

TRADE LIBERALIZATION AND CULTURAL POLICY

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‘Si c’était à recommencer, je commencerais par la culture.’¹

ABSTRACT

This article examines the tension between global trade liberalization and the pursuit of cultural policies by national governments. It reviews the background to the discourse over trade and culture and a range of domestic cultural policy measures. Attention is also focused on the emergent issues governing the relationship between intellectual property, trade and culture, and recent disputes involving these at the WTO. The article then analyses the pervasiveness of globalization and its impact on the way in which cultural goods and services are traded and distributed, using the new media technologies, and its effects on cultural identity. The final section of the article discusses some prospects for the treatment of trade and culture at the WTO at the beginning of the new Millennium. A broad cultural exception to trade is rejected in favour of the application of specific rules governing trade and culture.

INTRODUCTION

As the pace of trade liberalization proceeds unabated many countries have expressed an increasing desire to protect national identity, values, and beliefs

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¹ Jean Monnet, founding father of the European Community, quoted in Denis de Rougemont, ‘Denis de Rougemont tel qu’en lui-même’, in *Cadmos* No. 33 (1986) 7–23, at 22.

through a range of policies on culture.² To what extent should free trade principles apply to different sorts of artistic³ and linguistic⁴ products and services? Are certain so-called cultural goods and services more tradeable than others and therefore more susceptible to global dissemination? If so, should they be treated differently? To what extent should international trade policies defer to the cultural policies of national governments, even if those policies include the protection, or subsidization, of cultural goods and services in the interests of the preservation of cultural identity and cultural heritage?

It is precisely the juxtaposition between liberal trade policies and policies aimed at protecting cultural diversity and cultural heritage, which this article seeks to address. The article is divided as follows. The first part addresses the conflict between trade liberalization and domestic cultural policy measures. The second part explores the tension that exists between trade globalization and the preservation of cultural identity, as demonstrated by the audiovisual sector and print and electronic media. The third part considers areas where new linkages between trade liberalization and culture policy might be highlighted in the new Millennium. We recommend that the use of cultural exceptions to trade be abandoned in favour of specific rules governing the field of trade and culture. Our conclusions and recommendations are contained in the fourth and final part of the article.

1. CONFLICT BETWEEN TRADE LIBERALIZATION AND DOMESTIC CULTURAL POLICY MEASURES

1.1 Background to the conflict between trade and culture

The first manifestations of the industrialization of cultural production were in the printed media. Book, newspaper, and magazine publishing pre-date

² The word 'culture' usually defies definition even though the UN World Commission on Culture and Development has attempted to define culture in the specific context of economic development in its report entitled *Our Creative Diversity: Report of the World Commission on Culture and Development*, UNESCO, Paris, 1995 [hereinafter, UNESCO, *Our Creative Diversity*]. See further David Throsby, 'Cultural Capital', 23 *Journal of Cultural Economics* (1999), 3 at 6 for a functional and constituent construct of the word culture. The former comprises a specific interpretation of culture as a set of activities, sometimes known as 'cultural industries' and, in the functional sense, is represented by the 'cultural sector' of the economy. The latter, from an anthropological and sociological viewpoint, represents 'a set of attitudes, practices and beliefs that are fundamental to the functioning of different societies'.

³ Artistic products and services conceivably fall into three categories: (1) live performing art – theatre, concert, opera, dance and ballet; (2) unique, non-reproducible art – architecture, painting, sculpture, 'installations'; and (3) reproducible art – literature, sound recordings, film and television productions. It could be claimed that only the last of these is truly tradeable but the three categories are rather artificial, as the recording, storage and reproduction of a live orchestral concert on compact disc clearly demonstrates. The categorization is borrowed from Günther Schulze who claims that the economic characteristics of each is 'distinct with respect to durability of the products, the production technology, and the degree of uniqueness' which in turn have an impact on their production, consumption and trade. See Günther G. Schulze, 'International Trade in Art', 23 *Journal of Cultural Economics* (1999), 109 at 111.

⁴ What is meant by this is the medium for the transmittal of a particular form of artistic activity, thereby defining and delimiting its cultural boundaries, making it cultural specific.

audiovisual products and services, such as gramophone records, radio broadcasting, and films. However, the relatively low tradeability of printed books, magazines, and newspapers is due to two major factors – their publication in the vernacular of the local market and their cultural specificity – and hence their lack of appeal to a critical mass of consumers outside the domestic market.

By contrast, early film production and distribution in the 1920s soon revealed the potential of film to reach a wider audience beyond national boundaries, thereby highlighting its tradeability. Evidence of tension in the audiovisual field can be seen in the manner in which the American motion picture industry pressed the US Department of State during the inter-war years to respond to protective European screen quotas.⁵ An eventual solution to the problem was the inclusion of Article IV in the General Agreement on Tariffs and Trade (GATT), 1947. This Article specifically authorizes screen quotas,⁶ thereby removing them from the normal GATT disciplines; in practice their application in the immediate post-war era was of limited duration due to a decline in US film exports matched by a strong European film industry.⁷

The discourse over trade and culture had its antecedents in the work of Theodor W. Adorno, Max Horkheimer, and Walter Benjamin of the Frankfurt School in the 1930s and 1940s who coined the term ‘culture industry’ when criticizing the emerging radio, film, and recorded music sectors.⁸ For them the term ‘culture industry’ was an oxymoron which drew a critical distinction between the debasement of cultural values through the standardized mass production of cultural goods and ‘the associations of transformative power and aesthetico-moral transcendence that the concept of culture carried with it’.⁹

⁵ See Ivan Bernier, ‘Cultural Goods and Services in International Trade Law’ in Dennis Browne (ed), *The Culture/Trade Quandary: Canada’s Policy Options* (Ottawa: Centre for Trade Policy and Law 1998), 108 at 109, citing T. Guback, ‘Non Market Factors in the International Distribution of American Films’, *Current Research in Film: Audiences, Economics and Law* 1 (Norwood, NJ: Ablex Publishing Corporation 1985), 114–15.

⁶ A quantitative limit was put upon the number of films imported (numerical quotas) while screen time had to be shared between foreign and domestic films (screen quotas).

⁷ See *GATT Analytical Index: Guide to GATT Law and Practice*, 6th edn (1994), 191–93. New Zealand, one of the founding GATT contracting parties, was allowed from the outset to treat its renters’ quotas as a screen quota under Article IV rather than as the maintenance of a preference and its film hire tax as a customs duty under Article I; see Annex A to the GATT in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat 1994), 538–39.

⁸ See Theodor W. Adorno, *Aesthetische Theorie*, 9th edn (Frankfurt am Main: Suhrkamp, 1989) (English translation, *Aesthetic Theory*, London: Athlone 1997) and Walter Benjamin, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit* (Suhrkamp, Frankfurt am Main: 1977). See also John Sinclair’s contribution on ‘Culture and Trade: Theoretical and Practical Considerations’ in Emile G. McAnany and Kenton T. Williams, *Mass Media and Free Trade: NAFTA and Cultural Industries* (University of Texas Press 1996), 30 ff. See further, Christoph Beat Graber, *Zwischen Geist und Geld. Interferenzen von Kunst und Wirtschaft aus rechtlicher Sicht* (Baden-Baden: Nomos 1994), 19–20 and 149; Christoph Beat Graber and Gunther Teubner, ‘Art and Money: Constitutional Rights in the Private Sphere?’, 18 *Oxford Journal of Legal Studies* (1998), 61 at 67–68 and 71.

⁹ See Sinclair, note 8, at 30–31 and his critique of the Frankfurt School’s ‘dominant ideology thesis’ as an idealist legacy from Marx on the side of culture because it lacked any framework for an analysis of cultural industries.

The Frankfurt School approach lost ground to the 'political economy' approach in the English-speaking world in the 1970s and 1980s, which is best exemplified by the work of Nicholas Garnham and others who gave an adjectival form to the words 'culture' and 'industry'. Garnham used the term 'cultural industries' to describe 'those institutions in our society which employ the characteristic modes of production and organisation of industrial corporations to produce and disseminate symbols in the forms of cultural goods and services, generally, although not exclusively, as commodities'.¹⁰

The discourse over trade and culture began to be formulated as a debate which has continued up to the present with cultural critics complaining about the erosion of 'standards of quality', due to the commercialization of culture, particularly in the audiovisual industry. The introduction of satellite communication as a medium for the distribution and diffusion of culture has further fuelled the debate.¹¹ On a practical level the growth and spread of television broadcasting in the 1960s and 1970s, due largely to the expansion of satellite communication, led to various skirmishes between the US on the one side, and Europe and Canada, on the other.¹²

In international fora the relationship between trade and cultural policy was discussed within the United Nations Committee on the Uses of Outer Space in the 1960s¹³ and in UNESCO debates over the New International Information Order in the 1970s.¹⁴ Within GATT/WTO the trade and culture conflict first developed during the Tokyo Round Negotiations (1973–79) when the US complained about the subsidization of cinema and television by no fewer than 21 countries.¹⁵ The US also sought unsuccessfully to challenge European Community restrictions on the televised showing of non-European films in 1991, by invoking Article IV GATT, but the European Community viewed

¹⁰ Nicholas Garnham, *Capitalism and Communication* (Sage Books: London 1990), 155–56.

¹¹ Emile G. McAnany and Kenton T. Wilkinson in their 'Introduction' to *Mass Media and Free Trade: NAFTA and Cultural Industries*, above, note 8, at 5.

¹² One example of an attempt to settle such conflicts was the establishment of a GATT working party, at the request of the US, in the early 1960s to investigate various restrictions which different GATT contracting parties imposed on the broadcasting of television programmes. See 'Application of GATT to International Trade in Television Programmes: Report of the Working Party', GATT doc. L/1741 (13 March 1962) and Bernier, note 5, at 109.

¹³ With the debate on the control of unauthorized satellite television transmissions, otherwise known as direct broadcasting satellite services (DBS).

¹⁴ This led to the establishment of a comparative research programme in 1978 'on the place and role of cultural industries in the cultural development of societies' and subsequently a report, entitled *Cultural Industries: A Challenge for the Future of Culture* (UNESCO: Paris 1982). It was followed by UNESCO's declaration of a World Decade for Cultural Development (1988–97) and the establishment of a World Commission on Culture and Development, which has latterly concerned itself with the question: which industries should be included under the rubric 'cultural industries'? See Sinclair, note 8, at 33–34; also UNESCO, *Our Creative Diversity*, note 2, at 235–36.

¹⁵ Argentina, Austria, Belgium, Brazil, Canada, Chile, Denmark, Egypt, France, Germany, Greece, Indonesia, Israel, Italy, Japan, the Netherlands, Norway, Pakistan, Portugal and the United Kingdom; see GATT Doc. MTN/3B1, cited in Bernier, note 5, at 109.

television broadcasting as a service¹⁶ and considered that it could *not* be covered by the goods regime of the GATT.

The trade and culture debate gave way to outright conflict between the US and the European Communities (and Canada) during the Uruguay Round (1986–93). The developing conflict centred on ‘cultural identity’ and the trade in film and television programmes, to the extent that the term ‘culture’ became synonymous with the word ‘audiovisual’. While the US claimed that cultural identity could not be defined and that film and television products were marketable commodities, subject to the same trade rules as any other goods, opponents interpreted the US position as a challenge to national cultural expression, linguistic diversity, and alterity, in the name of trade liberalization.¹⁷

The European Communities, Canada, Australia, India, Egypt, Brazil, and some other countries where strong film industries exist, wished to preserve ‘cultural identity’¹⁸ and to recognize fundamental cultural differences, based on separate language, values, and beliefs. The US reacted by labelling national cultural expression as an excuse for the continued protectionism of national film, television, and media industries in those countries.

The underlying tension between these two opposing views led to the introduction of a ‘cultural exception’ to multilateral trade rules at the Montreal, mid-term Ministerial meeting in December 1988.¹⁹ Concerned about the cultural impact of disciplines for audiovisual services, the Canadian delegation

¹⁶ *GATT, Analytical Index*, above note 7, at 191–93. The EC’s view stems from the judgment of the European Court of Justice in Case 155/73 *Sacchi* [1974] ECR 409 at 427; [1974] 2 CMLR 177 which characterized the broadcasting of a television signal as the provision of a service. See Christoph Beat Graber, ‘Kulturpolitische Auswirkungen eines Schweizer Beitritts zur Europäischen Union – Untersucht am Beispiel des Film- und Fernsehrechts’ in Thomas Cottier and Alwin R. Kopsch (eds), *Der Beitritt der Schweiz zur Europäischen Union* (Schulthess: Zürich 1998), 987–1024, at 996–98.

¹⁷ As the recent negotiations on a Multilateral Agreement Investment (MAI) have demonstrated, some countries, the most vociferous of which is Canada, continue to insist that cultural goods and services are not mere commodities. Canada attempted to introduce into the MAI a general exception clause for cultural industries, as follows: ‘Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity’ in OECD: *The MAI Negotiating Text* (as of 24 April 1998), OECD, Directorate for Financial, Fiscal and Enterprise Affairs (Contribution from one delegation), at 128. See also Bernier, above, note 5, at 138.

¹⁸ However, it is not always clear what the European Communities concept of ‘cultural identity’ entails. It is certainly non-exclusive and plural, i.e. it allows for European identity (if such a thing exists) to coexist with national identity without either diminishing the other; see for a broader discussion Richard Collins, *Broadcasting and Audiovisual Policy in the European Single Market* (John Libby & Co: London 1994). Similar problems with defining cultural identity have arisen in other countries, for example in Australia: see the majority decision in *Project Blue Sky v. Australian Broadcasting Authority* [1998] HCA 28, 28 April 1998, S41/1997, available at <http://bar.auslii.edu.au>. The High Court interpreted the Australian Broadcasting Authority’s definition of ‘Australian content of programs’ broadly to include ‘matter that reflects Australian identity, character and culture’ as well as ‘the participants, creators or producers of a program [who] are Australian’; see also below at section 1.2.

¹⁹ See Karl F. Falkenberg, ‘The Audiovisual Sector’, in Jacques H. J. Bourgeois, Frédérique Berrod, and Eric Gippini Fournier (eds), *The Uruguay Round Results* (Brussels 1995) 429–34, at 429.

sought to secure specific language in the draft negotiating text on services so that the audiovisual sector would not be covered by the negotiations.²⁰ Towards the end of the Uruguay Round the audiovisual community in Europe, spurred on by Canada's earlier success in achieving a cultural 'carve-out' in Article 2005 of the 1988 Canada–US Free Trade Agreement,²¹ mobilized many directors, artists, intellectuals, and cultural ministers to encourage future WTO Members to fight for a 'straightforward exclusion' of the audiovisual sector from trade disciplines.²² Aside from this so-called 'off the table exemption' of culture, two further options were discussed:

- (a) The introduction of a 'cultural exception' to trade, within the scope of GATS. The problem with this option is that exceptions to key trade principles and disciplines, such as those found in Article XXIV GATT,²³ must be narrowly defined. A possible solution might have been to introduce the concept of an exception for 'culture', or 'art', into the general exception provisions of Article XIV GATS. It would then have to comply with the double test that it should 'not be applied in a manner which would constitute a means of arbitrary or

²⁰ As Falkenberg states, not even the delegation of the European Community wanted to exempt the audiovisual sector completely from the GATS because the elimination of audiovisual from the services sector would have provoked a cascade of withdrawal from other sectors by other trading partners, *ibid.*

²¹ Canada–US Free Trade Agreement of 1988, 27 ILM 281 (1988). The cultural industries exemption was in fact illusory, as Falkenberg points out, because the US retained the right to retaliate in other (non-cultural) trade sectors, should Canada take any measure that the US perceived as being contrary to her interests. As Bernier states, Canada repeated the mistake with the inclusion of Annex 2016 in the more recent North American Free Trade Agreement (NAFTA) which 'not only maintains in force the cultural exemption of the FTA but expands its reach through a definition of cultural industries that extends not only to enterprises, as in the FTA, but also to natural persons . . .', Bernier, above, note 5, at 123. In the case of Mexico, its cultural industries are also caught by the NAFTA provision although it did manage to negotiate some minor exemptions such as a 49 percent limit on foreign investment in the audiovisual sector and a 30 percent content quota (1993), reducing to 10 percent (1997) for the showing of Mexican films in local cinemas. See Hernan Galperin 'Cultural Industries Policy in Regional Trade Agreements: The Cases of NAFTA, the European Union and MERCOSUR' 21(5) *Media, Culture & Society* (1999), 627 at 632. For the text of NAFTA see 32 ILM 605 (1993). Canada has continued to negotiate a 'cultural exemption' in other bilateral free trade agreements, for example the Canada–Israel Free Trade Agreement and the Canada–Chile Free Trade Agreement. This means that cultural industries are not covered by those agreements. See Canadian Industries Cultural Advisory Group on International Trade, *Canadian Culture in a Global World*, February 1999 [hereinafter *Canadian Culture in a Global World*] at: <http://www.infoexport.gc.ca/trade-culture>, at 22.

²² Falkenberg, above, note 19, at 431; see also Michael J. Hahn 'Eine kulturelle Bereichsausahme im Recht der WTO?', 56(3) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996), 315–52; also Judith Beth Prowda 'US Dominance in the "Marketplace of Culture" and the French "Cultural Exception"', 29(1–2) *New York J of Int'l Law and Politics* (1996–97), 193–210.

²³ It should be recalled that Article XXIV GATT recognizes the relationship between culture and national identity in cultural heritage matters when it allows a derogation from GATT 1994 in the case of measures 'imposed for the protection of national treasures of artistic, historic or archaeological value'.

unjustifiable discrimination between countries where like conditions prevail' nor act as a 'disguised restriction on trade'. Since it is left to WTO panels, or the Appellate Body, to construe the exact meaning of the text of a general exception clause and to apply the tests contained in the *chapeau* to either Article XX GATT, or Article XIV GATS, this introduces a degree of legal uncertainty on the use of a cultural exception to trade in goods or services.²⁴

- (b) The adoption of a 'cultural specificity' approach.²⁵ The EC Commission first proposed the notion of 'cultural specificity', as a negotiating objective in the Uruguay Round, with the idea of transforming the market access openings that EC Member States allowed on audiovisual services into a schedule of specific commitments. It proposed that Article XIX GATS be modified, in order to enable parties to resist the objective of progressive liberalization for the audiovisual sector, and that similar language on cultural specificity be drafted into Article XV GATS (the obligation for WTO Members to negotiate further on subsidies) and into the Annex on Article II (Most-Favoured-Nation, or MFN) exemptions.

Neither of these two approaches succeeded. Instead the audiovisual sector (and indeed all cultural sectors, including the print and electronic media) were fully embraced by the GATS disciplines.²⁶ However, WTO Members were allowed to refrain from making commitments concerning specific sectors²⁷ on their lists of market access and national treatment and to add specific sectors to their lists of Article II exemptions.²⁸ At the same time, it was decided that Article XIX GATS on progressive liberalization would apply without exception.

The WTO Secretariat recently analysed the commitments of WTO Members concerning market access/national treatment and their lists of MFN

²⁴ Given the Appellate Body's recent ruling in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, complaint by India, Malaysia, Pakistan, and Thailand, 12 October 1998, WT/DS58/AB/R (available at <http://www.wto.org/wto/dispute/bulletin.htm>), WTO panels, if called upon to do so, would examine any general exception clause more vigorously in the light of the language contained in the *chapeau* of the respective GATT, or GATS, articles.

²⁵ See further Mary E. Footer, 'The Future for a Cultural Exception in the World Trade Organization', Paper for the International Trade Law Committee, International Law Association (ILA) Meeting, Geneva, 22–23 June 1995 (unpublished) at 5.

²⁶ See Falkenberg, above, note 19, at 433.

²⁷ The European Communities did precisely this, by withdrawing its sectoral offer. Concurrently, it took a MFN exemption for programmes such as Media II under the Annex on Article II Exemptions which in principle extends for 10 years.

²⁸ Besides the European Communities' listing of co-production agreements in the Annex on Article II Exemptions, Canada chose to table a MFN exemption on all audiovisual services for a period of 10 years and did not include any commitments on national treatment in its schedule of commitments.

exemptions in the audiovisual sector.²⁹ It reveals that of the 19 countries³⁰ that have made commitments in audiovisual services only two – the United States and the Central African Republic – made full commitments in all six sub-categories of audiovisual services relating to market access and national treatment.³¹ Counting the European Communities as a single entity, more than forty Members have taken 33 MFN exceptions covering audiovisual services.³² This implies that most countries feel the necessity to refrain from GATS obligations in the audiovisual sector in order to be able to continue to pursue their cultural policies.³³

1.2 Domestic cultural policy measures

While few countries have made any kind of commitments on audiovisual services in the WTO, many more have reserved their right to pursue national cultural policy measures. A brief survey reveals that these measures usually take one of the following forms:³⁴

- *Subsidies*: Eurimages, a Council of Europe initiative, provides grants and loans for the co-production of European works.³⁵ The European Union's Media II programme excludes the support of production from its scope and instead focuses on training for professionals,³⁶ the development of attractive projects and the transnational distribution of

²⁹ World Trade Organization, Audiovisual Services, Background Note by the Secretariat (S/C/W/40) of 15 June 1998 [hereinafter *WTO Secretariat Background Note: Audiovisual Services*].

³⁰ Central African Republic, Dominican Republic, El Salvador, Gambia, Hong Kong, India, Israel, Japan, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Nicaragua, Panama, Singapore, Thailand, USA; see *ibid*, table at 17 and text at 7.

³¹ The six sub-categories are (1) motion picture and video tape production and distribution (2) motion picture and projection services (3) radio and television services (4) radio television transmission services (5) sound recording and (6) other; *ibid*, at 17 and text at 8.

³² The countries involved are: Australia, Austria, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Colombia, Cuba, Cyprus, Czech Republic, Ecuador, Egypt, European Communities, Finland, Hungary, Iceland, India, Israel, Liechtenstein, New Zealand, Norway, Panama, Poland, Singapore, Slovak Republic, Slovenia, Sweden, Switzerland, Tunisia, United States, and Venezuela. Such MFN exemptions mostly cover co-production arrangements for film and television productions; *ibid*, at 8.

³³ However, caution is urged in reading this report since the WTO Secretariat Background Note: Audiovisual Services is Eurocentric, reflecting EU policies and those of other developed WTO Members (a factor which the WTO Secretariat itself acknowledges, *ibid*, at 1). Further research is necessary in order to determine the precise pattern of WTO Member trade in the audiovisual sector.

³⁴ Much of this analysis relies upon the following documentation, *Canadian Culture in a Global World*, note 21.

³⁵ Council of Europe, Resolution (88) 15 of 26 October 1988.

³⁶ Council Decision of 22 December 1995 on the implementation of a training programme for professionals in the European programme industry (Media II – Training) in OJ L 321/33, 30 December 1995.

audiovisual programs and films.³⁷ Within the framework of media distribution a new ‘automatic’ aid mechanism has been established to encourage the distribution of European films outside their national territories.³⁸ Endowed with 310 million Euro over five years (1996–2000), the Media II programme complements the various support programmes of the EU Member States.³⁹ By far the most important funding of the domestic film industry exists in France⁴⁰ followed by Germany⁴¹ and the United Kingdom.⁴² Such national programmes provide – in a similar way to other subsidy programmes that exist in Canada,⁴³ the United States,⁴⁴ or Switzerland⁴⁵ – for the direct support of the domestic film industry.

Countries with small audiovisual industries, like Switzerland, dispose of a total annual budget for government support of domestic films that is about half the size of the average advertising costs of one single Hollywood picture.⁴⁶ Canada also subsidizes its publishing industry through grants, marketing assistance, interest-free loans, and postal subsidies (see below).

- *Domestic content*: Measures regulating radio and television broadcasting content: for example in the European Communities,⁴⁷ the Council of

³⁷ Council Decision of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II – Development and Distribution, 1996–2000) in OJ L 321/25, 30 December 1995.

³⁸ European Commission, *The Digital Age. European Audiovisual Policy*. Report from the High Level Group on Audiovisual Policy, Brussels 1998 [hereinafter *The Digital Age. European Audiovisual Policy*], at 22.

³⁹ *Ibid*, at 21.

⁴⁰ See Centre National de la Cinématographie, CNC, at <http://www.cncfr.htm>.

⁴¹ See Filmförderungsanstalt, FFA, at <http://www.ffa.de.html>.

⁴² See British Film Institute, BFI at <http://www.bfi.org.uk>.

⁴³ See *Canadian Culture in a Global World*, note 21, at 8–10.

⁴⁴ According to its GATS List of Specific Commitments, US grants from the National Endowment for the Arts are only available to individuals with US citizenship, or permanent resident alien status, and non-profit companies.

⁴⁵ See Swiss Federal Office of Culture, Film Section at http://www.kultur-schweiz.admin.ch/film/f_film.htm.

⁴⁶ In 1998 the Swiss Government provided US\$13.6 million in support of domestic film production; see *Neue Zürcher Zeitung*, 19 June 1998. The average marketing cost of a Hollywood feature film in 1998 was US\$25.3 million; see Motion Picture Association of America (MPAA), *World-wide Market Research*, <http://www.mpaa.org/useconomicreview/1998/sld018.htm>.

⁴⁷ See Articles 4 and 5 of Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, amending Council Directive 89/552/EEC, on the co-ordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298/23 of 17 October 1989 and L 202/60 of 30 July 1997. Article 4 states that: a majority of broadcasting time devoted to fiction programming must be of EC origin. Article 5 obligates broadcasters to reserve at least 10 percent of their programming budget for independent European producers.

Europe,⁴⁸ Australia,⁴⁹ Canada,⁵⁰ and France⁵¹ use domestic broadcast content to control access to their television broadcast and film markets.

- *Market Access Restrictions*: Measures that control access to film markets: for example, screen quotas for cinemas in France, Mexico, South Korea,⁵² and Spain; a rebate on box-office taxes for cinemas that show national films (Italy); prohibition on the dubbing of foreign films (Mexico); dubbing licences (for example, in Spain film distributors could previously only receive a dubbing licence for foreign films when they contracted to distribute a certain number of national films).⁵³ Meanwhile, the Motion Picture Association of America (MPAA) uses movie ratings to limit film distribution in the United States.⁵⁴
- *Regulatory/Licensing Restrictions*: Similarly, measures that control access to radio or television broadcasting through regulatory or licensing restrictions. In 1994 the Canadian Radio-television and Telecommunications Commission (CRTC) licensed a series of Canadian pay and speciality services, including New Country Network (NCN), while delisting the American speciality channel, Country Music Television (CMT), even though it had been doing business in Canada for over a decade. Although CMT initially filed a §301 petition with US Trade Representative (USTR) and with the Federal Court of Canada, both actions were halted in 1996 when NCM, in exchange for access to

⁴⁸ Council of Europe, European Convention on Transfrontier Television of 5 May 1989, revised version of 1 October 1998 (expected to enter into force on 1 October 2000). The relevant provisions of the European Convention (Article 10 related to Article 2 (e)) come very close, in their substance and effect, to those of the EC directive.

⁴⁹ The 'Australian Content Standard' was determined by the Australian Broadcasting Authority on 15 December 1995. Clause 9 in part 5 states that, of all programmes broadcast between 6 am and midnight, 55 percent must be Australian programmes, but see High Court of Australia, *Project Blue sky v. Australian Broadcasting Authority* (1998) HCA 28, 28 April 1998, S41/1997, available at <http://bar.auslii.edu.au> and text, above note 18.

⁵⁰ For Canadian content requirements see *Canadian Culture in a Global World*, above note 21, at 10–13.

⁵¹ France requires 60 percent Community content for all programmes broadcast during prime time, between 6 pm and 11 pm. See John David Donaldson, '“Television Without Frontiers”: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity', 20 *Fordham Int'l Law Journal* 90 (1996), at 103, note 66.

⁵² Korean screen quotas require theatres to book domestic films for a minimum of 106 business days a year. Recently members of Korea's creative community defended these quotas against pressure from the Motion Picture Association of America (MPAA) with mass demonstrations and hunger strikes; see Christopher Alford, 'Goliath Balks at David's Quotas', in *Variety* (August 9–15 1995) at 34.

⁵³ See European Court of Justice, Case C-17/92, *Federación de Distribuidores Cinematográficos v. Estado Español* (1993), ECR I-2239.

⁵⁴ As a result of the MPAA movie rating the American public was not allowed to see 'Eyes Wide Shut' in the version which Stanley Kubrick had finished before his death. The executive producer of the film agreed to a 'digital adjustment' of 65 seconds of 'sexual material' to avoid an 'R' rating; see Todd McCarthy, 'MPAA Shuts down 65 Seconds of "Eyes"', in *Variety* (12–18 July 1999), at 5. See also Peter Bart, '“R” for Ridiculous', in *Variety* (26 July–1 August 1999), at 2 and 50.

CMT's name, programming, and other licensing benefits, provided CMT with a 20 percent equity stake in NCM.⁵⁵

- *Tax Measures:* Various forms of taxation: for example in France where taxes are levied on box-office revenues,⁵⁶ on receipts of broadcasters,⁵⁷ and on video cassettes⁵⁸ to support local film production. Switzerland wants to introduce a tax on films that are simultaneously exhibited on more than 50 screens within the country.⁵⁹

In 1995 Canada tried to introduce an 80 percent excise tax on advertising in split-run magazines⁶⁰ that were being transmitted into Canada from the US, via satellite, thereby avoiding the prevailing customs tariff (the measure was specifically targeted at the US periodical *Sports Illustrated*). In *Canada – Periodicals*⁶¹ the US successfully challenged Canada in the WTO dispute settlement system over the levy of the excise tax, the original tariff code, Canada's commercial postal rates and the postal subsidy that the Canadian Government paid to local producers. This case is relevant in other situations because in *Canada – Periodicals* it has been determined that almost any form of subsidy not granted directly in the form of payments to domestic producers is incompatible with Article III:8(b) GATT. The case thus has

⁵⁵ 20 percent is the maximum direct foreign investment or ownership allowed under the Investment Canada Act 1985.

⁵⁶ This tax (Taxe Spéciale Additionnelle) is levied on the price of the ticket and represents 11 percent of the ticket price. This special tax has for a long period been the essential source for the financing of the funding activities of the Centre Nationale de la Cinématographie (CNC). In 1996 it produced revenues of c. 86 million Euro.

⁵⁷ This tax, introduced in 1986, is a 5.5 percent levy on the total receipts from broadcasters with a French licence (including advertising and licence fees). In 1996 it collected 257 million Euros. The CNC used 62 percent for financing selected television programmes and 38 percent for the production of French movies.

⁵⁸ In 1993 a 2 percent tax was levied on the receipts from sales and rentals of registered video cassettes. In 1996 the CNC collected 11.5 million Euros from this tax. The CNC uses 15 percent for financing movies and 85 percent for financing television programmes.

⁵⁹ See Experten- und Expertinnenkommission zur Totalrevision des Filmgesetzes *Entwurf zu einem Bundesgesetz über Filmproduktion und Filmkultur* (EfiG), Berne, 27 April 1999.

⁶⁰ A split-run magazine, or periodical, is a local edition of a magazine originally published in another country that basically has the same content as the original but replaces more than 5 percent of its original advertisements with advertisements targeted at the local market. (Producers of split-run magazines thereby cover the cost of production through local sales and advertising.)

⁶¹ *Canada – Certain Measures Concerning Periodicals*, Report of the Appellate Body of 30 June 1997, WT/DS31/AB/R. It should be noted that: (1) the US challenge was mounted under Article III:2, and Article III:8(b) GATT even though Canada contended that the GATS was also relevant; (2) the Appellate Body did not distinguish between the GATT and GATS, instead ruling that obligations under both Agreements can 'coexist and that one does not override the other' (at 22); and (3) the US chose to proceed under GATT rather than the North America Free Trade Agreement (NAFTA) which includes a specific 'cultural industries exemption' in Article 2016. See for a recent discussion of this case M. Joanne MacMillan, 'Trade and Culture: Conflicting Domestic Policies and International Trade Obligations', 9 Windsor Review of Legal and Social Issues (1999), 5–30.

wider-reaching implications for the way in which financial help is granted to producers of other cultural goods (and possibly services).⁶²

- *Intellectual Property Protection*: Many countries use measures to protect intellectual property such as private copying schemes, or the use of a ‘blank levy’.⁶³
- *Foreign Investment and Ownership*: Measures restricting foreign investment and ownership, including divestiture policies: for example, in the broadcasting industry in Australia,⁶⁴ Canada, the United Kingdom, and the United States.⁶⁵
- *Border Measures*: These measures may include tariffs or quantitative restrictions, as was the case in India, which used to restrict the import of film titles to 100 per year.⁶⁶
- *Film Co-production Agreements*: A measure that is used in many countries to stimulate cultural production, especially in the film industry, is the co-production agreement, as exists under the Council of Europe.⁶⁷

While it appears that domestic cultural policy measures are prevalent, there are some specific issues that arise with respect to the relationship between intellectual property protection, trade, and culture. We turn next to consider some of them.

1.3 Intellectual property, trade, and culture

Pamela Samuelson has argued⁶⁸ that rules pertaining to intellectual property protection reflect cultural values, which are connected to national, and hence cultural, identity. This is particularly true in the domain of copyright and it has the attendant result that ‘intellectual property products, such as artistic and literary works, are incompletely commodified’.⁶⁹ The other issue with respect to copyright is that national and regional intellectual property laws

⁶² See Bernier, above, note 5, at 117.

⁶³ See below at para 1.3 for the relationship between intellectual property, trade, and culture.

⁶⁴ In 1997 the Australian Broadcasting Authority and the Australian Treasury ordered the Canadian broadcasting company, CanWest Global, to partially divest its shares in Australia’s Ten network in order to comply with similar ownership restrictions in the broadcasting industry (a maximum of 15 percent under Australian law), see <http://www.infoexport.gc.ca/trade-culture>, at 19. The case of NCM and CMT is also illustrative of this point, see above, this section 1.2 and note 55.

⁶⁵ The current national cap for networks is 35 percent. See Christopher Stern, ‘Nets Push to Remove National Ownership Cap’ in *Variety* (20–26 September 1999), at 6.

⁶⁶ Cited in India’s GATS List of Specific Commitments.

⁶⁷ Council of Europe, European Convention on Cinematographic Co-Production, Strasbourg, 2 October 1992, European Treaties, ETS No 147.

⁶⁸ Pamela Samuelson, ‘Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for the Cultural Dimension of National Copyright Laws’, 23 *Journal of Cultural Economics* (1999), at 95–107.

⁶⁹ *Ibid*, at 98.

are presently insufficiently harmonized. The WTO dispute settlement system should take this factor into account when adjudicating trade and intellectual property disputes.

A brief survey of the 16 intellectual property disputes, involving 12 separate matters, that have arisen in the WTO⁷⁰ reveals that 4 of them concern copyright protection, or the enforcement of copyright laws in national jurisdictions. One explanation for this may be the duality inherent in the underlying rationale for copyright. As John Frow⁷¹ explains, copyright distinguishes between the 'idea' which remains a common good and accessible to all in the public domain (public sphere) and its 'expression' which is susceptible to a property claim (private sphere). It is due to this public/private dichotomy to which cultural works give rise that they may be equated both 'with a notion of the public good and with an intensification of cultural commodification' and hence, the market retains an ambivalent position with respect to these public/private spheres.⁷² Indeed, this ambivalence about copyright protection translates readily into conflicts over trade and culture, as evidenced by both informal disputes and formal disputes (in the sense of WTO complaints brought before the Dispute Settlement Body) at the WTO.

On the informal side, the conflict between the US and the European Communities over the audiovisual sector, at the end of the Uruguay Round, also centred on copyright issues and the role of collecting societies. Copyright laws in several European countries (and elsewhere, for example in Canada) guarantee secondary use rights such as a private copying right⁷³ or a re-transmission right.⁷⁴ The revenues from these secondary use rights are often administered exclusively by one collecting society, authorized by the government. Such secondary rights schemes apply to national rightholders as well as foreign ones. Consequently foreign rightholders, in order to be compensated for their works which subsist in these countries, are forced to have their secondary use rights administered by these collecting societies and to pay the relevant administration fee.⁷⁵ The collecting societies then reserve a total sum

⁷⁰ See for an overview of some of these complaints Matthijs Geuze and Hannu Wager, 'WTO Dispute Settlement Practice Relating to the TRIPs Agreement', 2(2) J Int'l Econ L (1999), 347–84.

⁷¹ John Frow, 'Information as Gift and Commodity', 219 New Left Review (September/October 1996) 89, at 103–106.

⁷² Ibid, at 105.

⁷³ Since it is almost impossible to prevent private copying many countries have introduced a private copying levy on blank audio and/or video recording media (audio and video cassettes and CD-ROMs), sometimes known as a 'blank levy'. See for a presentation of the rules for compensation of private copying under Swiss copyright law Christoph Gasser, *Der Eigengebrauch im Urheberrecht* (Stämpfli: Bern 1998), at 145–76.

⁷⁴ See for an overview on the different schemes for collective administration of secondary use rights, World Intellectual Property Organization, *Collective Administration of Copyright and Neighbouring Rights* (Geneva 1990).

⁷⁵ Daniel Gervais, *The TRIPs Agreement. Drafting History and Analysis* (London 1998), 74ff.

of the revenues collected in order to subsidize projects involving local audiovisual production.⁷⁶

In the view of the US, these schemes for mandatory collective administration violate the national treatment obligation contained in Article 3 TRIPs. European countries usually defend themselves on the grounds of cultural policy. It is supposed that such rules are necessary as an adjustment to the provision of national treatment in the Berne Convention (which has been integrated by reference into Article 3 TRIPs Agreement). In practice, the operation of this provision means that the biggest share of revenue collected in Europe is usually paid to the US entertainment industry.

The four formal disputes, which highlight the link between intellectual property rights, trade, and culture, that have already entered the WTO dispute settlement system, are as follows. The very first TRIPs case to come before the DSB in 1996 concerned a complaint by the US against Japan (followed by the same complaint from the European Communities against Japan) involving performers' rights. Both complainants alleged that Japan's copyright régime did not provide adequate protection to producers and performers of sound recordings for the full 50-year period (failing to cover the period between 1 January 1946 and 1 January 1971), in accordance with Article 14:6 and Article 70:2 TRIPs *juncto* Article 18 of the Berne Convention (1971).⁷⁷ A mutual settlement of the matter was notified to the Dispute Settlement Body (DSB) by the US and the European Communities in each of their separate disputes, after Japan had adopted amending legislation.⁷⁸

In May 1997 the US sought consultations with Ireland and the European Communities claiming that Ireland was in breach of the TRIPs copyright and neighbouring rights provisions.⁷⁹ A panel was established in early 1998 to investigate the US complaint that Ireland had failed to comply with Articles 9 through 14 TRIPs *juncto* Articles 1 through 21 of the Berne Convention and its Appendix, particularly because Irish copyright law has not been amended to cover the translation of official works, the protection of architectural works, anonymous and pseudoanonymous works, ownership rights in film, and the recognition of bodies established to protect the rights of unknown authors of unpublished works. Additionally, the current limitations

⁷⁶ See for example Art. L 321-9 of the French *Code de la propriété intellectuelle* of 1 July 1992 which states that collecting societies have to use 25 percent of their remuneration for private copies (including void video cassettes) for the promotion of local artists or artistic production. For the situation in Canada, see *Canadian Culture in a Global World*, above, note 21 at 16.

⁷⁷ *Japan – Measures Concerning Sound Recordings*, complaint by the United States (WT/DS/28/1) and complaint by the European Communities (WT/DS/42/1); see <http://www.wto.org/wto/dispute/bulletin.htm>.

⁷⁸ US Notification of 24 January 1997 (WT/DS/28/4) and EC Notification of 7 November 1997 (WT/DS/42/4); *ibid.*

⁷⁹ *European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights*, complaint by the United States (WT/DS115/1); complaint by the United States against Ireland (WT/DS82/1); see <http://www.wto.org/wto/dispute/bulletin.htm>.

and exceptions to right holders' exclusive rights were considered to be in excess of those permitted under Article 13 TRIPs.⁸⁰ As with Japan, the US claims that Irish law does not provide adequate protection to producers and performers of sound recordings, in accordance with Article 14 TRIPs.⁸¹

Another dispute of April 1998 is still pending at the consultation stage with respect to lack of enforcement of performers' rights. It involves a complaint by the United States against the European Communities and Greece where the US claims that a significant number of TV stations in Greece regularly broadcast films and television programmes protected by copyright without the authorization of copyright owners, in violation of Articles 41 and 61 TRIPs Agreement.⁸²

More recently a copyright case has come before the DSB involving a complaint by the European Communities against the US over the non-payment of a royalty fee for the public communication of a broadcast, or other wireless communication of works, protected by the Berne Convention.⁸³ According to the European Communities, Section 110(5) of the United States Copyright Act⁸⁴ permits, under certain circumstances, the playing of radio and television music in public places (such as bars, shops, restaurants, and so forth) without the payment of a royalty fee. At its meeting on 26 May 1999, the DSB established a panel. Australia, Japan, and Switzerland have reserved their rights as third parties in the case. The publication of the report of the panel is expected at the beginning of 2000.

From the foregoing, it is clear that domestic policy, national laws, and regulations as well as WTO and other international obligations in the field of intellectual property protection, trade, and culture are leading to increased friction in the international community. We suggest various reasons for this occurrence. As noted in the introductory paragraph of this section, one reason is the incomplete commodification of intellectual property products, due in part to the lack of substantial national and regional harmonization of intellectual property laws. Another is the increased blurring between the private/public spheres of cultural works and their attendant rights. A third reason is the encroachment of international rulemaking upon the domestic policy

⁸⁰ Article 13 TRIPs permits such limitations or exceptions provided that they do not conflict with 'the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'. See further docs WT/DS115/2 and WT/DS82/2 (the Request for the Establishment of a Panel by the United States, made on 9 January 1998).

⁸¹ Ireland is also held to be in breach of its TRIPs obligation to provide adequate civil remedies to deal with the unauthorized production of music and cinematographic performances and the unauthorized broadcasting thereof.

⁸² *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, complaint by the United States (WT/DS124/1); complaint by the United States against Greece (WT/DS125/1); see <http://www.wto.org/wto/dispute/bulletin.htm>.

⁸³ *United States – Section 110(5) of the US Copyright Act*, complaint by the European Communities WT/DS160/1; see <http://www.wto.org/wto/dispute/bulletin.htm>.

⁸⁴ As amended by the Fairness in Music Licensing Act, enacted on 27 October 1998.

sphere. It is to this latter aspect that we turn our attention with a review of the impact of trade globalization on cultural identity.

2. THE PHENOMENON OF GLOBALIZATION

Is globalization a new phenomenon? Some argue that the world economy was more integrated in the late nineteenth century than it is today⁸⁵ but this merely perceives globalization from a quantitative point of view whereas there is also a qualitative one. The speed and the quantity of transactions have increased in the past decade, due to technological developments, leading to the establishment of global networks of transport and communication. This is not all. Globalization is more than an intensified internationalization; there are qualitative differences between the two. 'The internationalization of economics and cultures, which has marked the whole of the modern era, consists in opening the geographical frontiers of each society to messages and goods from other countries'.⁸⁶

What is specific to globalization is the emergence of phenomena that exist on a global level without roots in a distinct local, or national, environment. Globalization 'signals the growing interdependence and interpenetration of human relations alongside the increasing integration of the world's socio-economic life',⁸⁷ as evidenced by the emergence of a number of transnational enterprises like Sony, Nestlé, or Royal Dutch that operate on a purely global basis.⁸⁸

We turn to consider some of the aspects of globalization that have a direct bearing on the production and trade of cultural goods and services, with special reference to the technological impact of globalization and its relevance for the growth of the audiovisual sector and print and electronic media. In the final section, we suggest some of the reasons for the heightened tension between trade globalization and cultural identity.

2.1 Technological impact of globalization on cultural goods and services

The ongoing technological revolution is leading to the establishment of a global digital environment. Digital transmission technology allows for an

⁸⁵ See D. Rodrik, *Has International Economic Integration Gone Too Far?* (Washington, DC: Institute for International Economics 1997), as quoted by J. Mohan Rao, 'Culture and Economic Development' in UNESCO, *World Culture Report*, Paris 1998 [hereinafter UNESCO *World Culture Report*], at 33.

⁸⁶ See Néstor García Canclini, 'Cultural Policy Options in the Context of Globalization', UNESCO *World Culture Report*, above, note 85, at 159.

⁸⁷ See Frank Webster, *Theories of the Information Society* (London and New York: Routledge 1995), at 141.

⁸⁸ See for an analysis of the key elements of globalization, Jürgen Habermas, *Die postnationale Konstellation* (Frankfurt am Main: Suhrkamp 1998), at 101–05.

enormous extension of capacities to deliver data by many different networks (terrestrial, cable, and satellite). The Internet provides a new platform for multimedia services where the traditional systems for the delivery of text, voice, sound, and images are merged (more about which below).⁸⁹ Very soon this platform will also enable users to access high quality television services.

However, it is not yet clear if, or how, the Internet will be regulated. Most governments insist on exercising regulatory competence to further national policy interests in order to prevent the transmission of expressions of racism, violence, or pornography. Critics claim that the Internet does not represent the same mass-communication medium as broadcasting; instead it is a medium for individual communication, like telecommunications, and therefore it should not fall under local content rules for broadcasting transmissions.⁹⁰

While the scope and diversity of new media technologies, using satellite, cable, and digital technology has led to an increase in the choice of modes and quality of supply of cultural goods and services,⁹¹ technological developments, coupled with increased deregulation and privatization, have changed market structures. There has been a subtle shift away from the international exchange of domestic cultural goods and services to the production and distribution of cultural goods and services for global markets.

Inevitably, this has led to keener competition in the broadcasting and telecommunications sector, although the print and electronic media have also been affected. The consequences have been felt most in WTO Members, or regional groups, where the distribution networks for cultural goods and services are fragmented, as is the case with the audiovisual sector in Europe. The lack of national control and international regulation of export cartels in the audiovisual, print and electronic media, and the multimedia industries needs urgently to be addressed.⁹²

2.2 Growth of the audiovisual sector

The programmes that are distributed using global networks are to a great extent produced by the US entertainment industry we know as Hollywood. The US is the largest film exporter in the world, followed by Hong Kong. However, India is the biggest film producer⁹³ (producing for its domestic

⁸⁹ See *The Digital Age. European Audiovisual Policy*, above, note 38, at 11.

⁹⁰ Some transnational media enterprises, like Bertelsmann, favour auto-regulation of the Internet but when it comes to copyright protection for programmes distributed via the Internet they still count on the support of the state (or a regional body like the European Union) to assist with combating piracy.

⁹¹ See further Footer, above, note 25, at 8.

⁹² The European Commission has issued a number of important decisions concerning competition in the area of audio-visual media. A list of recent cases is available at http://europa.eu.int/comm/dg/avpolicy/key_docs/legis_en.html.

⁹³ See *WTO Secretariat Background Note: Audiovisual Services*, above, note 39, at 3.

market), followed by the US and Hong Kong.⁹⁴ In the American domestic market, Hollywood is an increasingly important sector of the national economy, whose share of gross domestic product (GDP) is growing at a rapid pace while the export of US films, television programmes, and pop music has increased by 94 percent over the five-year period 1991 to 1996.

Europe is the principal export market for the US entertainment industry: In 1995 about 70 percent of all US exports of audiovisual services went to Europe.⁹⁵ The American share of the European market rose from 56 to 78 percent over a period of ten years. During that same period the market share of European films decreased from 19 to 10 percent.⁹⁶

As a consequence of digitization, an explosion in demand for audiovisual content is expected. According to the European Commission, in 1995 one million people were directly employed in the cinema and television sectors in the European Union.⁹⁷ The US motion picture and videotape industries list employment in this sector at about 590,000 in 1995⁹⁸ while Japanese statistics indicate that in 1994 about 111,000 people were employed in the motion picture, video production, and broadcasting sector.⁹⁹ Due to the increase in demand for content, the level of employment in the audiovisual sector is expected to double globally.

The European Union, predicting a further explosion in demand for audiovisual products within Europe, set up a High Level Group in 1997 to review the audiovisual policy of the Community. In its report a year later the High Level Group recommended that current support measure for the film and audiovisual content industries be substantially completed.¹⁰⁰

2.3 Growth and diversification of the print and electronic media

Not unlike the audiovisual sector, the print and electronic media has also been revolutionized by technological developments that have led to the merger and convergence of previously separate sectors such as broadcasting, cable, satellite, and telecommunications, with the subsequent development of new products and services. Such convergence has made it easier and less expensive for magazine and book publishers to sell and distribute their products. Thus, books and journals, which combine visual images with sound can

⁹⁴ United States International Trade Commission: General Agreement on Trade in Services: Examination of the Schedules of Commitments Submitted by Asia/Pacific Trading Partners, Washington, DC, 1997, 6–12.

⁹⁵ Ibid.

⁹⁶ See *The Digital Age. European Audiovisual Policy*, above, note 38, at 15.

⁹⁷ Ibid, at 11.

⁹⁸ See *WTO Secretariat Background Note: Audiovisual Services*, above, note 29, at 2.

⁹⁹ See Japan Information Network, at <http://www.jin.jcic.or.jp/stat/stats/07IND66.html>.

¹⁰⁰ See *The Digital Age. European Audiovisual Policy*, above, note 38, 6–7.

be produced and distributed 'on-line' thereby changing the way in which 'reading' has traditionally been carried out.

New multimedia products that draw on content produced by film, television, sound recording, book, magazine, and cultural art industries are creating a whole new range of products and services. These appear in the form of CD-ROMs, video games, virtual reality, digital animation and interactive education, and information services (for example, distance learning, scientific research, and medical diagnostics) as well as the development of business services (for example, news and political comment services, financial planning, and professional consultancies).

The 1997 case of *Canada – Periodicals*, referred to above,¹⁰¹ demonstrates how technology is already being used to greater effect in the production and supply of cultural goods and services, thereby challenging trade disciplines. It will be recalled that the US periodical, *Sports Illustrated*, was beamed into Canada from the US, via satellite, thereby avoiding the prevailing customs tariff.

The new links that are being forged between cultural content, telecommunications, business, and industry applications could make it more difficult to define cultural products as goods, services, or a mixture of both. The scope of GATT/GATS was addressed in *Canada – Periodicals* where the Appellate Body ruled that obligations under both Agreements can 'coexist' and that they do not override one another, even though it is obvious that they do.¹⁰² The convergence of different industries, using differing modes of supply and medium, will continue to raise questions about the scope and tradeability of cultural goods and services.

2.4 Increased tension between trade globalization and cultural identity

We turn to consider the tension between trade globalization and cultural identity from standpoints other than the familiar economic and technological ones. From a sociological point of view, globalization is a process that produces new differentiation linked less to territories and more to market distribution.¹⁰³ A growing percentage of the world's population has free access to some form of radio and television broadcasting.¹⁰⁴ In industrialized countries, financial resources permitting, consumers can access all kinds of media, including widespread Internet linkage, but striking asymmetries between the centre and the periphery exist in the field of programme production, due to

¹⁰¹ See *Canada – Certain Measures Concerning Periodicals*, above, section 1.2 and note 61.

¹⁰² See text at note 61, above; also Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS', 2(2) *J Int'l Econ L* (1999) 295–346, at 313–17.

¹⁰³ See Canclini, above, note 86, at 169.

¹⁰⁴ For detailed statistical data, including coverage of the differences between developing and industrial regions, see *Our Creative Diversity*, above, note 2, 417–20.

the concentration of this process in the hands of a few large multinational enterprises.¹⁰⁵ In developing countries, very few consumers have access to cable TV, satellite, and the Internet.

From a psychological point of view, globalization leads to a slackening of strong, integrated forces replaced by a more open society with greater uncertainties.¹⁰⁶ People may react to these uncertainties by becoming attracted to new forms of authoritarianism which in turn affect their perceptions of national identity and cultural identity.¹⁰⁷ There is a tendency towards an increasing number of nondivisible conflicts, as Hirschman contends.¹⁰⁸ Technological and economic globalization also make national frontiers more permeable,¹⁰⁹ while the attendant higher levels of education and changing values create a public opinion with a global horizon.

While nationhood has traditionally been the precondition for the self-determination of citizens in modern democracies, Habermas, in his study of the disintegrating effects of globalization on the cultural fabric of society,¹¹⁰ demonstrates that it has led to political fragmentation in industrialized countries. In his view, the world-wide diffusion and dissemination of the standard products of mass culture has led to the suffocation of indigenous forms of expression.¹¹¹

In 1995 the UNESCO World Commission on Culture and Development forecast a global loss of cultural diversity, due to the homogenization of traditional cultures, as a result of the pressure of global markets.¹¹² The plethora of new television channels, producing the same standard mix of infotainment, Hollywood feature films, North American and Latin American soap operas, and sport, interspersed with news and current affairs reports, supports this projection. Meanwhile, public service broadcasters, besides collecting revenues from licensing fees, have pursued vigorous advertising campaigns as a

¹⁰⁵ See Canclini, above, note 86, 165–66. Further data concerning the top 50 entertainment companies, ranked by 1998–99 revenue, can be found in the trade magazine *Variety* (23 August 1999), at A49–A67.

¹⁰⁶ See Habermas, above, note 88, 91–167.

¹⁰⁷ See Catherine R. Simpson and Homi Bhaba, ‘Global Creativity and the Arts’, UNESCO, *World Culture Report*, above, note 85, at 190; see the World Commission on Culture and Development, *Our Creative Diversity*, 2nd rev edn (UNESCO: Paris 1996), at 28.

¹⁰⁸ Albert O. Hirschman, ‘Social Conflicts as Pillars of Democratic Market Societies’ in Albert O. Hirschman, *Propensity to Subversion* (Cambridge, MA, and London, UK: Harvard University Press 1995), 231–48. According to Hirschman, divisible conflicts are conflicts ‘over the distribution of the social product among different classes, sectors, or regions’ while nondivisible conflicts reflect the dichotomy of either/or, a concept with which free markets cannot cope.

¹⁰⁹ See David Held, ‘Democracy, the Nation-State and the Global System’ in David Held (ed), *Political Theory Today* (Oxford 1991) 197–235, at 204.

¹¹⁰ See Habermas, above note 88, at 99.

¹¹¹ *Ibid* at 114.

¹¹² For remarks concerning the audiovisual sector, see in particular Chap 4 of *Our Creative Diversity*, above, note 2.

‘top up’, even if it means that there has been a tendency towards the ‘corruption of information’.¹¹³

UNESCO’s pessimistic prognosis was partly revised and differentiated in its 1998 report.¹¹⁴ Countries with an essential domestic production of programmes, which encourage authentic expressions of local culture, are obviously better placed to react creatively to the global culture of Hollywood, MTV, or CNN.¹¹⁵

In our view certain forms of media like art films and public service television programmes have a key role to play in the fight against political fragmentation, as identified by Habermas, or in developing adequate responses to nondivisible conflicts, as identified by Hirschman. Such programmes create ‘positive externalities’ because they take up difficult topics, or choose new means of aesthetic expression, and can create positive values that are useful for exploring alternative action and the process of identification within society as a whole.¹¹⁶

Economically speaking, due to the structure of the world-wide audiovisual market, art films are in competition with Hollywood’s big budget mainstream movies.¹¹⁷ Whereas the average production cost of a Hollywood film in 1998 was US\$52.7 million,¹¹⁸ for countries with small film industries the average budget was below US\$2 million.¹¹⁹ Hollywood films benefit most from the huge home market where US box-office success determines further world-wide sales. Having recouped high fixed costs in the home market, it is very easy for a US film to successfully enter foreign markets at low marginal costs.¹²⁰ In the case of art films there is a situation of market failure because they fail to internalize all relevant externalities. The only way to address this problem is continuing state support, in the form of subsidies.¹²¹

¹¹³ See on this point Christoph Beat Graber, ‘Danaergeschenk für die Meinungsfreiheit, Zur Vermischung von Werbung und Programm in Radio und Fernsehen’, in *Medialex* 1 (1998), at 35–43.

¹¹⁴ See *World Culture Report*, above, note 85, at 16.

¹¹⁵ For information concerning the global culture of MTV see Axel Schmidt ‘Sound and Vision Go MTV. Die Geschichte des Musiksenders bis heute’ in Klaus Neumann-Braun (ed), *Viva MTV!* (Frankfurt am Main: Suhrkamp 1999) at 93–131; also Klaus Neumann-Braun and Axel Schmidt ‘Mc Music. Einführung’ in Klaus Neumann-Braun (ed), *ibid.*, at 7–42, and Canclini, above, note 86, at 173.

¹¹⁶ See Christoph Beat Graber ‘GATS 2000: Strategien für den Europäischen Film’, in *Medialex* 2 (1999), 86–97, at 96.

¹¹⁷ For detailed information concerning the distribution of films in Europe, see Graber, *ibid.*, 93–96.

¹¹⁸ In 1998, the marketing costs of a new Hollywood feature film were approx. US\$25.3 million. See MPAA, *World-wide Market Research*, at <http://www.mpa.org/useconomicreview/1998/sld016.htm>.

¹¹⁹ David Hancock, ‘Film Production in Europe. A Comparative Study of Film Costs in Five European Territories: France – Germany – Italy – Spain – UK’. Original report commissioned by the European Audiovisual Observatory, 1999, available at <http://www.obs.coe.int/docs/00001994.htm>.

¹²⁰ See Christoph Beat Graber, ‘WTO: A Threat to European Films?’ in Enrique Banus (ed), *Proceedings of the V Conference ‘European Culture’*, 28–31 October 1998, University of Navarra, Pamplona (forthcoming); available at <http://www.cid.harvard.edu/cidtrade>.

¹²¹ See Donaldson, above, note 51, at 108 and 171.

2.5 Some recent WTO complaints involving trade and the audiovisual sector

The ongoing tension in the audiovisual sector is illustrated by two complaints brought before the DSB within the last three years. The first, a dispute between the US and Turkey over the taxation of foreign film revenues by Turkey,¹²² was a combination of two domestic cultural policy measures that we have previously identified – the controlled access of foreign films to the domestic film market coupled with a tax measure to ensure restricted entry.¹²³ The US accused Turkey of violating its obligations under the national treatment obligation of Article III GATT by imposing a tax on box-office receipts from the showing of foreign films. Following consultations, Turkey agreed to ‘equalize any tax imposed in Turkey on box-office receipts from the showing of domestic and imported films as soon as reasonably possible’.¹²⁴

The second complaint involved a dispute between the European Communities and Canada over film distribution. On 22 January 1998 the European Communities (and their Member States) requested consultations with Canada concerning measures affecting film distribution services under a 1987 policy decision by the Canadian Government. The European Communities claimed that under the decision, Canada treated US distribution companies more favourably since they were allowed to continue to operate in Canada to the detriment of European film distributors, which as newcomers were not allowed to distribute films in Canada. The European Communities maintained that these measures contravened Article II GATS and Article III:1 GATS.¹²⁵ Since Canada had not taken a MFN exemption for measures affecting film distribution services, it was clearly bound by the MFN obligation in Article II:1 GATS. According to sources,¹²⁶ consultations have been suspended because the European company (PolyGram NV),¹²⁷ that complained when it was required to limit its distribution activity to proprietary films, has in the meantime been taken over by the Montreal-based, Canadian company (Seagram).

3. TRADE AND CULTURE AT THE WTO IN THE NEW MILLENNIUM

In the light of recent developments, we turn to consider some of the prospects

¹²² *Turkey – Taxation of Foreign Film Revenues*, complaint by the United States (WT/DS43); see <http://www.wto.org/wto/dispute/bulletin.htm>.

¹²³ See above, section 1.2.

¹²⁴ Notification of mutually agreed solution of 14 July 1997 (WT/DS43/3), see <http://www.wto.org/wto/dispute/bulletin/htm>.

¹²⁵ *Canada – Measures Affecting Film Distribution Services*, complaint by the European Communities (WT/DS117/1), <http://www.wto.org/wto/dispute/bulletin.htm>.

¹²⁶ The European Commission as well as the Canadian Cultural Industries Sectoral Advisory Group (SAGIT) both reported this outcome, see *Canadian Culture in a Global World*, above, note 21, at 24 and Bernier, above, note 5, at 128.

¹²⁷ A UK-based entertainment multinational, owned 75 percent by Phillips Electronics of the Netherlands.

for the treatment of trade and culture in the WTO in the new Millennium.¹²⁸ In particular we ask: how would WTO panels or the Appellate Body, through the ordinary application of current trade disciplines, deal with the trade and culture issue in the WTO Agreements? In the final section, we query whether WTO Members should consider broader approaches to disciplining trade and culture? One possible solution might be the adoption of a specific instrument on cultural diversity.

3.1 Distribution services

The distribution of cultural goods and services has already been touched upon in section 2.5, where consultations in *Canada – Film Distribution* concentrated on the discriminatory aspects of the Canadian measure with respect to film distribution. Distribution services are likely to remain fertile ground for conflict between trade and culture, both in the audiovisual and print and media sectors, since control over distribution¹²⁹ of cultural goods and services is increasingly concentrated in the hands of a small group of film and media producing companies, capable of controlling both geographically and temporally all the processes of production and distribution of a film, television programme, or book and magazine publication. This is obviously to the detriment of independent film and television producers, or book and speciality magazine publishers, who find themselves competing for distribution outlets.¹³⁰

The issue is most critical in Europe where the audiovisual sector is struggling to deal with fragmented distribution structures in the face of an American entertainment industry that is investing vast amounts in the promotion and distribution of its products throughout Europe. The highly effective and co-ordinated joint marketing and distribution of films by Motion Picture Association (MPA)¹³¹ members, using techniques such as deciding which

¹²⁸ It should be noted that aside from the general exception of Article XX(f) GATT for the protection of national treasures of artistic, historic, or archaeological value, Article IV GATT makes an exception to national treatment in Article III:10 GATT by allowing WTO Members to maintain or establish screen quotas that allow the exhibition of films of national origin during a specified period of commercial showing of all films of whatever origin, although subject to standstill and rollback measures. See further, Footer, above, note 25, at 3 and Bernier, above, note 5, at 114.

¹²⁹ Control of distribution is fuelled by the process of production of audiovisual or print services which resembles manufacturing since it results in a physical product, the costs of which all accrue in producing the first copy. Subsequent copies can be reproduced less expensively.

¹³⁰ There is a discernible trend among major distributors, particularly in the audiovisual sector, to link up in an effort to acquire control of box-offices and extensive programme catalogues: see M. Hamelink, *The Politics of World Communication* (London: Sage Publications 1994) 178–79.

¹³¹ The MPA is the international counterpart of the Motion Picture Association of America (MPAA). According to the MPAA/MPA brochure, both associations ‘serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA’. Since the MPA acts as liaison between its member companies and departments of the U.S. Government on matters related to international commerce, it is often referred to as ‘a little State department’. The MPA includes Buena Vista International Inc (Disney Enterprises Inc, The Walt Disney Company, Hollywood Pictures, Touchstone Pictures, Miramax

cinema has the right to show a film first and the imposition of block bookings on exhibitors,¹³² is anti-competitive.¹³³ It has led to fewer than a dozen US distributors taking the majority of box-office receipts in Europe whilst over a 1,000 European distributors compete for the rest.

Would a WTO panel be able to address this form of anti-competitive behaviour in the audiovisual sector? Of the few disputes that have come before the DSB where services are relevant, the third *Bananas* case¹³⁴ is significant for the distribution of cultural services. In third *Bananas* the Appellate Body confirmed the Panel's findings that a company which is a banana 'operator', i.e. engages in the buying, selling, and distribution of bananas, is caught by the broad definition of 'wholesale trade services' and, irrespective of the fact that it is vertically integrated, is a service supplier within the scope of GATS.¹³⁵ The same reasoning could be applied to the audiovisual sub-category of motion picture and videotape production and distribution.¹³⁶ However, any WTO Panel dealing with such a case would simply note the vertical integration of the film or video distribution network (as did the Panel with respect to the companies that are bananas operators in third *Bananas*¹³⁷) but would not rule on this form of anti-competitive behaviour since antitrust, or competition, matters are currently outside the remit of the WTO.

Film Productions Inc, Miramax Home Entertainment, Jim Hensen Video), Columbia TriStar Film Distributors International Inc (Columbia Pictures Industries Inc, TriStar Pictures Inc, Columbia TriStar Home Video, Sony Pictures Classics Inc, CPT Holdings Inc, ELP Communications, Columbia Pictures Television Inc), Metro-Goldwyn-Mayer Studios Inc (MGM, United Artists, MGM/UA Home Video, Cannon International, Pathe Entertainment Inc, United International Pictures), Paramount Pictures Corporation (United International Pictures, CIC Video), Twentieth Century Fox International Corporation (Fox Inc, Fox Video, CBS/Fox), Universal International Films Inc (Universal City Studios Inc, Universal Pictures, a division of Universal City Studios Inc, MCA Television Limited, MTE Inc, United International Pictures, CIC Video), Warner Bros, a division of the Time Warner Entertainment Company LP (Lorimar, HBO, Embassy, Turner Broadcasting Systems Inc, Turner Pictures International, New Line Cinema, Castle Rock Entertainment). These seven US majors are vertically integrated, i.e. they not only develop and produce films they also distribute them in more than 150 countries world-wide. See Graber, above, note 120, 6–7.

¹³² The same is true for video sales and television broadcasting rights.

¹³³ Current antitrust, or competition, laws exist to varying degrees in different countries. There is insufficient international co-operation and co-ordination on the harmonization of existing national legislation, or the completion of an international instrument to regulate anti-competitive behaviour at a global level, including export cartels; see further Footer, above, note 25, at 8.

¹³⁴ *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body of 9 September 1997 (WT/DS27/AB/R) see <http://www.wto.org/wto/dispute/bulletin/htm>.

¹³⁵ The Appellate Body upheld the Panel's findings that '“operators” – are service suppliers within the meaning of Article I:2(c) of the GATS – engaged in providing wholesale trade services and – where such operators form part of vertically-integrated companies, such companies are service suppliers for the purposes of this case', *ibid*, 99, para 255(q).

¹³⁶ See for the audiovisual sub-categories, above, note 31.

¹³⁷ See Panel Reports in *EC – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Ecuador (WT/DS27.R/ECU); complaint by Guatemala and Honduras, WT/DS27/R/GTM (WT/DS27/R/HND); complaint by Mexico, WT/DS27/R/MEX; complaint by the United States (WT/DS27/R/USA) 22 May 1997, para 7.320, see <http://www.wto.org/wto/dispute/bulletin.htm>.

3.2 Subsidies and countervailing duties

The issue of subsidies of cultural industries by WTO members, in the form of one support programme or another, is bound to arise. According to a 1997 OECD Report,¹³⁸ the promotion of domestic content takes many forms with national public broadcasters promoting and carrying certain quantities of domestically produced audiovisual content (often based on domestic content requirements).¹³⁹ The other means of government support is through the application of direct grants,¹⁴⁰ tax write-offs, and low-interest loans for film or book production.

Bernier claims that the use of various forms of payment to domestic producers is challengeable under Article III:8(b) GATT on the basis of the decision in *Canada – Periodicals* and thus there will be a need for WTO Members to take a serious look at the ways in which financial help is granted to producers of cultural goods (and services).¹⁴¹ He warns in particular of the need to pay heed to tax remittances and various fiscal measures that can be construed as a subsidy.¹⁴²

The possibility also exists that such forms of financial assistance to producers and distributors of cultural goods (but not cultural services¹⁴³) may fall under the Agreement on Subsidies and Countervailing Measures (SCM), given the wide definition employed in Article 1:1 SCM. A subsidization scheme such as the European Union's Media II programme¹⁴⁴ may not continue to meet the requirements for allowable subsidies¹⁴⁵ and an action under the SCM should not be dismissed lightly.

While it may be argued that many cultural programmes are non-specific, or if specific, not serious enough to cause prejudice, the audiovisual sector (the film industry in particular) may think differently, in view of the limited number of producers, the serious imbalance in market share of European

¹³⁸ OECD, Policy and Regulatory Issues for Network-Based Content Services, OECD, Paris (DSTI/ICCP/IE(96)9REV1), 4 August 1997.

¹³⁹ See also *Canadian Culture in a Global World*, above, note 21 at 18, for a review of some countries' restrictions.

¹⁴⁰ See for example the Draft Discussion Paper of the Australian Council on Major Performing Arts, July 1999, which lists three forms of government support – (1) direct explicit financial assistance (direct grants) (2) direct implicit support (goods and services) and (3) indirect financial support through a range of programmes (e.g. for training in the performing arts).

¹⁴¹ Bernier, above, note 5, at 117.

¹⁴² Note the pressure that was brought by the US upon Turkey, on the basis of Article III GATT, to equalize any tax imposed on box-office receipts from the showing of domestic and imported films in *Turkey – Taxation of Foreign Film Revenues*, see above at section 2.5.

¹⁴³ A WTO Working Party on GATS rules began work in 1995 (subsidies are included). Due to the inherent complexity of the subsidy issues for services trade, progress has been slow but it is expected that negotiations on achieving such discipline for services trade, in accordance with Article XV GATS, will be taken up in a Millennium Round.

¹⁴⁴ See above, section 1.2, and notes 36 and 37.

¹⁴⁵ See further Hahn on subsidies, above, note 22, 335–38.

producers, and the fragmented market, distribution-wise, for European and American films in Europe.

3.3 Antidumping

It cannot be ruled out that antidumping actions (most probably using national or regional remedies) will arise in the field of cultural goods and services. It should be noted that the Canadian Magazine Publishers' Association supported the Canadian prohibition on the importation of split-run editions of foreign periodicals (*Sports Illustrated* from the US), accusing American publishers of editorial 'dumping' of content, since they had already recovered their costs in the home market.¹⁴⁶

The production and sale of cultural goods such as films, television programmes, music CDs, and videos, as well as Internet products, are all characterized by high fixed and low marginal costs with frequent price discrimination between markets. The case for dumping is therefore based on the incremental cost of supplying the additional market (usually an export market) at prices below those charged in the domestic market rather than simply selling below cost.¹⁴⁷

3.4 Safeguards

The original safeguards clause of Article XIX GATT, as well as the Agreement on Safeguards, could be invoked as a means of helping WTO Members with strong cultural industries to protect themselves when seriously injured by the importation of like, or directly competing, products¹⁴⁸ although emergency safeguards with respect to services are still subject to negotiation under Article X GATS. Despite the looser wording in Article 2:1 Safeguards, on the conditions precedent to the invocation of a safeguard measure,¹⁴⁹ WTO Members

¹⁴⁶ However, see Bernier, above, note 5, 119–21, who gives an excellent overview of the prevailing views and literature on the relevance of dumping of cultural goods and services.

¹⁴⁷ See Colin Hoskins, Adam Finn, and Stuart McFadyen, 'Television and Film in a Freer International Trade Environment: US Dominance and Canadian Responses' in McAnany and Wilkinson, above, note 8, 63, at 70. To what extent is the 'like products' criteria applicable where cultural goods and services are characterized and distinguishable by their artistic and intellectual content? See Bernier on this point, above, note 5, 120–21.

¹⁴⁸ The idea of adapting the safeguards clause of Article XIX GATT to fit the case of cultural goods is not new. In a Protocol Annexed to the Convention on the Importation of Educational, Scientific and Cultural Goods, 1950 (the Florence Agreement), done at UNESCO, the US was able to obtain for itself a safeguards clause that essentially reproduces the text of Article XIX GATT although no specific reference is made to compensation.

¹⁴⁹ The requirements of 'unforeseen developments and of the effect of the obligations incurred by a contracting party – including tariff concessions' in the original Article XIX GATT 1947 are not repeated in Article 2:1 Safeguards; see the developing WTO jurisprudence on safeguards in two recent cases before the DSB: *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, complaint by the European Communities (WT/DS98/1) 21 June 1999 (on appeal) and

will still have to demonstrate that the flood of cultural goods onto their markets has arisen as the result of an increase in quantities of imports, absolute or relative to domestic production. This is not easy to do where the intellectual content of a cultural good cannot be separated easily from its material support, as in *Canada – Periodicals*. In the latter case, the real loss of revenue came not from the intellectual content of *Sports Illustrated*, which was beamed into Canada, but from the loss of revenue from subsequent publicity.

3.5 Trade and investment measures

Thus far no complainant has ever invoked the Agreement on Trade-Related Investment Measures (TRIMs) to directly challenge the WTO consistency of Members' foreign investment and ownership measures in the field of cultural industries. Nevertheless a WTO Member's investment regime that has a domestic content requirement for cultural products such as a film or television programme, as we have seen in the European Communities, the Council of Europe, Australia, Canada, or France,¹⁵⁰ might be caught by TRIMs. Similarly, any mandatory government measure, 'compliance with which is necessary to obtain an advantage',¹⁵¹ for example a tax concession or a subsidy for the production of a cultural good, could be TRIMs inconsistent.

However, foreign investment and ownership measures in the field of cultural goods and services that discriminate between foreign and domestic cultural goods and services are more likely to be challenged under Article III:4 GATT, or Article XVI GATS, as demonstrated in *Turkey – Taxation of Foreign Film Revenues*.¹⁵² It is also arguable that all of the alcoholic beverages cases that have come before the DSB to date¹⁵³ involve trade and culture issues.¹⁵⁴

Argentina – Safeguard Measures on Imports of Footwear, complaint by the European Communities (WT/DS/121/1) 25 June 1999 (on appeal); see <http://www.wto.org/wto/dispute/bulletin.htm>.

¹⁵⁰ See above, section 1.2, and accompanying footnotes.

¹⁵¹ The wording is contained in section 2 of the Annex to TRIMs. (It should be recalled that TRIMs applies to goods but not to services. Moreover, it contains a 'built-in' agenda for the Council for Trade in Goods to review the operation of the Agreement within five years of its establishment and to make proposals to the Ministerial Conference for amending it, the results of which could also affect the future trade in cultural goods.)

¹⁵² See above, note 122.

¹⁵³ *Japan – Taxes on Alcoholic Beverages*, 4 October 1996, complaints by the European Communities (WT/DSS/AB/R) by Canada (WT/DS10/AB/R) and by the United States (WT/DS11/AB/R) in the matter of 'shochu'; *Korea – Taxes on Alcoholic Beverages*, 18 January 1999, complaints by the European Communities (WT/DS75/AB/R) and by the United States (WT/DS84/AB/R) in the matter of 'soju'; and *Chile – Taxes on Alcoholic Beverages*, Panel Report of 15 June 1999, both complaints by the European Communities (WT/DS87/1) and (WT/DS110/1) in the matter of 'pisco' (on appeal); see <http://www.wto.org/wto/dispute/bulletin.htm>.

¹⁵⁴ See Samuelson, above, note 68, at 98; and also Gregory P. Lubkin 'Is Europe's Glass Half Empty or Half Full? Alcoholic Beverages Taxation and the Development of a European Identity', 3 Col J Eur L (1997/1998), at 357ff.

3.6 Towards a separate instrument on cultural diversity?

The scope for a cultural exception is uncertain, given the previous attempts in the Uruguay Round,¹⁵⁵ the recent experience of the MAI negotiations at the OECD,¹⁵⁶ and the growing list of subject matter, including environmental and labour standards, for which countries would like to see some form of exception to basic WTO disciplines.¹⁵⁷ The desirability of doing so is altogether another matter. Within the ordinary course of applying WTO trade disciplines, the burden of proof lies with the party invoking the exception. The results of some of the recent decisions in the field of trade and the environment, where Article XXIV GATT has been invoked, are not encouraging on this point.¹⁵⁸

A more radical approach has been taken by Canada's Cultural Industries Sectoral Advisory Group (SAGIT) with a proposal for a new international instrument on cultural diversity that would introduce specific rules to govern the protection and promotion of culture globally, including the relationship between trade and culture.¹⁵⁹ SAGIT sees a separate instrument on cultural diversity as one of four options¹⁶⁰ open to the Canadian Government and comes out strongly in favour of affirmative action in order to promote cultural diversity, in the same manner as states came together to protect and promote biodiversity.

It is doubtful whether any other countries, aside from Canada and France, support the idea of a specific international instrument on cultural diversity, let alone whether the DSB would exercise a degree of deference to cultural

¹⁵⁵ See above, section 1.2.

¹⁵⁶ See note 17, on Canada's attempt to introduce a general exception clause for cultural industries into the MAI negotiating text.

¹⁵⁷ For a consideration of the results of placing cultural heritage interests alongside those of the environment, consumer protection, and workers' rights, in the European Union context, see Malcolm Ross 'Cultural Protection: A Matter of Union Citizenship or Human Rights?' in Nanette A. Neuwahl and Allan Rosas (eds), *The European Union and Human Rights* (Nijhoff 1995), at 238.

¹⁵⁸ See in particular *United States – Restrictions on Imports of Tuna*, complaint by Mexico, circulated on 3 September 1991, BISD 39S/155 (unadopted) 30 ILM 1594 (1991); *United States – Restrictions on Imports of Tuna*, complaint by the European Communities and the Netherlands, circulated on 16 June 1994 (DS29/R) (unadopted) 33 ILM 839 (1994); *United States – Standards for Reformulated and Conventional Gasoline*, complaint by Venezuela and Brazil, Appellate Body Report of 20 May 1996 (WT/DS2/9); and *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, above, note 24; see <http://www.wto.org/wto/dispute/bulletin.htm> for the last two cases.

¹⁵⁹ It is proposed that such an instrument would: (1) recognize the importance of culture in society; (2) acknowledge that cultural goods and services are significantly different; (3) acknowledge the need of countries to take domestic policy measures to ensure access to a variety of indigenous cultural products; (4) establish rules on the type of domestic regulatory system that is needed to enhance cultural and linguistic diversity and (5) decide how trade disciplines would (or would not) apply to cultural measures and what the agreed rules should be: see *Canadian Culture in a Global World*, above, note 21, at 3 and 26–29.

¹⁶⁰ In SAGIT's view the other three options for Canada are: (1) to negotiate a broad cultural exemption to any future trade agreement; (2) to make no commitment on culture at all and (3) to develop agreements covering specific cultural industry sectors, measures or practices.

policy measures when applying WTO trade rules. The promulgation of such an instrument would raise the spectre of another international regime with which the WTO must reckon. Given the current difficulty of dealing with the twin regimes of trade and environment, this will not prove an easy task.

Whether the so-called doctrine of consistent interpretation¹⁶¹ could be applied to trade and culture disputes at the WTO, is harder to assess, due to the paucity of adjudication of such disputes in other international and regional fora.¹⁶² However, WTO Members could consider developing rules, or *de minimis*, a set of guidelines, in the form of a statement or an interpretation that clarifies existing rules, for the guidance of the DSB when dealing with disputes involving trade liberalization and cultural policy measures.

4. CONCLUSIONS AND RECOMMENDATIONS

This article has reviewed the current state of the debate between trade liberalization and cultural policy. During the course of our review it became apparent that the matter is far from settled and, as the number of complaints brought before the WTO demonstrates, the issue of trade and culture is of concern to many WTO Members. State practice in the field of cultural policy shows that many countries consider there to be something materially distinct about the way in which cultural goods and services are traded, meriting special and differential treatment.

However, it is uncertain the extent to which WTO Members outside the European Communities, the United States, Japan, Canada, and Australia, are concerned about the preservation of their cultural identity in the face of trade liberalization and the globalization process. The position of some of the developing countries, particularly those with an important cultural sector, such as audiovisual, needs to be considered in order to gain a broader picture of the debate over trade and the preservation of cultural and linguistic diversity.

What is certain is that the debate will resurface at the WTO in the Millennium Round of trade negotiations on the liberalization of services. The mandated negotiations on services will cover all sectors, including audiovisual services, and the allied services' fields of marketing, distribution, and advertising; WTO Members will be encouraged to extend national treatment more

¹⁶¹ Thomas Cottier and Krista Nadakavukaren Schefer, 'Consistent Interpretation – A Way Around Direct Effect, A Way Toward the Rule of Law', submission to the International Trade Law Committee of the International Trade Law Association Meeting, Geneva, 24–25 June 1999 (unpublished – on file with the authors).

¹⁶² However, see some of the case law of the European Court of Justice where cultural heritage values have outranked the principles of free movement, for example in Joined Cases 60 and 61/84 *Ciné-thèque v. Fédération nationale des cinémas français* [1985] ECR 2605 (video release of cinema films); at other times the application of the principle of proportionality in ECJ case law has meant that cultural heritage interests have been overridden, see Case C-198/89 *Commission v. Greece* [1991] ECR I-727 (tourist guides) and Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007 (broadcasting privileges); see further Malcolm Ross, above, note 157, 238–39.

broadly and to remove existing limitations. The GATS rules that are likely to come under closest scrutiny are those governing domestic regulation (Article VI), safeguards (Article X), and subsidies (Article XV) as well as government procurement of services. Additionally, there has been at least one proposal for renewed work on sectoral classification to be undertaken in the Committee on Specific Commitments.¹⁶³

We recommend that all WTO Members, for whom the trade in audiovisual services and the marketing and distribution by electronic and print means are of importance, balance their market access openings with their need to preserve cultural policies by developing specific disciplines. A more detailed classification system is needed for audiovisual services¹⁶⁴ and greater attention should be paid to the mode of supply of cultural goods and services by electronic means.¹⁶⁵ We also recommend that governments look critically at ways in which they can preserve their cultural heritage through domestic regulatory measures such as licensing, domestic content rules, and so on.

On subsidies, we recommend that WTO Members review their means of financial support to cultural industries while at the same time considering the inclusion of *de minimis* exemption clauses to allow foreign cultural suppliers limited forms of access to their markets.¹⁶⁶ A thorough review of the way in which safeguards may be applied to cultural goods and services is recommended, particularly since Article X GATS negotiations will receive attention during the Millennium Round.¹⁶⁷

Finally, there are striking examples of anti-competitive behaviour in the cultural industries that are currently not caught by WTO rules. We recommend that the Working Group on the Interaction between Trade and Competition consider some of those examples, particularly with respect to foreign film distribution.

¹⁶³ See Preparation for the 1999 Ministerial Conference: Further Negotiations as Mandated by the General Agreement on Trade in Services (GATS), Communication from the United States, WT/GC/W/295 and S/C/W/119 at 4, para 18.

¹⁶⁴ The existing six sub-categories can be found at above, note 31.

¹⁶⁵ The United States has suggested that Members adopt a horizontal approach and consider 'electronic delivery of services' as all, or part, of a mode of supply, see above, note 163.

¹⁶⁶ See the agreement between the Governments of Canada and the United States on 'Access to the Canadian Advertising Services Market', 26 May 1999, with respect to the sale of advertising by foreign publishers in the Canadian periodicals market, as part of the package of measures that Canada has taken in the wake of the *Canada – Periodicals* dispute; see <http://www.pch.gc.bin/News.dll/>. This could be extended to the film industry where a *de minimis* clause could be introduced to protect the production of low-budget art films as a means of supporting the preservation of cultural identity, particularly in smaller countries; see further Christoph Beat Graber, above, note 120.

¹⁶⁷ See above, note 148, for details of a specific example where a safeguards clause has been bargained for in the field of cultural heritage.