers. Their qualitative nature therefore makes them too subjective and vulnerable to attack in a dispute resolution system still concerned with establishing its legitimacy. Culture, which is composed of consumer habits and tradition as well as end-uses, is therefore seen as inherently suspect and judiciously avoided. Instead of sensitively weighing the Border Tax Adjustments factors, the panel in the *Periodicals* case relied on a questionable hypothetical and created overly specific bases of categorization. The Appellate Body’s analysis was also suspect, failing to account for the content, perspective and end-use case.
arguments of Canada. At both levels, there was a lack of any appreciation for the unique dilemma faced by Canadian policymakers in legislating for a highly peculiar problem, the maintenance and promotion of autonomy in the face of an overwhelming one-way cultural flow. There was likewise no recognition of legitimate Canadian efforts to receive public input on this issue and its resolution.

The treatment of the measures in the Periodicals case presents a clear example of how the "dominant gaze" of WTO decision-making is so fixedly economic that it is in some ways blind to context. Under WTO dispute resolution, economic thinking shapes how problems are perceived and solved. As part of this economic thinking, the cultural justification for laws is ignored, sidestepped, or belittled to ensure the achievement of efficiency. The analysis does not acknowledge that, in so doing, the greater "efficiency" of community and cultural continuity is sacrificed. Panels often justify their results by asserting that the GATT is not concerned with the ends that governments pursue, only means, but this statement is somewhat disingenuous in the sense that most disputes under the GATT have been about rule compliance, a compliance that, if achieved, leads to one end alone: efficient non-discrimination.

V. A CULTURAL WAIVER UNDER THE WTO AGREEMENT

A. Cultural Exception

What can be done? A GATT-consistent remedy, and one that meets the economists' penchant for accuracy, would be a subsidy. In the aftermath of the Periodicals case the Canadian government studied the possibility of subsidies for Canada's magazine industry, but ultimately decided to limit participation in the sale of advertising to Canadians instead. Subsidies present serious drawbacks, however. Subsidies do little except alter economic conditions. When in place, they make goods and services cheaper. Relying on them to change demand places faith in the idea that cost alone is the arbiter of taste. Moreover, by discussing culture in terms of subsidies we have automatically ceded ground to an

makes several suggestions as to how culture can be "quantified" and therefore amenable to greater control, for example:

Since the aim of subsidies would be to ensure that Canadians continue to have a choice of Canadian content across a range of media, they should go to products that the public can more readily identify as Canadian. As a result, the definition of Canadian content should shift away from the ownership of the producer of a cultural product or the location of the production money spent on it, and towards factors that are more directly related to cultural output by Canadians or to Canadian information. These might be the interpreters of the work (news anchors, political debaters, hockey players); whether an audiovisual product is based on an original work by a Canadian creator (playwright, composer, author) who is a permanent resident of Canada at the time the product is shown; whether a performance is presented before a Canadian audience; or with respect to nonfiction, whether the work displays a Canadian setting, reflects Canadians and their activities, or interprets Canadian history or world events involving Canadians. With respect to channeling public (or publicly mandated) funds into audiovisual productions, the goal of these changes would be to focus more, if not exclusively, on the Canadian creative or interpretive work involved. With respect to TV and radio programs, however, the changes would aim to cast the net of "Canadian content" so as to described subjects of particular interest to Canadians.

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economic viewpoint that insists that debate be carried on in terms of dollars and cents, as if culture had no intrinsic value when plainly it does. One additional difficulty is that under the WTO Agreement on Subsidies and Countervailing Measures total subsidies of a product cannot exceed five percent of the ad valorem value, meaning that only goods that are price elastic can be afforded protection in this way.\textsuperscript{343} It is impossible to determine if all Canadian periodicals would meet this condition.

The subsidy option, often so innocuously presented, is an outgrowth of the disquieting belief that governments must pay to protect culture. Accordingly, cultural autonomy is perennially regarded as a kind of add-on frill at variance with bottom-line thinking, rather than the way it is seen in international law, as an endowment belonging to each community to be honored and enriched in every generation.\textsuperscript{344} Much discussion about the subsidy option also seems to take place on the implicit assumption that governments actually have money to grant subsidies, when this is probably true only for a minority of countries.

The subsidy option then leads to the proposition that only rich countries should have the right to cultural survival, a proposition revolting to any sense of equity. Considerations of this type militate against any faith in subsidies as the protector of culture.

A perennial criticism of cultural protection is that culture is too indefinite a basis for trade regulation, yet it must be remembered that there exist other areas of the law and international legal protection where the regulating element is fluid.\textsuperscript{345} Each and every element of a cultural exception is not definable, nor need it be so. Although panels appear to demand an almost mathematical certainty when they deal with non-economic phenomena such as culture, it may be true that economics is as chimerically accurate as any other discipline. One needs only to think of the many “externalities” attendant upon economic development—be they the loss of tropical forests to create cattle ranches, the loss of culinary skills upon the introduction of prepackaged food, or the deadening of public discourse upon the advent of television—to realize that purely economic endeavors are imprecise in projected impact and will always have non-economic side effects.

Given this Article’s view that a greater “efficiency” is met by considering some aspects of culture in trade regulation, it seems that a cultural exception to the GATT is a worthwhile idea. As part of the process of finding a solution, it is useful to examine previous proposals made in this regard. In 1994, Braun and Parker posited that cultural goods are unique.\textsuperscript{346} Cultural goods are not tradable commodities under the GATT or services under the GATS, but rather “cultural expressions that have quantifiable economic value.”\textsuperscript{347} Such a hybrid nature requires the creation of a General Agreement on Trade in Culture (GATC) for culture’s full appreciation in a free trade context.\textsuperscript{348} While only presenting an outline of their proposal, Braun and Parker indicated that under the GATC “cultural products would be traded under managed circumstances” until the relevant cultural industry had matured.\textsuperscript{349} A separate general agreement could “alleviate the pressures of manipulating GATT articles to accommodate the elusive concept of culture, facilitate a GATS by allowing parties to concentrate on a comprehensive list of negotiable services, and ensure the survival of a diversity of cultural expression no matter how small or unprofitable they may be.”\textsuperscript{350}

Though admirable as an effort to reconcile the GATT and culture, Braun and Parker’s proposal leaves many key questions unanswered. Who is to decide what “cultural products” are? What would be the degree of “managed circumstances”? How could enough consensus be

\textsuperscript{343} Under the WTO Agreement on Subsidies and Countervailing Measures article 6.1(a), a subsidy is deemed to have “adverse effects”, and therefore to be actionable under WTO rules, when total ad valorem subsidization of a product exceeds five percent. WTO Agreement on Subsidies and Countervailing Measures, Article 6.1(a), Apr. 15, 1994 Marrakech Agreement Establishing the World Trade Organization, Annex 1A, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994).

\textsuperscript{344} See discussion supra in Part II.A.

\textsuperscript{345} Fluidity is often evident in the law of obscenity, where “the problem involved in laying down a standard of obscenity is to find the present critical point to the compromise between candour and shame at which the community has arrived.” People v. Richmond County News, Inc. (1961) N.Y.2d 578, 216 N.Y.2d 369, quoting United States v. Kemmerly, 209 F. 119, 121 (S.D.N.Y. 1913). Moreover, the right of freedoms of speech and press seems to be in conflict with the right of the state to enact laws for the purpose of protecting society against obscene publications. See John F. Schleppi, Obsenity and the Law, 10 N.Y.L. FORUM 297 (1954). In international law the protection of human rights is also often fluid, being based upon concern for national sovereignty. For instance, in resolving to condemn the practice of amputation under the

\textsuperscript{346} See id. at 188.

\textsuperscript{347} Id. at 188.

\textsuperscript{348} See id.

\textsuperscript{349} [a] number of Sub-Commission members... questioned the appropriateness of challenging Islamic law, judging internal penal policies, or singling out Sudan for condemnation. The revised text omitted references to Islamic law and Sudan and was readily adopted." FRANK NEWMAN and DAVID WEISSBROT, INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS 160 (2d ed. 1996).

\textsuperscript{349} See Braun & Parker, supra note 64, at 174.

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owed on this point to form a separate accord within the WTO Agreement? At what point would industrial maturity occur in order to end the exception? The writers did not provide any response to these pressing questions, and the lacuna suggest that a solution lacking in critical detail requires further elaboration. Still, their article is a worthy point of departure.

In 1996, Nichols offered a substantive proposal. He suggested that a national law or measure could be exempted from the GATT if (1) the impediment to trade created thereby was incidental; and (2) it was enacted for the purpose of reflecting an underlying social value. He provided the hypothetical of an absolute import ban on television sets as being an unacceptable use of the exception, but referred to "a [hypothetical] requirement that broadcasters reserve one hour per evening for locally produced programming" as reflecting a value relating to the preservation of cultural identity. On that basis, the reservation might survive WTO scrutiny. Notwithstanding the problem of defining what is "incidental" to trade, Nichols asserted that determining the second criterion, the purpose of the legislation, was an illusory problem. The purposive inquiry could be conducted with both circumstantial and direct evidence even though the law-making processes in some countries might be less transparent than in others. Ambiguities could be overcome by placing the burden of proof on the country that is defending its legislation.

The weakness of Nichols' proposal, like that of Braun and Parker, is essentially a lack of definition. He prescribes elusive criteria to remedy an elusive problem. Achieving agreement and consistency on the grounds that he proposes would be difficult. Decisions would always remain open to the charge that they had mischaracterized the essence of the legislation or act. What about legislation with several different purposes? And what degree of legislative purpose would be merely "incidental"? Many points of contention could be introduced into WTO interpretation, resulting in decreased security and predictability for the dispute settlement system.

CANADA—CERTAIN MEASURES CONCERNING PERIODICALS

B. A Cultural Waiver

Meaningful ways to take account of culture in the world trading system require an understanding of the process of amending the WTO Agreement. This focus is consonant with a new emphasis on implementation and effectiveness in treaty practice. Without such real-world thinking, proposals could languish forever as proposals. As mentioned, the GATT was difficult to amend, a factor that prompted governments to walk away from it at the end of the Uruguay Round and create the WTO. Nevertheless the new amendment procedures are almost as cumbersome as the old: while GATT Article XXX:1 required two-thirds majority for some amendments and unanimity for most others, it has been supplanted by WTO Agreement Article X, which requires a series of staggered amendments that, at the end of the day, probably make the task of treaty amendment only marginally less difficult. The substantial exceptions foreseen by Braun and Parker and by Nichols would likely invoke this new machinery. For all of the imagination that accompanies their proposals, implementation would essentially require a change to the treaty itself, which is something that, if past practice is any guide, could prove difficult.

Other considerations make a cultural exception a less desirable alternative. Because there is no generally accepted definition of "exception" in international law, analogy must be made to general principles. In law, an exception to a statute "is to except something from the operative effect of a statute or to qualify or restrain the generality of the substantive enactment to which it is attached . . ." Under the GATT, however, exceptions under Articles IV, XX or XXI apply only after there has been a breach of a substantive provision, such as Articles III or XI, not before. In addition, each exception has carefully defined conditions attached to its invocation, and detailed jurisprudence has developed over the extent of each exception's application.


358. McGovern terms the new amendment procedures "fairly complicated" and describes them as falling into three groups: amendment of (1) the WTO Agreement and Annex 1 Multilateral Trade Agreement, (2) the DSU and Trade Policy Review Mechanism, and (3) the plurilateral trade agreements. See McGovern, supra note 85, at 1.24-2.

359. Gatiloff Coal Co. v. Cox, 142 F.2d 876, 882 (5th Cir. 1944).

360. See United States—Reformulated Gasoline Panel Report, supra note 161, at 621, 622, where
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GATT exceptions seem to operate contingently upon breach, more akin, strictly speaking, to a proviso in U.S. law.

It seems that GATT exceptions are more in the nature of provisos than true exceptions, that is, they excuse ex post as opposed to avoiding ex ante. The distinction may appear small, but for legal purposes it has one very important consequence: GATT exceptions are interpreted narrowly. Exceptions, being difficult to implement and interpreted restrictively, appear to be inadequate tools to safeguard culture in a living, expansive manner.

Given the above considerations, a more workable proposal would be a cultural waiver. A waiver is distinguishable from an exception in several respects. It has been described as "[t]he intentional or voluntary relinquishment of a known right." The operation of a waiver is essentially unilateral, "resulting as a legal consequence from some act or conduct of a party against whom it operates, and no act of the party in whose favor it is made is necessary to complete it." In this way, it is a flexible tool and, with judicial conditioning, could meet the need of protecting culture in a generous way.

Waivers have a considerable history under the GATT. They were granted pursuant to GATT Article XXV:5, which requires "exceptional circumstances" for their invocation and approval by a two-thirds majority of at least half the GATT Contracting Parties. In the early years of GATT, waivers were given frequently and with little foresight. For example, the waiver granted to the United States in 1955 covered many U.S. agricultural products and was later the subject of much recrimination. However, as a result of abuse and the trend towards the harmonization of obligations under the GATT, a number of changes were made to the waiver requirements during the Uruguay Round. Apart from waivers extended by new procedures under the WTO Agreement, all waivers were terminated on their expiration date or at reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized." Id.

363. GATT, supra note 11, art. 25, 4/B.L.S.D. at 44.
367. WTO Agreement, supra note 6, art. IX (4), at 12, 33 L.M.L. at 1148.
368. Id.
370. WTO Agreement, supra note 6, art. IX (4), 35 L.M.L. at 1148.
371. See WTO Agreement, supra note 6, art. IX (3)(c)(iv), 35 L.M.L. at 1148.
372. See Understanding in Respect of Waivers of Obligations Under the General Agreement of Tariffs and Trade, supra note 366.
373. See id. art. 1.
374. See id. art. 1.
375. See id. art. 1.
376. See id. art. 1.
377. See id. art. 1.
would certainly be a higher majority than the two-thirds majority now
needed to add an exception to the WTO Agreement in most in-
stances.376 However, it should be remembered that the purpose of such
waiver is cultural protection, an aim dear to the interests of the
smaller, culturally vulnerable countries that today compose the major-
ity of WTO membership. The proposal could, therefore, be expected
to garner widespread support. Additionally, once it is in place, such a
general waiver could, with the appropriate conditions attached, be
invoked in a liberal manner—a fact that would further enhance its
attractiveness.

These considerations naturally lead to the question of exactly how a
cultural waiver would work. For the sake of meaningful discussion, a
draft text has been appended. Its animating principles are threefold.
First, to fulfill its purpose of cultural protection, the waiver recognizes
the need to protect, promote and enhance cultural autonomy. Second,
to deflect criticism of indeterminacy, the waiver’s application is limited
to a group of defined “cultural industries” most vulnerable in a free
trade context. Third, to acknowledge a role for impartiality and na-
tional sovereignty in making decisions about culture, the waiver takes
account of legitimate expressions of popular sovereignty relating to the
enumerated cultural industries.

According to the definition given in the annex to the waiver, the
waiver is carefully circumscribed to the listed industries. Moreover, the
method of amending this list is itself restricted (article 8), with a higher
majority required for withdrawals from the list than for additions to it.
This qualification makes the list slightly easier to add to than to subtract
from, and thus more culturally protective than it would be otherwise.

Like the well-known Enabling Clause,377 the cultural waiver is designed
to run for a ten-year period, with periodic reviews for the purpose of
amendment (article 7(3)). Members may invoke the waiver itself to
derogate from certain key WTO Agreement obligations with respect to
these industries (article 2(1)), but the measures must be taken only
after a risk assessment conducted by an “objective and impartial body”
(article 3(1)) and notification (article 4(1)). No particular form is

376. See McGregor, supra note 85.
377. In June 1971, the Contracting Parties decided to allow countries to waive their Article I
obligations vis-à-vis developing countries for a period of ten years. The waiver “enabled” countries
to do so. Countries were then permitted to make concessions on a range of items within limits
agreed to under what became known as the Generalized System of Preferences. Although the
Clause’s benefits remain uncertain, it is an example of a waiver of general application in the
WTO Agreement. See McGregor, supra note 85.
modification. Instead of virtual exemption from dispute settlement, it envisages a three-tiered review, including reference to the Ministerial Conference, with the possibility of referral to the DSB and thereafter appeal to the Appellate Body. The principal distinction between this proposal and a normal dispute such as the invocation of a usual exception might raise, would be that while the scheme here would require a majority vote by the Ministerial Conference (or the General Council acting in its stead) to make a decision of referral to the DSB, a like referral in the normal course would be invoked at the complaining party's discretion under DSU Article 4(7). The proposal, therefore, interposes the medium of the General Council majority between complainants and formal dispute resolution in recognition of the fact that a majority could well reach consensus that the measure at hand was legitimate to preserve culture. This scheme is designed to avoid the mechanical application of rules that, as seen, can ignore so much of the context in which cultural legislation is enacted.

To provide some idea of how these provisions would work, it is useful to consider Nichols' television set example. If France imposed a complete ban on imported television sets, the ban would likely fall outside the enumerated list of "cultural industries." Therefore, the waiver would not apply. However, a restriction on imported television programming could be justified not because it might have an incidental effect on trade or because of its motivation, but instead because it is covered by the waiver language either of "film recordings" or "radio communications." The conclusion presumes that all of the other conditions set out in the waiver, such as risk assessment, an impartial finding, minimization of negative trade effects, and notification, were met. In sum, the enumerated list would yield a certainty that other proposals do not.

None of the above negates the fact that these determinations will be difficult; undoubtedly they will be, and their resolution will be highly emotional as well. But the view taken here is that the threat of cultural effacement posed by freer trade makes this scheme worth a try. A meaningful definition can be given to culture. Moreover, it should be given in the context of international economic relations, where cultural identity is in issue.

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ARTICLE 1
GENERAL PROVISIONS

1. This Waiver applies to all measures for the protection of cultural industries which shall be applied by Members pursuant to this Waiver and applied in accordance with the provisions of this Waiver.

2. For the purposes of this Waiver, the definitions provided in Annex A. shall apply.

3. Annex A is an integral part of this Waiver.

ARTICLE 2
BASIC RIGHTS AND OBLIGATIONS

1. Without prejudice to any other article of the WTO Agreement, Members have the right to invoke this Waiver in order to take measures for the protection of cultural industries in derogation of provisions under GATT 1947 Arts. III and XI, any other agreement in Annex 1A of the WTO Agreement, the Understanding in Respect of Waivers or Obligations under the General Agreement on Tariffs and Trade 1994, and GATS Arts. XVI-XXI. Such measures shall be taken provided that they are not inconsistent with the terms of this Waiver and accord with the procedures set out hereunder. Such waiver shall operate for a
members, provided that any such treatment shall be for the purpose of protecting, promoting or enhancing their own domestic cultures.

2. Members shall ensure that any measure taken under this Waiver is applied for the purpose of protecting cultural industries and applied to the extent necessary for an appropriate level of cultural protection.

3. Members shall ensure that any measure taken for the purpose of protecting cultural industries does not arbitrarily and unjustifiably discriminate between members where identical or similar conditions prevail. A measure for the protection of cultural industries shall not be invoked abusively or in a manner which would constitute a disguised restriction on international trade.

4. Members shall ensure that any measure taken for the purpose of protecting cultural industries does not contravene any protections afforded to minorities within the national territory.

5. A measure taken for the protection of cultural industries which conforms to the relevant provisions of this Waiver shall be presumed in accordance with the obligations of Members under the WTO Agreement.

ARTICLE 3

ASSESSMENT OF RISK AND DETERMINATION OF THE APPROPRIATE LEVEL OF PROTECTION FOR CULTURAL INDUSTRIES

1. Members shall ensure that a measure imposed for the protection of cultural industries is based upon an objective and impartial assessment of the risks to cultural life of the status quo prior to adoption of any such measure, conducted by an independent body which takes into account risk assessment techniques developed by the relevant international organizations.

2. In assessing the risks Members shall take into account available scientific and sociological evidence, relevant processes, and production methods.

3. In determining the measures to be taken for achieving the appropriate level of cultural protection from risks referred to in subsection 2 of this Article, Members shall take into account: the potential cultural damage in terms of the loss of production or domestic sales in the event of foreign entry to the domestic markets, the establishment or spread of foreign cultural goods or services, the cost of controlling foreign cultural goods and services so that domestic culture may flourish while permitting appropriate opportunities for the entry and dissemination of foreign products and services and the damage, loss or offset to the cultural industries of the Waivering Members.

4. Members shall, when determining the appropriate level of cultural protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving standards for the protection of culture, each member shall prohibit arbitrary or unjustifiable distinctions in the levels of protection it considers to be appropriate in different situations, if such distinctions result in discrimination against foreign products or services or a disguised restriction on international trade.

6. When establishing or maintaining a measure to achieve the appropriate level of cultural protection in the specified industries, Members shall make every reasonable effort to ensure that such measure is not more trade restrictive than required to achieve the appropriate level of cultural protection.

7. Except under conditions posing a genuine and sufficiently serious threat to one of the fundamental interests of society, a Member shall not provisionally adopt measure for the protection of specified cultural industries prior to an objective and impartial assessment of the risks to cultural life of the status quo as contemplated in subsection 1 of this article.

8. When a Member has reason to believe that a measure for the protection of a cultural industry introduced or maintained by another Member is constraining, or has the potential to constrain, its exports, an explanation of the reasons for such cultural measure may be requested and shall be provided by the Member maintaining the measure.

ARTICLE 4

TRANSPARENCY

1. Members shall notify other Members of measures or changes in their measures for the protection of any cultural industry and shall provide them with information in conformity with subsection 8 of Article 3 of this Waiver.

ARTICLE 5

SPECIAL AND DIFFERENTIAL TREATMENT

1. In the preparation and application of measures to protect cultural industries, Members shall take account of the special needs and cultural context of developing Members, and in particular of members of the Group of 77 and China.
2. Where the appropriate level of cultural protection allows scope for the phased introduction of new measures for the protection of cultural industries, longer time frames for compliance should be accorded to the products and services of developing countries so as to maintain opportunities for their exports.

ARTICLE 6
CONSULTATION AND DISPUTE SETTLEMENT

1. Where any member considers that actions taken under this Waiver or any changes thereto are not consistent with this Waiver, or that any benefit accruing to it under the WTO Agreement may be or is being impaired unacceptably as a result of the Waiver and that consultations have proved unsatisfactory, it may bring the matter before the Ministerial Conference which will examine it promptly and will formulate any recommendations that its judges appropriate, including submission to dispute settlement pursuant to provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

2. In a dispute referred to a panel advice should be sought from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems appropriate, establish an advisory group on culture, or consult UNESCO, at the request of any principal party to the dispute or on its own initiative.

3. Nothing in this Waiver shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

ARTICLE 7
ADMINISTRATION

1. A Committee on Culture is hereby established to provide a regular forum for consultations. In light of the importance the Members place upon the protection, promotion, and enhancement of domestic cultures while promoting the objective of freer trade, the Committee shall report from time to time to the Ministerial Conference. The Committee shall reach its decisions by consensus.

2. The Committee shall maintain close contact with the relevant international organizations in the field of culture and cultural protection, particularly UNESCO, with the objective of securing the best available advice for the administration of this Waiver and in order to promote cultural exchange.

3. The Committee shall review the operation and implementation of this Waiver three years after its date of entry into force and thereafter as the need arises. Where appropriate, the Committee may submit to the Ministerial Conference proposals to amend the text of this Waiver having regard, inter alia, to the experience gained in its implementation.

ARTICLE 8
AMENDMENT

1. Due to the ever-changing nature of cultural industries and of their protection, the Members recognize that industries or media may be added to the definition of the term "cultural industries" in Annex A upon the vote of a majority of Members of the Ministerial Conference.

2. Members may remove industries or media from the definition of the term "cultural industries" in Annex A upon the vote of three-quarters of the Members of the Ministerial Conference.

3. The procedures provided for in this Article shall be exclusive of the provisions of Article X of the WTO Agreement and of Article 7(3) of this Waiver, but only for the purpose of amending the definition of cultural industries.

ARTICLE 9
IMPLEMENTATION

Members are fully responsible under the terms of this Waiver for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Waiver by other than central governmental bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Waiver. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local government bodies, to act in a manner inconsistent with the provisions of this Waiver. Members shall ensure that they rely on the services of non-governmental entities for implementing measures to protect cultural industries.
1. Cultural industries—Cultural industries covered by this Waiver are, persons 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 or sale of music in print or machine readable form; or
(e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services, except as where otherwise liberalized by the terms of individual member commitments under the WTO Agreement on Basic Telecommunications,
(f) the production, distribution, sale or exhibition of computer-generated communications.

2. Risk assessment—The evaluation of the potential cultural damage in terms of the loss of production or sales in the event of foreign entry to the domestic markets, establishment or spread of foreign cultural goods or services, the cost of controlling foreign cultural goods and services so that domestic culture may flourish while permitting appropriate opportunities for the entry and dissemination of foreign products and services, and the relative cost-effectiveness of alternative approaches to controlling these risks.

3. Appropriate level of cultural protection—The level of protection deemed appropriate by the Member establishing a measure to protect a cultural industry to protect the cultural contribution made by that industry within its territory.