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Domestic Cultural Industry Development Schemes and the World Trade Regime

by

Danny M. Kotlowitz

A thesis submitted in conformity with the requirements for the degree of Master of Laws, Graduate Department of the Faculty of Law, University of Toronto

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Defending Lilliput

Domestic Cultural Industry Development Schemes and the World Trade Regime

Master of Laws, 1998

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Abstract

This thesis investigates the increasingly tenuous position of domestic cultural industry development schemes, particularly for film, television and music, within the world trade regime. The common justifications for the deployment of such schemes are outlined, and the various methodologies adopted by countries to support their cultural industries, e.g. broadcast quotas, tax breaks, direct subsidies, and foreign ownership restrictions, are examined by way of value chain analysis. The WTO regime is then introduced, and the application of the GATS to audiovisual products is examined. The history and outcomes of such schemes in Australia, Canada and South Africa are specifically discussed, with particular attention being paid to Project Blue Sky Inc. v Australian Broadcasting Authority. The “public morals” exception is considered as a possible escape route for the retention of broadcast quotas, and the thesis concludes with an examination of the current Canadian initiative to build an international coalition for the creation of specific rules on international trade in cultural products.
Acknowledgments

In November 1994, having just completed my final-year LLB exams at the University of Cape Town, I attended my first public hearing of the new, post-Apartheid South African broadcast regulator, the Independent Broadcasting Authority. It is a long, long way from the Mariston Hotel in Hillbrow, Johannesburg, where that hearing into South African music content on local radio was held, to the University of Toronto, where I have had the wonderful privilege of studying and researching my thesis during the past year. This journey, and all the irreplaceable memories and experiences that went with it, would not have been possible without the kindness, support and generous assistance of the following, to whom I express my sincere thanks:

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1. Introduction

I enjoy all types of music, but the music of my own flesh and blood goes right to my heart. The curious beauty of African music is that it uplifts even as it tells a sad tale. You may be poor, you may have only a ramshackle house, you may have lost your job, but that song gives you hope. African music is often about the aspirations of the African people, and it can ignite the political resolve of those who might otherwise be indifferent to politics. One merely has to witness the infectious singing at African rallies. Politics can be strengthened by music, but music has a potency that defies politics.

- Nelson Mandela, *Long Walk to Freedom*¹

1.1 The Problem

This thesis is about a problem, a legal problem which fascinates me, and is fairly simple to describe. On the one hand, many countries around the world wish to foster the development of their domestic cultural industries - by this I mean, principally, creators and distributors of mass media products such as music compact disks, television programming and films² - and moreover, would

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² The term “mass-media product” (“MMP”) is usually taken to mean motion pictures, television programming and pre-recorded music, but also extends to cover new technology-based interactive media enjoying increasing penetration into the mass market, such as CD-ROMS and Internet-delivered entertainment and information products. In addition, products in traditional printed form such as books and magazines still constitute an important portion of international trade in MMPs, and have been the subject of the first substantive adjudication by the new dispute settlement structures of the World Trade Organisation in respect of trade restrictions on MMPs, in the celebrated *Sports Illustrated* matter: *Report of the Panel in: Canada - Certain Measures Concerning Periodicals (US v. Canada)* (14 March 1997), WTO Doc. WT/DS 31/R and *Report of the Appellate Body in: Canada - Certain Measures Concerning Periodicals (Canada v. US; US v. Canada)* (30 June 1997), WTO Doc. WT/DS 31/AB/R, Appellate Body Report No. AB-1997-2, (hereinafter the “*Sports Illustrated Panel Report*” and “*Sports Illustrated Appeal Report*” respectively, briefly summarised in section 1.3.2 below); both available in Joseph T. Dennen, ed., *Law & Practice of the World Trade Organisation* (Dobbs Ferry, New York: Oceana Publications, 1997) (hereinafter “*Law & Practice of the WTO*”), as Cases Booklets VIII and IX respectively (subsequent references to page numbers in *Law & Practice of the WTO* should be taken to refer to the relevant Case Booklet). Working from these commonly accepted examples of MMPs, a
like those industries to produce cultural works which have a distinct and parochial relevance for the citizens of their country. The three countries I use as my examples in this thesis, Australia, Canada and South Africa, would like at least some of their television, music and movies to be identifiably Australian, Canadian and South African, respectively. Giving their citizens the opportunity to express themselves, say these countries, is crucial for democratic discourse, particularly given that they are multicultural countries where the voices of the historically disadvantaged, immigrants and other usually marginalised groups and citizens would otherwise be silenced. So the governments and broadcast regulators of these countries intervene in the market to try to produce the desired outcome, by protecting their domestic cultural industries from foreign competitors (in particular, the United States’ entertainment industry), and by interposing incentives in the media value chain that are intended to encourage domestic production of music, films and TV shows. In practical terms, the measures used include tax breaks for desired domestic products, excise taxes on imported products, subsidies, broadcast quotas, and licence conditions or promises made by broadcasters in exchange for the allocation to them of scarce spectrum space, or, to a greater extent these digital days, merely to obtain the legal certainty provided by a broadcast licence. Similar regulatory paraphernalia are used to a varying extent across the world, from France to India to Uruguay, so that these measures are amongst the last hard edges of sovereignty in an increasingly globalized world.

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3 The “value chain” is a model which can be used to define the various elements which underpin the functioning of an industrial sector. See the more extensive discussion of value-chain analysis in the context of the media industry, in section 2.2. below.
It is that globalization, in particular the liberalisation of international trade, which leads to the dilemma that is the focus of my thesis. Post-war growth and prosperity in the West, and the astonishing achievement of creating the European Union after centuries of war, are in large part gains from free trade under the General Agreement on Tariffs and Trade ("GATT") and similar multilateral trade treaties. Because its economy is highly dependent on commodity exports, my country, South Africa, relies heavily on international trade and investment for growth. The principal challenge in overcoming the legacy of Apartheid in South Africa is not so much societal (though the challenges in that regard are enormous), but rather economic. Thus the importance of lowering foreign trade barriers to our goods looms large in current South African government policy. A fundamental principle of the GATT, however, is that countries should eliminate discrimination which favours domestically-produced goods, as against imports. South Africa cannot protect its domestic cultural industries while demanding that the US open its markets to greater South African commodity exports. And, more importantly, the rules of non-discrimination established in the GATT are general rules; particular countries should not be able to unilaterally bend them in order to favour particular domestic industries or outcomes, else the international trade system would soon collapse in chaos. So the measures which countries frequently deploy to foster their domestic cultural industries are, in principle, contrary to the fundamental rules of the world trade regime. That is the problem writ small, the legal problem which I will focus on in this thesis, looking at how it has played out in recent government policy-making processes, laws, regulations and court cases.

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The problem writ large is far more complex, of course, because of the unique role of culture in society and the complex globalisation of cultural industries themselves. Concerns about the homogenisation of culture caused by trade in media products must be balanced with recognition of the gains of learning from, and being entertained by, imported cultural works. For a person who believes both in the importance of fostering domestic cultural expression, the telling of our own stories, but equally in the need for the international trading system to continue to flourish because of the benefits it brings to the world, the problem is how to reconcile these two conflicting beliefs. By tackling the more modest, legal question in as pragmatic a fashion as possible, I hope that I may shed some light on the broader issues in the trade-and-culture debate.

1.2 Where to Begin?

Over the past decade, a substantial body of legal writing has developed around the issue of international trade in mass-media products ("MMPs"). Much of this writing appeared in the early 1990s and focussed on the application to international trade in MMPs of the GATT, which, as will be discussed in section 3.3.1 below, is concerned with liberalising trade in goods. For reasons which will be explained in section 3.3.2 below, the debate over trade in MMPs shifted during the Uruguay Round negotiations to the terrain of the General Agreement on Trade in Services ("GATS"),

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5 An extensive list of US and European journal articles focussing on the treatment of trade in MMPs under the GATT may be found in the Bibliography to this thesis, under the heading, "Pre-GATS Analyses".

6 Annex 1B to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, (1994) 33 I.L.M. 1140 at 1168; also (1994) 33 I.L.M. 44.
precipitating a new flurry of journal articles and chapters in trade law volumes. Therefore, my analysis will focus on the services sector and the developing trade rules by which this sector is governed.

There are a number of further pragmatic reasons for my approach of dealing predominantly with the trade-in-services context. First, much of the pre-1994 GATT-based analysis of trade in culture is somewhat theoretical, as it founders on a threshold objection long made by the European Union, namely that cultural works cannot be classified as “goods”, but should rather be treated as “services”. (This argument is discussed at some length in section 3.3.2 below.) Second, subsequent to the Uruguay Round there has been a slew of litigation in the area, providing much new material for more practical legal analysis. The *Sports Illustrated* litigation, aspects of which are discussed in various sections of this thesis, came to centre in part on the delicate distinctions between the application of trade rules to goods and services, and the overlapping jurisdiction of the GATT and the GATS. The most significant domestic litigation on the issue of trade in culture, *Project Blue Sky v Australian Broadcasting Authority*, focusses exclusively on trade in services. The case provides an exemplary real-life illustration of the clash between domestic cultural development measures and the free trade regime, and hence I devote the whole of Chapter 5 to it. Third, I focus on services because I have previously had an opportunity to research and write a goods-based analysis of trade in cultural products, and wished to explore fresh territory. Happily, my desire to examine cultural

---

7 One commentator counts some 25 articles and chapters in books which have addressed the issue from a legal perspective since the end of the Uruguay Round. (Ivan Bernier, “Cultural Goods and Services in International Trade Law”, Paper presented to the Canadian Bar Association - Media and Communications Law Section, Law Society of Upper Canada, 18 April 1998 [to be published in *The Culture/Trade Quandary: Canada’s Policy Options* (Ottawa: Centre for Trade Policy and Law, forthcoming)], at note 1.)

8 Danny M. Kotlowitz, *Cultural Protectionism: An Analysis of the Imposition of Local Content Broadcast Quotas in South Africa and the European Union* (Research long paper completed for
products within the context of trade in services follows the recent shift in treatment of these products within the negotiating fora of world trade, as outlined above. However, where appropriate I do examine relevant provisions in the GATT, to the extent that they are relevant.

Because I have been keen to explore the detail of the GATS and of the Blue Sky litigation in particular, constraints of length preclude analysis of some other important aspects of the trade-in-culture debate. For example, though it has been pivotal to the United States’ ability to bring litigation against its trading partners since 1995, I do not discuss the new World Trade Organisation (“WTO”) dispute settlement process and its mechanics. Also omitted from discussion is the emerging third leg of the trade-in-culture debate, namely intellectual property (“IP”). For example, it has already been speculated that it is difficult to reconcile the Uruguay Round’s Agreement on Trade-Related Aspects of Intellectual Property Rights (“Trips”), which facilitates non-discriminatory treatment of copyright holders, with measures which protect domestic cultural industries and hence implicitly diminish foreigners’ ability to exploit their IP. At the level of national legislation, measures designed to protect and reward domestic artists and rights-holders, and hence to reinforce their vital role in domestic cultural industries, can also have repercussions for international trade relations. The recent Phase II revisions to the Canadian Copyright Act which

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10 Sandrine Cahn and Daniel Schimmel, “The Cultural Exception: Does It Exist in the GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on Trips?” (1997) 15 Cardozo Arts & Ent. L.J. 281 at 304-307. The authors conclude that the argument is tenuous because Trips does not confer a positive right to exploit one’s intellectual property, but rather only safeguards the owner’s right to authorise or prohibit the exploitation of his or her work.
extend blank tape levy and royalty payments to performers and producers of sound recordings (recognising so-called “neighbouring rights”),\textsuperscript{11} for example, have antagonised the US Trade Representative because US performers are denied similar payments.\textsuperscript{12} IP is a distinct and complex body of law, full consideration of which would overwhelm this thesis, and hence merely flagging the intricate relationship between IP, culture and trade must suffice.

Also, while I recognise the importance of subsidies in developing culture, particularly given the crucial role of subsidy measures in the Canadian and Australian systems, I do not explore their GATT and GATS-legality at length. There are two reasons for my neglect of this important area. First, direct domestic subsidies are tolerated by the GATT and the GATS, and are less liable to attack as discriminatory measures under trade law than quotas requiring a percentage of total broadcast time to be given over to domestic product - so-called “broadcast quotas” - used by Australia, Canada and South Africa. I therefore have focussed on the latter, more vulnerable measures, since they have been first in the line of fire, as will be demonstrated in my discussion of the Blue Sky litigation. Second, cultural subsidy schemes deserve close analysis, so that it can be ensured that they comply with trade law, but they are less relevant in South Africa than in the wealthier jurisdictions of Australia and Canada. For example, while the Canada Television and Cable Production Fund pays out Can$200 million per year to foster domestic television

\textsuperscript{11} As described by the Hon. Sheila Copps, Minister of Canadian Heritage, “Designing a Strategy for a Canadian Knowledge Nation - The Canadian Heritage Perspective” (Address to the Canada By Design Visionary Speaker Series, McLuhan Program in Culture and Technology, University of Toronto, 26 March 1998); available at <http://www.candesign.utoronto.ca/copps.html#text>.

production, there is no equivalent fund in South Africa at present, and the only subsidy funds available are for film production, a mere R10 million (Can$2.5 million) this year. This is not due to a lack of will in government to support the local production industry through subsidisation of deserving projects - indeed, the recent White Paper on Broadcasting Policy issued by the South African Department of Communications expressly advocates the establishment of a fund to provide such subsidies - but rather a shortage of money, particularly given more pressing basic needs which are competing for the attention of the fisc. The major regulatory intervention in the marketplace in South Africa remains broadcast quotas, and hence I focus on these measures rather than subsidies. As will be seen, just taxonomising the various comparative features of broadcast quotas, discussing the history of their implementation and evaluating their success, is a large enough project to deserve a thesis all of its own.

Similarly, while the escape clause for cultural industry products in the United States-Canada Free Trade Agreement and its absorption into the subsequent North American Free Trade Agreement (NAFTA) is a most interesting discussion point, the GATT and GATS are more relevant for the purposes of this thesis - particularly since the US chose to bring its Sports Illustrated complaint under these treaties’ jurisdiction rather than under that of NAFTA. I therefore do not examine the treatment of cultural products under NAFTA.

---


1.3 A Personal Note

I have one final admission of neglect in respect of the content of this thesis, with a very personal justification. In South Africa in the 1980s, opposition to Apartheid often found expression in popular culture, ranging from the symbolic challenge to the State posed by the appearance on stage together of Sipho Mchunu and Johnny Clegg in their pioneering crossover band, Juluka, and the taunting mass march/dance, toyi-toyi, a feature of anti-government demonstrations, to Basil Coetzee’s haunting jazz piano elegy to the communities destroyed by the Group Areas Act, “Manenberg”, and the anti-conscription pop of the band Bright Blue. For young white South Africans in particular, shielded from the darker realities of life under Apartheid by a heavily censored media and the skewed version of history taught in whites-only schools, popular music was their education.

But the most memorable impact of all in articulating white opposition to Apartheid, through 1980s popular culture, was made by André le Roux de Toit, then known to his South African fans as André Letoit.\textsuperscript{16} Letoit, and other young Afrikaans-speaking artists such as James Phillips and Johannes Kerkorrel, began gathering a following in 1987 and 1988 for their venomous satire of the South African Defence Force and the PW Botha government. In 1989, at the height of the third year of Emergency rule in South Africa, their “Voëlvry” ("free as a bird", punned with “feel free”) concert tour was banned from most Afrikaans university campuses. Senior Afrikaner church leaders condemned their irreverence,\textsuperscript{17} and the Cape Times described one of their concerts as an

\textsuperscript{16} This stage name was subsequently replaced by "Koos Kombuis", de Toit’s current identity. Though it would be lost in English translation, both names are highly entertaining and satirical - as are most of De Toit/Letoit/Kombuis’ songs, despite the weighty issues they sometimes address.

\textsuperscript{17} Writing in Die Kerkbode ("The Church Messenger") on 7 July 1989, the Reverend Jannie Malan, the Moderator of the Southern Transvaal Synod of the Dutch Reformed Church, wrote: “Groups
unprecedented orgy of Afrikaner anarchy.”18 Letoit’s music was never played on South African radio in the late 1980s - not surprising considering its subversive content. One particularly well-known Letoit song included a coda set to the tune of Apartheid South Africa’s national anthem, “Die Stem”, replacing the anthem’s words with a bitter attack on the imperviousness of whites to black suffering under the Apartheid regime.19 Seeing young South Africans from Stellenbosch, the heart of white Afrikaner nationalism, singing scatological lyrics about the National Party

that claim to offer a so-called ‘alternative’ Afrikaans music, are shamelessly attacking religion and the fundamental values that underpin God’s Word. ... It is an attack on the establishment and the norms of the community ... On the song ‘Boer in Beton’ [Boer in Concrete], André Letoit says he doesn’t go to church because it’s boring ... it’s an onslaught on everything that’s decent and accepted for the Christian.” (My translation from the original Afrikaans, cited by Mariana Kriel, “Waar is die ‘alternatiewe Afrikaners’ ’n dekade na Boereblues en Voëlvry?”, available at <http://www.utr.ac.za/artS/afrik/amok/angel12b.htm>.)

18 The [Cape Town] Cape Times (1 July 1988) 8, cited ibid.

19 “Black September”, on the Niemandsland album. Some short excerpts convey an impression of how bitingly subversive Letoit and his fellow Voëlvry artists were, particularly given that they were white Afrikaners singing in Afrikaans (unfortunately, much is lost in my English translation, provided alongside):

```
September is die mooiste,
Mooiste maand
Viooltjies in die voorhuis
En riots orals deur die land
... Die tyres het gebrand
Daar by Manenburg se kant
Al die volk was hoenderkop
Die Casspirs vol guns gestop
... Oor ons afgebrande skole
Met die kreuns van honger kinders
Rys die stem van all ons squatters
Van ons land, Azania
Ons sal traangas, ons sal treurnicht
Ons sal offer wat jy vra
Ons sal dobbel in Sun City
Ons vir jou, Suid Afrika.
```

```
September is the prettiest.
Prettiest month
Violets in the sitting room
And riots all over the land
... The tyres were burning
In Manenburg
The volk were in panic
The armoured cars were stuffed with guns
... Through our burnt-down schools
With the cries of hungry children
Rises the voice of all our squatters
Of our land, Azania
We will teargas, we will mourn not
We will offer all you ask
We will gamble in Sun City
We for you, South Africa.
```
government set partly to the tune of the revered national anthem, we knew the system was finished.
And indeed, by the end of that year it was.

The point is that popular culture is more than just entertainment, just another product to be traded between nations. In the next section of this thesis, I summarise the justifications which countries advance for their domestic cultural industry development schemes, and the reasons for their belief that popular culture should not be treated as just another tradeable good. But I do not discuss at length the many implicit links between domestic cultural expression, democracy and the health of a society. I assume, as my point of departure, that cultural products do deserve some kind of specific treatment within the world trade regime, because of their unique role in society. Subsequently, in section 5.4.4, I briefly mention some of the international human rights instruments that set out the extent of cultural autonomy which people should be accorded, in an ideal world. But this thesis does not delve into the justifications for according people such rights. While I feel that the ideological justifications for the world trade regime do require reiteration (as I do in the initial portions of Chapter 3), the need to foster cultural expression in a society, particularly by marginalised groups and individuals within that society, is scarcely debatable. If I am remiss in not discussing the rationale for promoting culture at length, it is because I believe so implicitly in the power of cultural expression that the rationale seems self-evident. I grew up in a society in which valuable cultural expression was banned from being broadcast or performed, denying many young white South Africans access to opinions which might have made them question the system they were part of, which they were conscripted into the South African Defence Force to fight for, and for which many needlessly died. The lesson is that people must be given access to their fellow
citizens' voices, articulating individual and common experiences in their society. If only white South Africans could have heard their protest singers, how different our country might be today.
2. Domestic Cultural Industry Development Schemes

In the modern era, you do not defend your borders with guns. You defend your borders with culture.

- Luis Mosca, Uruguayan Minister of Economy and Finance

2.1 Justifications for Domestic Cultural Industry Development Schemes

Many member states of the WTO\(^2\) deploy domestic cultural industry development schemes ("DCID schemes") whose intended effect is to foster indigenous production of mass-media products, by way of the provision of subsidies and through market interventions in the form of minimum domestic distribution quotas, which serve to either implicitly or explicitly restrict the free distribution of foreign-produced mass-media products in their countries (or, in the case of the European Union, within the common market territory of the EU). Three principal policy objectives are usually advanced by governments to justify the implementation of such schemes: (i) a positive cultural development argument; (ii) the defence of the integrity of domestic social values; and (iii) realising an industrial development strategy for domestic producers of audiovisual products through market demand and scale interventions, often including an overt export strategy. The first and second justifications are unashamedly ideological, while the third is predominantly industrial.

First, countries argue that their governments are entitled to support the development of their own indigenous culture(s), shared values and national or collective identity, as expressed through audiovisual products, and indeed may be bound to do so as a function of good governance. Far from


\(^2\) The WTO provides the institutional and procedural framework for the coordination and liberalisation of international trading relations - see the discussion of its evolution in section 3.1 below.
having a chauvinistic nationalist agenda, DCID schemes are typically designed to facilitate public expression by voices in society that would otherwise be marginalised, thereby leading to a diversity of audiovisual products that would not be realised by market forces, and to foster “a means of communication among groups and cultures in the wider society” within a particular territory governed by shared political and economic institutions. For example, the Green Paper preceding the European Community’s (as it was then known) DCID scheme states:

Television will play an increasing role in developing and nurturing awareness of the rich variety of Europe’s common cultural historical heritage. The dissemination of information across national borders can do much to help the peoples of Europe to recognise the common destiny they share in many areas.

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22 A sound economic and public policy justification can be argued for DCID schemes on the basis that they realise externalities which domestic cultural industries would not have an incentive to pursue by the market alone, and hence that such schemes enhance market efficiency. For helpful treatments of the externalities argument in a trade law context, see Warren F. Schwartz and Eugene W. Harper, Jr., “The Regulation of Subsidies Affecting International Trade” (1972) 70 Mich. L. Rev. 831 at 841-847; John Terry, “Sovereignty, Subsidies, and Countervailing Duties in the Context of the Canada-United States Trading Relationship” (1988) 46:1 U.T. Fac. L.Rev. 48 at 52. A fuller discussion of the externalities justification is, unfortunately, beyond the scope of this thesis.


24 In this thesis I refer to the European Economic Community (“EEC”), subsequently the European Community (“EC”), and now the EU (since 1 January 1994) by its various names as is most appropriate to the time-frame under discussion.

In a similar fashion, the Australian Broadcasting Services Act 1992, the legislative framework for the DCID schemes designed and implemented by the Australian Broadcasting Authority ("ABA"), states that one of its objects is "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity."  

Underlying such claims for the positive role which domestically-produced mass-media products should play, is a belief that the output of cultural industries is substantively different from other tradeable goods and services, and should hence be accorded exceptional treatment. Bernard Ostry, a former Canadian public broadcasting executive and Communications Deputy-Minister, argues that DCID schemes are critical to social cohesion and development because, "[a] country, a nation, a community, is more than its economy. Something other than commerce and trade give it unity and integrity. We live by imagination, which expresses itself in culture. And what is more and most of all, we not only live by imagination, but we live together by imagination."  

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27 S. 3(e). Obviously, many countries use broadcast regulatory schemes for less benign purposes, such as to suppress political dissent and/or minority cultures. See, e.g., Monroe E. Price, "The Market for Loyalties: Electronic Media and the Global Competition for Allegiances" (1994) 104 Yale L.J. 667 at 673, where the author takes a dim view of the agenda behind broadcast regulation being used "as an instrument for "cohesiveness"" in Turkey. However, these suppressive policies can be distinguished from the DCID schemes deployed by countries such as Canada, South Africa and Australia, which seek to advance national cultural identity and diversity, but shy away from any form of explicit content-control of the audiovisual products produced. They do so by defining domestic product, not by reference to its content, but rather according to the nationality of its financiers, creators and producers, and of the artists appearing in it. The "content firewall", as I shall call this paradox infra, leads to difficulties in DCID schemes realising their stated aims due to the phenomenon of "Stanbury's iguana" - see both the discussion in section 4.3.2 and the critique by Chief Justice Brennan of the Australian High Court in section 5.4.2.2 below. Price acknowledges that broadcast regulation can be inclusive rather than chauvinist, and cites the Irish Broadcasting Authority Act as an example of such an approach (ibid. at 671 note 15.) The Australian objects clause cited here is very similar to the Irish provision cited by Price, as indeed are the relevant objects clauses in Canadian and South African legislation.

In short, as former European Commission President Jacques Delors put it, the argument is that "culture is not a piece of merchandise, like other things." This premise underlies the second ideological rationale for DCID schemes, defence of domestic social integrity. As a corollary to the positive cultural development justification, policy-makers in countries which implement DCID schemes argue that imported audiovisual products such as television drama serials tend to embody certain cultural values of the foreign country in which they are produced - in most cases the United States - which may be corrosive of the cultural and social value system in the importing country. US writers tend to assume that such policies have Draconian and xenophobic motivations. "For instance," suggests W. Ming Shao in the Yale Journal of International Law, "if the economic elite of a developing country watch Dallas or another US television show that portrays lavish lifestyles, they may develop aspirations or expectations that reduce the amount they are willing to sacrifice for indigenous development or other important national goals." But, in fact, DCID scheme proponents in countries such as Canada, Australia and South Africa do not argue for complete exclusion of foreign audiovisual products, as such US commentators may suggest. "[T]he concern

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29 Speaking at the 1989 Assises de l'Audiovisuel in Paris, quoted by Richard Collins, "The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community" (1993) 11 Cardozo Arts & Ent. L. J. 361 at 362, from Assises Européennes de l'Audiovisuel, Projet Eureka Audiovisuel 47-48 (Ministere des affaires etrangeres, Republique Francaise and Commission of the European Communities 1989). A more extensive analysis of whether such cultural goals are in fact realised by DCID schemes is beyond the scope of this thesis; however, Collins' writing on the subject is very helpful. In addition to the article on this issue cited here, see also his book-length discussion of Canadian DCID schemes and their cultural outcomes: Richard Collins, Culture, Communication, and National Identity: The Case of Canadian Television (University of Toronto, 1991).

is not with the ease of access to the products of other cultures,” the Canadian Department of Communications has argued. “[i]t is rather with the difficulty of access to our own products.”31

An illustration more accurate than that offered by Shao, therefore, would be to compare differing societal attitudes in two developed countries: for example, the emphasis on gun-control in Canada and the United Kingdom, as opposed to the claim to constitutional protection for the right to bear arms in the United States. DCID scheme advocates would argue that the sustaining of public opinion regarding gun-control requires that they be reinforced in the mass-media. For example, Canada and Britain may find the depiction of gun use and violence prevalent in American TV police shows to be discomforting: the detectives in Canada’s Cold Squad and Britain’s Inspector Morse are a comparatively gun-shy bunch. It might be contended that, if the Canadian and British public were exclusively exposed to American representations of police work and criminal behaviour, then their own societies’ more stringent attitude to the carrying of guns would be undermined. If these contentions are accepted, the securing of some place in local mass-media distribution channels for parochial audiovisual products could be justified.

Even if one is sceptical that exposure to a continuous barrage of imported audiovisual products can have pervasive effects on societal values, or if one takes the view that any restriction on the dissemination of ideas should only be contemplated in extreme circumstances, such as in the case of hate-speech, the difficulty remains that most countries’ broadcast channels provide only limited distribution opportunities.32 The result is a zero-sum game in which the distribution of

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31 Canada, Department of Communications, Vital Links: Canadian Cultural Industries (Ottawa: Minister of Supply and Services, 1987) at 11.

32 For example, the broadcast regulator in South Africa determined in 1997 that the total of anticipated advertising revenue in the country per annum would support a maximum of five broad spectrum national terrestrial television channels for the next three years (Republic of South Africa,
foreign-made television product unavoidably displaces domestically-produced programming. In a recent discussion document on Australian television broadcast quotas, the ABA notes that “[r]egulations for domestic content quotas for the television industries have been adopted by the majority of western countries”, and that most use similar mechanisms whose common objective is “promoting the enhancement of national culture by limiting the consumption of foreign programs”. In absence of such defensive measures, the result will be what Ostry describes as “this muffledom, this smotheration, this drowning out of our own voices and expression”.  

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[34] Australia, Australian Broadcasting Authority, Discussion Paper: Review of the Australian Content Standard (Sydney: Australian Broadcasting Authority, July 1998) (hereinafter Australian Content Standard Review) at 24; available at <http:www.aba.gov.au/what/program/pdf/acdpfin.pdf>. The cited statement illustrates how broadcast policy primers are often guilty of conflating the positive and defensive ideological rationales, sliding easily between the two in order to exaggerate the supposedly apocalyptic results of neglecting either policy pillar. Note 60 infra provides a similar example from South Africa. The two rationales are kept carefully distinct by many writers; see, e.g., Joyce Zemans on the political and cultural objectives underlying Canadian cultural policy: “First among them is the establishment or reinforcement of national identity and the promotion of national unity. Joined to this is a policy of ‘cultural defence’, prompted by the fear of ‘cultural imperialism’ which threatens national sovereignty.” - Joyce Zemans, “Where Is Here? Canadian Cultural Policy in a Globalized World” (Tenth Annual Robarts Lecture, York University, 13 March 1996), published as Where Is Here? (North York, Ontario: Robarts Centre for Canadian Studies, 1997); similarly, William Stanbury says that “there are two key implicit objectives in Canada’s broadcasting policy (and they are interrelated). The first is to expand the output of messages designed to create and/or maintain the differentiation of Canada/Canadians (and to reduce/restrict the relative supply of US-based messages). The second is to create economic rents and opportunities for the producers (creators) and distributors of what are defined as “Canadian programs” to distribute their wares.” [Emphasis in original.] - William T. Stanbury, “Canadian Content Regulations: A Consumer Perspective” (paper delivered at the Conference on Economic and Public Policy Issues of the Information Economy, Institute for Policy Analysis, University of Toronto, October 1997) at note 18, c. 3, page 11.

Third, and often as a subsidiary justification to the above two ideological arguments, advocates of DCID schemes suggest that there are worthwhile economic gains to be made out of developing a country’s comparative advantage in the production of mass-media products. For example, jobs created in cultural industries in Canada are 40 per cent better-paying than the average wage in that country, and each person so employed generates an average of 1.6 more jobs in other areas of employment.\(^{35}\) The cost of creating a job in the Canadian cultural industries is one-tenth of that in light industry, and is one-twentieth of the cost in heavy industry.\(^{36}\) Torontonians, accustomed to side-stepping downtown streets laden with film crews on outside shoots, would not be surprised to hear that the entertainment industry is now Ontario’s second-largest, surpassed only by auto manufacturing.\(^{37}\) Furthermore, development of the domestic television industry has been demonstrated to have significant positive effects on related media industries, from companion businesses such as film, video, music and advertising to upstream suppliers such as set and costume designers, lighting and technical advisors, etcetera.\(^{38}\) Also, a “software/hardware relationship” has

\(^{35}\) Jack, supra note 23. But see Daniel Schwanen’s debunking of this justification as a “dead end”, in “A Matter of Choice: Toward a More Creative Canadian Policy on Culture” (1997) 91 Commentary (C.D. Howe Institute) 14-15. (Job-creating rationales for protectionism in other industries have invariably misallocated resources and cost more than they were worth.)

\(^{36}\) The claimed figures are: cost of creation of a job in the cultural industries - Can$10,000; in light industry - Can$100,000; in heavy industry - $200,000. (Canadian Conference of the Arts, “The Canadian Cultural Sector: Putting Creativity and Imagination to Work” (Ottawa: Canadian Conference of the Arts, 1994) at 1-2, cited by Zemans, supra note 33 at 29, endnote 6.)

\(^{37}\) This statistic was cited by Ron Atkey, a Respondent to the paper delivered by Bernier at the Canadian Bar Association - Media and Communications Law Section, Law Society of Upper Canada, 18 April 1998, supra note 7. Toronto is the third-largest film production centre in North America after Los Angeles and New York, and the second largest in television, after Los Angeles (Christopher Harris, “Lights! Camera! Action!” The [Canada] Globe and Mail (30 October 1997) C1).

been identified, where a strong national presence in audiovisual production in turn stimulates the development of relevant electronics industries through the use of such equipment in production, as well as by audiences as consumers.\textsuperscript{39}

In a best-case scenario, DCID scheme support may develop domestic cultural industries to such an extent that they consistently produce mass-media products which are of sufficient quality to succeed in export markets, thereby paying for themselves and allowing the DCID scheme to be scaled back.\textsuperscript{40} For example, Toronto’s Nelvana Limited, one of the world’s leading animation production houses, earned 92 per cent of its revenues from exports in 1997.\textsuperscript{41} In January 1998 the company was contracted by CBS to fill the US network’s entire Saturday morning animation roster - an unprecedented achievement for a non-US programme supplier.\textsuperscript{42} Nelvana’s success story is eclipsed only by that of its Montreal-based competitor, Cinar Films Inc., pioneer of non-violent and gender-sensitive children’s programming. One of Cinar’s current hits, Arthur, is the most popular children’s show on PBS in the US and has been sold to 92 other countries.\textsuperscript{43} Both companies benefit significantly from the supply of young animators graduating from Ontario’s outstanding Sheridan


\textsuperscript{40} This argument bears more than a coincidental resemblance to conventional “infant industry” policies. See e.g. comments made by the then-Chair of the Canadian Radio-television and Telecommunications Commission (“CRTC”), Keith Spicer, regarding Canada’s broadcast quota-based DCID schemes: “For 25 years, the Canadian-content rules laid down by the Canadian Radio-television and Telecommunications Commission have worked spectacularly well. They were classic infant-industry nurturing.” (“Broadcasting Regulation: is it Obsolete?”, \textit{The [Canada] Globe and Mail} (8 June 1993) A15, cited by Stanbury, \textit{supra} note 33 at c. 2 note 4.)

\textsuperscript{41} Cited by Atkey, \textit{supra} note 37.


College, the world’s third-largest school of animation. There can be no better demonstration of the benefits of investment in cultural industries, and the multiplier effect which results, than this virtuous circle which has developed in the Canadian animation industry.

The more frequently cited industrial rationale, however, is defensive - or protectionist, depending on the ideological stripes of the observer. The cost of producing mass-media products domestically in smaller markets is invariably far greater than the cost of purchasing similar products from larger foreign, and particularly American producers, so that many countries have to “buy down” the cost of domestic production in order to compete with the US entertainment industry. For example, US programming which cost, on average, US$1 million per hour to produce could be sold for US$50 000 per hour in the United Kingdom. The reasons are straightforward:

It is economically efficient for producers in a large entertainment market to sell to smaller markets. While the initial production cost of a television program is quite high, and accounts for most of the program’s total cost, the marginal cost of selling a program to an additional broadcaster is quite low. The low marginal cost to a US


45 Clint N. Smith, “International Trade in Television Programming and GATT: An Analysis of Why the European Community’s Local Program Requirement Violates the General Agreement on Tariffs and Trade” (1993) 10 Int’l Tax and Bus. Lawyer 97 at 102-3 and the accompanying footnotes. For a summary of recent international trade flow data illustrating the overwhelming dominance of the US entertainment industry in the world market, see Shao supra note 30 at 114-119: e.g., of the top one hundred grossing films worldwide in 1993, which together earned over US$8 billion, eighty-eight were US productions (ibid. at 116). US product is particularly dominant in Canadian mass-media markets: the contents of more than 64 per cent of television programs, 60 per cent of books, 90 per cent of pre-recorded music, and 94 per cent of films consumed in Canada originated abroad, the vast majority being sourced from the US (Andrew M. Carlson, “The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports” (1997) 6 Minn. J. Global Trade 585 at 585 note 1, citing Canadian Ambassador to the US Raymond Chrétien.) In the European market, 80 per cent of films distributed for theatre screening and over 55 per cent of films shown on television are US-made. (Cahn and Schimmel, supra note 10 at 28 l, citing Elio Di Rupo, “Ouverture des Travaux”, in L’Europe et les Enjeux du GATT dans le Domaine de L’Audiovisuel (1994) 21.)
producer, which is merely the cost of taping an already-produced program and delivering the tape to a European producer, allows US producers to sell programs in Europe at prices much lower than the cost a European company would incur in producing a similar quality program on its own.46

Telling the same story from an Australian perspective:

In the USA, drama programs typically cost US$1.2 million per hour to produce. These programs are sold to US networks for US$800,000 per hour, and subsequently sold around the world at whatever price the secondary market will stand. This can be as little as a few hundred dollars. While Australia pays arguably the highest overseas per capita amount for US product, a top-rating US drama still only costs Australian broadcasters A$30,000 to A$70,000 an hour. This is far less than the price broadcasters must pay for Australian drama programs. These range from a relatively low cost for serials (approximately A$50,000 to A$200,000 per hour) to considerably higher licence fees (approximately A$200,000 to A$400,000 an hour) for adult telemovies and mini-series which have higher levels of government subsidy. This price differential between imported and Australian produced programs results in uneven competition, with the cost of local programs making their purchase less attractive to Australian broadcasters, if price were the only consideration.47

And, to demonstrate the ubiquity of the problem world-wide, from the Canadian perspective:48

46 Smith, ibid. at 102.
47 Australian Content Standard Review, supra note 33 at 23 (accompanying footnote omitted). Ross notes similarly that without their sales to foreign markets, many US productions would lose money: "On average, for every one-hour television show produced in the United States, production costs run $200,000 more than domestic networks pay. The international broadcast market has allowed United States producers to reduce or eliminate the deficit at which many shows are produced." (Brian L. Ross, "I Love Lucy,' but the European Community Doesn’t: Apparent Protectionism in the European Community’s Broadcast Market" (1990) XVI:3 Brook. J. Int’l L. 529.)
48 For fear of repetition, I do not provide a similar analysis from a South African perspective, but the comparative cost position is identical: for example, an episode of popular half-hour serial drama Dick Sithole, made in South Africa, costs R6600 (approximately US$1000) per minute, versus R500 (US$80) per minute to purchase imported US dramas such as The Bold and the Beautiful. (Chris Barron, “Local hero wipes the screen with US soaps” [South Africa] Sunday Times (20 July 1997) 15.)
[F]oreign programs are purchased at a small fraction of what it costs to produce them, usually less than 5 per cent for a TV series and 1 or 2 per cent for feature films. Hence for an expenditure of $133 million, English private broadcasters bought the right to show programs that probably cost at least $3 billion to produce, and might easily have cost $4 billion or $5 billion. It is not surprising that private broadcasters find this an attractive proposition, particularly when these shows come with the backing of extensive publicity and advertising that spills into the Canadian market.49

In fact, sale into foreign markets, at whatever price programming can command, is now a *sine qua non* of television production for the US networks. The licensing fees paid by networks for a season of a TV show (i.e. two runs) only cover around 80 per cent of production costs, and production houses therefore rely on foreign sales to break even, hoping to maintain domestic ratings long enough to last at least three full seasons - the point at which profits begin to roll in from syndication, for the one in five shows that make it.50 The peculiar export pricing characteristics of television programming, therefore, arise in part from the ability of producers of such programming in larger markets to recover a high proportion of their production costs by sales to the domestic market alone,51 and in part from their almost pure public good nature: they are both non-excludable

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50 Harold L. Vogel, *Entertainment Industry Economics - A Guide for Financial Analysis*, 3rd ed. (Cambridge, Mass.: Cambridge University Press, 1994) at 114-115. Foreign sales typically recoup the remainder of costs on one-hour shows, but only half of the remaining cash deficit on half-hour shows. (Ibid. at 117, Table 4.10.)

51 Smith, *supra* note 45 at 102. Schwanen, however, argues that there are economies from specialisation which may produce equivalent return rates for small-scale production to that enjoyed by Hollywood blockbusters, and that the real problem lies in difficulties in accessing distribution channels - a problem which should be dealt with by competition law (*supra* note 35 at 11-12). The discussion of Cinar and Nelvana above demonstrates Schwanen’s point. Similarly, a 1997 Canadian Senate Communications Subcommittee report argued that “[t]he key to success in a small market like Canada is to direct funds into niche areas where Canadian producers are strong, and to make funds available to producers in new markets, such as multimedia products, documentaries, animation, children’s programs, and so on. A less desirable strategy would be to invest in Hollywood-style movies and TV programs, because US producers will invariably do
and non-rival. Unlike the case of private goods, which can only be consumed once and whose prices across different markets therefore tend to equalise in order to cover the cost of production, exporters of public goods are able to price-discriminate in different markets, provided they have covered the (usually negligible) cost of distribution of the goods. The general trend in the international market for film and television programming is that “product flows from larger domestic markets to smaller ones - a centre and periphery flow that is determined by population size, the size of the television production industry, and, very importantly, local audience preferences.” While in most countries around the world, domestically-produced television enjoys the highest audience ratings, the margin of preference by local audiences for domestic programming, and resultant marginal increase in revenues earned through sales of advertising time around these programs, is not sufficient to outweigh the average 10:1 cost ratio for commissioning domestic vis-a-vis purchasing imported programming.

better than Canadians given their more substantial resources.” (Canada, Standing Senate Committee on Transport and Communications - Interim Report of the Subcommittee on Communications, “Wired to Win - Canada’s International Competitive Position in Communications” (Ottawa: Minister of Supply and Services, April 1997) (hereinafter “Wired to Win”) at 46.)

“Non-excludability” means that consumption of a good is impossible to exclude, or if exclusion is technically feasible, that it is too expensive to apply - e.g., the benefits of national defence are non-excludable. “Nonrivalness” means that the marginal cost of adding another person to consume the good is nil, or close to nil - e.g., mass-media products such as books and music CDs require substantial resources to produce the first, original product, but once the presses are running the cost of printing additional copies or discs is negligible. See Shao, supra note 30 at 120. For a helpful explanation of cultural products’ public good characteristics, see Schwanen, supra note 35 at 8-9.

Shao, supra note 30 at 121.

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Australian Content Standard Review, supra note 33 at 23.

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This is the case, for example, in Australia (see note 407 infra and the accompanying text in section 4.1.2), South Africa (see note 434 infra and the accompanying text in section 4.1.3), and Germany (Michael Braun and Leigh Parker, “Trade in Culture: Consumable Product or Cherished Articulations of a Nation’s Soul?” (1993) 22:1 Denv. J. Int’l L. & Pol’y 155 at 172).
Therefore, argue Michael Braun and Leigh Parker, "treating cultural works as a tradeable commodity would force it to exist under a theory of economic Darwinism, a fate that would lead to the production of cultural works by a few low cost producers." Proponents of free and open international trade in cultural products tend to ignore the fact that this market has unusual and complex economic characteristics, which are far removed from the idealised perfect competition scenario:

In the case of the film and television industry almost every possible complication exists: the number of (large dominant) firms is small, the number of units of output is small; products are highly differentiated (each film is unique); lack of information and uncertainty on both sides of the market is inescapable; supplier influenced taste formation is ubiquitous; public goods characteristics abound; externalities are common; and industry boundaries are particularly hard to define.

The price differentiation and domination of distribution which characterise such an imperfect market have disincentive effects on domestic cultural industries of smaller countries. Many of these countries accuse the United States, in particular, of dumping television programming in their markets, and of having a broader "coca-colonisation" agenda in doing so. The three rationales

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56 Ibid. at 174.

57 Simon Molloy and Barry Burgan, *The Economics of Film and Television in Australia* (Sydney: Australian Film Commission, 1993) at 68; cited in the *Australian Content Standard Review*, supra note 33 at 20. See also Collins, *supra* note 29 at 147-148, where the same points are made.

58 Consideration of the dumping allegation is beyond the scope of this thesis; however, Shao discounts it as being ill-founded (*supra* note 30 at 121-3), and other writers regard the charge is near-impossible to prove under current GATT rules: see e.g., Colin Hoskins *et al.*, "US Television Programs in the International Market: Unfair Pricing?" (1989) 39 J. Comm. 55; Bernier, *supra* note 7 at 8. For example, it is very difficult to compare the "normal value" of television programming in the US to that of other countries which have less commercially-oriented broadcasting markets, and hence virtually impossible to determine the alleged dumping margin. Demonstrating injury to like domestic products would be difficult, and Canada, in particular, would be reminded that in the *Sports Illustrated* hearings it insisted that domestic cultural products were unlike imported competitors because of their parochial content (see the discussion in section 3.2.2.2 below). No Contracting Party has ever countervailed foreign television
for DCID schemes outlined above, therefore, often coalesce and subsume each other in government policy primers,\(^\text{60}\) so that in practice they are more difficult to unpack than my discussion here may suggest.

programming on the basis of Article VI of the GATT, leading to the conclusion that the allegation is either too politically sensitive to pursue in a trade context, or simply unsustainable in current trade law.

\(^{59}\) See \textit{e.g.}, the comments of Italian director Ettore Scola: "[American] colonisation is not only economic, but chiefly cultural", and the more plaintive rhetoric of Edith Cresson, the European Affairs Minister for France, who asked, "What would remain of our cultural identity if audiovisual Europe consisted of European consumers sitting in front of Japanese television sets showing American programs?"; both cited by Presburger & Tyler, \textit{supra} note 25, at notes 67 and 68, from Johnson, "In Search of ... the European T.V. Show" (1989) 291 Europe 22. Much has been written about the alleged imperialist US hegemony and commodification of international media and communications, exemplified by the works of Herbert Schiller (see \textit{e.g.}, the summary by Shao, \textit{supra} note 30 at 126-131), as well as more contemporary analyses which focus on global media conglomerates that espouse US ideological values, \textit{e.g.}, Robert McChesney and Edward S. Herman, \textit{The Global Media: The New Missionaries of Corporate Capital} (London: Cassell, 1997).

\(^{60}\) For example, the following passage from a recent South African Communications Department policy document describing subsidy measures in international DCID scheme precedents uses each of the three arguments to buttress the other, in turn:

> Some of these systems of subsidy are very extensive, and they reflect a determination by national governments to ensure that local film and television production can cater to both domestic and international markets. These systems of subsidy are not structured so as to recoup the investments that are made. In virtually all cases, the subsidisation far outweighs the return on the investment, even in circumstances where international success and sales to overseas markets are achieved. But obviously the price is thought to be worth paying by these governments. The value they place on maintaining a sense of national identity in the face of the forces of globalisation is very great.

2.2  **How DCID Schemes Intervene in Domestic Markets: A Value Chain Analysis**

2.2.1  **Introducing the Value Chain**

Value chain analysis was developed by management theorist Michael Porter, primarily to enable companies to identify sources of competitive advantage within their specific industry.\(^6\) The value chain is a model that describes a series of value-adding activities connecting a company’s supply side (raw materials, inbound logistics, and production processes) with its demand side (outbound logistics, marketing, and sales).\(^6\) The same analysis can be applied to a particular industrial sector, in order to understand the various elements which underpin its functioning. In the cultural industries sector, this includes every process which adds value, from the initial conception of a media product by its original creators, through production of the finished product, to its distribution in the market and its consumption.\(^6\) The value chain for cultural industries is typically depicted as follows (see overleaf):

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\(^6\) This summary is taken from a helpful article by Richard Paterson, Chief Analyst, Corporate Policy and Planning, at the British Film Institute, entitled, “Policy Implications of Economic and Cultural Value Chains” in *Exploring the Limits - Europe’s Changing Communication Environment (European Communication Council (ECC): Report 1997)* (Berlin: Springer, 1997) 169 at 171.

\(^6\) *Ibid.*
For example, in the case of the television value chain, a sitcom such as *Seinfeld* was first dreamed up by its originators, Jerry Seinfeld and Larry David, who wrote the script for the 1989 pilot, “The Seinfeld Chronicles” - the ideas, rights and talent stage, which also includes the value added by the actors cast in each episode. This first stage is characterised by its low barriers to entry, and consequently the high levels of competition between creators selling their ideas, as well as actors selling their talents and existing rights-holders looking to leverage those rights so as to enter new markets. Obviously, the more sophisticated the education and training opportunities in a country, the greater will be its ability to compete at this stage of the value chain.65

The production stage, on the other hand, is characterised by imperfect competition and the small number of companies which have sufficient financial resources and infrastructure to be able to achieve the necessary economies of scale in a very expensive and difficult business.66 In July 1998, for example, two of Canada’s largest production companies, Alliance and Atlantis, merged

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64 *Ibid.* at 184.


66 Vogel, for example, explains that film production companies end up with, at best, only 31 cents of each dollar paid at the box office, before the negative costs of production are covered. “Small wonder,” he concludes, “that so many firms have found production to be more difficult and less profitable than they had at first thought.” Regarding television production, Vogel notes that because of the sizable risks and large capital investments required, independent production companies have not flourished in the US, and production and distribution have become largely consolidated into the hands of the major movie studios and other media companies with deep pockets. See Vogel, *supra* note 50 at 109 and 120.
to become the 12th largest film and television studio in North America, in order to enable them to better compete in that market. In the *Seinfeld* example, the show went into production by Castle Rock Entertainment for the NBC network in the US, and after garnering initial success began to be distributed for syndication in the US and around the world, by Columbia TriStar. Distributors add value by acquiring rights to distribution for their territories, thereby making new products available to buyers. The gateways for the delivery of *Seinfeld* into homes vary: in Canada, for example, it can be seen via over-the-air transmissions from broadcast stations such as Toronto’s Citytv, or on a US station delivered in Canada by cable, or by a direct-to-home (“DTH”) satellite provider such as ExpressVu. The management of the technology and infrastructure for such delivery by, for example, Rogers Cablesystems Inc., constitutes the value-adding activity at this stage. Because the gateway stage has traditionally been characterised by high infrastructure costs (for example, the cost of the rolling out of cable to homes), there are economic and technological limits to the number of firms that viably can offer gateways in any one market, though this barrier to entry is rapidly being eroded by both digitalisation and the proliferation of new delivery technologies such as DTH and even, one day perhaps, the Internet. Finally, at the exhibition stage, viewers watch the show on their television sets, with value added by a range of different actions, from scheduling of the show by channel programmers at the most attractive time for viewers, to sales of advertising around the program.

The television value chain therefore takes in a lengthy process of value-adding activities, from the very inception of the product until the last credit rolls up in a viewer’s living room. As theorist Tom Streeter describes it,

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‘Television’ includes the people in Hollywood and New York devoting their lives and careers to making programs, people in Washington making, changing, and enforcing laws that enable and shape the institutions in which programs are produced and distributed, and elaborate international systems of manufacturing, marketing and distribution that make the boxes available to audiences. And of course it involves the activities of audiences themselves: millions of people sitting down with millions of boxes all at the same time, and the cultures and patterns of daily life among those millions that provide the ability and motivation to buy boxes and tune in.68

The various imperfections in markets all the way through the value chain, and particularly at the production and gateway stages, offer many easy targets to governments that wish to intervene to protect domestic cultural industries. My examination of such interventions, which follows, is not intended to be an exhaustive catalogue of all of the measures deployed in the countries I examine, but is rather an itinerant survey which provides a sense of the extent to which governments and broadcast regulators around the world are compulsive interveners in their respective domestic cultural industries’ value chains, with examples of how some of these interventions are currently playing out.

2.2.2 Broadcast Quotas - Intervention to Guarantee Exhibition

The imposition of minimum quotas for the airing of domestically-made cultural works, i.e. broadcast quotas, is a typical DCID scheme intervention in the value chain. Several examples of such quotas, e.g. the 35 per cent Canadian Content (“Cancon”) quota for most Canadian commercial music radio and the 55 per cent quota for Australian television, as well as the common mechanisms

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used by drafters of the quota laws and regulations, are discussed in detail in chapter 4, below. The relevant aspect of broadcast quotas for this section of my thesis is that, no matter the proportion of domestic product they prescribe be aired, such quotas all intervene in the value chain in an identical fashion, by creating artificial demand for domestic product at the exhibition stage. This demand then has an impact all the way “upstream” (i.e. prior to the value-adding activity specifically under consideration), providing work for domestic distributors, and opportunities for domestic producers and, preceding them, domestic creators of cultural works. While generating these upstream effects is an important goal for broadcast quotas, just providing a guaranteed exhibition window for domestic product is, of itself, crucial. If the reinforcement of democratic discourse and other such externalities are to be realised, as one of the ideological goals of DCID schemes, then parochial product must be available to be heard or viewed by the domestic audience.

The importance of guaranteeing exhibition of domestic cultural works is demonstrated by the difficulties faced by British film-makers in having their pictures distributed in that country: of the 76 films made by British companies or as UK co-productions in 1995, half had not been released in the UK by May 1997.69 The major US studios occupy a dominant position at the distribution stage in most international markets - for example, they effectively control film distribution in Europe, and in Canada US-based distributors occupy 85 per cent of the theatrical film market.70 As Paterson explains, this creates the immediate problem for European film-makers of finding a distribution channel, and also has a more pervasive impact all the way upstream in the


value chain, since the US majors are able to attract the finance necessary for large investments in new films both because of their lengthy track record and on the basis that, downstream, they have such a powerful distribution channel.\footnote{Paterson, supra note 62 at 177.} France has attempted to address this problem both by financing films, i.e. intervening at the production stage, and by attempting to create a demand-pull effect at the exhibition stage by implementing screen quotas - cinemas are required to devote five weeks per quarter to French feature films.\footnote{Screen quotas are permitted in terms of Article IV of the GATT 1947, extensively discussed in section 4.2 below.} Canada intervenes at the distribution stage to protect the already small market share of domestic distributors, by requiring any new foreign distributor to handle only those films to which it holds worldwide distribution rights or in which it has invested more than 50 per cent of the production cost.\footnote{“Seldom Showing ...”, supra note 70 at 2.} This rule has been in force since 1988 but it is somewhat ineffective since it does not apply to the US majors, whose pre-existing rights were grandparented.\footnote{Canada’s exemption of the US majors from the rule followed a US threat that, if its companies were not allowed to distribute films they did not own, it would scuttle the US-Canada Free Trade Agreement negotiations. In January 1998 the EU gave notice that because the uneven application of the rule unfairly discriminated against its film distribution companies, specifically the Dutch-owned PolyGram Filmed Entertainment Co. which wished to enter the Canadian market, it would launch WTO dispute proceedings against Canada. A fortunate reprieve from the trade action occurred at the eleventh hour when PolyGram was sold to Canadian-based Seagram Co. Ltd. in May 1998. (Peter Morton, “EU set to take film complaint to WTO” The [Canada] Financial Post (28 April 1998) 5; Heather Scofield, “Seagram deal might annul EU complaint” The [Canada] Globe and Mail (12 May 1998) B16.)}
2.2.3 Subsidies - Intervention at the Production Stage

Another pervasive method of intervention is the supply of subsidies and venture capital financing to various participants along the cultural industry value chain. Direct domestic subsidies from government are the simplest form of intervention, exemplified by early Canadian initiatives such as the Canadian Film Development Corporation (the CFDC, now Telefilm Canada). As noted in section 1.2 above, the South African Department of Arts, Culture, Science and Technology introduced a R10 million direct subsidy fund in 1997. In Canada, the extent of direct funding for the film industry can be substantial: for example, in the 1993-1994 year, Telefilm contributed Can$19.4 million towards the production of 26 feature films, covering an average of approximately 40 per cent of each film’s costs. Such large demands on the state fisc have led the UK to obtain much of the necessary funds for the subsidisation of its film industry from the new National Lottery.

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75 The CFDC was established in 1968 with an initial grant of Can$10 million, and was intended to operate on a business footing in order to become self-financing. The CFDC’s first head, Georges Emile Laplame, described the agency as being akin to a bank, because it made loans and invested money in projects on the basis of their business potential, rather than the content of their scripts. However, in its first three years of operation the CFDC recouped less than 10 per cent of its investments, because English-language Canadian films have always experienced severe distribution problems in their home territory, and French-language films find it difficult to recover costs in their small domestic market. By 1990, Telefilm Canada had only been able to recoup 14 per cent of the value of its investments, and in 1998 the Oscar-nominated film, “The Sweet Hereafter”, became the first and only profitable Telefilm investment, ever. See Ted Magder, “Film and Video Production”, in Michael Dorland, ed., The Cultural Industries in Canada - Problems, Policies and Prospects (Toronto: Lorimer, 1996) at 147, 165-168; Robert Everett-Green, “Hereafter pays off for Telefilm” The [Canada] Globe and Mail (26 March 1998) C2.

76 Subsidies have been provided to South African film-makers in some form since 1957, when Jamie Uys successfully petitioned the National Party government for aid in making Afrikaans-language films. Though limited subsidies were introduced to finance vernacular-language films in 1973, the Apartheid government’s main interest was in supporting white film-makers, and separate schemes for “black” and “white” films were only amalgamated in 1990. Even then, producers were still being required to provide an undertaking that their proposed project was not being partly or wholly financed by “a revolutionary organisation”. (Nicola Galombik, “The History of the South African Subsidy Scheme” (Speaking notes for a paper delivered at the Film and Allied Workers’ Organisation general meeting, May 1990) [unpublished].)

77 Magder, supra note 75 at 168.
which will contribute the equivalent of more than Can$200 million over the next six years, and France imposes a 12 per cent tax on all theatre tickets, generating more than Can$250 million per annum for re-investment in French film production. The latter is a typical cross-subsidisation measure, taxing the exhibition stage of the value chain in order to support upstream activities; tax interventions will be considered in greater detail below.

Industry funds intervene primarily at the production stage of the value chain, though there has been growing attention to creating distribution channels, exemplified by the European Community’s MEDIA program. Industry funds also usually operate at arm’s length from government: for example, in South Africa funding allocations are determined by five panellists drawn from diverse backgrounds in the domestic film industry. Even so, there is often controversy over such funds’ decisions on allocation of support. For example, Telefilm has been heavily criticised in a recent review for having disproportionately supported larger distributors at the expense of smaller companies, which have now largely disappeared from the Canadian film industry economy.

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78 The MEDIA program was initiated in 1990, and supports the audiovisual sector in the smaller countries and more marginalised language-groups in the EC. Collins remarks that the program “is an excellent example of the Community’s recent attention to the middle stage between hardware and software distribution ... MEDIA does not support production; rather, it emphasises cultural pluralism within the Community by supporting the circulation of Community productions, particularly those made in minority languages.” (Collins, supra note 29 at 383-384.)


Many countries use similar direct subsidy measures to support their domestic sound recording industries. In Canada, the Sound Recording Development Program began with a Can$5 million grant from the federal government in 1986. Interestingly, the Canadian federal government does not administer the allocation of these funds itself, but instead routes them via the Fund to Assist Canadian Talent on Record ("FACTOR"), a private fund begun in 1982 which is supported by contributions from radio broadcasters. In other words, these broadcasters are effectively transferring rents they receive from their value-added activities at the exhibition stage, to the production stage. They do so in order to demonstrate their commitment to domestic culture, so as to comply with the licence conditions requiring such contributions established by the Canadian broadcast regulator, the Canadian Radio-televisión and Telecommunications Commission ("CRTC") - a somewhat questionable trade-off which will be investigated further in section 2.3.1 below. FACTOR, therefore, is a demonstration of a public-private partnership intervention in the value chain, principally at the stages of idea creation and production (support for the recording of demo tapes is one example of FACTOR's work), though the fund also intervenes to enable artists to access the distribution stage by helping them with promotion of their material.81

Direct subsidies are also a much-used intervention mechanism in the television value chain. In 1983 the Canadian Broadcast Program Development Fund was established with a Can$254 million, five-year budget and specific cultural objectives,82 to encourage domestic television production. It was thereafter superseded by the Canada Television and Cable Production Fund

81 Will Straw, "Sound Recording", in Dorland, supra note 75 at 95.
82 E.g. investment was to focus on programs in genres where Canadian production had hitherto been underrepresented, such as drama, children's programming, etcetera (Magder, supra note 75 at 167).
Chapter 2 - Domestic Cultural Industry Development Schemes

("CTCPF"), established in 1996 to disburse Can$200 million per year. Like FACTOR, the CTCPF is a complex public-private partnership, both in terms of contributions to the kitty and in respect of administration. A brief history is that, in 1994, the CRTC instructed Canada’s cable operators, who until then had been obtaining a levy on monthly customer subscriptions in order to finance technological development (though very little such development actually occurred), to contribute half the levy monies received to a fund set up to finance production of Canadian TV programs - the Cable Production Fund. In other words, some of the revenues from the gateway stage of the value chain were to cross-subsidise the production stage. In 1996, Can$100 million from this fund was combined with Can$50 million from government and Can$50 million from Telefilm’s (government-funded) budget, annually, to create a “super-fund”, the CTCPF. Administration of the CTCPF is split between Telefilm, which allocates half the funds through its Equity Investment Program, partly on the basis of the cultural merit of projects, and the Licence Fee Program, steered by a board appointed from the cable, broadcast and production industries, who would no doubt be more concerned with the bottom-line potential of proposed programs. In order to be non-discriminatory, the half of the $200 million annual monies disbursed by the Licence Fee Program is handed out on a first-come-first-served basis to projects which already have Telefilm approval. In February 1998 the CTCPF’s life-span was extended by the Canadian federal government for a further three years.

Administration of these interventions in the value chain can be difficult, as demonstrated by the various crises which afflicted the Canadian subsidy program in 1998. First, chaos erupted


when Telefilm failed to process its half of the CTCPF applications prior to the Licence Fee Program beginning its first-come-first-served process. Then, the Licence Fee Program was overwhelmed by the unexpectedly large number of applicants for funding (demonstrated by all-night line-ups outside its offices, pictures of which made the front pages of the Canadian press). Finally, it was realised with some embarrassment that all of the Licence Fee Program’s Can$100 million for the year had been allocated without some of Canada’s best-known domestically-produced shows, such as *Traders* and *Black Harbour*, receiving financing, a foul-up which was likely to cause their cancellation if not corrected. The federal government eventually solved the problem by authorising the CTCPF to advance Can$86 million from future fund budgets, and by obtaining a further Can$20 million in emergency bank credit. Shortly thereafter, however, Telefilm found that its budget for French-language films had been unexpectedly depleted, leaving noted film-makers without funding, because administrators failed to accurately predict project funding demand. There are few governments in the world which would have sufficient political will to bail out their cultural administrators in the generous fashion of the Canadian federal government in 1998.

On the other hand, Canada does not make use of the most traditional measure to fund domestic television production in countries with public broadcasting traditions: licence fees. Imposed at the exhibition stage, the television licence fee is still used in South Africa and the UK to fund those countries’ public broadcasting services (“PBS”), and thereby PBS production of

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parochial domestic programming. Like other interventions imposed at the exhibition stage, licence fees can be expensive and difficult to administer because the entire viewing public is being targeted rather than, for example, the small group of gateway providers in the market. Because they are highly visible additional taxes on the public, such interventions are unpopular, and in absence of either the will or ability by the state to enforce them, they quickly collapse. In South Africa licence fees only provided 18 per cent of the PBS’ income in the 1995-1996 period because of a severe piracy problem, with close to 60 per cent of viewers evading payment. On the other hand, licence fees collected by the PBS itself (as is the case in South Africa) have an underappreciated merit in substituting for direct government funding, which is a problematical mechanism because governments exerting such power have a tendency both to meddle in the content of PBS programming and to cut PBS budgets whenever the fisc faces financial problems. A licence fee-funded PBS can depend on a stable, extra-governmental source of income, and is therefore less likely to kowtow to the government of the day.

2.2.4 Tax Breaks - the Hidden Subsidy

An oft-used indirect intervention in the value chain is to provide tax breaks to cultural industries. For example, the Capital Cost Allowance (“CCA”) measure allowed investors in Canadian feature films to write off all their costs in one year. This led to substantial increases in production during the so-called “tax-shelter boom” period in Canada in the late 1970s, but there was

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widespread dissatisfaction with the quality of films produced, many of which were never
distributed, and in 1988 the CCA was reduced back to a maximum 30 per cent per year.90 A similar
South African scheme was dropped in 1988 when it became clear that its only salient results were
extensive tax fraud and a series of direct-to-video B-movies.91 Despite the failure of these schemes,
tax breaks remain a popular option for government to intervene at the production stage, effectively
reducing domestic production costs. Since the 1980s, most Canadian provincial governments have
established agencies and programs to assist film production,92 and offer tax incentives as well,
particularly in order to lure US production north of the border. As an example, the Ontario
provincial government currently offers a film and television tax credit of 20 per cent, and in May
1997 it introduced a special 35 per cent credit for films made in Ontario using computer animation,
in order to attract work for the burgeoning animation industry in the province.93 In June 1998,
British Columbia sweetened its tax incentive scheme to match that of Ontario, in order to prevent

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90 Magder, supra note 75 at 166-167.

91 "Golden Rendezvous Part II", [South Africa] Finance Week (22 May 1997) 24-25. The names of
some of the applicants for subsidies in 1989 illustrate the types of movies made under the subsidy
schemes in the 1980s: "American Ninja IV", "Kickboxer" and "Warriors from Hell" are fairly
representative. (Galombik, supra note 76.)

92 E.g., the Ontario Film Development Corporation was established in 1986, and according to its
1997 year-end figures, it provided some form of assistance to 161 productions shot in Ontario
during the year, at a total cost of Can$635,1 million. Two-thirds of the productions were
Canadian, the remaining third US productions attracted to Canada ("More money splashed on
another example, the Newfoundland and Labrador Film Development Corporation was
established by the Newfoundland government in 1997 to duplicate the success of the Nova Scotia
funding body, which helped generate a film and television industry in that province worth more
than Can$65 million in 1997, off a base of Can$7 million in 1990. The Nova Scotian approach is
to take a third of the equity in projects, up to a maximum of Can$200,000, and to support projects
on the basis of provincial business and employment benefits potential alone. (Douglas Bell, "Nova
Michelle MacAfee, "Fog lifts from opportunities for Newfoundland talent" The [Canada] Globe
and Mail (31 December 1997).)

93 "More money splashed ...", supra note 92.
the feared flight to Toronto of what British Columbia Premier Glen Clark described as “a classic footloose industry”.\textsuperscript{94} This illustrates how interventions in the value chain by competing jurisdictions can fall prey to the “race-to-the-bottom” syndrome.

The combined impact of all of these interventions, from direct funding to cross-subsidisation to tax credits, can be staggering. Examining total funding of television production in Canada is a revealing exercise: in 1996-1997, the Telefilm’s Equity Investment Program and the Licence Fee Program of the CTCPF contributed 30 per cent and 13 per cent respectively, while tax credits offered by provincial governments paid for 16 per cent of total Canadian production expenses. The remainder, just over two-fifths of total costs, came from private sector producers, distributors and broadcasters. In the example of the 26 Canadian films assisted by Telefilm in 1993-1994, cited above, close on a further 30 per cent of those films’ costs were covered by indirect government contributions such as tax breaks, meaning that government was, in total, covering 70 per cent of the costs of each film.\textsuperscript{95} Given such pervasive intervention, particularly at the production stage of the value chain, private film and television production in Canada is very much a publically-funded activity.\textsuperscript{96}

2.2.5 Investment in Human Capital

A further publically-funded intervention in the value chain is government support for education and training of Canadians entering the cultural industries. The Ontario provincial budget


\textsuperscript{95} Magder, \textit{supra} note 75 at 168.

for 1998 included, as an example, Can$10 million to support students at three media training institutions, including Sheridan College, the leading animation school discussed in section 2.1 above. The scale of such intervention is impossible to measure precisely - for example, even basic schooling contributes something to the ability of Canadians to create ideas and to develop their talent - but it is particularly important to sustaining a domestic industry that there be a steady stream of media industry specialists qualifying from the country’s tertiary education institutions.

2.2.6 Where Development Ends and Protectionism Begins

On the other hand, there are some government interventions in the cultural industry value chain which are so robust that they cannot fairly be described as cultural development measures, but are rather out-and-out protectionism. In the *Sports Illustrated* trade litigation between the US and Canada, discussed in section 3.2.2 below, the Canadian measures challenged included a prohibition on the physical importation of split-run editions of US magazines and an 80 per cent excise tax on the value of advertising placed in split-run periodicals that is directed at the Canadian market. Outright bans and taxes which are intended to be prohibitory rather than revenue-raising, such as was the case in this instance, fall blatantly into the protectionist category. However, it should be noted that it is not always domestic culture that is the beneficiary of such protectionism, but rather domestic cultural industries. For example, section 6(2) of the CRTC’s *Broadcast Distribution Regulations* requires all licensed distribution operations (e.g. all cable systems operators) to “ensure that a majority of the video channels ... received by a subscriber are devoted

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to the distribution of Canadian programming services”. The crucial criterion for a channel to be regarded as distributing a Canadian programming service, however, is that the service should “originate entirely within Canada”, and no cultural criteria such as the “Canadianness” of the services’ content are set out in the Regulations. When cable systems were brought within the purview of Canadian broadcast legislation in the 1970s, the quid pro quo which Canadian cable operators provided was their agreement to the “simultaneous substitution” rule, whereby a Canadian broadcaster’s signal is substituted for that of the US channel being carried on the cable service, whenever the Canadian broadcaster has purchased the rights to air the programming. A practical example of how this rule operates is provided by its application to the 1997 US season hit drama, Ally McBeal. A Fox network show, it first entered the metropolitan Toronto market on Rogers’ cable service, carried on the Fox affiliate WUTV, a station in Buffalo, not far from Toronto just over the US-Canada border. With the show, scheduled in a Monday evening prime time slot, came all the US advertisements - but as soon as the show’s popularity became evident, Canadian broadcast network CTV purchased the Canadian rights and scheduled the show simultaneously with the WUTV slot. Rogers then switched its cable feed to CTV for the duration of the show, each Monday evening, meaning that only the advertising sold by CTV was reaching the Canadian market. The impact of this rule, then, is to provide Canadian broadcasters with substantial windfall revenue from shows with confirmed popularity, since they are reaching audiences that might


99 S. 1 of the regulations; Grant, supra note 98 at §131-15.

100 Liss Jeffrey, “Private Television and Cable”, in Dorland, supra note 75, 203 at 208; the rule is currently provided for in s. 30, “Programming Service Deletion and Substitution”, in the Broadcasting Distribution Regulations (Grant, supra note 98 at §131-173).
otherwise be watching the Fox affiliate’s simultaneous screening, and are in the happy position of being able to sell these audiences to their advertisers for as long as it remains profitable to do so. Other than the revenue benefits, and hence perhaps the indirect effect that some of that revenue will be ploughed back into Canadian programming, there is no cultural benefit resulting from this rule, whatsoever.

2.2.7 Foreign Ownership Restrictions

Finally, a common and overarching intervention in the value chain is the use, by many countries worldwide, of restrictions on foreign ownership of cultural industries. The US leads the way here, preventing the grant of a broadcast licence to any foreigner or their representative, or to any company in which a foreigner is a director or officer and more than 20 per cent of shares are held or voted by foreigners, their representatives or a foreign registered company, or to any company which in turn is directly or indirectly controlled by any other company in which more than 25 per cent equity or control resides with foreigners.  

In Australia, section 3(b) of Broadcasting Services Act states that one of Act’s objects is “to ensure that Australians have effective control of the more influential broadcasting services”. In respect of foreign ownership of television licensees, the limit set by section 57(1) of the Act is, effectively, 15 per cent of the voting shares. Furthermore, section 57(3) states, “2 or more foreign


\footnote{S. 57(1) states that, “[a] foreign person must not be in a position to exercise control of a commercial television broadcasting licence”; as defined in the Schedule to the Broadcasting Services Act, a foreigner will be in a position to exercise control of an Australian licensee where that person holds more than 15 per cent of the voting shares of the company.}
persons must not have company interests in a commercial television broadcasting licensee that exceed 20 per cent"; and section 58(1) states, "not more than 20 per cent of the directors of each commercial television broadcasting licensee may be foreign persons."\(^{103}\) Despite these tough provisions, in late 1992 one of the three Australian national television networks, the Ten Network, was sold out of receivership to the Oltec consortium, with Winnipeg-based CanWest Global Communications Corp. putting up most of the consortium’s money. Unfortunately, therefore, Ten’s white knight had the single flaw of being foreign. After more than five years of negotiations with the Australian regulator and the federal government, CanWest sold 37 per cent of its Ten shares, to bring it back down to a maximum 57.5 per cent economic (i.e. non-voting shares) interest, and a 15 per cent voting interest, in the process making itself a profit of in excess of A$100 million on its initial investment.\(^{104}\) The affair demonstrates that the existence of non-voting shares in some countries (Canada and South Africa included) makes something of a mockery of foreign ownership limitations - for in reality, the holder of a large portion of a company’s equity, whether voting or not, does have the potential to exercise control over that company - and that foreign ownership rules can be exceedingly pliable should economic circumstances so require.

\(^{103}\) There are also foreign ownership limits in respect of subscription television services (s. 109). S. 1 of the Act defines a “foreign person” to mean, “(a) a natural person who is not an Australian citizen; or (b) a company, wherever incorporated, where natural persons who are not Australian citizens hold company interests in the company exceeding 50%; or (c) a company, wherever incorporated, where (i) a company referred to in paragraph (b); or (ii) natural persons who are not Australian citizens and a company or companies referred to in paragraph (b); hold company interests in the company exceeding 50%.”

In South Africa, section 48 of the Independent Broadcasting Authority Act\textsuperscript{105} prohibits one or more foreign persons from exercising control over a private broadcasting licence, or from having financial or voting interests in a private broadcasting licensee exceeding 20 per cent in total. Furthermore, not more than 20 per cent of the directors of a private broadcasting licensee may be foreigners. The precise interpretation of the South African foreign control limit remains a matter for some speculation: though section 48 was extensively debated in regulatory hearings for the issue of broadcast licences over the last three years, South Africa’s most respected commercial law bench, the Witwatersrand Local Division of the High Court, declined an opportunity to provide an authoritative interpretation in the only significant broadcast law case to date in that country, \textit{Onshelf Trading Nine v De Klerk}.\textsuperscript{106}

In Canada, explicit restrictions on foreign ownership of broadcasting licensees date back to the 1958 Broadcasting Act, which set the initial limit at 25 per cent voting control.\textsuperscript{107} Section 3(1)(a) of the current Broadcasting Act\textsuperscript{108} states that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians”, and the limit on direct control of a corporation which is a broadcast licensee, is capped at 20 per cent of voting shares and the equivalent level of control. However, the effective limit, when the right of foreigners to also hold 33\(\frac{1}{3}\) per cent of the voting

\begin{footnotesize}
\begin{enumerate}
\item No. 153 of 1993. The Act is available at \url{<http://wn.apc.org/iba/actaa.htm>}.\textsuperscript{105}
\item \textit{Onshelf Trading Nine (Pty) Ltd v De Klerk NO and others}, 1997(3) SA 103(W).\textsuperscript{106}
\item Broadcasting Act, S.C. 1958, c.22, s. 14(1). On the history of foreign ownership limitations in Canada, see Jeffrey Kowall, “Foreign Investment Restrictions in Canadian Television Broadcasting: A Call for Reform” (1992) 50 U.T. Fac. L. Rev. 61.\textsuperscript{107}
\item Broadcasting Act, S.C. 1991, c. 11. (Grant, supra note 98 at §104.)\textsuperscript{108}
\end{enumerate}
\end{footnotesize}
equity in the licensee’s parent company is taken into account, is actually 46% per cent.\textsuperscript{109} Canada’s foreign ownership restrictions in respect of broadcast licensees may hence seem, surprisingly, to be more lax than those of the US, but in fact the Investment Canada Act\textsuperscript{110} provides a very effective discretionary back-stop for the Canadian government. This Act allows the federal government to review any transaction that is considered to relate to “Canada’s cultural heritage or national identity”. In such a review, the office of Investment Canada looks at the impact of the proposed transaction on employment in and exports from Canada, the degree of participation by Canadians in the business that is the subject of the transaction, possible implications for Canadian innovation and technological development, competition effects, the compatibility of the proposed foreign investment with Canada’s cultural policies, as well as any effect it might have on Canada’s position in the world.\textsuperscript{111} Such a review had to be conducted, for example, in the case of the merger between Toronto-based cinematic theatre chain Cineplex Odeon Corp. and Sony Corp. of America’s Loews Theatre Exhibition Group in October 1997, with Cineplex being asked to guarantee more screen time for Canadian films in order to obtain Investment Canada approval.\textsuperscript{112}

Foreign ownership restrictions in respect of cultural industries are predominantly justified on the ground that the media are vital organs of society, and for strategic reasons should be kept in

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\textsuperscript{109} Direction to the CRTC (Ineligibility of Non-Canadians), SOR/97-192. (Grant, supra note 98 at §111.) S. 2 of the Direction states that “no broadcasting licence may be issued ... to an applicant that is a non-Canadian”, where a “Canadian” is defined to include a “qualified corporation” as defined in s. 1 of the Direction, and the various direct and indirect percentage limits for licensees and their holding companies are set out there.

\textsuperscript{110} Investment Canada Act, R.S.C. 1985, c. 28, s. 15(a).

\textsuperscript{111} S. 20.

\textsuperscript{112} Shawn McCarthy, “Cineplex deal may hinge on sale of unit” The [Canada] Globe and Mail (3 October 1997) B1.
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the hands of a country's own citizens. It is also argued that domestic media owners will have far
greater knowledge of local conditions, and are more likely to develop domestic cultural industries
as a result. Thus, goes the logic, entrusting ownership of companies involved in the media value
chain to locals, is more likely to result in the production of parochial product. As part of my
discussion in the next section of this thesis, I will be examining this claim.

2.3 Side-Effects of Intervention

2.3.1 The Domestic Industry Protection Trade-Off

Writing in 1980, Colin Hoskins and Stuart McFadyen concluded that the most significant
side-effect of broadcast regulation in Canada was that it had operated largely to the benefit of
private broadcasters, who received state protection from US competition in return for promising
undemanding levels of Canadian content, and, in any event, did not always fulfil these promises.113
Matthew Fraser describes the CRTC as having been, over the years, in “tacit complicity with big
industry interests”, and the “protector of the privileges of the large established players in the
Canadian broadcasting system.”114 Ownership in the Canadian television distribution services

113 See, generally, Colin Hoskins and Stuart McFadyen, Canadian Broadcasting: Market Structure
ago as 1965, a few years after the licensing of Canada’s first two private television operators, the
CTV network and the Télémétropole station in Montreal, by the Board of Broadcast Governors,
the Fowler Report found that few of the promises made by the licensees in respect of
programming had been kept. “A promise made by a broadcaster to obtain a licence … should be
an enforceable undertaking,” the report cautioned, “and not a theoretical exercise in imagination
or a competitive bid in an auction of unrealistic enthusiasm.” Thereafter, observed the 1986
Caplan-Sauvageau Report, there developed “the unbroken pattern by which new applicants
promise the moon if they receive a television licence, and are invariably back before the CRTC in
the briefest possible time seeking relief from their own commitments.” (See Canada, Committee
on Broadcasting, Report of the Committee on Broadcasting (Ottawa: Queen’s Printer, 1965) at
107; Caplan-Sauvageau Report, supra note 49 at 38.)

114 Matthew Fraser, “Welcome to the Information Superhypeway” The [Canada] Globe and Mail (13
September 1997) D1. Fraser teaches broadcast policy at Ryerson Polytechnic University in
industry is highly concentrated: three cable systems operators, Rogers, Shaw and Vidéotron, between them have more than 60 per cent of the total subscriber base.\textsuperscript{115} Canadian cable companies, in particular, have been heavily criticised for monopolistic mischiefs such as their negative-billing debacle in 1995.\textsuperscript{116} The response from the regulator, observes one Canadian newspaper editorial, has been “only the occasional tut-tut”.\textsuperscript{117}

Of course, much has been written about the theory that regulators are “captured” by the industries they are supposed to police.\textsuperscript{118} Regulation is defined, typically, as constraint by the state

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Toronto.

\textsuperscript{115} Distribution services include direct-to-home satellite services StarChoice and ExpressVu. Current cable subscriber figures are: Rogers - 2.2 million; Shaw - 1.5 million; Vidéotron - 1.4 million; total subscriber base for distribution services - 8.3 million. (Robert Brehl, “Canada’s 2 DTH satellite firms pass 100,000-customer mark” \textit{The [Canada] Globe and Mail} (30 July 1998) B3.) I am unable to calculate a precise Herfindahl-Hirschman Index (“HHI”) due to the difficulty of obtaining current data for all of the smaller operators, but since the three leading cable operators alone generate an HHI value in excess of 1300, the total HHI for all the operators in the market would likely attest to high levels of concentration, i.e. close to the benchmark of 1800.

\textsuperscript{116} A new tier of speciality channels was automatically supplied to subscribers - and billed to them - unless subscribers called in and asked not to receive the new service. To make matters worse, popular existing channels were moved up to this new tier, effectively forcing consumers to take the new option if they wanted to continue with their existing television viewing preferences. This sparked a consumer revolt and Rogers issued a public apology. See Jeffrey, \textit{supra} note 100 at 230-231.

\textsuperscript{117} “Playing monopoly” \textit{The [Canada] Globe and Mail} (28 October 1997).

\textsuperscript{118} There is a rich vein of legal, economics and political science scholarship on regulatory theory, by writers such as Kahn, Jaffe, Bernstein, Posner, Stigler, Peltzman, and Mitnick. While a full consideration of the theory of regulatory capture is beyond the scope of this thesis, a brief summary of the theory’s development through the literature follows. The so-called “iron triangle” phenomenon (i.e. untoward cosiness between the regulated industry, the regulatory agency officials, and the relevant government ministries) was closely documented in post-war analyses of US agencies created from the end of the 19th century until the conclusion of the economic restructuring of the US economy in the New Deal period. Writing in 1954, Jaffe noted “a significant current phenomenon ... present where the administrative action reflects predominantly the solution desired by the industrial group.” Around the same time, both Huntington and Bernstein examined regulatory agencies in the US and found much evidence that these regulators had been “captured” by the very industries they were meant to be regulating. In the context of broadcasting in particular, a celebrated 1969 book by Kohlmeier exposed the mutual back-scratching prevalent at the time between the Federal Communications Commission and US broadcasters. Finally, the regulatory capture theory reached something of an apotheosis in the
of private activity in order to promote the public interest.\textsuperscript{119} In the case of broadcast regulation, the production of parochial cultural works is a primary public interest objective, and the various interventions in the value chain described in the previous section are amongst the regulatory paraphernalia used to achieve this objective. Broadcast quotas and licence conditions requiring expenditure on domestic programming, for example, are typical constraints on private broadcasters, who would otherwise tend to purchase low-cost imported programming rather than commission, work of Stigler, who went beyond mere \textit{ex post} observation and proposed capture as a theoretical basis for the very deployment of regulation. He argued that if an industry or occupation has enough political power to utilise the state, it will, of its own accord, seek regulation by the state to control entry and resist competition. State regulation, therefore, is initiated and used by firms in order to secure income which otherwise would not have been obtained under normal conditions or market competition - i.e. typical rent-seeking behaviour. Stigler's analysis is premised on the notion that legislators and regulators are rational, self-interested actors who exchange policies for votes and resources (such as funding and information). The public pays the cost of the bargain between business and the state because individual citizens are unable to register their disapproval on an issue-by-issue basis, due to deficiencies in the electoral system, and in any event voters are apathetic because of the high costs of informed activity and the lack of any mechanism linking the impact of an individual's vote to the depth of his or her knowledge. Much of Stigler's work is prefigured by public choice theory, e.g. Downs and subsequently Olson argued that narrow producer interests would tend to dominate over thinly-spread consumer interests in the political process, because of differential costs faced by the two interest groups in mobilising and hence lobbying support for their respective positions. See, respectively: Louis L. Jaffe, "The Effective Limits of the Administrative Process - a Reevaluation" (1954) 67 Harvard L.R. 1105 at 1107; Samuel P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest" (1952) 61 Yale L.J. 467; Marvin H. Bernstein, \textit{Regulating Business by Independent Commission} (Princeton: Princeton University Press, 1955); Louis M. Kohlmeier, Jr., \textit{The Regulators - Watchdog Agencies and the Public Interest} (New York: Harper & Row, 1969); George J. Stigler, "The Theory of Economic Regulation" (1971) 2:1 Bell J. of Econ. & Management Sci. 3 (reprinted in George J. Stigler, ed., \textit{Chicago Studies in Political Economy} (Chicago: University of Chicago Press, 1988) at 209). This writing is synthesised and critiqued in the landmark work on regulatory theory in the US context by Alfred E. Kahn, \textit{The Economics of Regulation - Principles and Institutions} (Boston: MIT, 1988). On public choice theory see, generally, Anthony Downs, \textit{An Economic Theory of Democracy} (New York: Harper, 1957) and \textit{Inside Bureaucracy} (Boston: Little Brown, 1967); Mancur Olson, \textit{The Logic of Collective Action: Public Goods and the Theory of Groups} (Cambridge, Mass.: Harvard University Press, 1965). Regulatory capture theory in its simple Stiglerian form has been somewhat discredited and superseded by more complex systems theory, briefly discussed further in the text, below.

produce and air domestic product. These are fertile conditions for a trade-off between incumbent broadcasters wishing to protect their market position and a regulator requiring evidence that it is achieving its ideological mandate. Just such a trade-off has long been identified as a characteristic of the television and radio industries in Canada, and their regulation.

Examining the CRTC's preferential treatment of cable systems operators in the 1970s, the 1986 Caplan-Sauvageau Report observed that "there was the implicit demand upon the state to protect Canadian broadcasters in order that they could provide sometimes uneconomic services." This manifested itself in interventions such as the simultaneous substitution rule (discussed in the previous section), which the Caplan-Sauvageau Report described as "a form of industrial protection with results inimical to the goals of the [Canadian] Broadcasting Act," because it effectively encouraged broadcasters to duplicate the schedules of US network affiliates, in order to derive revenues from substituted Canadian advertising, rather than counter-scheduling Canadian shows in these important prime time broadcast slots. In its recent Public Notice calling for comments in respect of its forthcoming review of Canadian television policy, the CRTC notes that one of its tasks is to "ensure a viable broadcasting sector", and to this end, "mechanisms designed to strengthen the ability of the private television sector to fulfil its regulatory obligations ... include market protection for existing over-the-air broadcasters[, and] non-competitive licence renewals and

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120 Cable operators were permitted to carry US network-affiliated stations while, previously, over-the-air broadcasters were refused the right to affiliate to the US networks.

121 Caplan-Sauvageau Report, supra note 49 at 15.

122 Ibid. at 39.

transfers of ownership.” The CRTC recognises that what it refers to as “ownership consolidation” has been a significant trend in the Canadian television industry since the early 1980s, and the tacit bargain of allowing such consolidation of ownership in exchange for increased contributions to domestic DCID schemes, is illustrated by the CRTC’s comment that its “policy of requiring significant public benefits when the ownership or control of a television programming undertaking is transferred has resulted in additional contributions to production funds.” An outsider to the regulatory “black box” came away from a week in the company of industry and their regulators at the annual Banff Television Festival, Canada’s most important cultural industry trade fair, with the following conclusion:

[T]he CRTC road show is more a process than a result. It is about consolidating power in a cultural bureaucracy through an endless series of hearings, with occasional prizes being offered to the more patient Canadian companies who learn to play along. It’s a cozy arrangement for both sides, which benefit equally from this neverending quest for that elusive national identity. 

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124 Ibid., at para. 33.
125 Ibid. at para. (viii) of the Preface.
126 Ibid. at para. 69.
127 John Allemang, “Free speech loses when the CRTC hits the road” The [Canada] Globe and Mail (17 June 1998) C2. Streeter provides an excellent theoretical analysis of the contemporary Federal Communications Commission policy process “inside the beltway”, which underpins Allemang’s conclusion, in c. 4 of Selling the Air, supra note 68. Streeter describes how the distinction between “politics” and “policy” enables those perpetuating a policy of commercial broadcasting to cast their political activity as neutral, rational determination of policy by experts, and to move between different fields, e.g. sociology, engineering and law, using each as a justificatory mechanism for political decisions made under the guise of “policy”. Policy is sustained within an “interpretive community”, as a series of issues, in which the basic premises of commercial broadcasting are not contested. (Ibid. at 113-120.) “The history of policy by its own definition is a steady accumulation of rational, expert solutions to problems,” says Streeter, “Underlying gives of the system, such as for-profit principles and the public interest, do not conflict. Broadcast law is not beset by insoluble contradictions or fundamentally political discontinuities. Policy problems can be solved - hence, evidence of deeper fissures in the system of broadcast policy gets ignored. ... The fundamental assumptions of the policy community, in sum, are like water to fish: so much a part of the environment as to be invisible. They are simply common sense, beyond questioning.” (Ibid. at
In a particularly blatant demonstration of the consolidation-for-content bargain, the CRTC concluded a recent policy review in respect of the regulation of commercial radio by increasing the number of stations a broadcaster could own in a particular market, and simultaneously raising the broadcast quota stipulating the minimum amount of Canadian music which must be played by most stations, from 30 per cent to 35 per cent. Also, each radio station purchase in the consolidation process will be taxed, at 6 per cent of purchase value, with the contribution being allocated to industry funds promoting Canadian music. “New rules on radio on radio ownership mean broadcasters can own more stations in each market,” began one report on the new measures, “but the CRTC is making them pay for the privilege.” As CRTC chairperson Françoise Bértrand put it:

Whereas broadcasters were previously limited to owning a maximum of one AM and one FM commercial station in any particular market, in terms of the new regulations they may hold two FM and two AM stations in larger markets (markets with more than eight same-language stations, i.e. the seven largest cities in Canada) broadcasting in the same language, and up to three commercial stations (both AM and FM) in smaller markets (markets with less than eight same-language stations), broadcasting in the same language. The new measures will come into effect from the beginning of 1999. See: Canada, CRTC Public Notice 1998-41 (Commercial Radio Policy, 30 April 1998); Canada, CRTC Public Notice 1998-80 (Proposed Regulations Amending the Radio Regulations, 1986 - Commercial Radio Programming, 30 July 1998), s. 2(8) - increase to 35 per cent; Canada, CRTC Public Notice 1998-81 (Proposed Regulations Amending the Radio Regulations, 1986 - Acquisition by Radio Licensees of Equity in Other Stations in the same Market and Language, 30 July 1998); Heather Scoffield and Robert Brehl, “Radio stations told to turn up Canadian volume” The [Canada] Globe and Mail (1 May 1998) A1.

148.) In Canada, it seems that the domestic industry protection / cultural development trade-off is one such fundamental assumption.

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it, the new rules constituted “a balancing act between a financially stronger radio industry [and] increased exposure for Canadian musical artists.”131 In my view, this linkage of ownership policy to cultural protection is unhealthy, because it needlessly muddles the mechanisms for achievement of distinct regulatory objectives - diversity of ownership and voice on the one hand, and cultural development on the other.

On the other hand, the CRTC has, on occasion, disallowed purchases or the retention of commercial interests in broadcasting undertakings which would lead to unacceptably high levels of concentration. For example, in 1994 the CRTC approved the purchase of media group Maclean-Hunter by its competitor Rogers Communications Inc. (“RCI”), but refused to allow RCI to keep the former’s two television stations in Alberta, or to retain an ownership position in CTV, one of the Canadian networks.132 “[T]o extend RCI’s influence in this manner, and thus to effectively allow the applicant a position of influence in a further national voice,” said the CRTC, “would not be of benefit to the Canadian broadcasting system or serve the broader public interest.”133 More recently, the CRTC has disallowed Shaw Communications Inc., which holds 18.5 per cent of the Canadian cable market,134 from taking a 47.85 per cent stake in Sportscope Television Network Inc., owner of the Headline Sports speciality channel. The decision was prompted by disquiet regarding the increasing degree of vertical integration by cable distribution undertakings into speciality channel

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133 Ibid.

licensees, which in turn had led to a suspicion of undue preference in the allocation of now-scarce analog cable channels to those licensees by the cable companies.\textsuperscript{135} "Given Shaw's extensive vertical and horizontal holdings in the Canadian broadcasting industry," the CRTC ruled, "its dominant market position could lead to gatekeeping and other anti-competitive practices."\textsuperscript{136} Positions in the cable channel market are attractive to cable distribution companies because of the swift growth of the speciality market: as the number of speciality channels available on the dial has grown, so has viewership, with speciality channels capturing 29 per cent of the market in 1997, up from 18 per cent in 1993.\textsuperscript{137} It appears that the CRTC is using its power to block such deals as a lever to nudge Canada's cable companies into rolling out their long-promised digital cable services, which would greatly expand the number of channels available to consumers.\textsuperscript{138}

\textsuperscript{135} Doug Saunders, "Cable stations scream foul" \textit{The [Canada] Globe and Mail} (17 October 1997) A1; Doug Saunders, "Channel launch called unfair" \textit{The [Canada] Globe and Mail} (31 March 1998) C1: "[O]rganisations representing networks and some cable channels complained that the cable companies had given preferential treatment to channels they owned, had forced broadcasters to pay 'marketing fees' of $2-million in order to get slots on the dial, and had put US channels on the dial at the expense of ... licenced Canadian channels that were left off the air." The cable companies subsequently have been ordered by the CRTC to find a place for the four remaining Canadian speciality channels which are licenced but not yet on air, by 1 September 1999. (Robert Brehl, "Four speciality channels lose bid for fall launch" \textit{The [Canada] Globe and Mail} (9 August 1998) B3.)

\textsuperscript{136} Brehl, \textit{supra} note 134. Shaw already owns three speciality channels, the children's programming channels YTV and Treehouse, and Country Music Television (80 per cent equity / 90 per cent voting), as well as minority stakes in cartoon channel Teletoon (16.7 per cent), The Comedy Channel (14.95 per cent), and Teletlatino (20 per cent) - all of which found a place on the Shaw dial whilst other licensed speciality channels have been unable to get on air in 1998.


\textsuperscript{138} "Anyone who believes that cable ownership and distribution deals are not connected is either pathologically naive or simply being disingenuous," commented Fraser. "The CRTC's decision on Shaw's control of [Headline Sports] will be viewed as the litmus test for any further vertical integration of cable and programming. The question is: where will the CRTC draw the line? The big US cable operators made their move on so-called 'cable' channels in the 1980s, but not without provoking a great deal of controversy and many bitter court battles. It looks like we are going to learn the same lessons in Canada a decade later." (Cited by Robert Brehl, "Rogers doubles Sports Net stake: CRTC" \textit{The [Canada] Globe and Mail} (20 May 1998) B5.)
But while the CRTC may have been looking to punish Canada's cable companies for their recalcitrance in rolling out digital services, the issue of new speciality channel licences in 1996 gave the regulator an opportunity to reward the traditional over-the-air broadcasters, in the time-honoured bargain of regulatory protection in exchange for Canadian programming. According to Fraser,

Industry pressures on the Commission were clearly pushing [for speciality licences for] big broadcasters like CTV-Baton, CHUM and Global. What happened? Not surprisingly, CTV-Baton and CHUM emerged as big winners in the 1996 sweepstakes, and Global was handed a licence for Prime. The CRTC was clearly helping the broadcasters shift their business toward niche programming in order to capture advertising losses to the new speciality channels.\(^{139}\)

A large part of the reason for the CRTC's industry-mindedness, say critics, has nothing to do with the contribution of the Canadian television and radio industries' contributions to domestic culture, but rather is that many senior CRTC office-bearers are drawn from the industry they are expected to regulate.\(^{140}\) According to a recent petition issued by a large group of Liberal Party backbenchers, the CRTC "has been seen simply as a mediator between the industry and the government, rather

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\(^{139}\) Matthew Fraser, cited by Robert Brehl, *supra* note 137.

\(^{140}\) Currently, there are nine full-time CRTC Commissioners, and the recent appointments of Cindy Grauer (October 1997), Andree Wylie (re-appointed, March 1998), Joan Pennefather and Martha Wilson (both March 1998) attracted widespread criticism due either to their previous employment in the private media industry or their connections to the Liberal government. In addition, CRTC chairperson Bérand was chief executive officer of Radio-Québec, Quebec's educational network, and thereafter a senior communications industry consultant at KPMG's office in Montreal; and Charles Bélanger, the Vice-Chairman responsible for broadcasting, spent a decade in senior management with private broadcaster CFCF Inc. The three outgoing CRTC Commissioners, Gail Scott, Garth Dawley and Yves Dupras, were also drawn from industry - Scott and Dawley are broadcasters, and Dupras is an entertainment lawyer. (See: "Who's who at the CRTC", available at <http://www.crtc.gc.ca/>; Brenda Dalglisli, "Out of commission" *The [Canada] Financial Post* (28 February 1998) 10; Doug Saunders, "The most feared woman in TV" *The [Canada] Globe and Mail* (10 March 1998) D2; Hugh Winsor, "Some friends are also qualified" *The [Canada] Globe and Mail* (20 March 1998) A6; Hugh Winsor, "Time for clear look at CRTC choices" *The [Canada] Globe and Mail* (6 April 1998) A3; Hugh Winsor, "CRTC needs more rebels" *The [Canada] Globe and Mail* (25 May 1998) A5.)
than a regulator on behalf of the public interest."141 As an aspect of regulatory capture theory, the "revolving-door" syndrome is a well-documented phenomenon.142 While Canada is still afflicted with a secretive appointments process for the CRTC,143 other countries such as South Africa have more transparent processes which assist in conferring legitimacy on their regulators' decisions.144

The mere appearance of industry-bias is cause for concern,145 and in Canada's case, the problem

In February 1998, 36 of the governing Liberal Party's MPs and one Liberal senator petitioned Canadian Heritage Minister Sheila Copps to appoint a task force to examine whether the CRTC is too close to the industry it regulates. (Dalglish, ibid.; Graham Fraser, "Liberal backbenchers target CRTC" The [Canada] Globe and Mail (29 April 1998) A6.)

"Where the regulator expects ultimately to spend his days representing the other side, his philosophy is apt to reflect this fact," wrote Jaffe, "If being a 'good fellow' is an avocation with the ordinary, it is almost the business of an administrator." Similarly, Kahn posits that there exists a "subtle corruption that may affect administrators whose hope for future advancement may lie in working for the private companies they are supposed currently to be regulating." An extensive review by Mitnick of similar prior studies in the US lends some support for the theory that appointees are captured, primarily via their dependence upon industry information and recognition, and their desire for future employment. Mitnick's review also notes another recurrent theme: the handing out of regulatory jobs to non-specialists as political patronage. (See Jaffe, supra note 118 at 1132-1133; Kahn, supra note 118 at Vol. II, 11; Mitnick, supra note 119 at 209-240.)

The appointment of Commissioners is placed entirely in the hands of the government of the day by the Canadian Radio-television and Telecommunications Commission Act, R.S.C. 1985, c. C-22, s. 3(1). The sole concession made by the Liberal government following its backbench revolt, has been to begin advertising vacancies for CRTC Commissioners in the Canada Gazette. (Hugh Winsor, "Future Shock awaits CRTC" The [Canada] Globe and Mail (20 May 1998) A8.)

In South Africa, the Council of the Independent Broadcasting Authority is appointed by the President "on the advice of" Parliament, from a published shortlist drawn from nominations in which the public has the right to participate, and following a public hearings process prescribed in s. 4(1)(b) of the Independent Broadcasting Authority Act. Specific expertise criteria are set out in the Act which Councillors, viewed collectively, must comply with, making it more difficult for blatantly political appointments to be made - s. 4(2).

For example, SelectView Cable Services Inc., an aggrieved loser in a recent CRTC decision issuing a microwave multichannel distribution system (MMDS) licence for the Southern Ontario region to a consortium which included Teleglobe Inc., claimed in a Federal Court review application that the decision was made with bias in favour of Teleglobe, because during the period when Chairperson Bértrand worked at KPMG prior to her appointment to the CRTC, KPMG had allegedly been retained by Teleglobe to prepare the business plan that formed part of its licence application. While the allegations were rejected by Bértrand and denied by Teleglobe (the company stated that it had only employed KPMG after Bértrand had already left to take up her CRTC post), and subsequently the review application failed, the mere allegation was enough to precipitate a flurry of negative comment on the "easy ethics" said to be prevailing at the CRTC.
Chapter 2 - Domestic Cultural Industry Development Schemes

would be partially cured by a more open system of appointments to the CRTC. If trade-offs between domestic industry protection and cultural development are to be made, then it would at least be more prudent to give such bargains the credibility of being negotiated at arm's length.

Fuller consideration of contemporary regulatory theory is beyond the scope of this thesis, but it should be noted that capture theory, in its simple form at least, has been somewhat discredited and superseded by more complex systems theories, which take into account the multiple influences and actors in the regulatory process. For example, in their 1982 analysis of the regulatory policy-making process governing US broadcasting, Krasnow et al reject the notion that any single industry participant, or the broadcast industry as a whole, could consistently “capture” its regulator, the Federal Communications Commission. They speak of a wide range of “inputs” into the policy system, some of which are environmental and completely outside the control of any industry participant (e.g., child shooting tragedies such as the recent Jonesboro incident lead to public pressure on the regulator to censor violent programme content). Equally, policy system outputs are not limited to regulatory decisions, but are much broader, taking in governmental responses to regulation, successful court petitions by dissatisfied system participants, and so forth.


For example, in the US context, Meier concedes that although there is an element of truth in the charge that some US agencies were captured in the past, many regulatory bodies in the US have lengthy records of action contrary to the vested interests of industry. This is particularly the case where agencies have either been reformed or created in the last three decades to apply the “New Social Regulation”, i.e. regulation of the methods of production and quality of goods and services by commissions such as the Environmental Protection Agency, and are less vulnerable to capture because their mandate covers multiple competitors and, in some cases, multiple industries. (Kenneth J. Meier, Regulation - Politics, Bureaucracy, and Economics (New York: St. Martin's Press, 1985) at 5.)

Though such systems theories embrace many theoretical approaches simultaneously, this does not mean that they are merely the sum of all regulatory theories extant. Some specific theories can be empirically demonstrated to have more force than others, and they can be given relative weight in the broader systems theory, depending on the extent to which they actually can be demonstrated to have any predictive power. For example, much of Mitnick’s important 1980 work on regulation is dedicated to examining the empirical support for various regulatory theories. Interestingly, capture theory emerges from the hurly-burly of the systems approach substantially intact; Mitnick suggests that there is at least a “partial theory” which can explain “a predisposition by regulators to make decisions and take actions consistent with the preferences of the regulated industry.”

Canada is not the only country whose broadcast regulators trade protection of the incumbent industry for achievement of policy goals such as cultural development. In his discussion of recent Australian regulatory history, “Commercial TV: Bucks, Blokes, Bureaucrats and the Bird”, Jock Given summarises that country’s experience as follows:

Regulation has been a mixed blessing for the commercial TV industry. It has kept out new competition while influencing the way incumbents play the competitive game among themselves. The price of high barriers to entry to has been government-

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systems theory is Marcus’ “cybernetic theory”, summarised as follows: “Regulatory agencies should be seen as organisations operating in accord with ‘feedback’ principles. They are limited by bounded rationality, conflicting goals, and finite information. They make probes and adjust their behaviour in accordance with changing circumstances. They go through cycles of equilibrium and innovation. ... The notion of regulatory organisations being restricted to bounded rationality, responding to uncertainty, and being sensitive to feedback more adequately describes their behaviour than theories of simple corporate self-interest and capture.” [Original emphases omitted.] (Alfred A. Marcus, The Adversary Economy - Business Responses to Changing Government Requirements (Westport, Conn. and London, England: Quorum Books, 1984) at 79-80.)

148 The “partial incentive systems theory of regulatory ‘capture’”, Mitnick, supra note 119 at 206-240.
mandated social responsibility despite constant skirmishes between politicians, the bureaucracy and the TV stations.\textsuperscript{149}

In South Africa, where independent regulatory supervision of the broadcast industry was introduced less than five years ago,\textsuperscript{150} there have already been instances of regulatory protection for incumbent broadcasters, for example in the Independent Broadcasting Authority’s preference for licensing greenfields licence applicants in new formats, rather than in formats which would place them in head-to-head competition with existing private broadcasters in the market.\textsuperscript{151}

Therefore, the industry-mindedness of the CRTC can be partially justified by the contributions to domestic cultural expression which it does manage to extract from the Canadian broadcasting industry, and can also be explained away as just an inherent, if odious, characteristic of regulatory systems in general. However, no such justifications exist for the more dubious intervention of restricting foreign ownership, and the continued retention of such rules is puzzling, because they do not seem to contribute anything, even indirectly, to the development of domestic culture. The suspicion is that foreign ownership limits have become merely a protectionist device to save domestic media operators from having to deal with foreign competitors. If the trade-off is one of requiring contributions to domestic cultural development in exchange for licensing and

\textsuperscript{149} Jock Given, “Commercial TV: Bucks, Blokes, Bureaucrats and the Bird”, in Craik \textit{et al}, \textit{supra} note 38 at 27.

\textsuperscript{150} See the discussion of South African regulation in section 4.1.3 below.

ongoing gatekeeping by the regulator, why should that bargain not be offered to foreigners as well? In South Africa, for example, most of the foreign companies invested in the radio market up to the limit of 20 per cent, such as Europe Developpement International of France and P4 International AS of Norway, advocate high levels of domestic content since this formula has worked well for them in drawing audiences in other emerging economies’ radio markets. Despite being much influenced (if not effectively controlled) by its Norwegian shareholders, Cape Town station Radio P4 maintains amongst the highest proportions of domestic content in South African commercial radio. In fact, if media owners from other countries have particular expertise in encouraging domestic cultural production in their home markets, those skills are welcome in South Africa, where the infrastructure for domestic production requires development. In its recent *White Paper on Broadcasting Policy*, the South African Department of Communications acknowledged that foreigners are able to follow the rules of the road as well as locals, by instructing the regulator to investigate a raise in the limit on foreign investment in South African broadcast licensees.¹⁵² By sheltering behind a cultural policy rationale, are not foreign ownership restrictions in fact hurting the cause of DCID scheme proponents, because they are so blatantly protectionist in fact?

As asked this question, Peter Grant, one of Canada’s most prominent communications lawyers, noted that under the current Canadian rules only the majority of voting shares had to be under Canadian control, leaving non-voting equity free to be majority-held by offshore interests - and he hinted that, in the case of Canada’s larger publicly-traded operators such as Rogers Cablesystems, the majority of equity was in fact US-held. “[W]here the controlling person may well have a voice in decisions affecting the choice of programming, the scheduling of programming, the funding of

programming," argued Grant, "there is a discretion here we are more comfortable to see Canadians exercising, and not have it run [by] some person working out of head office in New York. What would he know about the new scripts, the up and coming scripts, and so on. You're closer to it if you're in Canada." Also, a great deal of discretion was left to owners of broadcasting and cable undertakings to determine aspects such as community access, and there was more comfort in knowing that Canadians were exercising that discretion. Lastly, asked Grant, why should Canada be the first to relax its foreign ownership rules for electronic media when other countries, particularly the US, continued to maintain vigorous restrictions? But, acknowledged Grant, it was doubtful whether foreign owners would take bottom-line decisions which were any different to those of Canadians, and it is hence legitimate to question whether there is any cultural benefit from foreign ownership restrictions, particularly if Cancon requirements are a known precondition to their investment.153

Paul Audley, a doyen of broadcast policy in Canada, had a sharper response to the same question:

... I'm an unrepentant heretic. I do not worship in the current church of unregulated global markets. I don't have any trouble with the notion that one of the things I elect my government to do is to protect my interest, and to protect what I think of as collective Canadian interests. It doesn't embarrass me even slightly. What I've learned from working in the policy area of the cultural industries is that without government intervention to sustain Canadian-controlled structures in distribution and exhibition we would have very little Canadian content. We would have very little flow of money from the structures of the industry into financing their own content. What happens is that it is not neutral foreign investment that is available. It's competing firms in the United States, some of them foreign controlled, but it's

153 Peter Grant, "Designing the Rules of the Road for a Canadian Knowledge Nation" (Question and answer session following an address to the Canada By Design Visionary Speaker Series, McLuhan Program in Culture and Technology, University of Toronto, 12 February 1998); available at <http://www.candesign.utoronto.ca/wk5txt.html>.
competing companies buying control over distribution structures in Canada, and extending the reach of their enterprise into Canada. And that has never been in Canada's interests, we have well documented evidence over many many decades from the very beginning that it doesn't work for us, and I believe if we're to have separate Canadian structures and a separate Canadian market then we need separate Canadian ownership and control structures, and that I think is what experience teaches us ... Why? Because these are to a substantial degree the instruments through which we carry on our political debates. They're the instruments through which we define our own interests, and I do not have any doubt whatever that if all the newspapers and radio stations and television stations based in Canada, came to be part of structures based in the United States that the editorial policies of all of them would very substantially change.\textsuperscript{154}

Seemingly, the fact that foreign investment and expertise, and hence greater competition in the domestic Canadian market, might be of benefit to the Canadian media industry, does not enter the equation for Audley. This makes him an unlikely bedfellow of Americans such as former Congressman and Oval Office official Leon Panetta, who introduced a bill in 1991 designed to prevent foreigners from gaining control over Hollywood studios and enterprises connected to them - a flag-waving reaction to the entry into the US entertainment industry of leading Japanese companies such as Sony.\textsuperscript{155} “We ought not to allow our motion picture industry and related firms to be run from abroad,” said Panetta, “The United States stands to lose both its artistic license and

\textsuperscript{154} Paul Audley, “Designing the Rules of the Road for a Canadian Knowledge Nation” (Question and answer session following an address to the Canada By Design Visionary Speaker Series, McLuhan Program in Culture and Technology, University of Toronto, 12 February 1998); available \textit{ibid}.

\textsuperscript{155} Sony purchased Columbia Pictures in 1989 for US$3.4 billion, and this was followed by the purchase of MCA by Matsushita for US$6.6 billion in 1991. Rupert Murdoch’s purchase of 20\textsuperscript{th} Century Fox in 1985 for US$575 million was not quite as controversial, because he became a US citizen in 1986 in order to be able to acquire control over Metromedia, the network of independent US television stations which subsequently became the genesis of his Fox network. See note 101 \textit{supra} and the accompanying text regarding US foreign ownership restrictions; also Jeremy Tunstall and Michael Palmer, \textit{Media Moguls} (London: Routledge, 1991) at 125-126.
its integrity as a truly American institution through the intangible but sure process of foreign owners’ discreet discretion, implicit censorship, or pervasive copyright philosophy.\footnote{Jamie Portman, “US changing tune on protectionism” \textit{Ottawa Citizen} (27 October 1991) C2, cited by Braun and Parker, \textit{supra} note 55 at 186. According to the writers, the Bill died in subcommitee (\textit{ibid}. at note 188).}

The most convincing answer to my question, in some respects, was provided by a Canadian new media specialist, Adam Froman. He pointed out that continued creativity in the new media field was largely dependent on the retention by companies of intellectual property they had developed - else the Canadian new media industry would become, like the audiovisual production industry in that country, a “fee for service environment, where ... there are great tax incentives to create American [products] in Canada.” While this provided employment in Canada, the right to long-term exploitation of the intellectual property created by Canadians was being traded out of the country. Ownership of that intellectual property was difficult to retain because Canadian companies were small by comparison to their US counterparts, and could not obtain commensurate financing.\footnote{Adam Froman, “Designing the Rules of the Road for a Canadian Knowledge Nation” (Question and answer session following an address to the Canada By Design Visionary Speaker Series, McLuhan Program in Culture and Technology, University of Toronto, 12 February 1998); available at <http://www.candesign.utoronto.ca/wk5txt.html>.} Survival of the domestic industry, to paraphrase Froman, would become dependent on servicing US ideas rather than creating one’s own ideas. While foreign ownership rules do not provide a credible solution to this problem of scale (Froman, in any event, seemed to prefer a domestic investment fund approach - essentially a \textit{quasi}-subsidy measure), they do facilitate the indirect mechanism whereby media distributors sustain domestic creativity, to some extent, through commissioning new products as a trade-off with government for their continued protection from foreign competition. As questionable as this indirect bargain may be, it should be conceded that not
all foreign investors might be as keen to promote production of cultural works for the domestic industry as the Norwegian investors in Radio P4, discussed above. A good example of Froman’s “fee-for-service” scenario is the Phillipines’ animation industry, which has become a giant sweatshop for the production of US cartoons, with all the significant creative work retained by foreign commissioning companies. Absent domestic funding mechanisms, it is difficult to break out of the intellectual property dependency that results.

The debate over foreign ownership restrictions for cultural industries was dealt with directly in the recent Organisation for Economic Co-operation and Development (“OECD”) negotiations over a proposed Multilateral Agreement on Investment (“MAI”). Prior to the negotiations commencing, a Canadian House of Commons Subcommittee had already recommended that Canada support France in its stance that cultural industries should be excluded from the application of the MAI. Ultimately, reservations in respect of cultural industries submitted by several of the OECD’s 29 members were amongst the problems which scuttled the negotiations, which have now

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158 The Filipino animation industry is led by a Hanna-Barbera subsidiary, Fil-Cartoons, set up in the late 1980s to replace Japan, Korea and Taiwan as a cheap source of skilled technical animation labour. Most major US animation producers ship their “in-betweening” work (the creation of the cels of animation that smooth movement between the basic sequence of frames) and their inking (the colouring of characters according to the instructions of layout artists) to low-cost labour centres like the Philippines. “The Philippines offers a bountiful labour pool of artists that will be capable of greater computer artwork, equal to that of the US and at a much lower cost,” says Jeffrey Harrison, CEO of Manila-based ImagineAsia. However, despite the “sweatshop” image suggested by such comments, it should be noted that Filipino animators are the second-highest earners in their country after airline pilots - though their average salary of Can$42,000 per annum is still substantially less than that of their highly sought-after colleagues in North America. See Adam Easton, “Philippines has corner on cartoons” The [Canada] Globe and Mail (8 January 1998) C1; also, Saunders, supra note 44.

been deferred to the far broader forum of the WTO’s next trade Round. While negotiation of the issue in the WTO process is likely to be interminable, serious thought must be given to whether the continued retention of foreign ownership rules as a cultural policy intervention is justifiable, and whether other measures, such as direct subsidy and funding approaches, might not be preferable to address legitimate concerns such as that raised by Froman, rather than the web of indirect trade-offs currently in place.

2.3.2 What Audiences Ought to Hear, Not What They Want to Hear

One of principal objections to broadcast quotas is that their imposition constitutes paternalistic meddling, allegedly replacing what audiences really want to hear on the radio and watch on television, with what they ought to hear and watch. Responding to the increase in radio Cancon quotas from 30 to 35 per cent, the Canadian Association of Broadcasters said, “It’s excessive, unfounded and most importantly, not what the listeners want.” Arguing that Canadian artists have outgrown the need for quotas to protect them, a Canadian newspaper editorial condemned the CRTC’s trade-off of ownership concentration limits for further cultural development demands:

[T]he regulator will henceforth let a single owner buy many stations in one market, and in return, the new oligopolists will give the CRTC more airtime for Canadian artists. What a model public-private partnership: it’s got something for everyone. The radio industry gets to consolidate ownership. The music industry gets more guaranteed airtime for its products. The Cancon lobby gets a small victory.

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161 Scoffield and Brehl, supra note 128.
The CRTC invents another reason for its existence. And Canadian listeners? Uh, sorry, the reception is breaking up.

Dear CRTC: Stop tuning our radio dials for us.¹⁶²

The first issue raised by this editorialist, namely the perception that the increase in Cancon is nothing more than a cynical trade-off between the industry and the CRTC, has been canvassed extensively in the previous section. In the discussion that follows, I will examine the subsequent part of the argument, namely the assumption that broadcasters’ line-ups would more accurately address listeners’ and viewers’ preferences in the absence of quotas. The assumption is a questionable one. “Ratings suggest only what listeners and viewers prefer among available alternatives,” points out Richard Collins - and not necessarily what viewers actually want.¹⁶³ The raison d’etre of commercial broadcasters is to sell audiences to advertisers,¹⁶⁴ a peculiarly indirect way of determining audience preferences. As Streeter comments,

[T]he economic lifeblood of the system, the audience commodity, rests on the social construction of a complex boundary between consumption and production, articulated with the methodologically tenuous systems of ratings and ideologically tenuous systems of understanding listeners and viewers, not as the free, active, rational individuals of liberal anthropology but as themselves a form of property, as audiences that are sold to advertisers.¹⁶⁵

Streeter’s criticisms are borne out by the South African experience, where low proportions of airplay for domestic music in the early 1990s were ascribed, in part, to advertisers’ views of what

¹⁶³ Collins, supra note 29 at 28.
¹⁶⁵ Streeter, supra note 68 at 216.
audiences preferred. "To be frank," one radio station executive is quoted as having said, "our advertisers prefer their commercials wrapped in foreign sounds; they think South African stuff is too down-market. So we're committed to certain programme formats to attract advertising."\(^{166}\) The absence of quotas, it has thus been argued, does not a free market make: instead of play-lists being determined, to some degree, in accordance with the public interest objectives mandated by broadcast regulators, they are merely left to be influenced by the prejudices of station music compilers, advertisers and media buyers. For example, during the recent debate over proposals to raise Canadian radio quotas, an advertising industry executive predicted that audiences would flee because "the audience loyalty to Cancon is zero".\(^{167}\) In fact, as noted earlier in this chapter, supplier-influenced taste formation is ubiquitous in broadcasting: in South Africa, for example, this was manifested in a so-called "First World programming theory" for English language radio stations aimed at white listeners, which favoured imported music because of "the Eurocentric and paternalistic perception that South African music is inferior to foreign music."\(^{168}\) In calling for the introduction of broadcast quotas in 1994, a broad coalition of South African artists and record companies submitted,

The Apartheid-driven and now post-colonialist view is that English-speakers are 'more sophisticated' than their Afrikaans/African language counterparts and therefore identify more closely with First World culture than with their own particular South African culture. ... [M]usic selected by station compilers is what

\(^{166}\) Cited in the South African Music Content Alliance ("SAMCA"), *Regulating the Broadcasting of South African Music* (submission of SAMCA to the Independent Broadcasting Authority Local Content Enquiry (10 June 1994) [unpublished] (hereinafter "SAMCA submission") at 23-24.


\(^{168}\) SAMCA submission, *supra* note 166 at 23-24.
becomes and stays popular to the exclusion of all other forms or sources of music. ... [I]t is sophistry ... to claim that audiences do not like to hear what they, in fact, seldom hear. [Emphasis in original.]

Similar frustrations were expressed in the recent radio quota debate in Canada: Brian Chater, president of the Canadian Independent Record Production Association, claimed that compilers at Canadian radio stations treated the then-30 per cent quota as a ceiling, refusing to even listen to new material which would take them beyond that proportion. While it cannot be denied that audiences would tune out of stations which consistently broadcast music they disliked, it is unlikely that stations would voluntarily take risks by changing an established formula of airing major artists - particularly US artists backed by the marketing muscle of their multinational record companies and the credibility of proven success in their far larger domestic market. For this reason, despite the increased Cancon quota which accompanied the new CRTC ownership rules, Songwriters' Association of Canada president Ian Thomas criticised the trade-off, saying that greater ownership consolidation would threaten the small, independent radio stations whose chief characteristic was their idiosyncratic support for new Canadian artists.

If the premise of quotas is that they intervene in the market to realise otherwise lost externalities, and to create additional choices for audiences, it is difficult to justify describing their outcome as disadvantaging listeners - particularly in a radio market such as Toronto, where listeners have a choice between three largely similar Adult Contemporary / Contemporary Hit Radio-format stations at any one time. On the other hand, stations in such competitive markets do invest heavily

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169 Ibid. at 11-15.
170 Graham, supra note 167.
171 Scoffield and Brehl, supra note 128.
in audience research, and their oft-repeated argument that much domestic music is of mediocre quality and unpopular with listeners\(^\text{172}\) should not be dismissed out of hand. That research, however, is often marred by poor methodology,\(^\text{173}\) and conflicts over the veracity of research findings are just another ritual in the ongoing conflict between broadcasters and quota proponents. Also, the contention that consumers are disadvantaged both by the CRTC's tolerance of oligopolistic practices by broadcasters, and by the alleged paternalism of broadcast quotas, is not borne out by surveys of consumers' opinions. A 1982 study by the Department of Communications found that 69 per cent of Canadians approved of the idea that government should keep in place schemes to support the production of Cancon, and this outcome has been confirmed by poll after poll since.\(^\text{174}\)

\(^{172}\) E.g. this is the view of CHUM Ltd.'s vice-president Duff Roman, quoted in Graham, \textit{supra} note 167; similar objections have been made to the CRTC's French-language music quotas (discussed in section 4.1.1 below): “According to the broadcasters, the Quebec music industry can't produce enough good-quality music to satisfy their needs. They argue that the 225 albums produced each year in French are not all of good quality and provide an insufficient number of hit songs to program a mainstream music station,” (Ray Conlogue, “Quebec broadcasters want to play less French music” \textit{The [Canada] Globe and Mail} (28 November 1997) D9.) The same objection was raised by South African broadcasters when quotas were first mooted in that country - see summary of submissions, Republic of South Africa, Independent Broadcasting Authority, \textit{Triple Enquiry Report} (Johannesburg: Independent Broadcasting Authority, August 1995) (hereinafter \textit{Triple Enquiry Report}) at 86 (section 16.4.3).

\(^{173}\) In South Africa, national English-language music radio station 5FM held a poll in July 1994 to assess whether it was playing sufficient proportions of domestic music. The results, widely publicised in a national advertising campaign, claimed that 60 per cent of respondents wished to maintain the then-proportion of South African music played on air (3 per cent at the time). The problem was that this result had been obtained from call-in respondents - already an unrepresentative sample - using on-air advertisements inviting existing listeners to reply to the laughably leading question, “Are we playing enough South African music or have you had enough?” (Kotlowitz, \textit{supra} note 8 at 11.) Recent research in Quebec by the Canadian Association of Broadcasters which claimed to demonstrate a large-scale shift away from French-language to English-language radio stations, has been criticised by the Quebec music industry body, ADISQ, \textit{inter alia} because it compared summer statistics with the usually lower fall numbers to demonstrate decline, and counted dual home-language respondents as francophones (Conologue, \textit{ibid.}).

\(^{174}\) Collins, \textit{supra} note 29 at 27-28; Canada, Department of Canadian Heritage, “Broadcasting - You are What You Watch”, [\texttt{http://www.pch.gc.ca/culture/report/HTM/3.htm}] at 1. Collins suggests that the support by Canadians for the notion that government should implement DCID schemes, on the one hand, and their preference for US television, on the other, are not as thoroughly
Ultimately, the debate over true listener preferences is circuitous: for as long as broadcasters argue that the market should be left to determine what is play-listed, proponents of quotas will argue that preferences in the market are predetermined by the broadcasters. The issue is worth flagging, however, because it neatly illustrates what many writers point out about broadcast markets, namely that they have no “natural” existence, but are rather created by a complex array of forces. As Streeter puts it,

[C]ommercial broadcasting ... is more a product of deliberate political activity than a lack of it. It is political, not just in the sense that it requires spectrum regulation and similar regulatory activities, but because its organisation as commercial, as a set of marketplace activities, is itself dependent on extensive and ongoing collective activities, activities that typically involve favouring some people and values at the expense of others. Commercial broadcasting exists, in other words, because our politicians, bureaucrats, judges, and business managers, with varying degrees of explicitness and in a particular social and historical context, have used and continue to use the powers of government and law to make it exist. The effort to create a free marketplace has produced an institution that is dependent on government privileges and other forms of collective constraints.175

Streeter points out that broadcasting is not merely constrained by a set of legal relationships, but is rather constituted by those relationships. This perspective should be contrasted with the more conventional view that the contemporary policy of commercial broadcasting is an outcome of technological imperatives, incontrovertible legal principle, and economic necessity.176 Seen from Streeter’s perspective, the debate over how high Cancon quotas should be before they begin to

contradictory as might be thought. This is because the assumption that cultural preferences should reflect political identification is not necessarily correct. In Canada’s case, argues Collins, “the different signals suggest contradictory interests and preferences being manifested simultaneously by viewers acting as citizens and consumers.” Political and cultural identity have been decoupled. (Ibid. at 49.)

175 Streeter, supra note 68 at xiii.
176 Ibid. at 21.
unreasonably distort "natural" market forces, becomes akin to asking how long a piece of string should be. The media owners protesting against the imposition of higher quotas are themselves proprietors of commercial property - radio stations - which use frequencies by license (though in Canada these licences are, in the words of the Caplan-Sauvageau Report, "implicitly institutionalised de facto private property rights" because once awarded, commercial licences are almost never taken away)\(^{177}\) which themselves are no more than a "legal inscription on technology".\(^{178}\) The great regulatory theorist Alfred Kahn made much the same point about the capture theory in *The Economics of Regulation*, first published almost 30 years ago, when he argued that the tendency for administrative agencies to defend the interests of the industries they regulate is inherent in regulation, as a system of industrial order.\(^{179}\) Just as broadcasters who presume that music play-listed on radio should be left to reflect market demand, appear to ignore the fact that their very existence on the dial is a deliberate legal construct somewhat at odds with a free market, so critics of the CRTC's apparent industry-mindedness seem to presume that regulation of broadcasting somehow simulates a free market, rather than acknowledging that it is a bargain heavily weighted towards industry, inherently. This is not to say that we should give up attempting to craft a regulatory or other system as advantageous as possible for all stakeholders in cultural industries, but is rather just a reminder that the stage upon which battles over market interventions are waged and deals struck, is just that: a created policy environment premised on a complex legal artifice, a stage. In the concluding chapter to this thesis, I will return to Streeter and Kahn,

\(^{177}\) Caplan-Sauvageau Report, *supra* note 49 at 40.

\(^{178}\) Streeter, *supra* note 68 at xiii.

\(^{179}\) Kahn, *supra* note 118 at Vol. II, 46.
examining whether their insights into the creation and regulation of domestic media markets can be extrapolated in order to predict possible side-effects of proposed multilateral rules for international trade in cultural products.
3. Mass Media Products and the World Trade Regime

Cultural products and services occupy an ever-expanding place in world economies. But culture is a very different kind of commodity that requires special treatment in the global marketplace. World trade bodies must treat culture in a unique way. In this era of globalization it is crucial that we promote unique national identities through our own cultural networks and communications systems.

- Sheila Copps, Minister of Canadian Heritage, addressing the 29th Session of the UNESCO General Conference.180

3.1 The World Trade Regime: From the General Agreement on Tariffs and Trade 1947 ("GATT 1947") to the WTO

Following the Second World War, international economic reconstruction and growth was regarded as the most important objective of the newly-emergent world trade law regime. Multilateral rules for committing countries to engage in trade would enable them to exploit their respective areas of comparative advantage and increase global economic efficiency; more fundamentally, however, the aim of the new regime was to encourage interaction between countries that had been at war with each other, to irrevocably integrate their economies in a web of reciprocal dependencies, and thereby to secure world peace.181 These objects were to be attained via robust international institutions, first envisaged by the 1944 Bretton Woods Agreement between the US and Great Britain: the International Monetary Fund, the International Bank for Reconstruction and

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Development (commonly referred to as the World Bank), and a proposed International Trade Organisation ("ITO"). As a precursor to the negotiation of the Havana Charter for the creation of the ITO, twenty-three contracting parties signed on to the GATT 1947, which was aimed primarily at managing customs and internal treatment of imported goods, on a multilaterally-agreed basis.\footnote{182} However, the US Congress thereafter refused to approve the Havana Charter, and the ITO was never established. This accident of history led the GATT 1947 to become the permanent institutional basis for the multilateral world trade regime, its provisions being developed, expanded and fine-tuned through eight rounds of multilateral negotiations. The implementation of the trade agreements reached in these negotiations has had very impressive results: for example, average world tariffs on manufactured goods were decreased from 40 per cent in 1947 to 5 per cent in 1995;\footnote{183} the original 23 contracting parties to the GATT 1947 have grown to 132 WTO member states, with 31 further applicants waiting for admission;\footnote{184} and international trade as a proportion of world gross domestic product has more than tripled since 1950, from 7 per cent then to 23 per cent today.\footnote{185}

Most recently, the Uruguay Round concluded with the signature of the World Trade Organisation Agreement in December 1994,\footnote{186} which finally established the robust institutional and procedural framework to coordinate trade activities between WTO member states first envisaged

\footnote{182} Trebilcock and Howse, ibid. at 21.  
\footnote{183} Ibid.  
\footnote{185} Ibid.  
\footnote{186} Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (15 April 1994) (hereinafter WTO Agreement); (1994) 33 I.L.M. 1140.
fifty years earlier. In particular, the WTO oversees a new dispute settlement procedure in which evolving GATT panel practice has effectively been codified and fast-tracked, and numerous issues previously outside the purview of the GATT, such as international trade in services, trade-related intellectual property issues and trade-related investment issues, have now been brought within the world trade law regime.

3.2 The Cornerstones of Non-Discrimination in the World Trade Regime: MFN and National Treatment

3.2.1 MFN and National Treatment in the GATT 1947

Notwithstanding the progressive and sometimes dramatic development of the world trade regime over the last five decades, its cornerstones remain the two principles of non-discrimination originally drafted in the GATT 1947. The first principle is that of Most-Favoured-Nation ("MFN") treatment contained in Article I of the GATT, which requires that a state granting any trade concessions to another state should accord treatment no less favourable to any third state. This means that trade liberalisation must be extended on a multilateral basis, even to countries which fail to provide equivalent concessions to the state from which MFN treatment is expected. Countries are therefore prevented from "playing favourites among foreigners", so that all products of the

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188 Trebilcock and Howse, supra note 181 at 22.
189 Article I of the GATT.
190 Trebilcock and Howse, supra note 181 at 27.
same type, no matter what their country of origin, enjoy the same treatment upon reaching the border of a member state.\footnote{191}

The second principle, that of \textbf{national treatment} contained in Article III of the GATT, continues the principle of non-discrimination once products are inside the borders of a member state: for example, Article III:1 requires that no regulatory and other types of measures affecting the sale and various stages of distribution of products should be framed so as to afford protection to domestic production.\footnote{192} The second sentence of Article III:2 is a specific application of the same principle in respect of the effect of taxation and other internal charges applying to relevant products; Article III:2's first sentence is more particular in requiring equal treatment, saying that imported products may not be subject to taxation and other internal charges which are higher than those applied, directly or indirectly, to like domestic products.\footnote{193} Article III:4 tackles the same concern from a different perspective: it says that all regulatory and other such measures affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products must accord to

\footnote{191}{The more accurate appellation for a signatory to the GATT 1947 would be a “Contracting Party”; only after the conclusion of the WTO Agreement could the Contracting Parties more appropriately be referred to as “WTO member states”. However, in the interests of consistency and clarity, I will refer throughout this thesis to “member states”.}

\footnote{192}{Article III:1 establishes the general principle that internal measures should not be applied so as to afford protection to domestic production, which is then given specific effect in various contexts by Article III:2 and several other provisions in Article III that follow. The protective application of a measure can be discerned from the design, the architecture, and the revealing structure of the measure. See \textit{Sports Illustrated} Panel Report, \textit{supra} note 2 at paras. 5.37-5.38; \textit{Law & Practice of the WTO}, \textit{supra} note 2 at 103-104; citing \textit{Report of the Appellate Body in: Japan - Taxes on Alcoholic Beverages} (4 October 1996), WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (hereinafter “Alcoholic Beverages / Japan Appeal Report”) at 18 and 29; Cases Booklet IIA in \textit{Law & Practice of the WTO}.}

\footnote{193}{For ease of reference, Article III:2 reads: “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in [Article III:1].”}
imported products treatment no less favourable than that accorded to like products of national origin. Therefore, for example, no quotas may be set up to limit the sale in a domestic market of imported goods so as to favour local producers of like goods on a discriminatory basis, a prohibition set out explicitly in the second sentence of Article III:5. The first sentence of Article III:5 prohibits the converse type of quota, i.e. it forbids members from requiring that a specified amount of product used should be supplied from domestic sources. In addition, the national treatment principle is applied on an MFN basis, meaning that a member state cannot discriminate internally in favour of goods from any other particular member state, as against the goods of third party states.194

3.2.2 “Like Products” - a Cultural Industry Cassandra?

It is important to determine the parameters defining which products would be considered “like”, for the purposes of Article III. In the context of the discussion in this thesis, for example, are Canadian and American television programs or musical works considered to be “like” products? Given that Canadian DCID schemes are ostensibly intended to produce distinctively Canadian cultural works, one would imagine that, if content was the determinant of “likeness”, Canadian MMPs would be sufficiently different from foreign MMPs to deny their “likeness” and hence the application of the national treatment principle to them.

3.2.2.1 The Sports Illustrated Complaint

A similar question was dealt with in the Sports Illustrated matter, where, after extensive trade litigation between the US and Canada, the WTO Appellate Body issued its

194 Article I:1.
conclusions in June 1997 impugning three of Canada’s principal methods of protecting its domestic magazine industry, namely, a prohibition on the physical importation of split-run editions of US magazines ("split-run periodicals"),\footnote{195} an 80 per cent excise tax on the value of advertising placed in split-run periodicals that is directed at the Canadian market,\footnote{196} and discounted postal rates for domestic publications.\footnote{197} These measures had been introduced in order to offset cost phenomena

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Tariff Code 9958 in Sch. VII of the Customs Tariff, R.S.C. 1985, c. 41, s. 114. The provision targets periodicals imported into Canada which are in split-run or "regional" edition form, that contain an advertisement primarily directed to a market in Canada and that do not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical’s country of origin. The rules determining whether or not an advertisement is primarily directed at the Canadian market are broad: factors considered include whether there are enticements to the Canadian market, references to Canadian GST, listing of Canadian addresses as opposed to foreign addresses, and specific invitations to Canadian consumers only. In addition, where more than 5 per cent of an imported periodical’s advertising is directed to the Canadian market, irrespective of whether it is a split-run or "regional" periodical, the import prohibition in the Code will also apply. In the latter case, mere reference in the relevant advertisements to specific sources of availability of the advertised product in Canada, or the specification of terms and conditions relating to the sale of goods or services in Canada is sufficient. See Sports Illustrated Panel Report, supra note 2 at paras. 2.2-2.4, 5.1 and 5.4; Law & Practice of the WTO, supra note 2 at 4, 90 and 91.
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\footnote{196}{
Part V.I - Tax on Split-run Periodicals to the Excise Tax Act, An Act to amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c. 46. The measure was introduced in response to evasion by Sports Illustrated’s publishers, Time-Warner, of Tariff Code 9958 by electronically transmitting the proofs for that magazine to a Canadian printer. An excise tax of 80 per cent of the value of all the advertisements placed in the impugned edition must be paid by the publisher, or failing the publisher, a person connected with the publisher, the distributor, the printer or the wholesaler of the split-run edition, depending on the circumstances - essentially whoever Revenue Canada can get their hands on within the jurisdiction. A split run periodical is defined for the purposes of the measure as any issue of a periodical distributed in Canada, in which more than 20 per cent of the editorial material is the same or substantially the same as editorial material that appears in the foreign version of the periodical, and which contains an advertisement that does not appear in identical form in all the excluded editions (i.e. a negative test for advertisements aimed at the Canadian market, assuming that if the advertisement is not identical, it must have been tweaked to address Canadian consumers specifically). See Sports Illustrated Panel Report, ibid. at paras. 2.6-2.9 and 5.1; Law & Practice of the WTO, ibid. at 5-6 and 90.
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\footnote{197}{
The so-called "funded" and "commercial" rates only available to Canadian periodicals and administered in terms of the Publications Distribution Assistance Program by the Canada Post Corporation, as described by the Sports Illustrated Panel Report, ibid. at paras. 2.10-2.19 and 5.1; Law & Practice of the WTO, ibid. at 7-10 and 90. The standard "international" rate paid by publishers of US periodicals was 14 per cent higher than the "commercial" rate and 83 per cent higher than the "funded" rate (Aaron Scow, "The Sports Illustrated Canada Controversy: Canada ‘Strikes Out’ in Its Bid to Protect Its Periodical Industry from US Split-Run Periodicals" (1998) 7 Minn. J. Global Trade 245 at 253).
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which favoured US titles, in a manner familiar from the economics of the television and film markets discussed in section 2.1 above:

With a split-run edition, a US publisher repackages the editorial content of its domestic edition with Canadian ads. Because editorial costs are covered in the US market, the ad revenues from a split-run edition deliver profit margins of 70 to 80 per cent, giving US publishers plenty of room to discount ad rates. Since ad revenues account for an average of 65 to 100 per cent of Canadian publishers' income, losing those revenues to predatory pricing would drive [Canadian periodical publishers] out of business.\textsuperscript{198}

The magnitude of the competition which the Canadian periodical industry would face in absence of defensive measures is summed up by the following statistics: first, the revenue base which the US periodical industry enjoys is around twenty-five times as large as that of Canada; second, given its small market, profit margins are very thin in Canada. The Canadian Magazine Publishers Association claimed in 1993 that a shift of just three per cent of advertising revenue to competing US publications would push the Canadian periodical industry into perpetual losses.\textsuperscript{199}

While some proponents of DCID schemes in other jurisdictions might wonder at the singular lack of subtlety in the measures deployed by Canada to protect its periodicals industry, it should be

\textsuperscript{198} François de Gaspé Beaubien (Canadian Magazine Publishers Association), "Defensive manoeuvres on magazines" \textit{The [Canada] Globe and Mail} (15 July 1998), A15. Even with Canada's aggressive DCID scheme for its magazine industry, foreign periodicals hold 81.4 per cent of the newsstand circulation and 50.4 per cent of the entire circulation of English-language magazines in the Canadian market. Interestingly, the advertising revenue estimate tendered by De Gaspé Beaubien is substantially higher than that contained in Canada's submission to the WTO Panel, which stated that advertising revenue accounted for 60 per cent of total revenue for Canadian magazines, and circulation revenue for 33 per cent. (\textit{Sports Illustrated} Panel Report, \textit{ibid.} at paras. 3.27-3.27; \textit{Law & Practice of the WTO}, \textit{ibid.} at 21-22.)

\textsuperscript{199} Scow, \textit{supra} note 197 at 249.
acknowledged that few if any media sectors in other countries, be they in the EU, Australia or South Africa, face anything like the challenge posed by US publications in Canada.200

The 80 per cent excise tax introduced in 1995 is certainly the bluntest of the measures, and the debate between the parties as to its GATT-legality is of particular relevance. The US complained that the tax breached the prohibition against discriminatory internal taxes contained in the national treatment provision in Article III:2 of the GATT 1994,201 and in considering this complaint the WTO Panel inter alia examined whether split-run periodicals and wholly Canadian periodicals were “like products”. In one of its previous reports, the Appellate Body had opted for a narrow, casuistic interpretation of “like products”, with relevant factors in each particular case including the product’s end uses in a given market, consumers’ tastes and habits, and the properties, nature and quality of the product.202 This approach was reiterated in the Sports Illustrated Appeal Report.203

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200 The periodicals challenge has elicited some particularly blunt rhetoric: “If the Americans insist on pursuing their domination of the world cultural community by using all the instruments at their disposal,” Canadian Heritage Minister Sheila Copps is quoted as saying, “they will expect the same in return. We are prepared to use all the tools in our arsenal to fight the decisions that restrict our capacity to build our own culture.” John Demont, “On guard for thee: Sheila Copps turns up the volume to protect culture” [Canadian] Maclean’s (24 February 1997); available at <http://www.canoe.ca/macleans/newsroom/can1022497.htm>.

201 The “GATT 1994” refers to the agreement concluded in the Uruguay Round of the GATT negotiations, and is the latest multilaterally-agreed update of the original GATT 1947. See General Agreement on Tariffs and Trade 1994, Annex 1A to the WTO Agreement. supra note 186 at 1154.

202 Sports Illustrated Panel Report, supra note 2 at paras. 3.73 and 5.22; Law & Practice of the WTO, supra note 2 at 39-40 and 98; citing Alcoholic Beverages / Japan Appeal Report, supra note 192 at 20, which in turn relies on Border Tax Adjustments (Report of the Working Party adopted on 2 December 1970), BISD 18S/97, a document the Appellate Body notes to have been followed in almost all adopted panel reports since.

203 Sports Illustrated Appeal Report, supra note 2 at part V.A; Law & Practice of the WTO, supra note 2 at 18.
3.2.2.2  **Canada’s Defences: Content as the Distinguishing Factor and Neutrality of the Excise Tax in respect of Imported and Domestic Periodicals**

Based on the Appellate Body’s narrow definition of like products, Canada argued in both the *Sports Illustrated* Panel and Appeal hearings that material in Canadian-produced titles was specifically directed at Canadian readers, comparing the parochial content in *Maclean’s* to that of a typical split-run news weekly such as *Time Canada*, which only infrequently deals with Canadian matters.\(^\text{204}\)

The chief and, for all practical purposes, the only distinguishing characteristic of a magazine is its content. ... Canada submits that content developed for and aimed at the Canadian market will include Canadian events, topics, people and perspectives. The content may not be exclusively Canadian, but the balance will be recognisably and even dramatically different than that which is found in foreign publications which merely reproduce editorial content developed for and aimed at a non-Canadian market.\(^\text{205}\)

Furthermore, Canada argued that the taxation measure involved notionally applied to all split-runs irrespective of their national origin, so the explicit discrimination required to constitute a violation of the first provision was absent,\(^\text{206}\) and hence regard should be had to the second

\[\text{\textsuperscript{204} Sports Illustrated Panel Report, supra note 2 at paras. 3.61-3.62 and 3.71; Law & Practice of the WTO, supra note 2 at 35 and 39; Sports Illustrated Appeal Report, supra note 2 at part II.A para. 2; Law & Practice of the WTO, supra note 2 at 4-5.}\]

\[\text{\textsuperscript{205} Sports Illustrated Appeal Report, ibid. at part II.A para. 2; Law & Practice of the WTO, ibid. at 5.}\]

\[\text{\textsuperscript{206} The Panel in the Sports Illustrated matter established the following test for violation of Article III:2, first sentence:}\]

\begin{align*}
\text{(a)} & \quad \text{Are imported “split-run” periodicals and domestic non “split run” periodicals like products?; and} \\
\text{(b)} & \quad \text{Are imported “split-run” periodicals subject to an internal tax in excess of that applied to domestic non “split-run” periodicals?}
\end{align*}

If both questions were answered, “yes”, then the first provision in Article III:2 was being violated. If the answer to question (a) was negative, then the inquiry would proceed on to the second provision in Article III:2. (*Sports Illustrated* Panel Report, supra note 2 at para. 5.21; *Law &
provision in Article III:2. Some brief clarification is required here: as noted in the discussion in section 3.2.1 above, the first provision of Article III:2 expressly prohibits the imposition of internal taxes or other internal charges of any kind “in excess of those applied, directly or indirectly, to like domestic products”, and the second more generally prohibits the application of such taxes or charges to products so as to “afford protection to domestic production.” An interpretive note to the GATT explains that a tax might conform to the first provision but nevertheless be inconsistent with the second, broader provision, “where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.” [Emphasis added.]

Factors which could be used to determine such

207 Canada submitted that, _prima facie_, “the legislation does not make any distinction between domestic and imported products ... [T]here can be no violation of Article III:2, first sentence, unless imported products, as a class, are taxed in excess of like domestic products. ... [T]he mere potential that an individual, imported item might be taxed at a higher rate than a like domestic product cannot create an automatic violation, when it results from fiscal classifications that are not themselves discriminatory in form or in fact.” _Sports Illustrated Appeal Report, supra note 2 at part V; Law & Practice of the WTO, supra note 2 at 17._

208 Article III:2, first sentence. See note 193 _supra_.

209 Article III:2, second sentence, as read with Article III:1. See _ibid._

210 Interpretive Note _ad_ Article III. Based on this note, the test for violation of the second provision in Article III:2 has been said by the Appellate Body to be whether,

1. the imported products and the domestic products are “directly competitive or substitutable products” which are in competition with each other;
2. the directly competitive or substitutable or substitutable imported and domestic products are “not similarly taxed”; and
3. the dissimilar taxation of the directly competitive or substitutable imported [and]
direct competitiveness and substitutability, the Appellate Body has said, include physical characteristics, tariff classifications, and the market place of the imported and domestic products being compared, but the decisive factor would be the existence of “common end-uses”, i.e. whether there is a high elasticity of substitution.\textsuperscript{211} As with the test for like products, the determination of the appropriate range of directly competitive or substitutable products is to be made on a case-by-case basis.\textsuperscript{212} It is not necessary to demonstrate perfect substitutability of the imported and domestic products - for then they would be regarded as like products and hence fall under the first provision in Article III:2 - but rather “imperfect substitutability” would suffice.\textsuperscript{213} Accordingly, insofar as internal taxes and other internal charges referred to in Article III:2 are concerned, current WTO jurisprudence effectively expands the application of the national treatment principle, from “like products” to the broader category of “directly competitive or substitutable products”.

domestic products is “applied ... so as to afford protection to domestic production”;

citing the Alcoholic Beverages / Japan Appeal Report, supra note 192 at 24 [emphasis in the original omitted]; Sports Illustrated Panel Report, supra note 2 at para. 3.111; Law & Practice of the WTO, supra note 2 at 53; also Sports Illustrated Appeal Report, supra note 2 at part VI:B; Law & Practice of the WTO, supra note 2 at 21.

\textsuperscript{211} Alcoholic Beverages / Japan Appeal Report, ibid. at 25, cited by the US in Sports Illustrated Panel Report, ibid. at para. 3.112; Law & Practice of the WTO, ibid. at 53.

\textsuperscript{212} Alcoholic Beverages / Japan Appeal Report, ibid. at 25, cited in Sports Illustrated Appeal Report, supra note 2 at part VI:B para. 1; Law & Practice of the WTO, supra note 2 at 22.

\textsuperscript{213} Sports Illustrated Appeal Report, ibid. at part VI:B para. 1; Law & Practice of the WTO, ibid. at 24.
3.2.2.3 The US Counter-Argument on the Alleged Content Distinction

In response to Canada’s content distinction argument, the US noted that if the Appellate Body precedent was to be relied upon, editorial content was only one of many attributes of a magazine, which included texture, physical appearance, and other factors making up the overall package purchased by the consumer. Crucially, the US noted in the Panel hearing that rather than being based on the inclusion or otherwise of Canadian editorial content, application of the excise tax measure depended on whether the editorial content was original or duplicated that of a publication sold in another market.

Canada’s argument that split-runs usually differ from magazines sold only in Canada with respect to the perspective and orientation of their editorial content is legally irrelevant. A panel must assess the distinction that a measure actually draws, not a distinction a measure might have drawn but does not. "[T]he excise tax does not, in fact, distinguish between magazines based on their editorial content ... Rather, it applies based on factors related to whether a magazine was produced for more than one market, and advertising content. Article III:2 does not permit governments to distinguish between otherwise like products based on such business and trade factors." [Emphasis in the original.]

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214 For a consideration of the value of precedent in the WTO dispute resolution system, see the discussion of Feddersen’s views at note 615 infra and the accompanying text in section 5.4.4 below.

215 Sports Illustrated Panel Report, supra note 2 at para. 3.78; Law & Practice of the WTO, supra note 2 at 42.

216 Sports Illustrated Panel Report, ibid. at para. 3.79; Law & Practice of the WTO, ibid. at 42. See the criteria for application of the excise tax in note 196 supra.

217 Sports Illustrated Panel Report, ibid. at paras. 3.81-3.82; Law & Practice of the WTO, ibid. at 42-43.
Put more simply to the Appellate Body, the US argument was that, “Canada’s attempt to
demonstrate that Time Canada and Maclean’s reflect a different editorial orientation is simply
irrelevant because the application of the Excise Tax Act is not based on any such difference.”218

3.2.2.4 Findings of the Panel and the Appellate Body

The latter argument of the US was accepted by the Panel, which stated,

Despite the Canadian claim that the purpose of the legislation is to promote
publications of original Canadian content, this definition essentially relies on factors
external to the Canadian market - whether the editorial content is included in a
foreign edition and whether the periodical carries different advertisements in foreign
editions.219

The Panel found that imported split-run and domestic non-split-run periodicals were “like products”
within the meaning of the first provision in Article III:2, based on hypothetical reasoning which was
subsequently rejected by the Appellate Body.220 While it did not accept Canada’s argument that the
excise tax was neutral in its impact on imported vis-a-vis domestic periodicals,221 the Appellate

218 Sports Illustrated Appeal Report, supra note 2 at part II.B para. 2; Law & Practice of the WTO,
supra note 2 at 10.

219 Sports Illustrated Panel Report, supra note 2 at para. 5.24; Law & Practice of the WTO, supra
note 2 at 98-99.

220 The Panel had not compared an imported periodical with a domestic periodical, but rather two
imported periodicals, one affected by the excise tax and the other not; see Sports Illustrated Panel
Report, ibid. at para. 5.25; Law & Practice of the WTO, ibid. at 99; and the rejection of this
approach in Sports Illustrated Appeal Report, supra note 2 at part V.A; Law & Practice of the
WTO, supra note 2 at 19.

221 The excise tax was held to be far in excess of the de minimus threshold set in the Alcoholic
Beverages / Japan Appeal Report, its effect being to prevent the production and sale of split-runs
in Canada, and hence to discriminate against some imported products (i.e. split-runs) as compared
to directly substitutable domestic products - sufficient mischief to violate the second provision of
Article III:2. See Sports Illustrated Appeal Report, ibid. at part VI.B para. 2; Law & Practice of
the WTO, ibid. at 25-26, citing the Alcoholic Beverages / Japan Appeal Report, supra note 192 at
Body felt that it could not retroactively repair “the absence of adequate analysis in the Panel Report” regarding the like products test, and hence it was driven to the subsidiary test in the second provision of Article III:2, namely that of direct competitiveness and substitutability.\textsuperscript{222} Based on admissions by Canada that its domestic English-language titles faced significant competition from split-run US imports, the Appellate Body determined that, “newsmagazines, like Time, Time Canada, and Maclean’s, are directly competitive or substitutable in spite of the ‘Canadian’ content of Maclean’s.” This finding should not be construed so broadly, cautioned the Appellate Body, as to conclude that all periodicals were competing in the same market; for example, a newsmagazine would not be directly competitive with or substitutable for a chess magazine.\textsuperscript{223} In other words, while genre-based distinctions were valid, the Appellate Body rejected Canada’s claim that, within any specific genre of periodical, the market was differentiated on the basis of editorial content. As with the Report of the Panel, this outcome appears to have been premised on the fact that the impugned measures themselves discriminated against split-runs on the basis of factors other than actual editorial content. It should be noted that, despite finding the excise tax to violate the national treatment principle, the Panel took care to say the following:

\textit{In order to avoid any misunderstandings as to the scope and implications of the findings above, we would like to stress that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case. The only task entrusted to this Panel was to examine whether the treatment accorded to}

\footnote{27.}

\textsuperscript{222} \textit{Sports Illustrated} Appeal Report, ibid. at part V.A; \textit{Law & Practice of the WTO}, ibid. at 19-20.

\textsuperscript{223} \textit{Sports Illustrated} Appeal Report, ibid. at part VI:B para. 1; \textit{Law & Practice of the WTO}, ibid. at 25.
imported periodicals under specific measures identified in the complainant’s claim is compatible with the rules of the GATT 1994.\textsuperscript{224}

3.2.2.5 \textit{Conclusion: the Impact of Sports Illustrated is Being Overstated}

Summarising the above, the national treatment provision in Article III:2 of the GATT 1994 refers not to the likeness of the affected products alone, but rather to their likeness in the context of the application to those products of the contested measure. In other words, the functional characteristics of the measure - how it works - are relevant. True, from a editorial content perspective magazines are not like products; but the measure being challenged by the US, the Canadian excise tax, has no regard to the content of the magazines and hence this “unlike” aspect of different magazines is irrelevant. The closing note of the Panel, cited above, suggests that if a measure protected a Member’s culture on the basis of its content, rather than extraneous criteria, such a DCID scheme would not be impugnable under Article III.

However, regulators and governments are reluctant to use subjective content-based criteria for DCID schemes, because more easily applied objective measures can produce roughly the same cultural development outcomes. Thus, for Canada it was much simpler to impose an excise tax on periodicals using non-original material, the vast majority of which would be US publications using split-runs to achieve lucrative advertising sales in the Canadian market, than to tax publications based on their lack of Canada-relevant content. The latter would be a subjective test that would, at the very least, require every periodical on the market to be read by an arbiter of “Canadianness”. As will be demonstrated in sections 4.3.2 and 5.4.2.2 below, the impracticality of content-based

\textsuperscript{224} \textit{Sports Illustrated} Panel Report, supra note 2 at para. 5.45; \textit{Law & Practice of the WTO}, supra note 2 at 105.
tests and the consequent preference for objective, non-content-based measures (such as whether a similar product is sold abroad in the case of the excise tax, and the nationality of works' creators in the case of broadcast quotas), is a pervasive problem of DCID schemes.

The Appellate Body's reasoning in rejecting Canada's argument for a content-based distinction between imported and domestic cultural products has been severely criticised. Bernier, for example, points out the limitations of using factual competitiveness in a market as a test for likeness: because US films and television programming would be considered like products to French films and TV in the French market, but the reverse was not true - since there is very low penetration of foreign-made film and television programming in the US\textsuperscript{225} - this would produce the absurd result that the US would be exempt from the national treatment principle if it wanted to prevent the screening of French films and TV shows, but France was obliged to open its market to US films and television programming.\textsuperscript{226} It might be argued further that, because films, television programming and music produced by countries such as Canada and Australia are often specifically geared towards the export market - so-called "industrial product" - they are far less distinctively

\textsuperscript{225} Jack Lang, a former French Minister of Culture, commented that "[t]he Americans don’t have a seventy per cent quota, or an eighty per cent quota. They have a hundred per cent quota against us." (Cited by Presburger and Tyler, supra note 25 at note 62.) See e.g., Shao, supra note 30 at 116: "... the dominance of US films in foreign markets is complemented by a blatant lack of penetration by foreign films in the US cinema market."; \textit{ibid}. at 117: "... according to surveys conducted in 1973 and 1983, imports constituted only one to two per cent of the [television] programs shown in the United States"; a recent backgrounder by \textit{The Economist} notes that Europe buys about US$2 billion of US television programming each year, but the principal exporter of European material to the US, Britain, annually sells only US$85 million worth of TV shows to the entire North American market ("A World View", \textit{The Economist} (18 January 1998) 4; available at <http://www.economist.com/editorial/freeforall/18-1-98/sb0232.html>); European audiovisual exports are desultory - only 10 per cent of European television and 20 per cent of films are sold outside the country of origin (Janet Wasko, "Jurassic Park and the GATT: Hollywood and Europe - An Update", in Farrel Corcoran and Paschal Preston, eds., \textit{Democracy and Communication in the New Europe} (Cresskill, N.J.: Hampton Press Inc., 1995) 157 at 164).

\textsuperscript{226} Bernier, supra note 7 at 6.
Canadian or Australian than periodicals aimed at those countries’ consumers. Therefore, this perspective would say that the Appellate Body’s ruling that content was not a distinguishing factor is even more damaging because periodicals, the most consistently parochial of MMPs, were the products under consideration. On this basis, imported film and television programming would be considered directly substitutable for domestic product in the same genre irrespective of their content.

Such a view of the *Sports Illustrated* Appeal Report is exaggerated: there is no reason to believe that a future Panel or Appellate Body Report, faced with a challenge to measures which are intended to foster cultural development, would necessarily take the same content-neutral view. The nuance which Bernier and others have not fully appreciated in the alarm over the *Sports Illustrated* outcome, is that Article III does not test for likeness, competitiveness and direct substitutability of products *in abstracto*, nor does any particular case outcome immediately transmogrify into a general rule. The outcome of each case tested under Article III depends entirely on its own peculiar facts, and in particular the manner in which the contested measure was designed and applied. It is quite possible that positive DCID scheme measures, i.e. which promote domestic culture without relying on mechanisms to discriminate against the importation of foreign MMPs, could survive scrutiny. This is because, in the context of a measure which operated on the basis of actual content of a cultural work, MMPs expressing parochial ideas and values would be more likely to be considered as unlike foreign products in the same genre, and such foreign product would be less likely to be regarded as directly competitive or substitutable for domestic cultural works. On the other hand, measures that are premised on extraneous criteria, such as the nationality of the creators of the cultural work rather than its actual content, seem vulnerable to Article III challenges.
Ultimately, though, no general rule can be derived for the application of the national treatment principle to DCID scheme measures, since “like products” turns out to be a very slippery term.

3.3 The General Agreement on Trade in Services (“GATS”): Still Under Construction

3.3.1 The Rationale for Liberalising Trade in Services

Prior to the Uruguay Round, the world trade regime concerned itself with trade in goods alone, because services were considered to be less amenable to trade. This assumption was based on the supposed distinguishing features of services, such as intangibility, non-durability, and the need to consume a service as it is produced, which in turn appears to require personal contact between the provider and the consumer, so that absent free movement of persons world-wide, free trade in services would be an impracticable concept. Moreover, the provision of services is often regulated on a national or regional basis, in the form of “rules on who can do what and how”, making the provision of services across borders dependent on cross-recognition of skill levels and either extensive deregulation or international harmonisation of regulatory regimes. As Michael Trebilcock and Robert Howse point out, however, these traditional characterisations of services are increasingly inaccurate in the modern world economy: the need for physical and temporal proximity between the service provider and consumer has in many cases been overcome by advances in

\[^{227}\text{Trebilcock and Howse, supra note 181 at 217; Shao, supra note 30 at 124; Smith, supra note 45 at 124.}\]


\[^{229}\text{Ibid. at 136 and note 116, citing P. Nicolaides, “Economic Aspects of Services: Implications for a GATT Agreement” (1989) 23 J. World Trade 125 at 126.}\]
telecommunications and electronic storage; deregulation and regulatory reform internationally have made possible increasing levels of international competition in service provision; and many previously integrated functions in the production process have been unpacked and "outsourced" to service providers.230 By the early 1990s, services were estimated to account for 50 to 60 per cent of GNP in developed industrialised countries, yet only made up 20 to 25 per cent of world trade.231 The preamble of the GATS recognises this "growing importance of trade in services for the growth and development of the world economy",232 and the purpose of the agreement, simply put, is to extend the general principles of the GATT to international trade in services.233

3.3.2 A Brief Excursus: Are Film and Television Programming Goods or Services?

Because of the historic emphasis of the GATT regime on goods rather than services, there has been a longstanding controversy as to whether television programming should be characterised as a good or a service. The current implication of regarding film and television programming as goods is that the applicable trade regime would be the GATT 1994, rather than putative coverage by the GATS. (As will be discussed below, the precise manner and extent to which the provisions of the GATS are to apply to film and television programming remain subject to further negotiation

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230 Trebilcock and Howse, supra note 181 at 215-216.

231 Ibid. Provision of services is not necessarily the province of wealthy countries alone, as the writers point out. Many developing countries have increased their service sector share of exports substantially in recent years, and a 1987 study revealed that the services sector share of total exports in at least a dozen developing countries emulated or exceeded that of many developed countries. (Ibid. at 225-226.)

232 Ibid. at 48.

233 Cahn and Schimmel, supra note 10 at 291.
by the WTO members set to commence in the year 2000, and to inscription of commitments regarding the audiovisual sector in individual member states’ schedules.)  

As early as 1961 the US had initiated the formation of a GATT Working Party on the issue, in the hope of obtaining agreement that restrictions adopted by some of its trading partners against the airing of foreign programming would be declared contrary to the national treatment principle of the GATT. The deliberations of the Working Party were inconclusive, but a notable aspect was the suggestion of the French delegation that television programming, even if taped, be considered a service and hence outside the then-applicable world trade regime. In the context of the Tokyo Round of the GATT in the early 1970s, the US again complained about non-tariff barriers which discriminated against its film and television production industries, pointing to subsidy schemes employed by 21 countries. Nearly two decades later, the matter had still not

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234 Cahn and Schimmel, supra note 10 at 298-299. See the discussion of the basic principles of the GATS and the "agreement to disagree" in respect of audiovisual products in sections 3.3.3 and 3.3.4 above.

235 A helpful summary of the debate in the Working Party, based on unpublished GATT source documents, can be found in: Jon Filipek, "'Culture Quotas': The Trade Controversy over the European Community’s Broadcasting Directive" (1992) 28 Stan. J. Int’l L. 323 at 340-342. The specific GATT provision which these early DCID schemes were alleged to violate was Article III:4, the general national treatment provision: ibid. and Jackson (i), supra note 18 at 294.

236 Filipek, ibid.

237 Other delegations took a different tack, and sought to extend the interpretation of Article IV of the GATT (the so-called “cinema exception”, discussed in section 4.2 below) to television: Filipek, ibid. at 341; Smith, supra note 45 at 117 and notes 150-155. Jackson cites an early US Department of State summary of the GATT 1947 which states that the value of a motion picture “is not in the film itself, but in its earning power” - i.e. applying the “real value” test (Jackson (i), supra note 18 at 293).

238 Bernier, supra note 7 at 2, citing GATT, Doc. MTN/3B1. According to Bernier, the 21 countries identified by the US at that time as unfairly deploying subsidies for their cultural industries included Argentina, Austria, Belgium, Brazil, Canada, Chile, Denmark, Egypt, France, Germany, Greece, Holland, Indonesia, Israel, Italy, Japan, Norway, Pakistan, Portugal, and the UK.
been resolved, and the European Council's 1989 "Television Without Frontiers" Directive set off a new storm of US opprobrium by requiring broadcasters in European Community ("EC") member states to "reserve for European works ... a majority proportion of their transmission time". The then United States ("US") Trade Representative, Carla Hills, described this domestic broadcast quota as being "inconsistent with the Community's obligations not to discriminate against foreign products ... under the GATT", and requested bilateral consultations as a precursor to a GATT dispute settlement process. The predictable response of the EC was that it considered television

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239 The European Council is the legislative authority of the EEC/EC/EU. It should be noted that, in most circumstances, Directives of the Council have to be transposed into domestic Member State law before they can bind that state's organs and subjects.

240 Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 89/552/EEC, (1989) 32 OJ (L298) 23, Article 4:1; (1989) 28 I.L.M. 1492 at 1496. A full discussion of Article 4:1 of the "Television Without Frontiers" Directive, and the extent to which it has been transposed into the domestic law of various EU members, is beyond the scope of this thesis; however, it should be noted that while some EU member states implemented the Directive enthusiastically, e.g. France imposed a 60 per cent "European works" quota on all programming broadcast on evening prime time television, other member states such as the Netherlands and Germany did not enact domestic legislation to give effect to the Directive, at all, on the basis that it was only to be implemented "where practicable". See Carol Fontanille, "TV Broadcasting Obligations in France" (1992) 10:4 Int'l Media L. 28; Smith, supra note 45 at 108-109. For a helpful recent discussion of the Directive, its implementation and the beginning of its process of revision in 1995, see Timothy Johnson and Grainne McKenna, "The 'Television Without Frontiers' Directive - European Regulation of Programme Content", in Entertainment, Publishing and The Arts Handbook, 1996-7 ed. (St Paul: Clark Boardman Callaghan, 1997) at 365. See also Cahn and Schimmel, supra note 10 at 313. A helpful general discussion of the Directive, free of the polemics that characterise other US journal articles on the topic, is provided by Braun and Parker, supra note 55 at 169-178.

241 Cited by Smith, supra note 45 at 106, from a press release issued by the US Trade Representative on 10 October 1989.

242 Filipek, supra note 235 at 345. The dispute was initiated prior to the introduction of the new WTO dispute settlement process (see supra note 187), under the previous pre-Uruguay Round procedures which gave somewhat desultory effect to Article XXIII of the GATT 1947, the "nullification or impairment" provision. While consideration of the shortcomings of the pre-Uruguay Round dispute settlement procedures is beyond the scope of this thesis, it is relevant to note that even if the US complaint had ultimately been considered by a GATT Panel, any recommendation by the Panel contrary to the EC's standpoint would almost certainly not have been adopted due to the EC's veto power over such adoption, through its various member states who were contracting parties to the GATT and had to give unanimous assent for the adoption of a
broadcasting to be a service and not a good, as a result of which it had “serious doubts about the relevance of the US complaint to the General Agreement”.243

Notwithstanding a chorus of US legal opinion in the early 1990s arguing to the contrary,244 the issue had become somewhat moot because all matters pertaining to trade in television programming and films were by then being debated within the context of the Uruguay Round’s Working Group on Audio-Visual Services, which, in turn, was part of the Group of Negotiations on Services (“GNS”) - as opposed to the Group of Negotiations on Goods (“GNG”).245 This de facto

Panel recommendation. For a full examination of the pre-Uruguay Round and new WTO dispute settlement processes, see Trebilcock and Howse supra note 181 at c.15, 383-407.

243 Cited by Smith, supra note 45 at 107 and notes 66 and 68, from “US Requests Consultations on EC TV Broadcast Directive”, GATT Focus (November 1989) at 3. On the EC “service defence”, see also Filipek, supra note 235 at 350-351.

244 See e.g., Smith, supra note 45 at 123-127 (rejecting the “real value” test; previous GATT panels have adopted the “necessary form” test; television programming must of necessity be stored in the necessary form of video tape in most transactions; hence should be considered a good); Filipek, supra note 235 at 355-357 (issue is not “broadcasting”, which admittedly is a service, but rather the sale of pre-recorded programming, which has the characteristics of a good when traded; most mass-media products have been treated as goods in GATT tariff schedules; television programming analogous to films, which required a specific exception from the GATT 1947 - hence television programming should be considered to be a good, as appears the case with films); Arthur Dimopolous, “The Television Without Frontiers Directive: Preserving Cultural Integrity or Protectionism?” (1993) 13 Loy. L.A. Ent. L.J. 273 at 305-307 (EC’s “service defence” is nothing more than semantics; only tangible works or products can enjoy copyright protection; Directive targets these goods, not their broadcast); Ross, supra note 47 at 553 (European Court of Justice itself has ruled that trade in audiovisual products subject to rules relating to trade in goods, and regards television programming and films as goods, citing Ex parte Guiseppe Sacchi (1974) E. Comm. Ct. J. Rep. 4, (1973) Comm. Mkt. Rep. (CCH) 9173; Vincent Bela Feher, “Television Without Frontiers: Possible US Responses” (1992) 9 Miami Ent. & Sp. L. Rev. 65 at 84-99 (Directive’s framework itself is premised on recognition that television programming is a good; production of television programming requires the use of tangible products throughout; even if broadcasting itself is a service, consequence of its regulation is on trade in tangible goods; previous GATT Panel in Italian Discrimination Against Imported Agricultural Machinery (7th supp. B.I.S.D. (1959) 60) has held that if a service is regulated so as to discriminate against an imported good, this would be a violation of the national treatment principle).

245 Filipek, supra note 235 at 343. The separate GNG and GNS structures were created in 1986 (see General Agreement on Tariffs and Trade: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations (20 September 1986), (1986) 25 I.L.M.1623). The Audio-Visual Sector Working Group was established following a decision taken by the GNS in June 1990, and first convened in late August 1990 (Filipek, Ibid. and his notes 124 and 125).
absorption of trade in audiovisual products into the GATS negotiations process was a pragmatic response to the reality that the GATT’s “failure to define goods adequately and to distinguish them from services precludes a simple determination of whether a GATT panel would consider television programs as goods.”

The US, glad merely to have negotiation of trade in audiovisual products on the table, acquiesced in their discussion within the GNS framework; and, after continuously claiming that these products were services and not goods, the EC could hardly dispute the right of the GNS to negotiate liberalisation in their trade.

In any event, traditional approaches to taxonomising relevant transactions into either the goods or the services category are not always helpful, as Trebilcock and Howse argue:

These various definitional quagmires are largely avoidable, however, if instead of attempting an abstract definition, one looks to the purpose of creating rules in services in the first place. The purpose is to reduce or eliminate barriers to trade that are not caught by existing rules, since those rules have been designed largely with a view to liberalising trade in goods. From the perspective of trade law and policy, what is most important is to be able to identify a set of barriers that should be reduced or removed to facilitate trade in services. Of course, the nature of these barriers arises from certain identifiable characteristics shared by a significant number of service industries (such as a high degree of domestic regulatory control or the importance of free movement of capital and labour to trading opportunities) but some non-service industries may also possess some of these characteristics.

In other words, if the barriers to liberalisation of trade in film and television programming (e.g. as contained in DCID schemes such as minimum domestic broadcast quotas) are similar to trade

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246 This admission is made by Smith, supra note 45 at 123.

247 Trebilcock and Howse, supra note 181 at 218. See also Shao, supra note 30 at 125, and Braun and Parker, supra note 55 at 188, where the relevance of the goods/services distinction is similarly questioned.
barriers typical of many services, it is most practical to deal with these barriers within the GATS framework, and vice-versa.\(^{248}\)

3.3.3 Basic Principles of the GATS and their Application to Audiovisual Services

The basic principles of the GATS, in a form largely analogous to that of the GATT, are set out in Parts I and II of the agreement. Article I in Part I sets out the ambit of application of the GATS, without actually defining precisely what constitutes a “service”.\(^{249}\) “Trade in services” is stated to include the provision of a service from the territory of another member state as well as services offered within the territory of the service-importing member state, by either a juristic or natural person representing the service-exporting member state.\(^{250}\) “Services” are said to include

\(^{248}\) This pragmatic approach appears to have been adopted in the *Sports Illustrated* Panel Report, where Canada’s excise tax on advertising was found to be a measure pertaining to trade in goods, based in part on the Panel’s observation that advertising had been dealt with under the jurisdiction of the GATT since the 1970s. (*Sports Illustrated* Panel Report, *supra* note 2 at paras. 5.15 and 5.18.)

\(^{249}\) Trebilcock and Howse, *supra* note 181 at 228.

\(^{250}\) Article I:2. Individual member state Schedules (discussed *infra* in this paragraph 1.4.3) to the GATS may contain so-called “horizontal” limitations (meaning limitations which cover all sectors, as opposed to being “vertical” or sector-specific) categorised into these four aspects of supply, i.e. (1) cross-border supply; (2) consumption abroad; (3) commercial presence; (4) presence of natural persons. A recent WTO cumulative analysis of the Schedules notes that while most member states have not limited service supply in categories (1) or (2), fifty-five countries have entered limitations on category (3) supply of services, namely via commercial presence - i.e. foreign ownership and control restrictions of one kind or another. While a fuller consideration of such “horizontal” limitations is beyond the scope of this thesis, these limitations in the various individual Schedules will obviously apply to trade in audiovisual products by virtue of their general application to trade in all services in which the particular member state engages. The WTO document makes the point that, as a result, seemingly liberal sectoral commitments are deceptive: “In the case of supply through commercial presence and the presence of natural persons, the high proportion of [sector-specific] commitments without limitations must be seen in relation to the fact that most limitations on these modes are contained in the horizontal section of the schedules.” Examples of such horizontal limitations are discussed below in this section 3.3.3, and see: “UR: Commitments in Services” in *Uruguay Round: A Quantitative Assessment*, <http://www.wto.org/etfal/e/wto01/wto01_47.htm>.
“any service in any sector except services supplied in the exercise of governmental authority”,\textsuperscript{251} and this latter exception to GATS coverage is significantly limited, to services “supplied neither on a commercial basis nor in competition with one or more service suppliers.”\textsuperscript{252} Measures by both governmental and non-governmental bodies exercised in terms of delegated governmental authority must comply with the GATS.\textsuperscript{253} Finally, “supply of a service” is defined to include the production, distribution, marketing, sale and delivery of a service.\textsuperscript{254}

Such ambitious breadth of application leads Cahn and Schimmel to conclude that “exchanges of cultural services are covered by the scope of the GATS.”\textsuperscript{255} While this may be true in a general sense, it could be argued that the provision of public broadcasting is precisely the type of non-commercial and non-competitive service supplied in the exercise of governmental authority which the GATS intended to exempt from its coverage. In that case, DCID schemes which mandate minimum domestic product quotas for public broadcasters such as the Canadian Broadcasting Corporation (“CBC”) would be GATS-exempt. On the other hand, the decidedly commercial and competitive posture of contemporary public broadcasters, which in many countries deliver audiences to advertisers in direct competition with private broadcasters in their markets,\textsuperscript{256} makes

\textsuperscript{251} Article I:3(b).

\textsuperscript{252} Article I:3(c).

\textsuperscript{253} Article I:3(a). A good example of a self-regulatory measure taken by a non-governmental body, but empowered by legislation and hence subject to the GATS, is the determination of minimum Australian music broadcast quotas in the form of a Code of Practice, by the Australian commercial radio broadcast sector industry group in terms of s. 123(2)(g) of the Broadcasting Services Act 1992.

\textsuperscript{254} Article XXVIII(b).

\textsuperscript{255} Cahn and Schimmel, supra note 10 at 292.

\textsuperscript{256} While the radio services of the CBC have been commercial-free since 1974, its television services are described as a “hybrid”: Can$299 million of the CBC’s total 1993-4 spending of Can$985
the argument something of a stretch, and, in any event, most countries’ DCID schemes are applied in some form to private broadcasters as well.257

The GATS is, essentially, a work in progress. There are only a few general commitments which are immediately applicable to all the signatories, the most important of which is the MFN principle in Article II:1, which requires that “each Member shall accord immediately and unconditionally to services and service suppliers of any Member treatment no less favourable than that it accords to like services and suppliers of any other country.” The requirement that treatment be “no less favourable” does not only impugn patently discriminatory measures, but also, as a general rule, measures which are de facto discriminatory in effect.258 This corresponds to the similarly expansive understanding of Article I of the GATT 1994, and no shelter may be sought in a claim that de facto discriminatory measures are necessary to achieve aims and effects which are otherwise GATS-consistent.259

The one significant exception to the MFN principle in Article II of the GATS is that Members were given a one-time opportunity260 to enter exemptions from MFN treatment under

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257 The Australian Content Standard discussed at length in section 4.3 below is a typical illustration of such application.


259 Bananas Appeal Report, ibid. at para. 241; Law & Practice of the WTO, ibid. at 96.

260 As noted by Schott, the opportunity to enter MFN exemptions was only available up until the time that the GATS entered into force, i.e. January 1995, with extended deadlines to accommodate the
strict conditions and time-limits, but any such exemption shall “in any event ... be subject to negotiation in subsequent trade liberalizing rounds.” The Annex on Article II Exemptions requires such exemptions to have been listed by the relevant member state, and all such exemptions are subject to review after five years and expiry, “in principle”, in ten years’ time. However, even after the expiry of the ten-year period, there is no obligation to relinquish any MFN exemptions taken. To date, 42 Members have taken MFN exemptions in respect of audiovisual services.

261 Article II:2.

262 Clause 6, Annex on Article II Exemptions, supra note 260. In other words, a member state’s MFN exemption in respect of a specific service cannot prevail over a subsequently negotiated sectoral agreement. This “conditional MFN” exception represents a compromise between the US, which wished to retain some arm-twisting power through reciprocal market access, and the more broadly accepted GATT ideal of unconditional MFN so as to prevent the GATS from becoming no more than an agglomeration of bilateral sectoral deals (Trebilcock and Howse, supra note 181 at 230).

263 The review is to be conducted by the Council for Trade in Services, and its mandate is to “examine whether the conditions which created the need for the exemption still prevail.” But even if the Council finds that the conditions which were said to justify a particular exemption no longer prevail, it does not have the power to order the termination of the exemption (Schott, supra note 260 at 104-105).

264 Clauses 3 and 6 of the Annex on Article II Exemptions, supra note 260.

265 Schott, supra note 260 at 101.

266 If the EU’s member states are counted as one member, then the figure is 27 members, as confirmed by Bernier, supra note 7 at 12.

267 The Article II Exemptions are available at <http://www.tradecompass.com/library/wto/schedulesandexemptions/>. References to various WTO member exemptions which follow are to the texts as they appear at this web-site. The countries which took exemptions in respect of audiovisual services are: Australia, Austria, Bolivia, Brazil, Brunei Darussalam, Bulgaria*, Canada, Chile, Colombia, Cyprus, Czech Republic, Ecuador*, Egypt, the European Union and its twelve member states, Finland, Hungary, Iceland, India, Israel, Liechtenstein, New Zealand, Norway, Panama*, Poland, Singapore, Slovak Republic, Slovenia*, Sweden, Switzerland, Tunisia, and Venezuela. The asterisked countries submitted their exemption lists after signature of
While a full analysis of these exemptions is beyond the scope of this study, it is valuable to mention some features common to many Members’ exemption lists. Australia, for example, has exempted from the application of MFN treatment its film and television co-production arrangements with Italy, UK, Canada and France and "any other country where cultural co-operation might be desirable and which is prepared to exchange preferential treatment on the terms and conditions specified in the Australian co-production programme." Describing the measures in respect of co-production maintained by Australia and the reason why they may be inconsistent with Article II of the GATS, the Australian MFN exemption list states that,

Under the Australian Government Co-production programme, Australia maintains preferential co-production arrangements for film and television productions. Official co-production status, which may be granted to a co-production produced under these co-production arrangements, confers national treatment on works covered by these arrangements, including in respect of access to finance and tax concessions and simplified requirements for the temporary entry of skilled personnel into Australia for the purposes of the co-production.

The rationale behind these bilateral treaties is recorded as being, “to promote collaborative efforts between Australian and foreign film producers and general cultural links”. Numerous of the other

268 GATS/EL/6 (94-1096); MTN.GNS/W/264.
269 Ibid.
270 Ibid.
members list preferential treatment for co-productions as their exempted measure, on a similar basis to that of Australia.  

Insofar as DCID schemes for minimum domestic broadcast quotas are concerned, a good example of MFN exemption from the GATS is provided by the EU’s listing of measures “which define works of European origin, in such a way as to extend national treatment to audiovisual works which meet certain linguistic and origin criteria regarding access to broadcasting or similar forms of transmission.” The reference is obviously intended to cover the “European works” broadcast quota in Article 4 of the “Television Without Frontiers” Directive, and the purpose of favouring other European nations in a manner inconsistent with the multilateral MFN principle is stated to be the promotion of “cultural values both within EC Member States and with other countries in Europe, as well as achieving linguistic policy objectives.” Numerous of the other European

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271 See e.g., the exemption lists of Canada, Colombia, Egypt, Hungary and Tunisia. It must be of concern that, prior to its recent conclusion of an important audiovisual co-production agreement with Canada, South Africa did not entered a similar audiovisual services exemption in respect of the application of Article II of the GATS, and hence any preferential South African treatment of Canadian services suppliers pursuant to the co-production agreement would violate the MFN provision of the GATS.

272 GATS/EL/31,(94-1115); MTN.GNS/W/228/Rev.1.

273 See discussion in section 3.3.4 below and note 240 supra.

274 GATS/EL/31, supra note 272. It should be noted that at the time, neither Australia nor Canada needed to enter a similar exemption in respect of the Australian Content and Canadian Content broadcast quotas respectively, because these DCID schemes favour only domestic producers, not producers from other WTO member states as is the case with the EU quota scheme, which extends Europe-wide. (Australia may yet rue the missed opportunity to include preferential treatment of New Zealand programming as an MFN exemption, as will be discussed in c. 5 below.) The putative violation by the Australian and Canadian schemes is in respect of national treatment, and no violation exists until such time as these countries inscribe a national treatment commitment in respect of their audiovisual services, in their Schedules. The Article II Exemption lists are necessary only to qualify the MFN provision in Part II; the national treatment and market access provisions in Part III of the GATS are a separate matter. See the discussion of the latter, below in this section 3.3.3. The history and reasons for the EU and its member states to have taken this exemption in the context of the Uruguay Round is discussed in section 3.3.4 below.
members provide for a similar exemption, some mentioning the "Television Without Frontiers" Directive directly.\textsuperscript{275} Signatories to the GATS have, therefore, taken ample advantage of the opportunity to derogate from the MFN obligation. However, while this may seem to negate the entire purpose of the treaty, it should be seen in perspective: according to John Jackson, it is estimated that 25 per cent of all world trade moves under some form of discriminatory regime that is a departure from MFN principles.\textsuperscript{276}

A Part II provision which is particularly relevant to DCID schemes, Article XV, deals with subsidies. Noting that "subsidies may have distortive effects on trade in services", the Article encourages member states to begin negotiations "with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects" (these negotiations indeed began last year),\textsuperscript{277} and requires member states which deploy subsidy measures for their service industries to afford "sympathetic consideration" to any request for consultations by another member state which believes that it is being "adversely affected" by a particular subsidy so deployed. According to

\textsuperscript{275} For example, the Polish list refers to measures consistent with the "EC Television Broadcasting Directive (No 89/552) and which define programmes of European origin in order to extend national treatment to audiovisual programmes meeting specific criteria" (GATS/EL/71 (94-1139); MTN.GNS/W/234/Rev.1). Poland is a signatory to the 1989 European Convention on Transfrontier Television, which duplicates the text of the "Television Without Frontiers" Directive and extends its preferential treatment beyond the member states of the EU, to the 31 European states which are parties to the European Cultural Convention. Discussion of this broader Convention is beyond the scope of this thesis, but it should be noted that while such preferential treatment would notionally be acceptable in terms of Articles XXIV of the GATT 1994 and V of the GATS in respect of the EU, as a free trade area, to the extent that the Convention extends preferential treatment to member states beyond the boundaries of the EU trade area it violates the national treatment principle \textit{vis-a-vis} countries which do not enjoy that preference. A helpful discussion of the Convention on Transfrontier Television may be found in Filipek, \textit{supra} note 235 at 335-337.


\textsuperscript{277} Cahn and Schimmel, \textit{supra} note 10 at 301.
Trebilcock and Howse, Articles VI and XVI of the GATT 1994, which authorise the imposition of countervailing duties by an importing country in respect of the relevant exporting country’s subsidies where they threaten or have actually caused material injury to a domestic industry, only apply to subsidised goods, not services.\textsuperscript{278} Therefore, the absence of a corresponding authorisation in Article XV of the GATS would disallow any possibility of imposing countervailing duties in respect of subsidised services, since any such country-specific duties would violate the MFN principle in Article II (the countervailed country would not be accorded the same treatment as other, non-countervailed member states) - unless the current limp-wristed approach to trade-distortive subsidisation is cured in subsequent GATS negotiations.\textsuperscript{279} While it might seem logical to develop the GATS subsidy rules in a symmetric fashion to those applicable to goods, a WTO official is quoted by Bernier as saying,

\begin{quote}
There is no presupposition as to what they will contain or how different they will be from rules on subsidies in the goods area. Like all GATT/WTO negotiations, they will take place on the basis of consensus, and it would seem unlikely that governments would abandon their explicit right to support film production.\textsuperscript{280}
\end{quote}

Despite the absence of formal subsidy and retaliation rules from the current framework of the GATS, it should be noted that the EU states have taken MFN exemptions which would enable them to apply “redressive duties ... in order to respond to unfair pricing practices, by certain third countries’ distributors of audiovisual works”, as well as "[m]easures taken to prevent, correct or

\begin{footnotes}
\textsuperscript{278} Trebilcock and Howse, \textit{supra} note 181 at 233.

\textsuperscript{279} \textit{Ibid.}

\textsuperscript{280} Bernier, \textit{supra} note 7 at 13, citing Mario A. Kakabadse, “The GATT/WTO Rules and Cinema: Their Consequences for Europe” (Paper presented to a conference on this topic held at the Centre Jacques Cartier, Lyon, 6 December 1995) [unpublished] at 5.
\end{footnotes}
counterbalance adverse, unfair or unreasonable conditions or actions affecting EC audiovisual services, products or service providers, in response to corresponding or comparable actions taken by other Members.\(^{281}\) This is oblique code entitling the EU to apply anti-dumping and countervailing duties, respectively, against foreign suppliers of audiovisual services. A countervailing duty regime in respect of products of film and television programming subsidy schemes may not be much use to the US (for the simple reason that very little of the subsidised product ever manages to penetrate the US theatre screening or network television market),\(^{282}\) but could possibly be invoked by other, smaller countries which experience imbalances in the trade of mass media products with countries that heavily subsidise their cultural industries. Similarly, given the previous discussion on pricing of audiovisual products,\(^{283}\) it might be argued that anti-dumping duties may be imposed against the US in particular.\(^{284}\) Finally, many European states have boiler-plated their cultural industries’ access to European DCID scheme subsidy funds by including them as MFN-exempt measures.\(^{285}\)

The second cornerstone principle of the GATT, national treatment, only appears in Part III of the GATS, and is attenuated in that it only applies to those sectors inscribed by member states

\(^{281}\) The EU exemption list (GATS/EL/31), \textit{supra} note 272.

\(^{282}\) See the discussion of this point in note 225 \textit{supra}.

\(^{283}\) See section 2.1 above.

\(^{284}\) Though, as discussed in note 38 \textit{supra}, there are severe obstacles to substantiating the dumping argument; the merits of the argument, however, may be of little import in a political spat between the EU and the US over trade in culture.

\(^{285}\) See \textit{e.g.}, the EU MFN exemption list, which cites “Measures granting the benefit of any support programmes (such as Action Plan for Advanced Television Services, MEDIA or EURIMAGES) to audiovisual works, and suppliers of such works, meeting certain European origin criteria” (GATS/EL/31, \textit{supra} note 81); and Poland’s list, which exempts “preferential treatment that is adopted for the implementation of benefits, in conformity with support programmes and suppliers of these programmes, meeting specific European origin criteria” (GATS/EL/71, \textit{supra} note 275).
in their Schedules to the GATS, and “subject to any conditions and qualifications set out therein”\(^{286}\).

As Marco Bronckers and Pierre Larouche explain, the national treatment obligation “only becomes operational once a Member has actually negotiated concessions, or in GATS language, ‘specific commitments’”\(^{287}\). The GATS provides the framework for these specific sectoral commitments, and each member state’s specific commitments are recorded in an elaborate system of country schedules attached to the GATS\(^{288}\). Therefore, although Article XVII of the GATS provides that,

> each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers,

a member’s DCID scheme which mandates minimum domestic quotas for broadcasters licensed by that member’s broadcast regulator, and which \textit{prima facie} violates the national treatment principle by according more favourable treatment to domestic products, would not be considered to be contrary to the GATS unless that member had inscribed a specific commitment in respect of its broadcast sector within an audiovisual services sectoral schedule, without condition or qualification.

\(^{286}\) Article XVII:1.

\(^{287}\) Marco C.E.J. Bronckers and Pierre Larouche, “Telecommunications Services and the World Trade Organisation” (1997) 31:3 J. World Trade 5 at 14. A WTO guide to reading the GATS describes a “specific commitment” as “an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service. Specific commitments thus have an effect similar to tariff binding - they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage.” See World Trade Organisation, “Guide to Reading the GATS Schedules of Specific Commitments and the Lists of Article II (MFN) Exemptions”, <http://www.wto.org/wto/new/guide1.htm> (hereinafter “GATS Guide”). The principle of “market access”, as distinct from “national treatment” is discussed in this section, below.

\(^{288}\) \textit{Ibid.}
In fact, the GATS' title is a misnomer: it is not a “general” agreement, but rather a “special agreement on services”.\textsuperscript{289} To date, only a small minority of WTO members have scheduled commitments in respect of audiovisual services: eighteen, by the current count.\textsuperscript{290} In most cases, the scheduled commitments are modest: for example, Hong Kong and Singapore both make commitments in respect of production, rental and sale of video tapes, as well as sound recordings, but expressly exclude broadcasting from the ambit of the audiovisual services covered.\textsuperscript{291} Similarly, the Republic of Korea makes commitments in respect of the production and distribution of motion picture and video productions, but expressly excludes cable television distribution from those

\textsuperscript{289} Schott, supra note 260 at 101, who attributes this helpful insight to Richard Snape of Monash University, Melbourne.

\textsuperscript{290} The members are: Central African Republic, Dominican Republic, Hong Kong, India, Israel, Japan, Kenya, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Singapore, Thailand, the US, Gambia, Lesotho and Panama. I identified these countries by perusing all of the Schedules of Specific Commitments to the GATS which are available on the “tradecompass” web-site, supra note 267, as well as the updated schedules of commitments entered after signature of the WTO agreement, available by searching the WTO web-site, ibid., on “GATS/SC”. According to other data available on the WTO web-site, the number of countries is only thirteen: ibid. at \texttt{www.wto.org/evol/e/wto06/wto6_58.htm}. Cahn and Schimmel report only 12 countries as having inscribed audiovisual services within their schedules, though their source is fairly dated - a paper delivered by a WTO official in December 1996 (supra note 10 at 298 and accompanying notes). Cahn and Schimmel cite the official as including Switzerland in his list of countries which have inscribed audiovisual services within their Schedule of Specific Commitments to the GATS, but my perusal of the original Swiss Schedule of 15 April 1994, and of several subsequent supplements to it, did not reveal any such commitment. See: GATS/SC/83 (94-1080); MTN.GNS/W/109/Rev.5/Add.1.

\textsuperscript{291} Hong Kong: GATS/SC/39 (94-1037); MTN.TNC/W/54/Rev.3. Singapore: GATS/SC/76 (94-1073); MTN.TNC/W/65/Rev.4. The latter schedule makes itself abundantly clear, noting that, All broadcasting and AV services and materials that are broadcasting-related are excluded, examples being

- Free-to-air broadcasting
- Cable and pay television
- Direct broadcasting by satellite
- Teletext.
commitments, meaning that access of foreign suppliers to a crucial market sector is not governed by the national treatment principle. Even where commitments to national treatment of audiovisual services are open-ended, suppliers must still face significant horizontal barriers, which are inscribed at the beginning of Members' Schedules of Specific Commitments and apply across all sectors in which commitments are made. For example, though the Dominican Republic is unusually liberal in entering commitments in respect of radio and television cable services, aspirant foreign broadcasters must still contend with a 29 per cent foreign equity limit. And, in some cases, Members' Schedules of “Specific Commitments” are a misnomer: instead of liberalising access to their markets, they have simply included their DCID schemes in their Schedules. Malaysia, for example, makes its commitment to national treatment of suppliers of broadcasting services contingent upon a caveat that it is “unbound for government channel”, i.e. that there is no commitment in respect of the government-owned media in the country. Mexico makes a commitment to national treatment of “private film-screening services”, but conditions the commitment with the following two obligations: “Thirty per cent of screen time must be devoted to Mexican films. For each copy screened in Mexico, a copy must be processed in a Mexican laboratory.”

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292 GATS/SC/48 (94-1046); MTN.TNC/W/61/Rev.4.
293 For a brief explanation of “horizontal” barriers, see note 250 supra.
294 GATS/SC/28 (94-1026); MTN.GNS/W/173.
295 GATS/SC/52; MTN.GNS/W/122/Rev.4. In respect of market access (see discussion of this concept in the GATS below in this section 3.3.3), the commitment is only to “20 per cent of total screening time; and dubbing into the national language may be required”.
296 GATS/SC/56 (94-1053); MTN.TNC/W/71/Rev.3/Corr.1. Note that screen quotas are expressly permitted in terms of Article IV of the GATT 1947 - see the discussion of the GATT “cinema exception” in section 4.2 below.
The same requirement for Schedule inscription holds in respect of specific “Market Access” commitments undertaken by member states in terms of Article XVI of the GATS, but once market access commitments in the sector concerned have been undertaken by the members in their respective Schedules, there is a six-point “black list” of restrictions which a member state may not impose in respect of foreign service providers’ access to its market, and members are bound to accord market access on an MFN basis. The market access obligation is intended to secure entry of foreign service suppliers into the market of a member state, irrespective of the position of national suppliers in that state, and the national treatment provision ensures that once in the market of the member state, a foreign service supplier will be treated like local suppliers. As Bronckers and Larouche note, the market-access and national treatment obligations frequently overlap, and so Article XX:2 of the GATS provides that limitations listed with respect to market access apply to national treatment as well. Finally, the text of the GATS national treatment provision is careful to ensure that foreign suppliers gain substantially equal competitive opportunities, by disavowing “formally identical treatment” if it would tend to favour domestic service suppliers, and by allowing “formally different treatment” where that achieves the goal of national treatment.

The six types of market access limitations disallowed by Article XVI:2 concern: (i) the number of service suppliers allowed; (ii) the total value of transactions or assets; (iii) the total output of services; (iv) the number of natural persons employed; (v) the type of legal entity through which the service is supplied; (vi) foreign equity participation or investments. Elements of numerous DCID schemes violate one or more of these “black-listed” limitations - e.g. foreign control limitations in ss. 57 and 58 of the Australian Broadcasting Services Act, supra note 26 and the accompanying text.

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298 Article XVI:1.

299 Bronckers and Larouche, supra note 287 at 16.

300 Ibid.

301 Article XVII:2-3; Trebilcock and Howse, supra note 181 at 233.
In summary of the basic principles of the GATS in Parts I to III discussed above, it should again be emphasised that the extent to which these provisions currently apply to individual member states is wholly dependent on the Schedules entered by those states: “It is only by reference to a country’s schedule, and (where relevant) its MFN exemption list, that it can be seen to which services sectors and under what conditions the basic principles of GATS - market access, national treatment and MFN treatment - apply within that country’s jurisdiction.”

Therefore, the application of the GATS still requires much ongoing development. Part IV of the GATS sets out the timetable for and intended scope of liberalisation in services: Article XIX:1 requires member states to “enter into successive rounds of negotiations”, beginning from January 2000, “with a view to achieving a progressively higher level of liberalisation.” On the one hand, the scope of the sectoral negotiations is sweeping, taking in “any domestic regulatory measure that has the effect of limiting market access”, a provision which has “far-reaching implications ... for domestic policy sovereignty”. On the other hand, Article XIX:2 records that “[t]he process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual sectors, both overall and in individual sectors.”

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302 “GATS Guide”, supra note 287. There are twelve formally identified sectors, and audiovisual services (regarded as film and television production) fall within the “Communications” sector, though arguably other MMP-related services could also fall into the “Recreation” sector (e.g. promotional tours by music artists - in respect of which Peru, notably, has taken an MFN exemption regarding measures providing “greater facilities for the presence of Latin American artistes interpreting Latin American themes (a higher quota of participation of such artistes compared with those of third countries)”, GATS/EL/69, (94-1137); MTN.GNS/W/235). For a helpful table of sectors and the number of countries which have entered schedules in each specific sector, see: <www.wto.org/een/wto06/wn05_58.htm>.

303 Trebilcock and Howse, supra note 181 at 234; italics in the original. The authors base this interpretation on the broad language of Article XIX:1, which speaks of “the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.”

304 Ibid.
3.3.4 Audiovisual Services in the GATS: Agreeing to Disagree

The tension between liberalisation of services and national policy objectives discussed in the previous paragraph is particularly exemplified by DCID schemes, which blatantly favour domestic cultural industry suppliers and claim justification in ideological national policy and industrial development rationales. In fact, at an early stage in the Uruguay Round negotiations, members of the EC argued that while audiovisual services had to be included along with all other services in the coverage of the agreement, these services' "cultural specificity" should be recognised so that, *inter alia*, EC member states' DCID subsidy and quota schemes for the production of "European works" would be exempt from the MFN obligation,\(^{305}\) and that no further liberalisation should be expected in the audiovisual sector as would generally be required by Article XIX:1.\(^{306}\) These outcomes would be contained in a specific annex to the treaty on services then under discussion by the GNS.\(^{307}\) The "cultural specificity" strategy was endorsed by several other countries with significant domestic film industries, such as Canada, India and Egypt,\(^{308}\) but it was subsequently rejected by France in particular, which saw great danger in including the audiovisual

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\(^{305}\) If this exemption was not achieved, then, because the EC schemes and the related Convention on Transfrontier Television do not operate only within one jurisdiction but rather between many countries, US producers would have to be accorded equal treatment as beneficiaries of subsidy schemes under the MFN principle, and the quota schemes would have to be abandoned. See Shao, *supra* note 30 at 106-107.

\(^{306}\) Cahn and Schimmel, *supra* note 10 at 293-295, discussing the initial strategies of the EC in respect of the audiovisual sector in the GATS negotiations, and the agreement on the "Six Informal Requirements of Mons" by the EC's communications ministers in 1993. According to the writers, the "cultural specificity" strategy was first mooted in 1990, and was steered by Sir Leon Brittan, at the time Vice-President of the European Commission. Filipek, *supra* note 235 at 343-345 provides a helpful summary of the proceedings of the first meeting held by the GNS Audio-Visual Sector Working Group in August 1990.


\(^{308}\) Filipek, *supra* note 235 at 343-344.
services sector within the coverage of the GATS at all, because it feared that mere inclusion would begin the slippery slope towards total liberalisation of trade in audiovisual products and the forced abandonment of the EC’s DCID schemes. Therefore, the EC changed tack and sought a “cultural exception”, keeping the domestic regulation of audiovisual services outside of the GATS by adding to the “General Exceptions” Articles a provision stating that national measures regulating the supply of audiovisual services could be taken to preserve and promote local, national, and regional cultural identities. Other European Community members noted, however, that final confirmation of whether such measures were acceptable would depend on their being applied in a manner consistent with terms similar to those contained in the preamble to Article XX of the GATT - i.e.

309 Cahn and Schimmel, supra note 10 at 295-296.

310 Articles XIV and XIVbis, which authorise members to adopt measures necessary to protect, inter alia, public morals, public order, human life, national security, etc., which measures would otherwise contravene the GATS. These articles are very similar to Articles XX and XXI of the GATT 1947. See the more extensive discussion of the “public morals” exception in section 5.4.4 below.

311 Cahn and Schimmel, supra note 10 at 296-7. Most commentators do not recognise the distinction which Cahn and Schimmel make between the two strategies, the first bringing audiovisual products within the proverbial tent and the second keeping them out. Although Filipek describes the EC strategy at the GNS stage as advocating a “culture exception”, he notes that the EC’s proposal was for recognition of “cultural specificities” within a separate sectoral annex for audiovisual services (supra note 235 at 343-345), which Cahn and Schimmel refer to as the first, “cultural specificity” strategy, rather than the subsequent “cultural exception” strategy. Bernier describes Article IV of the GATT 1947 (discussed in section 4.2 below) as recognizing the “the specificity of cultural products ... without subtracting them from the disciplines of the agreement” (supra note 7 at 1), and then says that the goal of the EC’s initial cultural specificity strategy was to obtain a clause similar to the exemption of Canadian cultural industries in Article 2005(1) of the Canada-US Free Trade Agreement (“FTA”); Part A, Schedule to the Canada–United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65, 27 (1988) J.L.M. 281. Both measures would be characterised as “specificity” approaches, since they did not “exclude” cultural products from application of the relevant treaties as much as provide them with specific treatment that derogated from the general principles in the treaties. In the FTA, for example, use of the exemption under Article 2005(1) was made subject to the caveat in Article 2005(2) that the US could retaliate with “measures of equivalent commercial effect”. However, Bernier does not view the 1993 French-led “cultural exclusion” initiative as being distinct from the previous “specificity” approach in the GNS (ibid. at 2). Perhaps it would be better to view Cahn and Schimmel’s distinction between “specificity” and “exclusion” as describing varying degrees of exclusion rather than being dichotomous.
that they would not "constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services"312 - so that ultimately the entire strategy could fail with one adverse WTO panel ruling.313 In any event, this internal EC wrangling over strategy was somewhat irrelevant since the US steadfastly maintained its position that no special deal could be made in respect of audiovisual services, whether on the grounds of "specificity" or "exclusion".314 That the US held to this stance with such vigour can be ascribed in part to the genuine economic importance of its entertainment industry to its overall balance of payments,315 and in part to the pivotal role of then-US Trade Representative Mickey Kantor, formerly a leading lawyer for prominent companies in the US entertainment industry.316

With the Uruguay Round set for conclusion by 15 December 1993 due to legislative pressure by the US Congress, the dispute over audiovisual services intensified into one of the major stumbling

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312 This caveat is set out in the preamble (the "chapeau") to Article XIV of the GATS, and repeats the provisions of Article XX of the GATT 1947. Provenance-based criteria for broadcast quotas might well be impugnable on the basis that they constitute "a means of arbitrary or unjustifiable discrimination" per Article XIV of the GATS, even if there was a "cultural exclusion" in place. See the discussion of provenance-based criteria in section 4.3.2 below, as well as the suggestion in sections 5.4.3.3 and 5.4.4 below as to why on-screen criteria would be less vulnerable to the charge of arbitrary effect.

313 Dispute settlement in the GATS operates on substantially the same basis as under the GATT 1994 (see Trebilcock and Howse, supra note 181 at 235-236), in terms of Articles XXII and XXIII of the GATS. Unfortunately, as stated in note 242 supra, a fuller consideration of the new WTO dispute settlement process is beyond the scope of this thesis.

314 Cahn and Schimmel, supra note 10 at 297.

315 For example, the US enjoys a trade surplus in cultural products of $1.5 billion with Canada alone, in the context of an overall deficit in trade with Canada of more than US$21 billion in 1996 (Scow, supra note 197 at 254). In 1993 US film and television sales outside the country's borders generated a total of more than US$4.5 billion in trade surplus, rising from US$2.5 billion in 1989; in the broader category of videos, films, music and television programming, the US trade surplus with Europe alone came to more than US$8 billion in 1992. (Braun and Parker, supra note 55 at 156, note 88 and 168.)

316 Wasko, supra note 225 at 165-167, where she convincingly demonstrates how successful the US entertainment industry has been in lobbying the Clinton administration and its predecessors.
blocks to meeting the deadline, and ultimately could not be resolved: “Faced with a final, 3 am offer ... for a freeze on quotas now and talks later on the issues, the US walked away from the table - the final breakthrough that assured the Round’s success. The Americans called the stand-down ‘agreeing to disagree’, but it left the EU unscathed.”

Therefore, while audiovisual services are putatively covered by the GATS, application of the market access and national treatment provisions in Part III of the agreement must await the inscription of specific commitments by member states in their Schedules, to provide access to their domestic audiovisual markets - but, as noted in the previous paragraph, thus far very few countries have done so, and the extent of their scheduled commitments is modest. Furthermore, the EU and its member states scheduled Article II exemptions in respect of their regulatory measures pertaining to the audiovisual sector, so that application of the MFN principle will not threaten their EU territory-wide DCID schemes until, “in principle”, the end of 2005. However, by 2000 the EU will have to put some offer on the table in respect of audiovisual services (presuming negotiations in the audiovisual sector restart by the deadline prescribed in Article XIX:1), and have its Article II Exemption list reviewed by the Council for Trade in Services.

317 “And That’s a Wrap”, Time Magazine (27 December 1993) 36. See also Schott, supra note 260 at 107-108, who attributes the fierce dispute to US concerns that the quotas in the EU’s “Television Without Frontiers” Directive and the facsimile European Convention on Transfrontier Television would marginalise US penetration into growing European markets for new media: “The European market is expected to experience explosive growth over the next decade, as new technologies expand the range of services available to a broad segment of the population and blur the distinction between entertainment and information flows. This latter point is particularly relevant in explaining the bitterness of the US-EU dispute, and the fear that US firms will not be able to participate in, or will face severe constraints on, growth in this sharply expanding market.”

318 See the discussion of the relevant provision in the EU Article II Exemption list in section 3.3.3 supra.

319 Clause 6 of the Annex on Article II Exemptions, supra note 260.

320 Clause 3 ibid.
The difficulty with categorising transactions in audiovisual products as applying to goods or to services, discussed in section 3.3.2 above, became more troublesome after conclusion of the GATS, because of the prospect that its jurisdiction could overlap that of the GATT 1994. In the *Sports Illustrated* matter, for example, Canada argued before the Panel that its periodicals excise tax pertained to advertising services rather than to periodicals as goods, and hence the GATS should be the applicable treaty. Since Canada had made no commitments in its Schedule in respect of advertising services, this would exempt the excise tax from application of Article XVII of the GATS, the national treatment provision.\(^{321}\) The Panel rejected Canada's stance, stating that, "[t]he ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement,\(^{322}\) taken together, indicates that the obligations under GATT 1994 and GATS can co-exist and that one does not override the other."\(^{323}\) These words were specifically reiterated by the subsequent Appellate Body Report.\(^{324}\) Endorsing the pragmatic rather than the formalistic approach to the jurisdiction of the GATT,\(^{325}\) the Panel noted that advertising services have long been associated with GATT Article III, since as early as 1970, and that several previous adopted Panel

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\(^{321}\) *Sports Illustrated* Panel Report, *supra* note 2 at paras. 3.33-3.34; *Law & Practice of the WTO*, *supra* note 2 at 23-24. Otherwise, argued Canada, the US would be deriving a benefit indirectly through the GATT 1994 which it could not achieve directly through the GATS.

\(^{322}\) This provision reads, "The agreements and associated legal instruments included in Annexes 1, 2 and 3 ... are integral parts of this Agreement, binding on all members." The Panel points out that both the GATT and the GATS agreements are in Annex 1, and no formal hierarchy is established between the two, suggesting that they are intended to be equal in authority where their jurisdiction overlaps. *Sports Illustrated* Panel Report, *ibid.* at para. 5.17; *Law & Practice of the WTO*, *ibid.* at 95.

\(^{323}\) *Sports Illustrated* Panel Report, *ibid.* at para. 5.17; *Law & Practice of the WTO*, *ibid.* at 95.

\(^{324}\) *Sports Illustrated* Appeal Report, *supra* note 2 at part IV; *Law & Practice of the WTO*, *supra* note 2 at 17.

\(^{325}\) See Trebilcock and Howse's articulation of the pragmatic approach in section 3.3.2 above, note 247 and the cited text.
reports have examined the provision of services in the context of Article III.\textsuperscript{326} The Appellate Body did not even see the need to explore whether Article III could be applied to a service as opposed to a good, since it took the view that the excise tax applied to goods, namely the periodicals themselves.\textsuperscript{327} Thereafter, in a different matter, the Appellate Body explained that while in some cases both treaties might apply to a particular measure,

the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinised under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.\textsuperscript{328}

Bernier argues that this casuistic approach could result in contradictory outcomes, where a right exercised under the GATS runs headlong into a conflicting right under the GATT 1994. He provides as an example India's limitations of film distribution by foreigners in its Schedule of Specific Commitments to the GATS, which is in conformity with the "positive list" character of that agreement, but runs counter to the national treatment principle in the GATT 1994. A line needs to be traced somewhere, he says, between what pertains to trade in services and what pertains to trade in goods.\textsuperscript{329} However, I would submit that Bernier's concern is exaggerated: non-application of the

\begin{footnotesize}
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\item\textsuperscript{326} Sports Illustrated Panel Report, \textit{supra} note 2 at para. 5.18; \textit{Law & Practice of the WTO, supra} note 2 at 96.
\item\textsuperscript{327} Sports Illustrated Appeal Report, \textit{supra} note 2 at part IV; \textit{Law & Practice of the WTO, supra} note 2 at 14-15.
\item\textsuperscript{328} Bananas Appeal Report, \textit{supra} note 258 at para 221; \textit{Law & Practice of the WTO, supra} note 2 at 89-90.
\item\textsuperscript{329} Bernier, \textit{supra} note 7 at 4.
\end{enumerate}
\end{footnotesize}
national treatment provision in the GATS to a specific market activity, due to the absence of a commitment by a country to its implementation, hardly amounts to a "right" to do the opposite. India does not enjoy any "right" to discriminate against foreign film distribution services simply because such service provision is reserved in its Schedule to the GATS; the better construction is that provision of this service in India is not yet covered by the GATS. The US response to Canada's argument before the *Sports Illustrated* Panel hearing cited above, is apposite:

A true conflict between [GATT and GATS] arose only where compliance with one agreement necessarily resulted in non-compliance with the other. This simply was not the case with respect to the excise tax. Applying rates to imported split-run magazines in a GATT-consistent manner (i.e. at a rate no higher for split-run than for non-split-run magazines) in no way requires Canada to breach its GATS obligations with regard to advertising services or any other service sector.  

In summary, the outcome of the audiovisual services imbroglio is described by Cahn and Schimmel thus:

> [T]he Uruguay Round gave the European Union neither the right to permanently restrict the diffusion of US audiovisual works in Europe, nor the permanent right to subsidize its cinematographic industry. No cultural exception per se emerges from the text of the GATS. On the contrary, audiovisual works are fully covered by the free trade provisions of the Uruguay Round. The real victory that the European Union won is a temporary exclusion of the audiovisual sector from the liberalisation process of GATS.  

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331 Cahn and Schimmel, *supra* note 10 at 303-304; see also Bernier, *supra* note 7 at 12. As these writers note, the correctness of this conclusion is confirmed both in recent European Commission documents and by the GATT Director for Services, but nonetheless there is widespread misunderstanding of the status of audiovisual services in the GATS. For example, Janet Wasko, *supra* note 225 at 165, claims that, "[u]ltimately, cultural products were excluded from the agreement". The South African Department of Communications' recent *Green Paper on Broadcasting Policy*, *supra* note 60, maintained that "[t]he Europeans, and others including Australia, resisted American pressure to include [film and television] services in the GATT Round
This view, that protections for the EU’s audiovisual industries are enjoying only an Indian summer, is shared by the US International Trade Commission (“ITC”). In an evaluation of the United States’ major trading partners’ GATS Article II Exemptions and Schedules of Commitments issued in December 1995, the ITC condemned the vague nature of the MFN exemptions in audiovisual services claimed by Canada and the EU, and said that their schedules “do not serve the purposes of regulatory transparency and benchmarking.” The EU, in particular, was singled out for applying “onerous restrictions” against US suppliers in the US entertainment industry’s largest export market. But, argued the ITC, “restrictions on the provision of audiovisual services likely will be eroded over time.” It suggested that commitments by the EU to opening up domestic markets for telecommunications services would, in time, result in US suppliers being able to provide audiovisual services over telecommunication networks, particularly what it refers to as “ubiquitous information networks” - i.e. the Internet.  

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333 Ibid. at 5.
The status quo in the “agreement to disagree” was not altered by the conclusion of the Fourth Protocol to the GATS ("the 4th Protocol”), in February 1997. Notwithstanding the fact that the GATS Annex on Telecommunications expressly excludes from its coverage “measures affecting the cable or broadcast distribution of radio or television programming”, the EU was nervous that negotiations on basic telecommunications services would introduce broadcasting into the GATS arena via the backdoor of commitments on telecommunications carriage obligations. Therefore, in its Schedule of services tendered to the Group on Basic Telecommunications, the EU expressly defined telecommunications services as “excluding broadcasting”. The EU Schedule text then goes on to conclude that, in respect of broadcasting, “commitments in this offer do not cover the economic activity consisting of content provision which require telecommunications services for

334 GATS/S/L20, 20 April 1996. The Annex on Telecommunications was concluded as part of the Uruguay Round negotiations, and serves predominantly to apply the principles of the GATS to value-added telecommunications services. In the post-Uruguay negotiations, the Negotiating Group on Basic Telecommunications, which ran from May 1994 to April 1996, and Group on Basic Telecommunications ("GBT"), which ran from July 1996 until February 1997, focussed on the liberalisation of basic telecommunications, i.e. services that move customer information between points without value-adding changes in form or content. The negotiations of the GBT were ultimately concluded in February 1997, with 69 members committing to add particular services falling within the basic telecommunications area to their GATS Schedules, as well as to the principles contained in a Reference Paper, which provides ground-rules for domestic regulatory implementation and oversight of scheduled commitments. See Colin Long, “WTO Basic Telecommunications Agreement” (1997) 5 Int’l Trade L. & Regulation 151. The text of the 4th Protocol is available at <http://www.wto.org/services/4-proto.htm>, and the Reference Paper is at <http://www.wto.org/press/refpap-e.htm>.

335 Clause 2.2, GATS, supra note 6 at 73.

336 See the discussion of the role of the Group on Basic Telecommunications, note 334 supra.

its transport."³³⁸ Drake and Noam note that the EU negotiators even attempted to extend the broadcast exception to video transmitted over the Internet, but in the end this effort was apparently abandoned as unworkable. However, since members may in any event define video over the Internet as a unidirectional service to the public and hence part of the broadcasting exclusion referred to above,³³⁹ this would exclude it from the ambit of telecommunications, with the result that "the audio-visual exclusions could become a huge loophole in liberalisation" of telecommunications by the 4ᵗʰ Protocol.³⁴⁰

This outcome, of course, would be consistent with the current twilight status of audiovisual services in the GATS and is precisely what the EU intended. In fact, the EU approach over the past decade appears to have succeeded handsomely: US-based entertainment companies have responded to the "Television Without Frontiers" Directive by increasing their direct investment in and co-operation with the European media production and distribution industry in order to produce "European works", a change in strategy which one Member of the European Parliament describes as "enlightened self-interest".³⁴¹ Other countries which maintain DCID schemes are expressing interest in a new Canadian initiative which aims "to push culture on to the agenda at the WTO to

³³⁸ Ibid.

³³⁹ "Broadcasting" is defined in a footnote to the 4ᵗʰ Protocol as "the uninterrupted chain of transmission required for the distribution of TV and radio programme signals to the general public, but does not cover contribution links between operators." Cited ibid.

³⁴⁰ Ibid. at 812.

³⁴¹ Mary Banotti, cited by Johnson and McKenna, supra note 240 at 371. On the increased involvement of US-based entertainment companies in Europe, see: ibid. as well as Cahn and Schimmel, supra note 10 at 312-3.
define a set of rules that would allow government promotion of domestic industries"\textsuperscript{342} - in other words, in anticipation of the renewal of GATS negotiations on audiovisual services scheduled for January 2000, these countries will argue that there should be more trade-restrictive rules for cultural industry products, possibly within a discrete "General Agreement on Trade in Culture".\textsuperscript{343} I will return to consider this suggestion in the concluding chapter of this thesis.


\textsuperscript{343} See Heather Scofield, “Cultural Protection Changes Pondered” \textit{The [Canada] Globe and Mail} (17 December 1997) B1. The first suggestion in the literature of the concept of a "General Agreement on Trade in Culture" is in the Braun and Parker article, \textit{supra} note 55 at 188.

No quota ever made a movie or television program. Talented people do.

- Jack Valenti, President of the Motion Picture Association of America344

4.1 Introduction: Broadcast Quotas in Canada, Australia and South Africa

DCID schemes which require private broadcast licensees to comply with minimum quotas for the airing of domestic audiovisual products ("broadcast quotas") have been deployed by numerous governments and regulatory agencies world-wide. This introduction will briefly survey three similar quota-based schemes, adopted by Canada, Australia and South Africa respectively.

4.1.1 Canada: Fending Off the American "Monoculture"

"The United States is a daily presence in the life of every Canadian," writes Aaron Scow, "through television programming, sports, and film."345 This omnipresence is regarded as a serious danger to the autonomy of cultural expression by Canadians, and to even threaten the distinctiveness of their country's political and social order:

The common language and geographic proximity of Canada and the United States cause Canadians to view their culture as being very vulnerable to influence by US cultural exports. In addition, the large population disparity between the two countries further increases the fear of a US cultural monopoly. Many Canadians

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345 Scow, supra note 197 at 247.
believe that an American value system and lifestyle would be imposed upon the Canadian people if Canada allowed unfettered free trade in cultural products with the United States.346

In Canada in the 1920s, “unregulated US signals bombarded the country and threatened to drown out domestic voices”,347 leading to protests by “citizen activists”348 and ultimately the passing of the Broadcasting Act of 1932, which “declared the airwaves public property” and established the precursor to the Canadian Broadcasting Corporation (“CBC”).349 This legislation was precipitated by the 1929 Aird Commission on Radio Broadcasting, which expressed the quintessential challenge to Canadian broadcasting as follows:

At present, the majority of programs heard are from sources outside of Canada. It has been emphasised to us that the continued reception of these has a tendency to mould the minds of the young people in the home to ideals and opinions that are not Canadian. In a country of the vast geographical dimensions of Canada, broadcasting will undoubtedly become a great force in fostering a national spirit and interpreting national citizenship.350

346 Ibid., footnotes omitted. Among the statistics mentioned by Scow are the fact that 80 per cent of the Canadian population live within 100 kilometres of the US border; and that a poll reported in 1995 found 53 per cent of Canadians to be concerned that transborder information flows would undermine Canadian values and identity, and 62 per cent believed that the Canadian government should play a role in preventing this from occurring.

347 Jeffrey, supra note 100 at 207.

348 Ibid. Jeffrey is referring to the Canadian Radio League. Interestingly, citizen activism in respect of broadcasting is still alive and well in Canada in the 1990s: the Friends of Canadian Broadcasting, an advocacy group “whose mission is to defend and enhance the quality and quantity of Canadian programming in the Canadian audio-visual system”, and whose activities are funded by donations from the general public, claims a support base of 45,000 households. The organisation has a high media profile and participates in all major CRTC inquiries. See <http://friendscb.org/about.htm>.

349 Jeffrey, supra note 100 at 207.

350 Canada, Report of the Royal Commission on Radio Broadcasting (Ottawa: King’s Printer, 1929) at 5.
Ever since, Canadian broadcast policy has been devoted to developing a viable media industry and a sovereign cultural identity distinct from that of the US. The principal state intervention in the market has been its continued allocation of spectrum space and considerable financial support to the CBC, with the underlying public policy rationales for this costly commitment being “national identity and the attempt to create a shared vision of Canada.”\textsuperscript{351} In respect of the private sector, the approach has been to licence broadcasters and allow them to import popular US programs, while requiring them to use a portion of the resulting revenues to carry, produce or purchase domestic content.\textsuperscript{352} This policy is reflected in the 1991 Broadcasting Act, which requires \textit{inter alia} private broadcasting undertakings to “contribute in an appropriate manner to the creation and presentation of Canadian programming”,\textsuperscript{353} by making “maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming”, and, in the case of specialised content or format broadcasting undertakings, “the greatest practicable use of [Canadian] resources.”\textsuperscript{354}

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  \item \textsuperscript{351} Zemans, \textit{supra} note 33 at 13. Zemans notes that as far back as 1951, the Massey-Levesque Report described the CBC as Canada’s “greatest single agency for national unity.” (\textit{Ibid.}) This notwithstanding, funding for the CBC has been cut by Can$500 million, in real terms, since 1984/5, according to Audley, \textit{supra} note 154.
  \item \textsuperscript{352} Jeffrey, \textit{supra} note 100 at 208.
  \item \textsuperscript{353} \textit{Broadcasting Act}, S.C. 1991, c. 11, s. 3(1)(e).
  \item \textsuperscript{354} \textit{Ibid.}, s. 3(1)(f). Private networks and programming undertakings are similarly required to “contribute significantly to the creation and presentation of Canadian programming.” - s. 3(1)(s). Distribution undertakings (including cable television distribution systems) are instructed to “give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations” - s. 3(1)(o)(1).
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“Cancon” regulations for television were introduced in 1962 by the Board of Broadcast Governors, the regulator of the time, requiring 40 per cent Cancon in the prime-time period. Until 1979, television Cancon requirements were contained in regulations applying to the industry as a whole, but thereafter the CRTC began also to specify Cancon requirements in licence conditions, in an attempt to extract greater compliance by commercial broadcasters. Presently, 60 per cent of material aired by over-the-air television broadcasters must be Cancon material, though for the evening viewing period this quota is reduced to 50 per cent for private broadcasters. There are also requirements setting a minimum level of expenditure on Canadian programs, tied to

355 W.E. Hinkson and W. Krasilovsky, “Constructive Canadian Cultural and Commercial Chauvinism” (1982) 3 J. Media L. & Pract. 204 at 209; SOR/62-179. “Prime-time” was defined as the period between 18h00 and 24h00. For a history of Cancon regulations, see Herschel Hardin, Closed Circuits: The Sellout of Canadian Television (Vancouver: Douglas & McIntyre, 1985) particularly c. 2.

356 See the discussion of this shift, and subsequent tweaking of the regulatory system, in Hudson N. Janisch, “Aid for Sisyphus: Incentives and Canadian Content Regulation in Broadcasting” (1993) 31:3 Alta. L. Rev. 575 at 581. The CRTC itself currently defines its regulatory arsenal in respect of Cancon on television as being composed of: (i) Television Broadcasting Regulations, 1987, SOR/87-49 (Grant, supra note 98 at §137); (ii) the definition of a Canadian program found in Canada, CRTC Public Notices 1984-94 (Recognition for Canadian Programs, 15 April 1984) (Grant, ibid. at §212), 1987-28 (Recognition for Canadian Programs - Production Packages, 30 January 1987) (Grant, ibid. at §229), and 1988-105 (Amendments to the Definition of a Canadian Program as it Relates to Certain Types of Animated Productions and as it Relates to Expenditures on all Productions, 27 June 1998) (Grant, ibid. at §241); and (iii) specific conditions of licence or expectations relating either to expenditures by certain private television broadcasters on Canadian programs, or to the exhibition of Canadian programs in underrepresented categories. (See Canadian Television Policy Review, supra note 123 at para. 3.)

357 Television Broadcasting Regulations, 1987, SOR/87-49, s. 4(6); Grant, supra note 198 at §137-46.

358 Television Broadcasting Regulations, ibid. at s. 4(7)(b); Grant, supra note 98 at §137-47. The “evening broadcast period” is defined as the period between 6:00 pm and midnight, measured across the broadcast year (s. 4(2); Grant, ibid. at §137-41).
broadcasters’ advertising revenues, and similar rules are imposed on speciality channel licensees.

A May 1998 evaluation of Cancon television regulations by the CRTC concluded,

Over the years, there has been general agreement that the Canadian content regulations for conventional television have been an effective mechanism to ensure a predominance of Canadian programming in the schedules of Canadian broadcasters. Generally, all conventional television broadcasters meet the regulated minimum levels of Canadian content, and the CBC and French-language private broadcasters frequently exceed them.

The CBC, for example, has promised a fall line-up in 1998 which is almost entirely composed of Canadian programming. However, as the CRTC notes, private broadcasters typically meet the 50 per cent evening broadcast requirement by scheduling two hours of news programming in the shoulder times, leaving only one hour of Canadian programming to be broadcast in the prime time.

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360 Ibid. at 81; the Speciality Services Regulations, 1990, SOR/90-106 (Grant, supra note 98 at §136), do not impose any Cancon quotas in respect of the programming offered by speciality channels - instead, varying commitments are set out by the CRTC in the channels’ licences, dependent on the particular nature of each service. For example, speciality channel The Comedy Network is required to spend at least Can$6 million per year on original Canadian programming starting in its second year (1999), and the Outdoor Life channel must similarly spend 37 per cent of its annual revenue (Doug Saunders, “Cable-TV firms target viewers in battle for loyalties” The [Canada] Globe and Mail (5 January 1998) A1). Expressed as a percentage of revenue, spending by Canadian speciality channels on Canadian programming is impressive: 43.9 per cent in 1996 and 40.6 per cent in 1997 (Robert Brehl, “Speciality TV ad revenue rises 18.4 per cent” The [Canada] Globe and Mail (10 March 1998) B4). Partly due to the proliferation of new speciality channels since 1995 (21 new channels have become available in that time), the total amount of spending on Canadian programming by speciality channels has almost doubled, from Can$144.7 million in 1994 to Can$275.9 million in 1997 (Brenda Dalglish, “Better year for speciality channels” The [Canada] Financial Post (10 March 1998) 10).


362 “CBC to go largely all-Canadian in fall” The [Canada] Globe and Mail (24 April 1998) D4. The result will be the national public network that was first envisioned by the Aird commission in 1928, CBC President Perrin Beatty is reported as saying.
period of 7:00-11:00 pm. To provide an incentive for more committed compliance, the CRTC rewards the broadcast of distinctively Canadian dramatic programming in peak viewing periods with a 150 per cent time credit towards meeting their Cancon requirements.

The first substantive Cancon regulations for AM radio were introduced in 1970, setting a 30 per cent quota and defining content in accordance with the “MAPL” criteria which remain the basis of radio regulation today. The 30 per cent Cancon quota which currently applies to most commercial music radio broadcasting is being raised to 35 per cent from the beginning of January 1999, and enforcement of the quota is going to be stiffened, by requiring the new quota to be complied with at all times - previously broadcasters could scale down to 25 per cent Cancon during dayside peak times, and make up the difference late in the evening. The CRTC also signalled a target of 40 per cent Cancon on radio by 2003. However, as discussed in section 2.3.2. above,

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364 Ibid. at para. 5.
365 Hinkson and Krasilovsky, supra note 355 at 210; SOR/70-256. In terms of the MAPL system, four criteria are set: the music was composed by a Canadian; the artist performing the music or lyrics is Canadian (or, where there is more than one artist, the artists are principally Canadian); recording of the work, i.e., its production, took place in Canada; or the lyrics were written by a Canadian. If any two of the four criteria is satisfied, the work qualifies as Cancon. See Radio Regulations, 1986, SOR/86-982, s. 2.2(1)(2)(a) (Grant, supra note 98 at §135-33). Despite the flexibility of the 2/4 criteria rule, some well-known Canadian artists' work does not qualify as Cancon because they have collaborated with foreign lyricists, recorded overseas, etcetera - see the discussion of Bryan Adams and Terri Clark infra at note 376. A recording industry executive - usually supportive of Cancon regulations - says that this is a problem of the MAPL system which requires attention: "It's almost like a prison sentence. The rules certainly penalise artists who want the creative freedom to work anywhere in the world." (Brian Robertson, president of the Canadian Recording Industry Association, cited by Peter Morton, “Country sings the blues” The [Canada] Financial Post (7 March 1998) 14.)
366 See note 128 supra for the citations of the relevant CRTC notices.
367 “CRTC opens radio markets”, supra note 130.
368 Scoffield and Brehl, supra note 128.
broadcasters complain that it is difficult to find “quality” Canadian music to fill the existing quota requirements, particularly on AM oldies stations.\textsuperscript{369} For French-language radio, an important additional rule is that songs in French must make up 65 per cent of airtime, though broadcasters are permitted a 55 per cent minimum during dayside peak times, with their outstanding commitments being balanced out during lower listenership periods.\textsuperscript{370}

The recent export performance of Canadian sound recording artists and audiovisual products demonstrates impressive industrial results for these policies: for example, Canada's revenues from cultural exports increased 83 per cent in the first half of this decade, to close on Can$3 billion in 1995; a third of Canadian film and video producers' royalties are generated by the export market; and Canadian songwriters and composers earn more royalties from international than from domestic airplay.\textsuperscript{371} So many Canadian acts broke through in the US market in 1997 that one industry observer proclaimed it “the year of the Canadian invasion south of the border.”\textsuperscript{372} It was an excellent


\textsuperscript{370} \textit{Radio Regulations, supra} note 365 at s. 2.2(5) (Grant, supra note 98 at \S 135-35a). This is the briefest of summaries of a very complex regulatory and funding system which, in addition to imposing quotas for private and public television and radio broadcasters, also sets must-carry Cancon requirements for a host of other delivery means, such as cable and DTH satellite broadcasting, uses a sophisticated points system to promote domestic production in the drama genre (see note 447 \textit{infra}); enforces lucrative programme substitution and tax incentive rules; implements contribution and subsidy-based DCID schemes; and imposes significant foreign control limits in respect of private broadcasters (see notes 108 and 109 \textit{supra} and accompanying text). More generally, see e.g. the recent summary of Canadian regulation by Bernd Holznagel in Hoffman-Riem, \textit{supra} note 32 at 191; Stanbury, \textit{supra} note 33 at c. 6 and 7; Michel Filion, “Radio”, in Dorland, \textit{supra} note 75, 118 at 130-138, as well as the other contributors in that volume. Full regulatory detail is available in Grant, \textit{supra} note 98, as well as at the CRTC web-site, <http://www.crtc.gc.ca>, and information on the principal funding schemes can be found at the Department of Canadian Heritage web-site, <http://www.pch.gc.ca>.

\textsuperscript{371} Schwanen, \textit{supra} note 35 at 6.

\textsuperscript{372} Sean Flinn, “Canadians invaded US in 1997” \textit{The [Canada] Globe and Mail} (27 December 1997). Flinn notes that Canadian artists can count on, inter alia, assistance from the Department of Foreign Affairs, which has published a special guide assisting Canadian artists in finding
year for French-language Canadian music as well: repeating the successes of Québécoise singers such as Ginette Rino, Renée Claude and Celine Dion, Lara Fabian achieved spectacular commercial success in France in 1997 and was named the Révélation de l’année in that country’s annual music awards ceremony.373

Domestically, a significant outcome of Cancon regulations has been an increase in total music sales market share of Canadian product from 8 to 13 per cent between 1990 and 1995.374 Growth in domestic market-share and international success are connected: the development of a “star system” and sophisticated infrastructure to support it in Canada (i.e. record companies, artist management, performance venues, a local industry press, domestic recognition benchmarks such as the Juno Awards, and national distribution outlets such as the “MuchMusic” speciality channel), generates enough income for artists to sustain their careers at home, while giving them “a solid base for a grab at the gold ring of international stardom”, as arts journalist Chris Dafoe puts it. “Cancon regulations have indisputably fostered the development of a domestic recording industry,” he writes, because “[t]he multinational [record companies], provided with an assured outlet for their domestic product, have grown from branch-plant distribution outlets into semi-autonomous, full-service

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374 Straw, supra note 81 at 95. There is some dispute as to the current figure, with representatives of the broadcast industry putting domestic artists’ sales at 14,5 per cent of total sales, and recording industry representatives claiming the figure could be as high as 25 per cent. (Brehl, supra note 369.)
companies.” The amount of money the “big six” annually invest in the development of Canadian talent has increased between 30 and 40 per cent in the past decade.

Joyce Zemans notes that a particular attribute of cultural industry development in Canada has been the broad geographical spread of its benefits, citing major growth in regional film production as an example. Benefit spreading is also demonstrated by the fact that 80 per cent of Cancon music recordings are released by independent Canadian record companies, and independent producers are responsible for the creation of the majority of Canadian drama.

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375 Chris Dafoe, “Cultivating pop stars we can call our own” The [Canada] Globe and Mail (21 March 1998) C6. Dafoe describes how, in the 1970s and 1980s, Canadian artists would need to have a hit record in the US before becoming popular in Canada, because the larger record labels in Canada were really no more than printing presses for their parent companies in New York and Los Angeles. In the 1990s, the trend has been for Canadian artists to first succeed in Canada and then “break out” - as was the case with Celine Dion, Alanis Morissette and Jan Arden. (Ibid.) On the other hand, artificially-created domestic radio airplay can create doubt as to the true ability of Canadian artists. “Unfortunately,” concedes The Tragically Hip’s manager, Jake Gold, “[US music industry executives] still believe they can’t trust Canadian statistics. It means [nothing] to them if you’re big in Canada. They’re saying it’s not a level playing field.” (Graham, supra note 167.) The history of the Canadian sound recording industry is best summarised by Straw, supra note 81 at 95-117.

376 PolyGram/A&M, Warner Music, EMI, Universal, BMG, and Sony - Dafoe, ibid. Between them, these companies control 90 per cent of the sound recording distribution in English-speaking Canada, and 20 per cent of the Quebec market. See Canada, Department of Canadian Heritage, “Music Industry - Waking Up the Neighbours”, <http://www.pch.gc.ca/culture/report/HTM/5.htm> (hereinafter “Waking Up the Neighbours”). It is rather ironic that Canadian Heritage has named its music industry fact-sheet on its web-page after a Bryan Adams album, “Waking Up the Neighbours”, since in 1992 this album was ruled to fall outside the definition of Canadian content, as many of the songs were written by Adams in collaboration with his non-Canadian producer, Robert “Mutt” Lange, and therefore could not satisfy two of the four MAPL criteria. A similar fate recently befell Albertan country singer Terri Clark, whose song, “Something in the Water” is regarded as foreign product, in part because Clark co-wrote the song with two Americans. (Alexandra Gill, “Adams faces the music” The [Canada] Globe and Mail (17 December 1997) A17; Morton, supra note 365.)

377 Citing Canadian Recording Industry Association president, Brian Robertson, in Morton, supra note 365.

378 Zemans, supra note 33 at 17.

379 “Waking Up the Neighbours”, supra note 376.
entertainment and documentary programs scheduled by private broadcasters.\textsuperscript{380} Though a 1997 Senate Communications Subcommittee report warns that the success of the Canadian production industry has been built on a fragile base of a weak Canadian dollar (attracting US production), tax concessions and direct federal subsidies,\textsuperscript{381} these economic drivers have been sufficient to propel Canada to second place in the world, after the US, in television program exports.\textsuperscript{382} There are many critics, on the other hand, who believe that the Cancon pendulum has swung too far over to the industrial side,\textsuperscript{383} producing material which has few identifiably Canadian characteristics, and this problem will be discussed at length in section 4.3.2 below. And despite the Canadian industry’s export successes, it has long had difficulties drawing audiences at home: in 1986 the Caplan-Sauvageau Report noted that only 29 per cent of total English-language television watched by Canadians was Canadian-made, and that figure fell to 24 per cent in prime time.\textsuperscript{384} Of the total of 31.8 per cent of their viewing time which anglophone Canadians devoted to drama programs in the 1993 fall measurement period, 29.5 per cent went to foreign programs and only 2.3 per cent went to Canadian-made drama.\textsuperscript{385} Cancon’s prime time difficulties have only been amplified by the substantial expansion in the number of channels available to most Canadians: in 1997, of the 60 hours of prime time product aired on the basic cable tier in Canada, only 8 hours were domestically-

\textsuperscript{380} \textit{Canadian Television Policy Review}, \textit{supra} note 123 at para. 68.

\textsuperscript{381} Wired to Win, \textit{supra} note 51 at 31.

\textsuperscript{382} \textit{Ibid.}, at 24. For anecdotal examples, see the discussion of the success of animation and children’s program producers Nelvana Limited and Cinar Films Inc. in section 2.1 above.

\textsuperscript{383} The metaphor belongs to Grant, \textit{supra} note 153.

\textsuperscript{384} Caplan-Sauvageau Report, \textit{supra} note 49 at 81.

\textsuperscript{385} Jeffrey, \textit{supra} note 100 at 222, Table 8-4.
made. French-language networks’ market share amongst francophone viewers has fallen to 62 per cent in the 1997-1998 measurement period, down from 82 per cent fifteen years ago. While the two top-rated programs amongst Francophones in 1997-1998 were both made by Radio-Canada (the French-language wing of the CBC), the English-language programs increasingly being watched by francophones are predominantly US-made. Responding to the weakest aspect of Canada’s cultural industry performance, namely the fact that less than 3 per cent of movies watched by Canadians are made at home, the Department of Canadian Heritage has announced a thorough review of film support policies, to take place during the course of 1998. In tandem, the CRTC will be conducting an extensive review of its regulatory policy for television, beginning in September 1998.

4.1.2 Australia: Over Fifty Years of Quota Experimentation

“The idea that Australian broadcast media should contain Australian content,” writes Terry Flew, “has existed for as long as the media themselves.” The first broadcast quota appeared in

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390 Flew, supra note 38 at 73.
section 88 of the Australian Broadcasting Act of 1942, entitletd, "Local talent to be encouraged".

Section 88(2) stated:

Not less than two and one-half per centum of the total time occupied by the National Broadcasting and not less than two and one-half per centum of the total time occupied by any commercial broadcasting station in the broadcasting of music shall be devoted to the broadcasting of works of Australian composers, produced either on sound records made in Australia or by artists actually present in the studio of the broadcasting station concerned.

The quota was increased to five per cent by an amendment contained in the Broadcasting and Television Act of 1956; 1960, 1962 and 1965 saw progressive quota increases for commercial television to 40, 45 and then 50 per cent respectively, though these directives by the then regulator, the Australian Broadcasting Control Board, were largely ignored and left unenforced. In many respects, the growth of the Australian media industry in the 1960s was demand-driven: the emergence of a third national commercial television network, a ratings drift away from American to indigenous product, and the doubling of drama commissioning by the Australian Broadcasting Corporation all contributed. In 1973 a points-based quota system was introduced for

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392 S. 49 of Act No. 33 of 1956. The amendment dropped the requirement that the Australian artist/s concerned be recorded in Australia or be present in the studio, and added a definition of "Australian": "a person who was born or is ordinarily resident in Australia."

393 Flew, supra note 38 at 76, citing I. Bertrand and D. Collins, Government and Film in Australia (Sydney: Currency Press, 1981) at 129.

394 The Ten network, established in 1964.

395 Flew, supra note 38 at 78.

396 Ibid., at 79; see also Hoffman-Riem, supra note 32 at 244, who comments that, "the levels were set so low that broadcasters had no difficulty in obtaining the required point figures. As a result, it was impossible to discern any relevant effects for the support of Australian productions. It is thus
commercial television, coupled with specific genre quotas. Drama was targeted in particular, since in this high-cost area the great majority of programming was imported from the US.\textsuperscript{397} From the time of its establishment in 1977 the Australian Broadcasting Tribunal was empowered to promulgate binding “Television Program Standards” for commercial licensees, one of which specifically dealt with the “Australian Content of Television Programs”, setting specific minimum airtime quotas and defining Australian content in terms of the nationality of its creators.\textsuperscript{398} Commentators viewed the genre-specific quotas as having been successful, and in 1990 the measures were elaborated with “qualitative” elements, though these were determined by objective criteria such as production cost.\textsuperscript{399}

The most recent revision of the Australian Content Standard for commercial television will be discussed in detail in section 4.3.1 below; amongst its important modifications was the raising of the Australian content quota from 50 to 55 per cent (measured between 6:00 am and 12 midnight) with effect from this year, and the doubling of the sub-quota requirement for children’s first-release drama.\textsuperscript{400} Australian content quotas for commercial music radio broadcasting have also been successively increased, and the Broadcasting Services Act of 1992 placed their determination in the

\textsuperscript{397} Hoffman-Riem, \textit{ibid}. at 230.

\textsuperscript{398} On the Australian Broadcasting Tribunal, see \textit{ibid}. at 231. Program standards were promulgated by the Australian Broadcasting Tribunal in terms of s. 16(1) of the 1942 Act, as amended. The relevant Television Program Standard was TPS 14, which endured in various forms until the promulgation of the new Australian Content Standard of 1996 discussed in section 4.3 below. (“Respondent’s Submissions”, paragraphs 10-13, \textit{Project Blue Sky Inc. v Australian Broadcasting Authority}, High Court of Australia (Sydney), No. S41/1997 [unpublished].)

\textsuperscript{399} Hoffman-Riem, \textit{supra} note 32 at 245.

\textsuperscript{400} \textit{Australian Content Standard Review}, \textit{supra} note 33 at 27.
hands of a self-regulatory stakeholder representative body, as a “Code of Practice” registered by the Australian Broadcasting Authority.\(^{401}\) Currently, the most commercially significant radio quota is a 25 per cent Australian content requirement on metropolitan and regional contemporary hit radio (i.e pop/rock and album oriented rock) stations.\(^{402}\)

Evaluations of the Australian experience suggest that these quotas, coupled with other features such as the existence of a national public youth radio network,\(^{403}\) a favourable tax regime for production of cultural works, and the development (and regulatory protection) of strong broadcasters with high levels of ownership concentration in the industry,\(^{404}\) have led to impressive domestic results: a 1983 Australian Broadcasting Tribunal assessment of the music radio quota noted the share of broadcast royalties paid to Australian composers had doubled in the previous


\(^{402}\) As noted with regard to the Canadian regulatory system, this summary is very brief and excludes many important aspects of Australian content policy. For example, the music content Code of Practice is format-based, and imposes lower quotas on formats where Australian repertoire is difficult to source or is as yet undeveloped - in the Adult Contemporary and Gold formats, for example, the quota is 15 per cent, and lower quotas are also set for country music (10 per cent) and jazz (5 per cent). See “Code 4 - Australian Music” in Federation of Australian Radio Broadcasters, \textit{Codes of Practice}, available at <http://www.aba.gov.au/what/program/codes/farb.htm#Code4>.

\(^{403}\) The Triple-J network, credited by \textit{inter alia} Peter Garrett of the band \textit{Midnight Oil} for the success of Australian music world-wide: “I think the combination of the quota and the National Youth Broadcaster meant that there was a tremendous upsurge of young talent and bands like ourselves who were in no ways commercial when we started, actually had an opportunity to get played and then build a career.” (SAMCA, \textit{Interview Transcript - Independent Broadcasting Authority Enquiry into Local Content} (28 October 1994) [unpublished].)

\(^{404}\) Hoffman-Riem, \textit{supra} note 32 at 245.
decade,\textsuperscript{405} and similarly positive outcomes were achieved in television production.\textsuperscript{406} More recent studies of the results of the television quota system highlight the fact that domestically-produced programming now tends to obtain the highest audience ratings in Australia\textsuperscript{407} - according to a current report, seventeen of the top twenty rated shows on network television are Australian.\textsuperscript{408} In particular, the quotas are cited as having been responsible for the development of a highly sophisticated music, film and television production infrastructure in Sydney and Melbourne,\textsuperscript{409} as well as the building of a broad skills base in the traditional mass media industries which is now fostering content creation for newer media technologies.\textsuperscript{410}

Having pioneered broadcast quotas, Australia is now grappling with the most pressing contemporary challenges to its DCID schemes: first, amendments required to the Australian Content Standard in order to comply with the ruling of the Australian High Court in the \textit{Blue Sky} litigation discussed in Chapter 5 below, reflecting the impact of international trade law; and second, technological developments which are undermining the rationale of spectrum scarcity used to justify the traditional public/private bargain of trading broadcast licences in exchange for the delivery of Australian programming. As recently as 1990, an essay published by the broadcast

\begin{itemize}
\item \textsuperscript{405} Cited in the SAMCA submission, \textit{supra} note 166 at 16.
\item \textsuperscript{406} According to statistics cited by Flew, \textit{supra} note 38 at 79, expenditure on Australian programming, the number of programmes produced, and program hours occupied by domestic content all increased steadily throughout the 1970s.
\item \textsuperscript{407} \textit{Australian Content Standard Review}, \textit{supra} note 33 at 24. See also Hoffman-Riem, \textit{supra} note 15 at 246.
\item \textsuperscript{408} Lauren Martin, "Court opens our TV screens to Kiwis" \textit{Sydney Morning Herald} (29 April 1998); available at \texttt{<http://www.smh.com.au/daily/content/980429/national/national5.html>}. 
\item \textsuperscript{409} Flew, \textit{supra} note 38 at 79; SAMCA submission, \textit{supra} note 166 at 15.
\item \textsuperscript{410} \textit{Australian Content Standard Review}, \textit{supra} note 33 at 25.
\end{itemize}
regulator called for the “decolonisation of the Australian imagination”, in a society and culture “only just emerging from the submissive posture of the colonial cringe”.411 In a country which is expending a great deal of creative energy and resources on considering whether to become a republic, the protection of the Australian media industry is non-negotiable, its continued production of identifiably Australian content a leitmotif of statehood.412

4.1.3 South Africa: Development and Redress

In South Africa, broadcast quotas are a recent phenomenon, having been introduced by the newly created regulator, the Independent Broadcasting Authority, as a means of redress for the damage wreaked on the country’s cultural industries by Apartheid.413 Prior to the transition to democracy in April 1994, the majority of resources at the state television broadcaster, the South


412 This is not to say that the objects of Australian broadcast policy are uniformly accepted; for example, Flew notes disquiet about pursuing a unitary identity for an “imagined state” in a society which is multi-cultural, and which is only beginning to realise the richness of the Aboriginal culture which it suppressed for so long. (See ibid. at 76 and 82) Determining how heterogenous an inclusive cultural identity can be without self-disintegrating, is really an insoluble dilemma - Canada's multicultural policy is admired internationally and considered a model by UNESCO, but Zemans, supra note 33 at 19, notes that “critics blame the policy for devaluing what it purports to promote, fracturing Canadian society by its insistence on hyphenated Canadians and the creation of ‘identity communities’. While the principle of the ‘mosaic’ has arguably served us better than the US ‘melting pot’, there is no doubt that the policy contains within it, particularly as implemented, the seeds of continual struggle and even discord.” Zemans suggests that instead of simplistically trying to balance competing forces of assimilation and separatism, the way forward is to institutionalise cultural democracy and continuous change, a “multilogue” in the words of sociologists John Berry and Jean Laponce - an intriguing idea which, unfortunately, is well beyond the scope of this thesis.

413 See, generally, the excellent history of South African broadcasting in Ruth Tomaselli et al, Broadcasting in South Africa (New York: St. Martin's Press, 1989; London: James Currey, 1989; Cape Town: Anthropos, 1989); this history is briefly summarised and the tumultuous events from 1989 to 1998 added, in Janisch and Kotlowitz, supra note 151 at 3-34.
African Broadcasting Corporation ("SABC") and its single private pay-television competitor were devoted to serving urban white South Africans,414 and both radio broadcasting and the music industry were segmented along racial lines.415 While the Nationalist government had spared no expense in promoting Eurocentric "high culture" such as the performance of ballet, classical music, opera, and traditional theatre,416 much popular culture was suppressed because of its frequently overt anti-Apartheid content.417 The crisis in South African cultural industries was exemplified by the low levels of airplay for local music: by April 1993, only three per cent of music broadcast on the major national "white music" radio station was South African; on its "black music" equivalent, the figure was five per cent.418 The most iconic depiction of the spirit and principles of non-racism which the new South Africa sought to create amongst its citizens was not to be found in any film, television drama or musical work aired at the time, but rather in television beer commercials placed by South African Breweries.

414 Green Paper on Broadcasting Policy, supra note 60 at 4. See also Triple Enquiry Report, supra note 172, sections 6.1 and 6.2 at 21-23.

415 Triple Enquiry Report, ibid., section 16.3.2 at 83, under the headings, "A racially divided radio industry", and "Racial inequity in the music production process".

416 See, for example, c. 2 paragraphs 7 and 11, and c. 4 paragraph 11 of Republic of South Africa, Department of Arts, Culture, Science and Technology, White Paper on Arts, Culture and Heritage, (Pretoria: Government Printer, 4 June 1996); available at <http://www.polity.org.za/govdocs/white_papers/arts.html>.

417 Testimony of, inter alia, recording artists, producers and cultural activists Johnny Clegg, Don Laka, Hugh Masekela, Mara Louw, Ray Phiri, Lloyd Ross and Motsumi Makhene, at the hearings held by the Independent Broadcasting Enquiry in respect of local television content and South African music, Johannesburg, 29 November 1994 (notes of oral testimony, on file with the writer)[unpublished].

418 Triple Enquiry Report, supra note 172 at 86 (SAMRO estimates); SAMCA submission, supra note 166 at 22-23. The statistics are for 5 FM Stereo and Radio Metro respectively, and are rounded off to the nearest whole number.
Against this background, one of the most important pieces of pre-election legislation, the Independent Broadcasting Authority Act was passed in October 1993. Although it was primarily aimed at transferring authority over the state broadcaster to a new, independent regulator, so as to help create a climate for free and fair elections, the Act also adopted Canadian and Australian regulatory practice for the promotion of local cultural content, in an attempt to catalyse the rebuilding of South Africa’s cultural industries. While the Australian influence is evident in the structuring of foreign ownership limitations and subsequent film production support policies, CRTC regulatory drafting is the dominant source of the remainder of the South African DCID scheme programme. The most important of the currently applicable regulations are a 20 per cent South African content quota on commercial private music radio and 30 per cent quota across the public broadcaster’s three television channels. A new private television broadcaster, e-tv, was licensed in April 1998 and is expected to begin broadcasting towards the end of the year. Its required start-up local content quota is set at 10 per cent, rising to 20 per cent by the end of its

419 See supra note 105 for full citation.


421 For example, s. 53(1)(c) of the Independent Broadcasting Authority Act duplicates the Canadian “MAPL” criteria used to identify Canadian music works.


second year of operation, but the new channel’s proprietors have promised far more ambitious local content commitments.424

Despite some short-term financial dislocations caused by their adoption, the radio and television quotas are regarded, anecdotally at least, as having played a significant role in the revitalisation of South Africa’s cultural industries, in encouraging those industries to reflect and depict the new democratic and culturally diverse ethos of the country, and in reaching previously under-served South African audiences.425 Piracy remains a severe problem for the South African music industry, which is reflected in disappointing sales, despite there being a fast-increasing number of artists producing material and performing on the country’s live circuit.426 In addition, the domestic sound recording industry remains underfinanced, partly because unlike in most other countries, South African copyright law does not currently accord public communication rights to owners of sound recordings, precluding them from obtaining “needletime” royalties.427 While noting

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424 Carol Steinberg, “Local Content Regulation and the Cultural Industries Growth Strategy: South African Music and Television” (paper presented at the Conference on Local Content, Department of Arts, Culture, Science and Technology, Durban, South Africa, 20 November 1997) [unpublished], paras. 2.7, 2.10 and 2.13.


427 Such a right was provided for in South African law until 1965, when it was abolished at the instigation of the South African state (and then the only) broadcaster. This development was particularly anomalous, given that owners of copyright in musical works (as opposed to sound recordings) do enjoy public communication rights in South Africa. The introduction of “needletime” royalties is high on the legislative agenda in South Africa, but problems need to be addressed in respect of how these royalties will be collected and disbursed, as well as the financial sensitivity of new private broadcasters in the market. These broadcasters point out that since South Africa is a Trips signatory, royalties will have to be paid to foreign sound recording copyright holders as well, on a non-discriminatory basis - a major new expense, in total. (See: Owen Dean, “‘Needletime’ as a means of financing the local music industry” (paper presented at the
that several South African radio stations had been recalcitrant in complying with the 20 per cent quota, a representative of South Africa's sound recording industry did emphasise that many stations were exceeding the quota, in a November 1997 industry review.\textsuperscript{428} An IBA Councillor speaking at the same conference hinted that, in fact, some of the public broadcaster's stations were violating the quota while private broadcasters were largely in compliance.\textsuperscript{429} However, measurement of local content on radio will only begin to present a coherent picture over the coming few years, and definitive conclusions regarding the music quota are difficult to draw at this early stage.\textsuperscript{430}

In respect of television, the picture is also still somewhat blurred, but there are some promising signs emerging. The SABC cut back sharply on expenditure on domestic production in August 1997,\textsuperscript{431} as part of its restructuring program to stem the losses it suffered in the previous year.\textsuperscript{432} According to Carol Steinberg, local content on the SABC has been progressively declining

\textsuperscript{428} Mthunzi Mdwaba, "Is needletime a viable way to finance the local music industry" (paper presented at the Conference on Local Content, Department of Arts, Culture, Science and Technology, Durban, South Africa, 21 November 1997) [unpublished]; Howard Belling, "Is needletime a viable way to finance the local music industry" (paper presented at the Conference on Local Content, Department of Arts, Culture, Science and Technology, Durban, South Africa, 21 November 1997) [unpublished]; and the reference to the need for amendment of the relevant legislation in the \textit{White Paper on Arts, Culture and Heritage. supra note 416 at 30, c. 4 para. 76.}

\textsuperscript{429} John Matisonn, "Shaping government policy for the 21st Century" (paper presented at the Conference on Local Content, Department of Arts, Culture, Science and Technology, Durban, South Africa, 20 November 1997) [unpublished] at 3. Matisonn cautioned that this was based on a very limited period of monitoring compliance.

\textsuperscript{430} Steinberg, \textit{supra} note 424 at paras. 3.1-3.3.

\textsuperscript{431} Cas St Leger, "Local talent loses out to US soaps at SABC" \textit{[South Africa] Sunday Times} (20 July 1997).

\textsuperscript{432} The SABC lost R60 million (then approximately US$17 million) in the 1996-1997 financial year, but by September 1997 it had already recouped R72 million, partly as a result of cutting expenditure on domestic product (Ferial Haffajee, "The year SABC went commercial" \textit{[South Africa] Mail and Guardian} (24 December 1998) 20; available at
over the past five years, from an average of 32.6 per cent in 1992 to 26.3 per cent in 1997.\textsuperscript{433} However, one reason for the decline might be that the SABC has, in that time, expanded its service from two to three fully-fledged channels, so that even a substantial increase in domestic product being aired by the PBS, in total, would be dissipated by the impact of another 50 per cent of total airtime being added by the third channel. Also, it is misleading to only examine total time occupied by local content, without reference to actual ratings. For example, a domestically-made sitcom whose premise is the relationship between black and white families living together in a suburban townhouse complex, \textit{Suburban Bliss}, was South Africa’s top-rated television program in 1997, its audience cutting across all race, gender and age boundaries.\textsuperscript{434} With its financial fortunes restored in 1998, the SABC has invested heavily in new domestic drama series with parochial subject-matter, such as the mine drama, \textit{Isidingo}.\textsuperscript{435} Pay-TV station M-Net’s long-running South African soap, \textit{Egoli}, is sold in Latin America\textsuperscript{436} and throughout Africa.\textsuperscript{437} Somewhat ironically, South African television exports are growing so rapidly that Communications Minister Jay Naidoo

\textsuperscript{433} Steinberg, \textit{supra} note 424 at para. 3.8. She cautions that her statistics are tentative, as they were taken from a September-only year-on-year sampling of the SABC’s schedules, but nevertheless believes that the downward trend has been correctly identified (ibid.).

\textsuperscript{434} Despite its potent political premise, \textit{Suburban Bliss} is a typical US-style sitcom, with interracial relations as a rich mine for humour, and has been described by one respected television critic as “a trashing of good taste and national manners”. See Janet Parker, “The Molois, Dwyers and Forresters still rule” \textit{Electronic [South Africa] Mail & Guardian} (24 December 1997) <http://www.mg.co.za/mg/art/reviews/97dec/24dec-sabc.htm>.


recently said he was being inundated with complaints from other African governments about the flood of South African programs into their countries.\footnote{438}

4.1.4 In Summary

Three conclusions emerge from the above discussion. First, it is notable that broadcast quotas have become an entrenched \textit{sine qua non} of cultural industries in Canada and Australia, and their characteristic as a measure of redress for Apartheid in South Africa makes the argument for their retention equally inviolate in that country. In other words, there are powerful domestic political and economic interests in these countries which support the maintenance of the present regulatory status quo, and any multilateral attempt to scale back these measures because they have trade-distortive effects is unlikely to succeed. This is particularly due to the difficulty in assessing the costs of broadcast quotas, unlike in the case of subsidies where the cost to consumers and governments is transparent.\footnote{439} Second, it appears that while the Canadian, Australian and South African broadcast quota schemes have evolved under different market circumstances, they intervene in the domestic market-place in largely the same fashion, by creating artificial demand for domestic production. The various schemes may have different operational characteristics (for example, different means of identifying what constitutes domestic content), but their quota mechanism is

\footnote{438} Veteran observers of Canadian broadcast policy will be amused to learn that South Africa’s resemblance to the US, in this respect, goes even further: until April this year, the SABC was locked in a lengthy legal battle with a Gaborone television station which had been rebroadcasting the SABC signal in Botswana, without payment. Similar practices in Canada were only stopped by the conclusion of the US-Canada Free Trade Agreement. See: Kevin O’Grady, “SA broadcasts ‘flood’ Africa” \textit{[South Africa] Business Day Online} (27 November 1997) <http://www.bday.co.za/97/1127/news/n19.htm>; “Botswana law to end illegal TV” \textit{eBeeld} (29 April 1998) <http://www.ebeeld.com/n290408.htm>.

\footnote{439} For a taxonomy of the costs to consumers of broadcast quotas, see, e.g., the comprehensive analysis by Stanbury, \textit{supra} note 33.
identical. Therefore, should broadcast quotas deployed by any one country be successfully challenged in the WTO framework at some time in the future, on the basis that they violate the national treatment principle, the remainder of countries that deploy these schemes can expect their quotas to be impugned by reference. (Obviously, given my conclusion in section 3.3.4 above, namely that audiovisual products are only putatively covered by the GATS, no such adverse WTO ruling is imminent. But countries that make use of such schemes need to tread warily in their forthcoming GATS negotiations.) Third, irrespective of whether one holds the view that such schemes are mere trade protectionism hiding behind a pretense of cultural sovereignty, or one regards their costs to consumers as being an example of outrageous (but successful) rent-seeking by the cultural industry sector, the predominant view is that they have fulfilled their industrial objective, as outlined in Chapter 2 of this thesis, and have done so rather admirably. This makes their retention - in some form - very attractive to broadcast policy makers, and their inchoate coverage by the GATS very worrisome. The balance of my discussion will therefore look more closely at broadcast quotas, in sections 4.2 and 4.3, and in Chapter 5 will examine the recent decision of the High Court of Australia in the Blue Sky litigation, which provides a portent of the

440 “Le modèle canadien de développement culturel n'est pas protectionniste,” argues Canadian Heritage Minister Sheila Copps, supra note 11, “Il vise plutôt à promouvoir et à favoriser le développement culturel du pays.” The distinction claimed by the Minister is, of course, a rather delicate one.

441 See e.g., Stanbury, supra note 33 at c. 10 page 7, where he offers as one hypothesis the possibility that “Canadian content regulations result from the successful rent-seeking behaviour of those persons whose income/wealth is heavily dependent on such policies. In other words, the suppliers of Cancon have obtained a set of policies which raise their incomes well above the level that they would be able to obtain in the absence of Canadian content regulations. The nationalist rhetoric associated with Cancon policies is merely a ‘smokescreen’ to disguise the pecuniary interests of the strongest advocates and beneficiaries of the policy.”
complexities which would arise if trade in audiovisual products was required to accord with the principles of the GATS.

4.2 The Broadcast Quota Prototype: The “Cinema Exception”, Article IV of the GATT 1947

Paradoxically, the prototype of contemporary quota-based DCID schemes is found in the GATT 1947 itself. At the time that the treaty was drafted, explains one commentator,

it was commonly believed that films changed political attitudes and influenced individual behaviour. ... Foreign governments, uncertain of the effects of US films on their citizens and fearing that Hollywood’s dominance of the world cinema market would soon make it all but impossible to develop local film industries, erected trade barriers against US films. Typically, these restrictions did not prohibit the entry of films into the country, but instead restricted the percentage of US-made films local movie theatres could show or required that theatres show a minimum percentage of local films.442

Article IV of the GATT 1947, the so-called “cinema exception”, therefore sought to bring the then-prevalent practice of imposing trade restrictions against foreign-made movies within the ambit of the treaty. Entitled “Special Provisions relating to Cinematograph Films”, the Article requires that any contracting party which establishes or maintains internal quantitative regulations relating to exposed cinematograph films must determine such regulations in the form of “screen quotas”, in conformity with the following requirements:

Smith, supra note 45 at 118-119 and accompanying notes. In addition, Bernier points out that European countries had deployed screen quotas as early as the 1920s, “in order to protect their film industry from an influx of American films considered as a threat to their culture. The American motion picture industry responded by developing closer relations with the Department of State and American embassies and by the end of the Second World War in 1945, the protective legislation enacted by many European countries had been overturned.” (Bernier, supra note 7 at 1.)
Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof.\textsuperscript{443}

This pioneering legal framework for screen quotas is a perfect example from which to extract the specific features of broadcast quotas. There are four discrete elements which become recurrent motifs in domestic content broadcast quotas from the 1950s onwards:

4.2.1 Works of “National Origin”

“National origin” is not defined in Article IV(a) itself, and the attribution of cultural value to a product merely because it was produced domestically is questionable. The fact that a musical work, television show or film is produced in a particular country does not mean that it will have any identifiable representation of or link to that country’s national culture, values and identity, and this remains an enduring problem of quota-based DCID schemes. This issue is explored in more detail below.\textsuperscript{444}

4.2.2 Quota-setting Mechanism

The required domestic content can be expressed in several different ways: Article IV allows a “minimum proportion” or percentage of domestic content \textit{vis-a-vis} total content to be specified,

\textsuperscript{443} Article IV(a).

\textsuperscript{444} See the discussion of “Stanbury’s iguana” at section 4.3.2 below.
and this is the predominant quota-setting mechanism adopted by broadcast regulators today.\footnote{See e.g., the South African Independent Broadcasting Authority regulations for the public broadcasting licensee, requiring a minimum average of 30 per cent local television content across its three channels by May 1999, measured weekly. (S. 3.2 of the \textit{Independent Broadcasting Authority Local Television Content Regulations of 1997}, supra note 422.)}

Other approaches include determining the minimum number of hours that should be occupied in total by domestically produced works;\footnote{See e.g., the South African regulatory requirements applying to licence applicants for the first free-to-air private terrestrial television service in that country:}

\begin{itemize}
  \item The Authority will require the private broadcaster to ensure that:
  \begin{itemize}
    \item at least 2 hours 20 minutes of its prime time programming is South African drama;
    \item at least 3 hours of of its overall weekly programming is South African drama.
  \end{itemize}
\end{itemize}

\footnote{See e.g., the points system applicable in Canada, where a television program must have earned a minimum of six points to be regarded as “Canadian” for the purposes of fulfilling the required broadcast quota, based on the following point allocations for Canadian participation in the creative process: director and screenwriter = 2 points each; lead and second performers, art director, director of photography, music composer and picture editor all = 1 point each. At least one of the director or screenwriter, and either the lead or second lead performer must be Canadian; there are a number of further caveats of this nature, so that this brief description does not do full justice to the elaborateness of the regulatory scheme. See Canada, CRTC Public Notice 1984-94 (\textit{Recognition for Canadian Programs}), supra note 356 and the other Notices cited there; \textit{The Guide ’97} (Toronto: Canadian Film and Television Production Association, 1997) at 13.}

4.2.3 \textbf{Means of Measurement}

Where a percentage or proportion of total content is the approach taken, as in the case of Article IV(a), the definition of the total content amount against which the domestic content amount may be measured is critical. The usual approach was to determine total screen time or airtime as the mean, but regulators quickly learnt that such a broad definition gave ample scope for “dumping” of domestic product by screening or broadcasting it in low-audience times of the day. For example,
the provisions of Article IV(a) could easily have been circumvented through screening all domestic product in the middle of the night, or early in the morning when movie-goers were unlikely to attend; then, high audience times could be reserved for more popular foreign product. The result has been that regulators now prefer to limit the mean of measurement to relevant viewing hours, such as peak-time viewing, shoulder time, and optimum children’s viewing times. Finally, it should be noted that once the parameters of the mean of measurement have been defined, regulators may still wish to exclude non-content time within those parameters (for example, air-time which is taken up by commercials and links) so as to prevent distortions caused by differing amounts of advertising time or other inserts in local content product as opposed to foreign product. “Screen time actually used” by cinematograph films should be understood in this latter context.

4.2.4 Period of Measurement

Here too, different approaches can have different results: Article IV(a) sets the period of measurement as being a year, over which the time devoted to local content screenings is to be calculated as a percentage of total screen time, but that would enable “dumping” of local product during the summer months when audience attendance is usually lower. Television suffers from similar seasonality of viewership, so regulators have learnt to prevent dumping by specifying shorter periods of measurement, such as measuring compliance with quotas on a quarterly, monthly

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448 Perhaps the requirement in Article IV(a) that screenings be in the ordinary conduct of “commercial exhibition” would preclude such antics; however, that would be a rather robust interpretive approach.

449 For example, the South African regulatory requirement for domestic content drama referred to in note 422 supra prevents “dumping” by requiring 140 minutes per week to be aired in “prime time”, which in turn is defined by s. 2.12 of the regulations as meaning “the period between 18h00 and 22h00 every day”.

or weekly basis.\textsuperscript{450} On the other hand, regulators may intentionally provide a lengthy period of measurement in order to give broadcasters flexibility in implementing the quota.

In conclusion, it should be noted that Article IV(d) anticipated that screen quotas would be “subject to negotiation for their limitation, liberalisation or elimination.” No such change has ever been agreed, not least because the rising popularity of television undercut the dominance of cinema, making screen quotas an anachronism. However, the diplomatic caveat demonstrates that Article IV was, in fact, “a compromise between two quite different objectives, one of which [was] to eliminate discrimination between foreign and domestic products, the other to guarantee a minimum national production in the film sector.”\textsuperscript{451} More than fifty years later, actually achieving that compromise remains as elusive.

4.3 The Current Australian Content Standard - A Typical Broadcast Quota

4.3.1 The Quota Mechanism

As noted at the outset of this thesis, one of the objects of the Australian Broadcasting Services Act of 1992 (“the Act”) is “to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity.”\textsuperscript{452} As discussed in paragraph 2.1.2 above, a “primary function” of the Australian Broadcasting Authority (“ABA”) in realising the intent of the Act is “to develop program standards relating to broadcasting in

\begin{footnotes}
\item[450] For example, both of the South African domestic distribution quota requirements referred to in note 422 \textit{supra} are measured on a weekly basis.
\item[451] Bernier, \textit{supra} note 7 at 4.
\item[452] S. 3(e).
\end{footnotes}
Australia”. Section 122(1) of the Act instructs the ABA to determine standards that are to be observed by commercial television broadcasters, as required, and section 122(2) directs that -

Standards under subsection (1) for commercial television broadcasting licensees are to relate to:

(a) programs for children; and

(b) the Australian content of programs.

Insofar as a standard related to Australian content, the underlying policy intent as set out in the Explanatory Memorandum to the Broadcasting Services Bill 1992 was that it should encourage the broadcast of programs which -

- reflected the multicultural nature of Australia’s population;
- promoted Australians’ cultural identity;
- facilitated the development of the local production industry; and
- included a requirement for Australian programming for children.

In other words, the motivation for the legislative mandate to the ABA was a typical mix of ideological and industrial rationales. Pursuant to the above empowering legislation, the Australian Content Standard (“the Standard”) was determined by the ABA on 15 December 1995, after the

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453 S. 158(j) of the Act.
454 Australian Content Standard Review, supra note 33 at 13.
extensive process of public consultation prescribed by the Act, and went into operation from the beginning of 1996. The object of the Standard is recorded in Clause 3 as being,

... to promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community’s continued access to television programs produced under Australian creative control.

The quota-setting mechanism is contained in Clause 9(2), which requires that, “from the beginning of 1998, Australian programs must be at least 55 per cent of all programming broadcast”, and the same clause sets the mean of measurement as being “between 6.00 a.m. and midnight”, with the period of measurement described as being, “in a year”. Both of the latter measures are therefore liberal in providing broadcasters with flexibility to schedule domestic product, though they are prevented from “dumping” Australian content programming in the early hours of the morning.

The quota is elaborated through a points mechanism aimed at encouraging drama production and broadcast. Clause 10(2) establishes a “drama score” system, where the total drama score for a particular production is calculated by multiplying the “format factor” by the duration of the production in minutes. The “format factor” is a multiplier which equals 1 in the case of “a serial or series produced at the rate of more than 1 hour per week”, 2 where the serial or series is “produced at a rate of 1 hour or less per week”, and 3.2 for feature films, telemovies, mini-series or self-contained dramas of less than 90 minutes’ duration. Clause 10(1) requires that, over a period of measurement of three years, private commercial television broadcasters must achieve 775 points, with the mean of measurement for drama set more onerously, at “between 5.00 p.m. and midnight”.

456 See ss. 126 and 127 of the Act.
A caveat is that in any one year a score of no less than 225 must be achieved. The explanatory notes to the Standard comment that “[t]he values awarded to each format represent a bias towards encouraging short form, higher cost drama, rather than lower cost long form drama” which Australian broadcasters had evidently sought refuge in, in order to reduce their quota compliance costs in the past. In addition, specific requirements are set out by the Standard in respect of children’s drama and documentary programming, in the form of sub-quota minimum hours per annum.

4.3.2 Provenance, National Origin, Creative Elements, the Content Firewall and Stanbury’s Iguana

As discussed in section 4.2.1 above, broadcast quotas typically use a national origin or “provenance” test to determine that a work qualifies for the purposes of the quota, and this is the approach of the Standard. Clause 7(1)(a) defines an “Australian program” as one which “is produced under the creative control of Australians who ensure an Australian perspective”, and this may only be evidenced by compliance with one of three “gateways”, as the explanatory notes call them. The first gateway is that the program has received certification by the Minister for Communications and the Arts as qualifying for tax incentives, because it has “significant Australian

457Clause 10(2).

458Clauses 12 - 14 deal with children’s programming, and require inter alia that from the beginning of this year, at least 32 hours of first release Australian children’s drama must be broadcast per year. Clause 16 requires at least 10 hours of first release Australian documentary programs to be broadcast per year; interestingly, it is specified that these programs must be “at least 30 minutes in duration”, preventing the use of short fillers to evade the intent of the quota.

459The “provenance” term was coined by Chief Justice Brennan in his judgment in the Blue Sky case, infra note 529.
content”, but the criteria for such certification are overwhelmingly based on provenance criteria, e.g. a requirement that qualifying films be shot on Australian territory. The second gateway is where the program is produced as a co-production in accordance with treaties concluded by Australia with other countries. The third gateway, in clause 7(3) of the Standard, sets out the substantive test for what qualifies as an “Australian program”:

[A] program is an Australian program if:

(a) the producer of the program is, or the producers of the program are, Australian (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not an Australian); and

(b) either:

(i) the director of the program is, or the directors of the program are, Australian; or

(ii) the writer of the program is, or the writers of the program are, Australian; and

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460 Clause 7(2)(b) of the Standard. The relevant document is known as a “Division 10BA certificate”, issued under s. 124ZAC of Division 10BA of Part III of the Income Tax Assessment Act of 1936. In terms of the tax legislation, there are two requirements for a film to be an “Australian film”: (i) the film has been made wholly or substantially in Australia or in an external Territory; and (ii), the film has a “significant Australian content”. This latter phrase is misleading in that the definition of the phrase in s. 124ZAD is biased towards provenance-based criteria rather than actual “Australianness” of the subject-matter:

In determining for the purposes of this Division whether a film has, or a proposed film, when completed, will have, a significant Australian content or a significant non-Australian content, the Minister shall have regard to -

(a) the subject matter of the film or proposed film;
(b) the place or places where the film was, or the proposed film, will be, made;
(c) the nationalities and places of residence of [various people involved in the production].
(d) the source from which moneys that were used ... 
(e) the details of the production expenditure ...
(f) any other matters that the Minister considers to be relevant.

461 For some of the relevant countries, see the citation of the relevant provision in Australia’s MFN exemption list to the GATS discussed in section 3.3.3 above.
(c) not less than 50 per cent of the leading actors or on-screen presenters appearing in the program are Australians; and

(d) in the case of a drama program not less than 75 per cent of the major supporting cast appearing in the program are Australians; and

(e) the program:

   (i) is produced and post-produced in Australia but may be filmed anywhere; and

   (ii) in the case of a news, current affairs or sports program that is filmed outside Australia, may be produced or post produced outside Australia if to do otherwise would be impractical. 462

The ABA describes this as a “creative elements test”, which achieves “Australian collaborative authorship via control of key creative roles and decisions”. 463

The test is an objective test based on ensuring that Australians are key creative decision makers of the production and perform the majority of on-screen roles. It is based on the concept that if Australians have creative control, the programs they make will be “Australian”. [Emphasis added.] 464

But it will be readily apparent from the list of criteria in clause 7(3) that not a single one requires a qualifying program to be demonstrably Australian in content, so that the link between the programs recognised as Australian and the aims of the Act and the Standard can be tenuous.

462 “Australian” in relation to a person, means a citizen or permanent resident of Australia, for the purposes of the provisions of the Standard. (Per clause 5 of the Standard.)

463 Australian Content Standard Review, supra note 33 at 28.

464 Ibid. at 29.
Discussing a similar difficulty in the Canadian regulatory system (for the definition of both radio and television Cancon is similarly nationality-based), Stanbury comments acidly that,

If a group of Canadian citizens made a television program about iguanas, the history of the Albanian labour movement, Pathet Lao folk songs, the weapons of Teutonic knights, medieval Spanish poetry, moon rocks, the works of a 14th-century Chinese author, the importance of cricket to Old Etonians, the military campaigns of Alexander the Great, the voting laws of Australia, or Pol Pot’s political philosophy - all would be classified as Canadian content in terms of the regulatory requirements. On the other hand, if a group of foreigners (even former Canadian citizens) made a television program dealing with the political philosophy of Sir John A. Macdonald, the ranching culture of southern Alberta, the spiritual life of Mackenzie King (that quintessential Canadian), the rise of the Parti Québécois, any of Pierre Berton’s books about Canada, the history of the CBC and CRTC, the growth of minor league hockey on the Prairies, the life of John Diefenbaker or the childhood of Jean Chretien - none would qualify as Canadian content. Absurd, is it not? How many Canadians understand what Canadian content really means?” [underlining in the original]

For short, I will call this problem, “Stanbury’s iguana”.

Similarly, in the Sports Illustrated matter, the US noted that in order to qualify for the “funded rate”, which offered publishers the greatest postal discount, periodicals were required to satisfy provenance criteria alone, such as having been typeset and edited in Canada. These criteria did not cause the periodicals to be “unlike” their US competitors, nor did they have a direct impact in terms of generating identifiably Canadian content. Therefore, the Canada Post measures could

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465 I acknowledge that the Broadcasting Act, supra note 353, requires the CBC to provide programming which is “predominantly and distinctly Canadian” (s. 3(1)(m)(i))(Grant, supra note 98 at § 104-35), but private broadcasters are required only to “contribute significantly to the creation and presentation of Canadian programming” (s. 3(1)(s)(i)) (Grant, supra note 98 at § 104-41), and “Canadian programming” is not defined, save for the nationality-based criteria contained in the CRTC’s points system - see note 447 supra.

466 Stanbury, supra note 33 at c. 6 page 5.

467 Sports Illustrated Panel Report, supra note 2 at para. 3.177-3.178; Law & Practice of the WTO, supra note 2 at 77.)
be argued to have been solely imposed "so as to afford protection to domestic production", in contravention of the national treatment principle in the GATT 1994.

Underlying the use of provenance criteria is the presumption that, in most cases, creators of a certain nationality will tend to reflect some aspect of their country's ethos or history (perhaps by way of their life experience in that country) in the cultural works they produce, and hence there is likely to be a linkage fulfilling the ideological justifications for DCID schemes. But a 1995 evaluation of Australian television quotas noted that the growing role of co-productions and the need for Australian programming to penetrate export markets in order to cover production costs, was leading to "an increasing asymmetry between the economic and industrial imperatives of the local industry in an era of globalisation, and the cultural objectives of representing Australia to Australian audiences through television product." In other words, idiomatically Australian expression is being sacrificed in order to produce more homogenous product which will be easily accessible to international audiences. Agreeing that a similar problem exists in the Canadian system, the Senate Subcommittee on Communications said in 1997,

Canadian firms should not be given policy incentives to tailor domestically-produced programs and films specifically for foreign markets, particularly the United States. Experience has shown that, when Canadian production is motivated largely by foreign sales, the end result is often diluted cultural products that do not reflect the Canadian experience. The "Hollywood North" syndrome may have benefits as an "industrial" strategy, but it invariably does not work as an instrument of cultural policy.

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469 Flew, supra note 38 at 84-85.
470 Wired to Win, supra note 51 at 48. Audley comments similarly, "we're providing now a quite generous tax credit in order to get American production into Canada. We also base our existing tax credit for Canadian production on a six point requirement that means that, if you have a half a
To illustrate the point further, Daniel Schwanen cites the example of Cancon-qualifying works made for American audiences - "complete with the changing of mailboxes and police uniforms to give them the look of a US locale."\(^{471}\)

Stanbury acknowledges that one possible reason for the problem is that while "the federal government wants to expand the supply of Canadian content, ... it cannot define in substantive or thematic terms the types of content which it wishes to encourage. So it is reduced to saying that Canadian content is anything produced by persons who are Canadians in legal terms."\(^{472}\) The reason for the government's unwillingness to get involved in content-based definitions is that such meddling in artistic output would be regarding as a slippery slope to violation of constitutional guarantees of freedom of expression. This "content firewall" is certainly the reason why the South African regulations which define quota-qualifying television programming are similarly nationality-based\(^{473}\) - despite the preamble to the regulations stating that such programming should be "identifiably South African, [be] developed for South African audiences and ... recognise the

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\(^{471}\) Schwanen, supra, note 35 at 17. See, similarly, the comments of former CBC director of English programming, Mavor Moore, pointing to a less blatant but perhaps more worrying problem of industrial Cancon than that of faux US settings: "What governs the situation here is the American style. As long as we are trying to put Canadian content into American packaging, it's self-defeating." [Emphasis in the original] (John Haslett Cuff, "CanCon could use a rewrite, but it has kept the Yanks at bay" The [Canada] Globe and Mail (19 May 1990) C1, cited by Janisch, supra note 356 at 585.)

\(^{472}\) Stanbury, supra note 33, c. 6 at 6. [Emphasis in the original.]

\(^{473}\) S. 2.16.1 of the Independent Broadcasting Authority Local Television Content Regulations of 1997, supra note 422.
diversity of all cultural backgrounds in South African society".474 If the Independent Broadcasting Authority in South Africa was to attempt to micro-manage compliance with these lofty ideals through, say, vetting of scripts, there is little question that such regulatory intervention in content would violate the Bill of Rights in the South African Constitution.475 In Australia, the Act specifically establishes a content firewall, by providing in section 129(1) that the ABA may not determine a standard which requires that programs, or a sample of a program, be approved by the ABA or any person or body appointed by it, prior to broadcast.476 The ABA argues that this would not prevent it from offering "guidance" as to whether a particular program would be likely to meet a content-based standard before it is broadcast,477 but such "guidance" might well have the effect of pre-screening and therefore be ruled contrary to the prohibition in section 129(1).

Even if the difficulty of satisfying freedom of expression concerns could be dealt with, the prohibition on a pre-screening test means that a content-based test would have to include very specific criteria in order to ensure legal certainty for broadcasters, who would be investing large amounts of money in particular products on the assumption that they would satisfy their quota obligations. As is the case in other jurisdictions, Australian administrative law requires that regulations not be vague or indeterminate in application. This principle was articulated with particular reference to broadcast standards in *Herald-Sun TV Pty Ltd v ABT*478 where the High Court

474 *Ibid.* s. 1.2.
475 Act 108 of 1996; in particular, it would most probably violate s. 16, "Freedom of expression".
476 An exception to this general rule is that children’s programming may require pre-approval - s. 129(2).
477 *Australian Content Standard Review, supra* note 33 at 14 note 2.
478 (1985) 156 CLR 1.
held that a standard is of the nature of subordinate legislation, and as such must be easily ascertainable and establish general criteria fixed in advance. A standard should be framed in such a way that both the licensee and the court, or any other body called upon to decide whether the standard has been observed, can determine whether or not the program answers the criteria set by the standard. The test established by the standard had to be exercised in the determination itself and could not be varied by, nor could there be any subsequent discretion given to the ABA. Though the High Court stated that a standard need not be entirely objective and could involve questions of taste, the administrative law principles it sets out are more comfortably satisfied by objective criteria such as the nationality of creators of a program, than by the very subjective criteria which would typify an on-screen content characteristics test. Trying to set objective criteria for on-screen "Australianness", for example requiring that programs are set in Australia, simply begs the obvious exceptions: "Breaker Morant" and "Gallipoli" are films which should be regarded as satisfying an Australian content test, yet the principal events they depict do not take place in Australia. Australian broadcast policy-makers wrestled with the issue in two consecutive policy reviews and have yet to find an adequate practical means of moulding subjective criteria which demand discretionary judgment into the framework of certainty required by the Herald-Sun TV principles. The following excerpt from the current Review of the Australian Content Standard sets out some of the problems:

479 Ibid. at 4-5.
480 Ibid.
Australian programs can usually be identified as such on screen, but the notion of tying creative representation to concepts of culture defined by time, place and ideas could be limiting. Difficulties in relation to certain genres, both fiction (for example, fantasy and science fiction) and non-fiction (such as news and current affairs) are obvious, but the involvement of foreign characters, stories or locations could make judgments about the "Australianness" of productions very problematic.\footnote{Australian Content Standard Review, \textit{ibid.} at 33.}

Even if pre-screening by the ABA was permitted, notes the discussion paper, such evaluation would occur at the pre-production stage and no further changes to the production could be made after ABA approval if broadcasters were to be certain that the program would qualify as Australian content. Conversely, the ABA could only be legally bound to its pre-screening opinion if the completed program was an accurate realisation of its pre-production description. Given the typical topsy-turvy environment of media production, characterised by budget changes, script alterations, casting problems, etcetera, the implementation of an on-screen content test might well require intermittent ABA oversight of all qualifying productions. This could lead to substantial, if not wholly impractical, demands on the ABA's time and resources.\footnote{\textit{Ibid.}}

Australian broadcast policy-makers have long been aware of the shortcomings of provenance-based criteria: in the late 1980s attempts were made to introduce a test of program content based on "on-screen indicators", called the "Australian look" test, which was intended to be broadly reflective of the "Australian way of life". A 1988 draft proposal suggested that relevant criteria should include theme (content and topic), perspective (an Australian viewpoint), language (Australian speech, including idiom and accents), and character (incorporating scenes and costumes,
character portrayal, interpretation of material, and accurate casting). 484 Ultimately, due to all the difficulties with such criteria and their administration discussed above, the proposal was dropped, and the TPS 14 standard 485 adopted in 1989 was instead premised on a creative elements test, 486 i.e. on criteria of national origin or provenance. In respect of drama programming, TPS 14 did require that they have an Australian theme and perspective, if they were based on an original work by an Australian, or, where they were based on foreign original work, an Australian perspective. But these criteria were never enforced, as the ABA itself concedes:

[I]n administering the standard the ABA considered compliance with this requirement to be a result of the fulfillment of the other criteria of the test. In practice the on-screen content or look of a drama program was never directly assessed by the ABA or ABT for theme and or perspective. It [was] assumed to be there if the program satisfied the objective test for Australian creative control over production. 487

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485 TPS 14 is briefly discussed in note 398 supra.

486 Oz Content, supra note 481 at 38-39. It should be noted that some content-based criteria have been adopted by the Act with respect to "Australian drama programs" in the context of subscription television broadcasting licences. As an alternative to qualification under the Standard based on the creative elements test, a drama program aired on subscription television would qualify as Australian if it has been made wholly or substantially in Australia or an external Territory and has a significant Australian content. In addition, s. 6(3) grants the ABA a negative veto power in respect of programming aired by a subscription television broadcasting licensee, as follows:

The ABA may, if it is satisfied that a drama program of the kind referred to in ... the definition of "Australian drama program" ... has non-Australian content of such significance that it should not be treated as an Australian drama program, declare that it is not an Australian drama program.

This veto power would, no doubt, be exercised with great caution.

As the example of Stanbury’s iguana suggests, however, provenance criteria can be somewhat arbitrary in producing their intended outcome of fostering national expression and culture. This is not only a problem in terms of realising the ideological goals of these countries’ DCID schemes, but, more interestingly to trade lawyers, these measures would probably not pass the test imposed by Article XIV of the GATS, namely that even if excepted under that Article, such measures may not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail”. It will be recalled that precisely this concern led several EU members to oppose the French-led “cultural exception” strategy. Equally, discrimination on the basis of nationality is by definition a violation of the national treatment principle. The nationality-based definition of Australian programming in the Standard has been best summed up as follows:

The practical effect of the Australian Content Standard is ... to give a preference or protection to Australian producers, directors and actors with the effect that each commercial television broadcasting licensee must each day broadcast for a minimum time Australian programs. This has the effect of limiting the power of the licensee to program non-Australian programs. Of necessity this confers a benefit on Australians at the expense of non-Australians as defined in the Standard.

The writer is Northrop J, one of the federal judges who adjudicated the case of *Australian Broadcasting Authority v Project Blue Sky Inc. and Others*, to which I now turn.

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488 See notes 311 and 331 supra and the accompanying text in section 3.3.4, and the more extensive discussion of the “public morals” exception in section 5.4.4 below.

489 Though obviously, as previously noted, such violation is moot while the GATS national treatment provision is only putatively applicable to trade in audiovisual services - see *ibid*.

490 (1996) 141 ALR 397 at 401. The judgment of the Full Federal Court, in which the ABA was the appellant, is hereinafter referred to as “*ABA v Blue Sky*”, as distinguished from the subsequent High Court judgment in which Project Blue Sky was the appellant, referred to as “*Blue Sky v ABA*” (the full citation for which may be found at note 529 *infra*), and further distinguished from
5. Turning the Tables Down Under: the Blue Sky Decision

But if I work all day on the blue sky mine
There'll be food on the table tonight.


5.1 Introduction

A fascinating illustration of the tension between the growing global spread of the free trade
regime and quota-based DCID schemes is provided by the dispute between Project Blue Sky Inc.,
a New Zealand film and television industry group, and the ABA, the Australian broadcast regulator,
which wound its way through Australia’s federal courts and was decided finally in that country’s
High Court at the end of April 1998. At the nub of the dispute were the conflicting provisions of,
on the one hand, the Australian Content Standard, which I have already discussed in some detail
in the preceding chapter, and, on the other hand, the Services Protocol to the Australia New Zealand
Closer Economic Relations - Trade Agreement ("the Services Protocol"). The relevant provisions
of the Services Protocol are similar in substance to the cornerstone principles found in the GATT
1947 and the GATS, as I discuss in the following section, and it is necessary to briefly review the
Protocol in order to fully understand the issues decided in the Blue Sky litigation.

the judgment in the court a quo, a decision made by a single federal judge, which I refer to as
"Blue Sky v ABA - court of first instance" (the full citation for which may be found at note 504
infra). ABA v Blue Sky is available from the Australasian Legal Information Institute’s excellent

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5.2 The Services Protocol to the Australia New Zealand Closer Economic Relations - Trade Agreement ("the CER")

The CER was concluded in 1983 between Australia and New Zealand, establishing a free trade area between the two countries, thereby "maximizing economic advantages from bilateral trade so as to stimulate export-led economic growth with the rest of the world". Australia and New Zealand had established a common labour market in 1920, and hence the CER was aimed at liberalizing trade in goods, rather than services. In 1988, however, as part of the review process mandated by Article 22 of the treaty, a far-reaching services protocol was added to the CER. The Services Protocol came into effect on 1 January 1989. Article 1 records that its objects are, *inter alia*, "to liberalise barriers to trade in services between the Member States" (currently New Zealand and Australia), "to ... expand trade in services between the Member States", and "to facilitate competition in trade in services."

Article 2:3 defines the scope of the Services Protocol very widely, as applying "to any measure, in existence or proposed, of a Member State that relates to or affects the provision of a service by or on behalf of a person of the other Member State within or into the territory of the first...

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492 M.S. Burnett, "Introductory Note", *ibid*.

493 *Ibid*.

494 Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations - Trade Agreement, done at Canberra (18 August 1988) (hereinafter "the Services Protocol"). The relevant provisions are all quoted in the *ABA v Blue Sky* and *Blue Sky v ABA* case reports, *supra* notes 490 and 529 respectively. The Services Protocol is available at <http://www.austlii.edu.au/au/other/dfat/treaties/19880020.html>.

495 Article 23 of the Services Protocol.

496 See the comments to this effect by Northrop J, *ABA v Blue Sky*, *supra* note 490 at 402.
Member State.” More particularly, “Provision of services” is defined as including “the production, distribution, marketing, sale and delivery of a service”, which would include “access to and use of domestic distribution systems”. This definition seems almost tailor-made to include television programming, if one accepts that a domestic television broadcast licensee is effectively a “domestic distribution system” to which New Zealand’s television programming suppliers must be given access. Because the main text of the CER had already provided for free trade in goods between the countries, the question of whether television programming is a good or a service did not enter into the dispute in *ABA v Blue Sky*: there would be no point in denying that television programming was a service, for then, in any event, it would be covered by the original 1983 CER provisions. Consequently, it was common cause amongst the parties that “the provision of television programs for broadcasting within Australia by a commercial television broadcasting licensee is the provision of a service under the Protocol.”

The cornerstone trade law principles, MFN and national treatment, are provided for in the Services Protocol in Articles 4 to 6. Because the dispute here is in respect of the two signatories to a (presently) bilateral treaty, only the national treatment and market access Articles (the latter really being a specific application of the former), are relevant:

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497 Article 3(a).
498 Article 3(b)(i)
499 *ABA v Blue Sky*, *supra* note 490 at 402.
500 In other words, there is no third state involved to trigger MFN.
Article 4
Market Access
Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them.

Article 5.1
National Treatment
Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them.\(^{501}\)

While both Australia and New Zealand were entitled to inscribe services in the Annex to the Services Protocol which they wished to be excepted from its application, neither inscribed the supply of television programming.\(^{502}\) In absence of such inscribed exceptions, the provision of television programming would be a service governed by the Services Protocol, as indeed the parties to the dispute agreed. So as to be entirely clear on this crucial point, the position of television programming in the Services Protocol should be distinguished from the status quo in the GATS, where coverage of audiovisual services is just putative due to their inclusion in MFN exemption lists or their non-scheduling as specific commitments. If in fact the GATS were to be fully operative

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\(^{501}\) For the sake of completeness, it should be noted that Article 3 defines a “Person of a Member State” to include a natural person who is a citizen of, or ordinarily resident in, that State; a body corporate established under the law of that State; and an association comprising or controlled by such natural persons or bodies corporate.

\(^{502}\) Under the heading, “Broadcasting and Television”, Australia only lists its foreign ownership limits; the list of inscribed items provides expressly that, “(w)here an activity is described further, the exemption ... applies to the description only.” In other words, because Australia went beyond the sector heading of “Broadcasting and Television” and specifically listed the relevant legislation in respect of foreign ownership limits in broadcast undertakings, it is just that latter specific aspect of broadcasting, i.e. foreign investment, which is excepted from application of the Services Protocol. Similarly, New Zealand inscribes the “Communications” sector as being excepted from application of the Services Protocol, but then goes on to list several specific aspects, namely foreign ownership restrictions and ministerial and regulatory licensing for broadcasting. New Zealand’s excepted activities are therefore these activities alone, and not the entire “Communications” sector.
without such caveats, it would have full coverage of the supply of television programming as a service, as the Services Protocol does.

5.3 The Problem: In Determining the Australian Content Standard, the ABA Must Perform its Functions Consistent with the Provisions of the Services Protocol

I return now to the Broadcasting Services Act, in terms of which the ABA determined the Australian Content Standard. Section 122(4) of the Act provides that, "Standards must not be inconsistent with this Act or the regulations." Among the remainder of the provisions of the Act with which the Standard must be consistent, is Section 160(d), which in turn requires the ABA, to perform its functions in a manner consistent with ... Australia’s obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

Therefore, functions performed by the ABA to determine the Standard were bound to be so done consistent with the CER and in particular the provisions of the Services Protocol, which is an “agreement between Australia and a foreign country” covered in section 160(d) of the Act. The single issue which arose in the court of first instance was “whether the Standard was invalid because it failed to impose the same requirement of preferential treatment of New Zealand programs that it imposed for Australian programs.” Insofar as a New Zealand-made program does not

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503 It is trite that the Australian Content Standard is one of the “Standards” referred to by s. 122(4).


505 Wilcox and Finn JJ’s summary in ABA v Blue Sky, ibid. at 410.
qualify as an "Australian program" in terms of clause 7 of the Standard, and hence is not considered to qualify for preferential treatment under the 55 per cent television broadcast quota, the ABA would not have performed its function of determining the Standard consistent with the Services Protocol, which requires equal treatment in accordance with the national treatment and market access principles in Articles 4 and 5 cited in section 4.5 above. Specifically, the ABA was alleged to have acted ultra vires sections 122 and 160 of the Act; alternatively, it was argued that the determination of the Standard "was not a proper exercise of the power conferred by section 122 in that it failed to take into account the provisions of paragraph 160(d) of the Act and Articles 4 and 5 of the Protocol." It is this incorporation into the Act of the Services Protocol, by reference, which brings about the somewhat unusual consequence of a private, foreign litigant being able to pursue the Australian regulator in a domestic court to enforce the provisions of an international trade agreement.

5.4 **Blue Sky through the Courts**

Project Blue Sky Inc., as noted, represents the audiovisual production sector in New Zealand, and its formation was encouraged by the New Zealand Trade Development Board, the statutory trade promotion arm of the New Zealand Government. Project Blue Sky's principal objective is to foster film and television production in New Zealand, and one way in which it seeks

506 "Statement in Support of Application for Special Leave to Appeal", *Project Blue Sky Inc. v Australian Broadcasting Authority* (the High Court appeal of *ABA v Blue Sky*, under the case no. S41/1997), paragraph 12 [unpublished]. I have been fortunate enough to obtain copies of numerous of the pleadings in the High Court appeal from Mr Michael Ward of the Australian Film Commission, to whom I express my sincere thanks.

507 "Appellants' Written Submissions", *Project Blue Sky Inc. v Australian Broadcasting Authority* (High Court appeal), paragraphs 12 and 13 [unpublished].
to achieve this goal is by pursuing the development of New Zealand and Australia as an integrated market for television "as anticipated by the CER Agreement."\(^{508}\) One of the challenges facing Project Blue Sky is that, at current levels, the balance of trade in Australia - New Zealand export of television productions (including the broadcast of motion pictures) is 50 to 1 in Australia’s favour.\(^{509}\) The benefits to New Zealand’s cultural industries of obtaining equal treatment under Australian broadcast quotas are hence obvious. New Zealand-made programming would be placed in an advantageous position vis-a-vis all other programming imported into Australia, and would enjoy the artificial demand benefits created by Australian quota-based DCID schemes.

The inconsistency between the nationality-based definition used by Australian broadcast quotas and the obligations of Australia towards New Zealand in the CER was well-known prior to both the passage of the Act in 1992 and the publication of the Standard in December 1995. New Zealanders had been arguing ever since adoption of the Services Protocol in 1988 that “Australia’s local content requirements should allow NZ programs to qualify for quotas.”\(^{510}\) The responsible Minister, Bob Collins, wanted the Act to expressly implement the CER,\(^{511}\) and the Explanatory Memorandum which accompanied the Act at Bill stage stated that the purpose of section 160(d) of the Act was to require the ABA “to perform its functions in a manner consistent with various

\(^{508}\) *Ibid.*


\(^{511}\) Minister Collins wrote to the Chairperson of the ABA on 2 December 1992, saying, “Having consulted with the Minister for Trade and Overseas Development, I am aware that Australia’s present treatment of New Zealand produced programming in Australian content standard TPS 14 may be in breach of Australia’s Services Protocol obligations. I would hope that the ABA can quickly reconsider the Australian content standard.” (Cited by the *Australian Content Standard Review, supra* note 33 at 15.)
matters, including Australia’s international obligations or agreements such as Closer Economic Relations with New Zealand.\textsuperscript{512} But ultimately, “the legislation was not drafted to achieve this result unambiguously”,\textsuperscript{513} with the result that the ABA was left to implement the legislature’s intent in drafting the Standard. Instead, in a working paper released in 1994, the ABA said that, in accordance with advice it had received from its legal advisors, it would be going beyond the scope of its powers granted in section 122 of the Act if it framed the Standard in such a way as to comply with the requirements of the Services Protocol.\textsuperscript{514} The ABA did not contest the fact that the nationality-based quota in the Standard violated the Services Protocol; instead, it argued that if one of the intentions of the Act was to “promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity”,\textsuperscript{515} and pursuant to this aim the ABA was mandated by section 121(1) and (2) to develop a Standard “to relate to ... the Australian content of programs”,\textsuperscript{516} which - according to its inference that fulfilment of nationality-based criteria de facto led to parochial product being produced - obliged it to prefer programs having Australian content to those with New Zealand content.\textsuperscript{517} Therefore, soon after publication

\textsuperscript{512} Explanatory Memorandum to the Broadcasting Services Bill, AB51, cited by Wilcox and Finn JJ, \textit{ABA v Blue Sky, supra} note 490 at 414.

\textsuperscript{513} Given, supra note 510. But see contra: Brown, \textit{supra} note 401 at 94-95, who thought at the time that the Act “appears to have resolved these disputes” through the provision in s. 160(d), and finds comfort in the co-production recognition provisions for subscription television in s. 6(1). Given, of course, has the benefit of hindsight.

\textsuperscript{514} \textit{Blue Sky v ABA} - court of first instance, at para. 11.

\textsuperscript{515} S. 3(e).

\textsuperscript{516} See full citation of s. 122(2) in section 4.3.1 above.

\textsuperscript{517} \textit{Blue Sky v ABA} - court of first instance, \textit{supra} note 504 at para. 12.
of the Standard in December 1995, the ABA found itself facing the aggrieved New Zealand industry group in court.

5.4.1 Decisions of the Federal Courts

In the court of first instance,\(^{518}\) Davies J, the single federal judge hearing the matter, accepted the ABA’s contention that its powers were limited to determining what constituted Australian content. “[T]he ABA ... is not empowered by the Broadcasting Services Act to define an Australian person so as to include a New Zealand person or to define an Australian program as to include a New Zealand program”, he said, continuing, “The ABA has no authority to lay down a standard with respect to the New Zealand content of programs.”\(^{519}\) However, Davies J took the view that the ABA could nevertheless act consistently with the Services Protocol and still remain foursquare within the parameters of its empowering provisions in the Act:

One means of doing so ... would be for the ABA to adopt a standard such as was adopted but to provide that the obligations under it were reduced to the extent to which New Zealand programs were broadcast during the specified period, 6 am to midnight. ... Such a standard would be within power for it would impose duties with respect to the Australian content of standards. It would impose no duty with respect to New Zealand programs. The Standard would be consistent with the Protocol for the effect would be that, to the extent to which the ABA could so provide, New Zealand programs would have access to Australia’s domestic distribution system no less favourable than that accorded to Australian programs.\(^{520}\)

\(^{518}\) See \textit{ibid.} for full citation.

\(^{519}\) \textit{Ibid.} at para. 12; also cited in \textit{ABA v Blue Sky, supra} note 490 at 410.

\(^{520}\) \textit{Blue Sky v ABA} - court of first instance, \textit{supra} note 504 at paras. 15-16; also cited in \textit{ABA v Blue Sky, supra} note 490 at 411.
Therefore, given that he believed there to be a prospect of the ABA framing the Standard in a manner consistent with the Services Protocol, Davies J declared the Standard to be invalid to the extent to which it failed to be so consistent with the Act, and gave the ABA just over four months to revoke or vary the Standard to bring it line with sections 122(4) and 160(d) of the Act, else it would be set aside.\footnote{521}

The matter was then appealed by the ABA to a full bench of the Federal Court. Northrop J in the minority agreed with Davies J’s judgment, saying that “it is possible that a standard based upon different criteria from that adopted in the Standard could result in no inconsistency” between the mandate to the ABA contained in the Act and the Services Protocol (though he did not feel it necessary to go further and explain how this could be done),\footnote{522} and would have dismissed the ABA’s appeal. Interestingly, Northrop J noticed the problem of Stanbury’s iguana in the nationality-based criteria for Australian content, and recorded that he found it somewhat mystifying:

... it would be expected that the Standard would be directed to the content of programs to be broadcast. Strangely, this does not seem to be the case since the Standard identifies Australian programs by reference to the citizenship or residence of the producers, directors and actors involved in the program.\footnote{523}

The majority of Wilcox and Finn JJ, on the other hand, rejected Davies J’s suggestion as sleight of hand:

If the ABA specified the ‘Australian content’ of television programs in such a way as to allow any of the required content to be satisfied by New Zealand programs,

\footnote{521} Blue Sky v ABA - court of first instance, supra note 504 at paras. 15-16.

\footnote{522} ABA v Blue Sky, supra note 490 at 404.

\footnote{523} Ibid. at 400.
However they might be defined, it would fail to carry out its statutory task. It would not then be specifying the (minimum) Australian content of each licensee’s program time, but rather the minimum Australian-New Zealand content, in whatever proportion the licensee saw fit. The only standard the ABA could set, consistent with the Protocol, would be one that allowed for there to be no Australian content programs at all ... While one may be able to describe this as determining a standard, it is not one that puts into effect the statutory obligation to determine a standard that relates to the Australian content of programs.\(^{524}\)

There were also considerations of certainty which persuaded the majority that Davies J’s *laissez-faire* approach to the quantity of Australian material *vis-a-vis* New Zealand material was undesirable:

>[P]eople ... involved in the Australian film or television industries ... have a financial interest in knowing what proportion of television programs will be Australian-made, and in ensuring it is as high as possible. There are, possibly, many other people who have no financial interest to protect, but are nonetheless concerned that, in the words of s 3(e) of the Act, Australian commercial television programs play a role ‘in developing and reflecting a sense of Australian identity, character and cultural diversity’. Under the proposal ... adopted by Davies J, there could be no assurance that they will do so; certainly there will be no way of knowing in advance the extent of their contribution.\(^{525}\)

In consequence, the majority held that the Act had given the ABA two mutually inconsistent instructions: on the one hand requiring it to set a Standard giving preferential treatment to Australian productions (in section 122(2)(b)), and on the other requiring it to do so even-handedly as between Australia and New Zealand (in section 160(d)): “The ABA has been put in the same position as the man instructed to be faithful to his wife and love her above all others but to accord

\(^{524}\) *Ibid.* at 413.

\(^{525}\) *Ibid.* at 413-414.
Chapter 5 - Turning the Tables Down Under

her sister no less favourable treatment."\(^{526}\) Applying the interpretive maxim *generalia specialibus non derogant*, Wilcox and Finn JJ took the view that the provision in section 122(2)(b) of the Act was the special one, which should prevail over the more general provision requiring the ABA to have regard to Australia’s international treaty obligations.\(^{527}\) Accordingly, in the judgment issued by the Full Federal Court in December 1996, the ABA’s appeal was allowed. Whereas the court of first instance had chosen to allocate the messy task of reconciling Australia’s cultural development policy with its trade obligations back to the ABA, the Full Bench identified Parliament as the culprit in creating the legislative inconsistency. The use of the *generalia specialibus* maxim appears to have been a convenient interpretive means of achieving this outcome. In Given’s analysis, “The Full Bench, in effect, told the Parliament to get its act together. The Court wasn’t going to try to make the policy the Parliament should have chosen clear words to implement, if it really wanted to.”\(^{528}\)

5.4.2 The High Court Decision\(^{529}\)

\(^{526}\) *Ibid.* at 414.

\(^{527}\) *Ibid.* See *contra* the view of Northrop J, the minority judge, who argues that s. 160(d) is the more specific provision: “It is a direct command that obligations undertaken by Australia under an international convention or agreement must be applied with respect to domestic law.” *Ibid.* at 403.

\(^{528}\) Given, *supra* note 510 at 40. This analysis appears to have been endorsed by Chief Justice Brennan during the course of the subsequent High Court appeal proceedings, where he remarked, “It might be that Parliament ... wants to have it every which way ... unaware that it was imposing on the ABA obligations that may be inconsistent.” Cited by Jock Given, “Blue Sky in High Court” (1997) 137 Communications L. Update 12. This article provides an interesting account of the oral exchanges between counsel in the High Court proceedings. Available at <http://www.comslaw.org.au/research/screen/19971119 blueskyCU.html>.

In April 1997 Project Blue Sky was granted leave to appeal from the Full Federal Court judgment, and the appeal was heard in the High Court of Australia in late September 1997.\textsuperscript{530} Because the Blue Sky case so perfectly captures the conflict between the use of provenance-based quotas for DCID schemes and the fundamental principles of international trade law, the argument before the court and the judgments handed down deserve detailed study.

\subsection*{5.4.2.1 The Inexorable Web of MFN Multilateralism, or, Why You Cannot Play Favourites Among Foreigners}

Of great interest from a trade law perspective are the submissions made by an \textit{amicus curiae} group representing the Australian film and production industry, “Project True Blue”.\textsuperscript{531} The crucial point made by the group was that there are numerous international agreements to which Australia is a signatory, imposing obligations which have the potential to multilaterally extend trade concessions granted to New Zealand in terms of the Services Protocol to the CER.\textsuperscript{532} If it were accepted that the ABA was required to comply with the Services Protocol in determining the Standard, then it would similarly be obligated to comply with these other agreements.\textsuperscript{533} The consequence is that, contrary to the suggestion made by Davies and Northrop JJ, the Australian


\textsuperscript{532} True Blue submissions, \textit{supra} note 531 at 8, para. 26.

\textsuperscript{533} \textit{Ibid.} at paragraph 27.
content quota could not be divvied up between Australian and New Zealand-made programs alone.

A stop-gap measure whereby the ABA attempted to include New Zealand within the definition of Australian programs in order to comply with the Services Protocol, would not solve the problem of compliance with section 160(d) of the Act.

For example, Australia is bound by the OECD Code on Liberalisation of Current Invisible Operations ("Code on Invisibles"),\(^534\) Article 2(a) of which requires signatories to "grant any authorisation required for a current invisible operation",\(^535\) with such operations specified to include the importation, distribution and use of "printed films and other recordings ... for television broadcasts".\(^536\) Now, although Australia has in force a reservation to the OECD Code on Invisibles exempting from its application measures applying "time-quota limitations on the television screening of programs which are not of Australian origin",\(^537\) in terms of Article 9 the OECD Code on Invisibles it may not adjust that reservation selectively in respect of different countries, in order to "play favourites among foreigners":

A Member shall not discriminate as between other Members in authorising current invisible operations which are listed in Annex A and which are subject to any degree of liberalisation.\(^538\)

\(^{534}\) Available at <http://www.oecd.org/da/CMIS/Codes/Cliaart.htm>. According to the True Blue submission, Australia acceded to the Convention on the Organisation for Economic Co-operation and Development with effect from June 7, 1971. The OECD Code on Invisibles was concluded on December 12, 1961, and applied to Australia from the time of its accession.

\(^{535}\) True Blue submissions, \textit{supra} note 531 at 9 para. 32.

\(^{536}\) OECD Code on Invisibles, Annexure A, Item H/1. \textit{Ibid.}

\(^{537}\) True Blue submissions, \textit{supra} note 531 at 10, para. 33. The full list of Australia’s reservations is available at <http://www.oecd.org/da/CMIS/Country/Austral.htm#clia>.

\(^{538}\) True Blue submissions, \textit{supra} note 531 at 10 para. 34.
Such multilateral extension of trade concessions is the very essence of the MFN principle. Therefore, argued Project True Blue, treatment of New Zealand television programs in accordance with the Services Protocol, but which discriminated against programming emanating from third countries, would be in breach of Article 9 of the OECD Code. Any favourable treatment given to New Zealand programs would have to be accorded on an identical basis to programs produced by all the other OECD members. The consequence would be that, if the share of Australian programming was reduced on a zero-sum basis within the 55 per cent quota requirement so as to admit the programs of these countries (including the US), there would be very little "shelf-space"

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539 True Blue submissions, supra note 531 at 10 para. 36. This argument is expressly stated to be subject to the caveat that, under Article 10 of the OECD Code on Invisibles, Australia would be allowed to extend preferential treatment to New Zealand if the two countries notified the OECD that they formed "a special customs or monetary system" as well as of the provisions in the CER which would thereby have a bearing on the OECD Code on Invisibles. However, note the True Blue submissions, "The CER Protocol has not been notified by Australia and New Zealand pursuant to Article 10 of the OECD Code and the application of Article 10 to the CER Protocol was specifically left open by the OECD Committee on Capital Movements and Invisible Transactions in a report to the OECD on the CER Protocol in 1989." Ibid. at 11 para. 37.

540 True Blue submissions, supra note 531 at 11 para. 38. To flesh out the argument a little more, it should be noted that, according to Article 30 of the Vienna Convention on the Law of Treaties,

> When a treaty specifies that it is subject to or is not to be considered as incompatible with an earlier or later treaty, the provisions of that other treaty prevail. (Vienna Convention on the Law of Treaties, 23 May 1969, 11 U.N.T.S. 331.)

In the Preamble to the Services Protocol there is indeed such a specification, which records that in concluding the Services Protocol Australia and New Zealand are,

> Conscious of their rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral agreements and arrangements [underlining in original],

and the OECD Code on Invisibles would indeed be one of the latter agreements to which this provision refers generally. On this basis, argues Project True Blue, the ABA should conclude in determining the Standard that Article 9 of the OECD Code would prevail over the requirements of the Services Protocol to the CER. Of course, the very notion that a specialist broadcast regulatory agency should be basing its determinations in part on its understanding of contested interpretations of international law and trade agreements is troubling - a point made in the majority judgment of the High Court (see below).
left for Australian programs, making any such Standard meaningless in substance, which in turn would violate the Act’s mandate to the ABA to develop an **Australian** Content Standard in accordance with the cultural development and national identity objects of the legislation.

In fact, Australia is a signatory to several other agreements with MFN provisions similar to that contained in the OECD Code on Invisibles. For example, Project True Blue draws attention to the Basic Treaty of Friendship and Co-operation between Australia and Japan ("the Friendship Treaty"), which has been in force since 1977.\(^{541}\) Article IX:3 of the Friendship Treaty sets out the MFN principle thus:

> Each Contracting Party shall accord within its territory to the nationals of the other Contracting Party fair and equitable treatment with respect to matters relating to their business and professional activities, provided that in no case shall such treatment be discriminatory between nationals of the other Contracting Party and nationals of any third country.

Clause 1 of the Agreed Minutes initialled by the Prime Ministers of Australia and Japan in connection with the Basic Treaty ("the Minutes") confirms that the interpretation to be placed upon Article IX:3 is that the treatment which it prescribes "will in effect be treatment which is no less

\(^{541}\) The treaty was entered into on 16 June 1976, and took effect on 20 August 1977. True Blue submissions, supra note 531 at 8 para. 27.
favourable than that accorded to nationals of a third country ...".\(^{542}\) Clause 3 of the Minutes defines "matters relating to business and professional activities" referred to in Article IX:3 as comprising,

the levying of taxes, fees or charges of any kind, study and research, the making and performance of contracts, rights to property, participation in companies, investment activities and generally the conduct of all types of commercial, industrial, financial and other business activities as well as professional activities.\(^{543}\)

Project True Blue contended that this definition has sufficient breadth to include the provision of television programming on an equitable basis, so that in terms of Article IX:3 of the Friendship Treaty, any favourable treatment which the ABA might accord to New Zealand nationals in order to comply with the Services Protocol would have to be accorded on an equal basis to Japanese nationals. In consequence, the Australian Content Standard "would become in substance the ‘Australian and New Zealand and Japanese Content Standard’".\(^{544}\)

Finally, the identical difficulty arises under the GATS. The MFN exemptions taken by Australia do not include a specific exemption allowing it to accord special treatment to New Zealand television services, other than in terms of a co-production agreement. While it is possible that such preferential treatment would be acceptable in terms of Article V of the GATS, which

\(^{542}\) True Blue submissions, *supra* note 531 at 12 para. 41. Clause 2 of the Protocol entered into at the time of signature of the Friendship Treaty records that nothing in the Friendship Treaty is to affect the rights or obligations of either Contracting Party under multilateral agreements to which both are parties, which, on application of Article 30 of the Vienna Convention on the Law of Treaties cited above, would for example mean that preferential concessions granted by Australia which it sets out in its Article II MFN exemptions list annexed to the GATS would not have to be extended to Japan, since the GATS would trump the Friendship Treaty. But there is nothing to suggest that the same holds for the Services Protocol, to which Japan is not a party, and in any event there is no exception in respect of Australia's broadcast quotas inscribed in the Services Protocol. *Ibid.*

\(^{543}\) *Ibid.*

\(^{544}\) *Ibid.* at 12-13 paras. 41-44.
permits Members to enter into bilateral agreements liberalising trade in services between them,\textsuperscript{545} usually in the context of “a wider process of economic integration or trade liberalisation among the countries concerned”,\textsuperscript{546} this would require that the Services Protocol be notified to the Council for Trade in Services\textsuperscript{547} - which has not been done. Even supposing such notification was made, that would only cure the difficulty in respect of preferential treatment for New Zealand. If the conclusions of Project True Blue in respect of the Friendship Treaty are accepted, then the web of MFN treatment has by now been spun further, to Japan. Whether the MFN provision in Article II the GATS requires Australia to extend on a multilateral basis its favourable treatment of New Zealand and Japan, or just its treatment of Japan, the outcome is the same. Hence, concluded Project True Blue, “the ‘Australian content standard’ would become in substance the ‘WTO Members Content Standard’”.\textsuperscript{548} These contentions, in sum, constitute the “multilateral trade effects argument”, to which I will return in subsequent sections. The issue in the appeal to the High Court, therefore, was how to reconcile the legislature’s instructions to the ABA, in sections 122(2)(b) and 160(d) of the Act. This was not just a matter of statutory interpretation; looming large in the background was the substantive incompatibility of Australia’s cultural policies with its trade promises.

\textsuperscript{545} Article V:1.

\textsuperscript{546} Article V:2.

\textsuperscript{547} Article V:7(a).

\textsuperscript{548} True Blue submissions, supra note 531 at 14 para. 51.
5.4.2.2 Chief Justice Brennan’s Minority Concurring Judgment, or, Why the Emperor Has No Clothes

For Chief Justice Brennan, who delivered the minority concurring judgment in the High Court, the problem of Stanbury’s iguana was central:

It is the provenance of a program, not its subject matter, which determines whether it is an “Australian program” for the purposes of the Australian Content Standard. The Australian Content Standard gives a competitive advantage to programs having an Australian provenance over programs having a corresponding New Zealand provenance. Thus the Australian Content Standard appears not to be consistent with Australia’s obligations under Arts 4 and 5(1) of the Protocol.549

In argument before the court, noted Brennan CJ, it was conceded by the appellants that if the Standard had only specified that the preferred programming have content which was identifiably Australian, rather than the nationality of its creators and producers, then there would be no breach of the Services Protocol. The Chief Justice quotes with approval the following comments by Project Blue Sky’s counsel:

Obviously, if a standard could be devised which had no reference to ... trade-related matters - then it may be that there was no need to be concerned about the international obligation. ... if a standard was confined to content in the sense of subject matter, then anybody in the world could make or produce with whatever actors or writers, et cetera, they wanted to such films. Therefore, it could be argued that everybody would be on a level playing field in relation to such a standard and there may not be any specific requirements for the application of section 160(d). In other words, all I am positing is that it is quite possible, fully consistent with our argument, that you may have a case where a standard satisfies section 122 and is consistent with section 160(d), even though it does not have to mention New Zealand films or other films if they have a most favoured nation situation. [Emphasis added by Brennan C.J.]550

549 Blue Sky v ABA, supra note 529 at 844 (para. 4).
550 Ibid. at 846 (para. 12).
In fact, Brennan CJ was perhaps a little hasty in accepting this view: despite the fact that a measure does not discriminate against foreign services on the grounds of nationality directly, it could nevertheless amount to *de facto* discrimination contrary to the national treatment principle. This question is discussed in more detail in section 5.4.3.3 below.

All this interesting comment would ordinarily be *obiter* because, as the Chief Justice explained, the grounds upon which the appeal had been brought did not include any suggestion that the Standard should relate to the content of programming rather than its provenance. The appellants would have no commercial interest in such an outcome, since programs made in New Zealand would be less likely to be "recognisably Australian" than programs made in Australia, unless specific efforts were made to direct the content towards satisfying such a test in the Standard. For the appellants, having the Standard accord New Zealand programming the same preferential status as Australian works would not only enhance commercial viability for future production by New Zealand's cultural industries, but would also provide a ready market for the extensive back-catalogue of product available from that country.551 However, almost none of this back catalogue material would satisfy a Standard premised on identifiably Australian content. For this reason, and despite some urging from Brennan CJ, the appellants were not prepared to advance a content-based test as the true construction of the meaning of "Australian content"552 - though such a construction seems patently obvious, and many people who have examined the issue, from Canadian commentators such as Stanbury to Australian federal judges such as Northrop J, and now finally

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551 See Australia, Federal Department of Communications and the Arts, "Australian content standard to be revised" (Press Release, 9 June 1998) <http://www.dca.gov.au/>. "Due to the economics of film and television marketing, New Zealand programming has a cost advantage over Australian product and there is also a substantial back-catalogue of New Zealand product available."

552 *Blue Sky v ABA*, *supra* note 529 at 846 (para. 12).
the Australian Chief Justice himself, find the provenance-based construction to be tangential to the statutory language expressing the (supposed) aims of cultural policy, and exasperating in the maze of contradictions it creates.

Notwithstanding the caginess of the appellant’s counsel, Brennan CJ was not prepared to leave his view of the Standard as obiter dicta. “Judges are more than mere selectors between rival views,” he cites Lord Wilberforce as saying, “they are entitled to and do think for themselves.” 553

It was the duty of the court to ascertain the meaning of “Australian content” in section 122(2)(b) of the Act from the statutory context and to determine whether the Standard, insofar as it prescribes a transmission quota for programs having an Australian provenance, relates to the Australian content of programs. 554 For the Chief Justice, the determination was straightforward and self-evident:

The “content” of a “program” is what a program contains. The Act calls that content “matter”: it is what the broadcast audience sees or hears. “Australian” is the adjective describing the matter contained in the program; but the matter contained in a program is not its provenance. The content of a program for broadcast may be difficult to define in a statute, for it has to do with the communication of sights and sounds that convey ideas and the classification of an idea as “Australian” is a rather elusive concept. But that is not to deny the reality of Australian ideas; they are identifiable by reference to the sights and sounds that depict or evoke a particular connection with Australia, its land, sea and sky, its people, its fauna and its flora. They include our national or regional symbols, our topography and environment, our history and culture, the achievements and failures of our people, our relations with other nations, peoples and cultures and the contemporary issues of particular relevance or interest to Australians. ... The “Australian content of a program” is the matter in a program in which Australian ideas find expression. The ABA is empowered by s 122(1)(a) to determine a transmission quota for programs in which

554  Ibid. at 847 (para. 21).
Australian ideas find expression and the manner in which and the extent to which such programs must contain Australian ideas.\footnote{\textit{Ibid.} at 848 (para. 22).}

The problem with the Standard, therefore, was not its inconsistency with section 160(d) of the Act and the trade law consequences arising as a result, but rather that its nationality-based criteria did not give effect to section 122(2)(b), namely that the Standard should relate to the “Australian content of programs”:

The provisions of the Act uniformly point to one meaning of “the Australian content of programs”, namely, the Australian matter contained in a program. There is neither historical nor textual foundation for the proposition that the term can be used to classify programs by reference to their provenance. The determination of the Australian Content Standard adopts an impermissible basis for classifying programs as the subject of a standard under s 122. It follows that I would hold the Australian Content Standard to be invalid, but for a reason other than the reason advanced by Blue Sky and debated by the ABA and the interveners.\footnote{\textit{Ibid.} at 848 (para. 26).}

In other words, the emperor had no clothes. This would come as quite a shock to those inside the “black box” of cultural policy determination and enforcement, for whom the realisation of industrial DCID scheme objectives within a context of high-flown ideological rationales is no fabrication, but rather a pragmatic and rational response to a pressing problem. For example, in order to counter Brennan CJ’s suggestion that the industrial objective realised by provenance-based criteria had little to do with the ideological objectives of “Australian content”, i.e. the fostering of indigenous culture and expression, the ABA’s counsel was driven to state openly that the regulator considered the industrial outcome to be the principal goal. He explained his client’s position thus:
The principal point being, your Honours, to make clear that the involvement of Australians in the process has always been a fundamental aspect of Australian content as understood in this regulatory context. If that is right, as we submit it is, then the conflict ... cannot be resolved otherwise than in the way in which the Full Court resolved it.557

Citing the explanatory memoranda to the Act at the time of its introduction to the Australian parliament, the ABA’s counsel concluded that the legislators were being told, “This helps the local production industry.”558 Kirby J asked sharply,

So it is a job protection purpose, not a culture protection purpose?

To which the ABA’s counsel replied,

No, I would not accept that, your Honour. The dichotomy which your Honour mentioned we submit is not seen as a dichotomy by those in this field because the involvement of Australians is likely to produce something with an Australian outlook when compared with a foreigner producing something and, secondly, the existence of an Australian production industry is seen as being a necessary function of being able to fulfil the objective. So whilst we do not shrink at all from the proposition that the provisions are preferential, their objective is the objective in the Act. [Emphasis added.]559

In other words, development of local cultural industries was to be “understood” as the true intention of the legislature in mandating the ABA to develop the Standard, and it was assumed that product would emerge with a suitable degree of “Australianness”. (This is further evidenced by the

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558 Ibid. at 24.

559 Ibid. at 28.
reasoning of the ABA for its non-enforcement of the on-screen criteria for drama programming in the prior TPS 14 standard - see section 4.3.2 above.) This “understanding”, though perhaps widely shared within the black box, was thoroughly alien to Brennan CJ. He saw the Standard as being required to reflect “Australian content” within its plain, grammatical meaning, i.e. content about Australia - which corresponds alone to the ideological motivations for DCID schemes, not the industrial premise. If an industrial premise was intended, that should be clearly stated in the legislation (as, for example, is the case in section 53 of South Africa’s IBA Act). It should be noted that Brennan CJ’s trenchant observations are not an indictment of either the industrial or the ideological objectives; in fact, several remarks made by the High Court judges at the hearing were very supportive of the notion of creating a space within the broadcasting environment for identifiably Australian expression and cultural works. Rather, the Chief Justice’s concern is that provenance-based broadcast quotas are a different creature altogether to that envisaged in the Act, when it speaks of “Australian content”. Broadcast policy may consist of complex tradeoffs mandated using vague “wish-lists” of objectives with “understood” meanings, but for the purposes of statutory interpretation, a spade must be called a spade.

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560 See note 487 supra and accompanying text.

561 For example, Kirby J remarks, “But do we not have to read the Act in the context of international global media, that one of the problems that is presented by it is the domination of United States material and that this is a response which is trying to say, ‘Lest we fall completely victim to something which already monopolises so many of the hours, we’re going to reserve a certain content for Australians, both to allow the cultural identity to be interpreted and to give jobs to Australians?’”. He continues, “If you turn on commercial television in Australia, you see how many of the hours are taken up [by American product]”, and goes on to say, “Maybe you give a little bit less American. Maybe we have an Australian content and a New Zealand content and a little bit less from the United States of America. It may not be a bad thing.” Transcript, supra note 557 at 11 and 34 respectively.
5.4.2.3 The High Court Majority, or, Letting the Chips Lie Where They Fall

The majority judges, McHugh, Gummow, Kirby and Hayne JJ, disagreed with Brennan CJ on his primary argument. In their view, the Standard plainly related to "the Australian content of programmes", within the literal and grammatical meaning of section 122(2)(b) of the Act. They reached this conclusion on the basis of the legislative history of the Standard (in particular the Act’s grandparenting of the previous TPS 14 standard, which was also nationality rather than content-based)\textsuperscript{562} and the "extremely wide" range of matters relating to Australian content which the words, "relate to", empowered the ABA to include in the Standard.\textsuperscript{563} While agreeing with Brennan CJ that one knew what Australian content was when one saw it, on screen, the majority ruled took the opposite view to the Chief Justice regarding the validity of the provenance criteria used by the Standard:

The phrase "the Australian content of programs" in s.122 is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture. A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians. Given the history of the concept of Australian content as demonstrated by the provisions of TPS 14, a program must also be taken to contain Australian content if the participants, creators or producers of a program are Australian. [Emphasis added.]\textsuperscript{564}

\textsuperscript{562} \textit{Blue Sky v ABA, supra} note 529 at 856 (paragraphs 72-77), and see the brief discussion of TPS 14 in note 398 \textit{supra}. S. 21 of the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 grandparented TPS 14 as a standard deemed to have been determined by the ABA under s. 122(1)(a) of the Broadcasting Services Act, as well as the provisions of s. 114 of the Broadcasting Act 1942.

\textsuperscript{563} \textit{Ibid.} at 858-859 (para. 87). It will be recalled that the words "relate to" appear in s. 122(2) of the Act - see the full citation of s. 122(2) in section 4.2.1 above.

\textsuperscript{564} \textit{Ibid.} at 859 (para. 88).
From the transcript of the hearing, it appears that this conclusion was premised on a pragmatic view of the use of provenance criteria amongst the majority: Kirby J, for example, asked,

Is it not likely, though, that in the real world that Australian films are more likely to develop with the sense of Australian identity, character and cultural diversity, than the fare that is constantly fed up from the United States of America?

To this the appellants' counsel replied,

That is correct, your Honour, but my point is more this, that there is a dichotomy of whether you achieve Australian content by giving preference to Australian films as such or to Australian filmmakers as such or whether, amongst the choices which may be available, you decide to give or require Australian content in terms of subject matter. We might think that Australians are the best people to produce films of Australian subject matter, but anybody in the world can produce a film which has Australian subject matter and therefore can be a film which satisfies [the Australian identity, character and cultural diversity policy objective in section 3(e) of the Act] and satisfies the notion of Australian content.\textsuperscript{565}

Which, of course, was precisely the point seized upon by Brennan CJ: a standard framed on the basis of content rather than provenance criteria would not create any operational conflict between the ABA's statutory powers under section 122 and Australia's international obligations under section 160(d). For the Chief Justice, the question of whether the Standard was consistent with section 160(d) constituted an enquiry in the alternative, should his view that the ABA was not entitled to prescribe a program standard on the basis of criteria of Australian provenance be wrong.\textsuperscript{566} The majority in the High Court, on the other hand, made the question of the Standard's consistency with section 160(d) their principal enquiry, and concluded that the court \textit{a quo} had erred.

\textsuperscript{565} Transcript, \textit{supra} note 557 at 2.

\textsuperscript{566} \textit{Blue Sky v ABA}, \textit{supra} note 529 at 849 (para. 27).
in applying the *generalia specialibus* maxim: rather than the relationship between sections 122 and 160 of the Act being that of a special and a general provision, they were "interlocking provisions".\footnote{Ibid. at 857 (para. 81).} Section 160 was the dominant provision, and directed how the function of determining the Standard was to be carried out by the ABA. Therefore, the regulatory agency was prohibited from making a Standard which was inconsistent with the agreements referred to by section 160(d), the relevant treaty in this case being the Services Protocol.\footnote{Ibid. at 857 (para. 81-82).} Brennan CJ agreed with this construction of the statute,\footnote{Ibid. at 849 (para. 28-30).} noting that the inconsistency between sections 122 and 160(d) identified by the majority of the Full Federal Court, was in fact only apparent in operation of the Standard as framed by the ABA and did not constitute an inherent conflict within the statute's text.\footnote{Ibid. at 849 (paragraph 33).}

All five judges of the High Court agreed, therefore, that clause 9 of the Standard did not conform with Articles 4 and 5(1) of the Services Protocol.\footnote{Ibid. at 851-852 (paragraph 42 - Brennan CJ's judgment) and 858 (paragraph 84 - the majority's judgment).} Brennan CJ concluded that on both his primary and alternative arguments, clause 9 was invalid; the majority preferred a more attenuated outcome, ruling that although clause 9 of the Standard breached section 160(d) of the Act, it was not *invalid*. Rather, the ABA’s determination of clause 9 of the Standard in breach of the Act was held by the majority to be *unlawful*, and on this basis any interested person could
obtain an injunction restraining the ABA from taking further action based on its unlawful action.\textsuperscript{572} The effect of the majority’s declaration is that the ABA is required to bring the Standard within the law,\textsuperscript{573} as soon as is reasonably possible, but in the interim it will remain in force - unless an injunction is brought by Project Blue Sky, which would be unlikely if the ABA demonstrates that it is acting with due haste to correct the situation of unlawfulness. This the ABA has done, on 15 July 1998 publishing its discussion paper on the revision of the Standard to conform to the decision in the Blue Sky judgment, with the new Standard to be gazetted by the end of 1998 following the required public consultation process.\textsuperscript{574} (The thrust of the discussion paper is dealt with in section 5.4.3 below.) The ABA is given much helpful guidance by the majority as to what may be included in this new Standard:

It is of course true that one of the objects of the Act is “to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity”. But this object can be fulfilled without requiring preference to be given to Australian programs over New Zealand programs. Thus, the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian or New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time. Such a standard would relate to the Australian content of programs even though it also dealt with the New Zealand content of programs.\textsuperscript{575}

There is a second ground of practicality favouring the majority’s declaration of unlawfulness: if the Standard had been found to be invalid, the ABA would at every turn have to

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\textsuperscript{572} \textit{Ibid.} at 862 (paragraphs 99-100).

\textsuperscript{573} \textit{Australian Content Standard Review, supra} note 33 at 66.

\textsuperscript{574} \textit{Australian Content Standard Review, supra} note 33 at 10.

\textsuperscript{575} \textit{Blue Sky v ABA, supra} note 529 at 859 (para. 90).
review all of Australia’s trade agreements, for there to be certainty that its determinations were valid:

While the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language as the result of compromises made between the contracting State parties. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia’s international obligations was invalid are compounded by Australia being a party to about 900 treaties.576

Though the majority discusses as its example of compliance with section 160 a non-discriminatory Australia-New Zealand standard, it was also alive to the multilateral trade law effects argument raised by the Project True Blue interveners. The transcript of the hearing has Kirby J referring to the “vast variety of international obligations” such as the OECD, Japanese Friendship and GATS treaties, which make “a very important point that it is not just New Zealand we are dealing with here; it is a whole variety of international obligations that Australia has subscribed to that may have to be taken into account.”577 In its judgment, the majority notes that the Standard should not “discriminate against persons of New Zealand nationality or origin or the services they provide or against the members of any other nationality protected by agreements similar to those contained in the [Services] Protocol.” [Emphasis added.]578 The issue was not pursued in detail, as the appellants would not be lured into contending that only New Zealand-made programs should benefit, if the Standard was declared to have been unlawfully made. Correctly, counsel for the

576 Ibid. at 861 (para. 96).
577 Transcript, supra note 557 at 3-4.
578 Blue Sky v ABA, supra note 529 at 859 (para. 89).
appeallants regarded the web of Australian trade promises that would come into effect, if the appeal was allowed, as being no problem of his clients:

It is not offensive to our argument; it just means that New Zealanders say, "Well, we have to be given no less favourable treatment than Australians. If they are subject to equal treatment with Japanese or people of the European community or whatever it may be or members of the OECD, then all we're asking for is that we stand on the same footing as Australians and if that's less than having the two of us in the market-place, if it's a greater number in the market-place than the two of us, then so be it."\(^{579}\)

This, it appears, was also the view taken by the High Court.\(^{580}\) Multilateral extension of the principle of non-discrimination might result in the complete gutting of Australian television broadcast quotas, but the chips would have to lie as they fell. Tough-minded but correct, the majority's decision - along with the stronger views expressed in the concurring minority judgment of Brennan CJ - was that the appeal should be allowed.

\(^{579}\) Transcript, *supra* note 557 at 4.

\(^{580}\) See, in particular, the comments of Kirby and Gummow JJ, *ibid.* at 37 and 46. The attitude of the court is exemplified by the following exchange between the High Court judges and Stephen Gageler, True Blue's counsel, as he attempted to take them through the multilateral trade effects argument:

**MR GAGELER:** ... there is another treaty which is the basic treaty of friendship and co-operation between Australia and Japan.

**GUMMOW J:** There might be another 10 tomorrow, for all I know, by the time one comes to write this judgment.

**MR GAGELER:** They just illustrate the difficulty.

**KIRBY J:** The Parliament imposes many duties which are extremely difficult, so that is really just a cry in the wind; it is difficult.

**MR GAGELER:** Not only is it difficult but it is something that cannot be resolved without asking a domestic administrator to make a decision - - -

**KIRBY J:** Then the domestic administrator does what a good domestic administrator should do: gets advice from the Australian Government Solicitor or the Solicitor-General or somebody else about what the obligations are and then acts according to law. It might take a little time. (*Ibid.* at 46.)
5.4.3 Reaction in Australia to the Blue Sky Decision

5.4.3.1 Government Dodges the Media Industry Lobby, Passes the Buck

The argument presented to the High Court by the True Blue interveners representing the Australian media industry was that the free trade genie had to be kept in the bottle: else, as a senior official of one of its member groups predicted, “Australians will see the demise of local TV”.

The subsequent decision was described as a “scandal” and a “black day for Australian culture” by prominent figures in the Australian media industry, and ABA Chairperson David Flint decried the ruling as “undermining the regulatory framework that enables Australian audiences to enjoy Australian television.”

Flint dismissed Brennan CJ’s preference for on-screen criteria, saying, “Is Hamlet a Danish play because it’s about the King of Denmark?”

Some of the Australian media industry criticism is exaggerated, and fails to take cognisance of the safeguards built into the Services Protocol. For example, prominent Australian film-maker Paul Barron argued that,

The issue is not a question of being anti-New Zealand, as such. The fact is that a lot of NZ product is shot in NZ but it is not NZ conceived, created and controlled. We’re thinking of shows here like “Xena: Warrior Princess” and “Hercules: The Legendary Journeys”... The problem is allowing in NZ shows that are made in NZ but are in fact creatively controlled and reflect the style of America...


582 Martin, supra note 408.


584 Ibid.

But this particular concern, valid though it may be, is easily dispelled by Article 14 of the Services Protocol, which provides that a Member State may deny the benefits of the Protocol to persons of the other Member State, if it is established that the service concerned is being indirectly provided by a person who is not a person of either Member State. While the Services Protocol does require adequate notification and consultation prior to such unilateral denial of benefits, this would not impede the Australian government from spotlighting and disallowing equivalent application of the Standard to programming which, though made in New Zealand or using New Zealand personnel, was clearly being controlled by US or other foreign companies. A range of measures could be suggested to test for such indirect control of the service, from determining the nationality of the juristic or natural person ultimately in control of the programming, to assessing whether the recipient of the majority of income from the provision of the service in Australia was a New Zealand person, or otherwise. Irrespective of the mechanism adopted to prove the Australian case, if Barron is correct in his criticism then the Services Protocol itself provides him with an adequate solution.

A further illustration of the misconceptions of the Australian media industry is that, although it is the Services Protocol that would have to be altered in order to preserve Australia-only quotas, the uniform call was instead to amend the Act. A broad-based lobby group including studio chiefs, producers, writers and prominent directors and actors, calling itself “the War Council”, called publicly on Prime Minister John Howard “to personally intervene to ensure there is no delay in introducing the necessary amendments to the Broadcasting Services Act to restore the integrity of
the local content standard.586 There was disquiet in the industry about the government’s commitment to cultural policy because the Deputy Prime Minister and Trade Minister, Tim Fischer, had said during the previous Australian election campaign that he would be willing to consider relaxing local content regulations in order to obtain greater access to the US market for Australian agricultural products.587 The government’s response was to refuse the pleas of the media industry, instead instructing that the existing Standard be reviewed by the ABA.588 “The Government is confident that the ABA can, after thorough consultation, revise the standard to strike a balance between the complex cultural and trade issues involved,” explained Minister for Communications, the Information Economy and the Arts. Senator Richard Alston,589 but the media industry panned the government’s solution as buck-passing, calling again for amendments to the legislation to preserve the status quo.590

5.4.3.2 The Sudden Disappearance of the Multilateral Trade Effects Argument

In presenting the options for amendment of the Standard in its July 1998 discussion paper, the ABA adopts a narrow approach to the High Court judgment. Its proposed changes are limited to bringing New Zealand programming within the fold, and the suggested options include a single “trans-Tasman” quota which would be satisfied by both New Zealand and Australian


587 Martin, supra note 583.


589 “Australian content standard to be revised”, supra note 551.

590 Harvey, supra note 588.
product; a single quota with separately defined New Zealand and Australian content; or separate but equivalent quotas. The ABA rejects the contention that extension of the benefits conferred by the Standard to New Zealand in accordance with the Services Protocol alone, would lead to further claims under other treaties. Without explaining how it has come to this conclusion, the ABA states that it "is not currently aware of any other treaty which would invalidate a television content standard that met Australia's international treaty obligations concerning New Zealand." Subsequently, in the context of restating the practical difficulties that would arise in framing and implementing an on-screen criteria test for Australian content, the discussion paper says,

If eligible programs were determined by means of an on-screen test alone, the nationality of those making the programs would not matter and programs from anywhere in the world could be eligible under the standard. The purpose of this review, however, is to determine a standard that gives no less favourable treatment to New Zealanders and the services provided by them, consistent with the CER. As far as the ABA is aware, Australia is presently under no such obligation in relation to any other nation.

There are a number of possible reasons for the sudden demise of the multilateral trade effects argument: first, the successful New Zealand appellants would have no interest in pursuing multilateral extension of the Blue Sky principle in accordance with the Friendship Treaty, the OECD Code on Invisibles, etcetera, because this would dilute and eventually extinguish any gains the New Zealand group could make from bilateral extension of the preferences accorded by the Standard. Second, since the multilateral trade effects argument had originally been made by the True Blue

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591 Australian Content Standard Review, supra note 33 at 38-40.
592 Ibid. at 18.
593 Ibid. at 32.
group representing the Australian industry, with the intent of striking fear into the hearts of the High Court judges regarding the consequences of accepting the appeal, this group's bluff has now been called. The best the Australian industry can now hope for, given that their government has refused their pleas for a legislative quick-fix, is that the damage be limited to inclusion of New Zealand-made programs in the Standard. Project True Blue will, no doubt, now back away from its apocalyptic multilateral trade effects argument with due stealth, silence and speed. Third, as noted in section 5.4.2.3 above, the impact of the High Court judgment was intentionally limited to declaring clause 9 of the Standard to be unlawful, and not invalid. A new Standard which accords equality to New Zealand in terms of the Services Protocol but discriminates against a third country in violation of another agreement, would nonetheless be valid until that third country, or litigants representing its media industry, took up the matter.

In addition, perhaps the ABA has determined that since the provisions of the GATS, the OECD Code on Invisibles and the Friendship Treaty are far more contestable than the very clear case which was presented under the Services Protocol, any such challenge could be either defeated or held off for several years while it wound its way through the Australian courts - the Blue Sky litigation, after all, has been in process since February 1996, and can only be declared a success if and when the new Standard is gazetted at the end of 1998. Having bought this time, there is the option of moving formally towards closer integration of the Australian and New Zealand audiovisual services markets, along the lines of the European Union’s “Television Without Frontiers” approach, which would enable preferential bilateral treatment to be extended by the two
countries to each other without violating the GATS.\(^{594}\) In this manner, any concessions beyond the admission of New Zealand-made programmes could be staved off for years, certainly until the next WTO negotiation round begins in 2000, when concessions could be offered in exchange for reciprocal reductions in trade barriers by the US.

5.4.3.3  \textit{On-Screen Criteria Could Also Be Ruled Offside}

Interestingly, the ABA takes the view that even a solely on-screen criteria test would require “separate but parallel tests for Australianness and New Zealandness, respectively. A parallel test recognises that New Zealand programs are not Australian programs, and are included in the standard solely because of Australia’s obligations under the CER protocol.”\(^{595}\) This is quite contrary to the suggestion made by Brennan CJ,\(^{596}\) and seemingly agreed to by the majority in the High

\(^{594}\) See the discussion of this point in section 5.4.2.1 above, and the more general discussion of the GATS in section 3.3.3 above.

\(^{595}\) \textit{Australian Content Standard Review}, supra note 33 at 29.

\(^{596}\) See section 5.4.2.2 above.
Court,\textsuperscript{597} that on-screen criteria for Australian content would not be discriminatory. The ABA explains its position as follows:

Notwithstanding the dicta of the majority, an Australian on-screen content test applied equally to both Australians and New Zealanders might be challenged as inconsistent with Australia’s obligations under Articles 4 and 5 of the Protocol. If such a test imposed significant limitations on the ability of New Zealanders to gain “Australian on-screen content” status for programs made by them or under their control, then given the breadth of the Protocol provisions, such a standard might be unlawful. For example, a standard might not be consistent with Articles 4 and 5(1) of the Protocol if it required that a program must be about Australian subjects and appear to be set in Australia. The practical effect of this may be to deny New Zealand equal treatment in terms of access to the market for television programs, contrary to Article 4. Rather, it would require New Zealand producers to make an “Australian” program.\textsuperscript{598}

The relevant provision in the Services Protocol which would inform this opinion, is Article 8, entitled “Discriminatory or Restrictive Measures”:

Notwithstanding that such measures may be consistent with ... this Protocol, neither Member State shall introduce any measure, including a measure requiring the establishment of commercial presence by a person of the other Member State in its territory as a condition for the provision of a service, that constitutes a means of

\textsuperscript{597} See \textit{Blue Sky v ABA}, supra note 529, at 859 (para. 88), the same portion of the majority judgment as was previously referred to at note 564 \textit{supra} and the accompanying text, but with different passages being emphasised: “Nor is there anything anything in the Act - including the combined effect of s. 160 and the Trade Agreement - which prevents the ABA from determining a standard relating to the Australian content of programs in cases where preferential treatment cannot be given to Australian programs. The phrase ‘the Australian content of programs’ in s.122 is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture. A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians. Given the history of the concept of Australian content as demonstrated by the provisions of TPS 14, a program must also be taken to contain Australian content if the participants, creators or producers of a program are Australian.” [Emphasis added.] In other words, the majority regards an on-screen criteria test for content which is Australian (and not trans-Tasman content or inclusive of New Zealand content) as being consistent with s. 160.

\textsuperscript{598} \textit{Australian Content Standard Review}, supra note 33 at 32.
unjustifiable discrimination against persons of the other Member State or a disguised restriction on trade between them in services.

The effect is similar to that of Article XVII:2-3 of the GATS, which as discussed in section 3.3.3 above, disallows "formally identical treatment" if it would tend to favour domestic service suppliers, and makes provision for "formally different treatment" where that achieves the goal of national treatment. The fact that both New Zealand and Australian audiovisual service providers would be required to satisfy identical on-screen criteria in order for their products to obtain preferential treatment under the Standard, and such on-screen criteria might formally comply with Articles 4 and 5(1) of the Services protocol, did not mean that the Standard would automatically be held to accord national treatment to New Zealand service providers. By, for example, insisting that programming appear to be set in Australia, an on-screen criterion might discriminate against New Zealand-based production companies because, say, they could not depict an Outback scene without going to great expense to shoot in Australia, away from their home base.

Both the reaction of ABA chairperson David Flint to the High Court judgment (cited in section 5.4.3.1 above) and the general scepticism about on-screen criteria expressed by the ABA in its discussion paper,599 suggest that the ABA was not pleased to be second-guessed by the High Court regarding on-screen criteria for Australian content - a matter to which the broadcast regulator and its predecessors had already devoted considerable thought before plumping for its "creative elements" or provenance test.600 Though the ABA’s argument of de facto discrimination is rather tentative, in the balance of its discussion paper it effectively dismisses both the High Court’s

599 Ibid., at 31-34, and the passages from the Australian Content Standard Review cited in section 4.3.2 above.

600 See the discussion of the “Australian look” proposal in section 4.3.2 above.
proposal that an Australian content on-screen test would satisfy the requirements of section 160(d) of the Act, and Brennan CJ’s suggestion that provenance criteria could be dispensed with entirely.\textsuperscript{601}

The question begged is whether, in its scorn for the on-screen criteria proposal, the ABA has properly understood how the national treatment provision in the Services Protocol would be applied in such an instance.

For example, the ABA’s assumption that on-screen criteria would include compulsory requirements that “a program must be about Australian subjects and appear to be set in Australia” is not necessarily correct; perhaps such requirements would be set, but they would be part of a larger basket of criteria, and programming might have to satisfy several of the criteria in the basket but not necessarily all.\textsuperscript{602} A basket of criteria would encourage programming set in Australia, but at the same time would not discriminate against films about Australian subjects set in foreign countries - this would solve the difficulty regarding movies such as “Breaker Morant”. In the context of achieving their ideological goal of cultural development, such on-screen criteria certainly do not constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail, as may be the case with provenance criteria.\textsuperscript{603} The problem is whether cultural development can,

\textsuperscript{601} This conclusion is suggested by the drafting of the call for comment following the Australian Content Standard Review’s discussion of on-screen criteria: “Comment is sought on incorporation of on-screen criteria in any test for eligible programs in the standard, specifically, on-screen tests for the Australian content of programs and for the New Zealand content of programs.” [Emphasis added.] Here the ABA indicates that it intends to “incorporate” on-screen criteria with its existing provenance criteria, and will require a New Zealand on-screen test to test for “New Zealandness”, rather than merely an Australian on-screen test as had been suggested by the High Court. Australian Content Standard Review, supra note 33.

\textsuperscript{602} The basket solution is adopted by Canada in its MAPL standard for identifying Cancon music, though the basket is composed of provenance-based criteria alone - see note 365 supra.

\textsuperscript{603} The requirement of non-arbitrariness is contained in Article XIV of the GATS and Article XX of the GATT 1947 - see the discussions in sections 4.3.2 and 3.3.4 above.
of itself, be regarded as a legitimate domestic policy goal within the WTO regime, in absence of an express "cultural exception" in the text of either the GATT 1994 or the GATS. In other words, even if on-screen criteria were structured in sufficiently flexible fashion to enable foreign media companies to compete in producing parochial content, would the mere fact that the content was required to be parochial be contrary to trade rules?

Beginning with the GATT, recall that "[u]nlike the FTA and NAFTA, GATT contains no cultural exemption. ... As a result, any trade law involving cultural products, other than cinematographic films, must be consistent with the provisions of the GATT." in respect of the GATS, the discussion in sections 3.3.3 and 3.3.4 above explained why, notwithstanding the current non-coverage of trade in cultural products by most signatories to that treaty due to their failure to schedule commitments in audiovisual services, there is nevertheless no exemption in respect of cultural products. Finally, the Services Protocol does not have any provision allowing derogation from the basic principles of the treaty in order to achieve "cultural objectives". Under all three treaties, de facto discrimination is disallowed. It is conceivable that there could be cases where content-based measures are, notwithstanding their disavowal of the more arbitrarily discriminatory provenance criteria, nevertheless found to be de facto discriminatory. The outcome would depend on the facts of each matter, particularly on how the contested measure was framed, and the cost circumstances in each of the countries involved. For example, while it may be more expensive to shoot in Australia than in New Zealand, therefore perhaps de facto discriminating against New Zealand companies who are required to include depictions of typical Australian terrain in order for their programs to enjoy preferential treatment, the situation is reversed when looking at relative US-

604 Scow, supra note 197 at 251.
Canada costs. So the same on-screen indicators might have differing outcomes in terms of *de facto* discrimination, depending on the countries involved. Contrary to Brennan CJ’s suggestion, therefore, it is not possible to posit a general rule that use of on-screen criteria as the determinant of eligibility for preferential treatment under a DCID scheme will automatically make the relevant measure compliant with the Services Protocol.

In my view, content-based criteria would be more likely to comply with trade rules, because they do away with the direct discrimination that bedevils provenance-based criteria, and they create a better case for claiming that foreign cultural industry products should not be entitled to national treatment due to their not being like products. But, assuming that this strategy fails, and that a measure employing on-screen criteria is found to be *de facto* discriminatory, as the ABA contends might occur, is there any escape from the conclusion that, in such a case, trade law trumps sovereignty? There is, in fact, one last resort, the “public morals” exception.

5.4.4 The “Public Morals” Exception: A Bridge Too Far?

In almost identical fashion to Article XX of the GATT 1994 and Article XIV of the GATS, the Services Protocol provides that a Member State may adopt measures, “to protect public morals and to prevent disorder or crime,” with the caveat that such measures may not be “used as a means of arbitrary or unjustified discrimination against persons of the other Member State or a disguised restriction on trade in services.” (It was the similar provision in the GATT 1994 and

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605 See the discussion in sections 3.2.2.4-3.2.2.5 above.
606 Article 18(a) of the Services Protocol.
607 In the GATT 1994, Article XX(a) excepts measures “necessary to protect public morals”.
GATS\(^{608}\) which the French delegation to the Uruguay Round was seeking to expand to include a "cultural exception", a proposal which was rejected by other culturally-sensitive countries due to their concern that provenance-based criteria were indeed "arbitrary" in their effect.)\(^{609}\) While not everyone would agree that Australian public morals could be a complete justification for the production of movies such as "Priscilla, Queen of the Desert", it is worthwhile to test whether a public morals defence could be invoked for cultural development measures that would otherwise violate the national treatment principle. I acknowledge that the proposition seems outlandish, an extraordinary stretch of a provision which, in all the trade treaties in which it appears, is intended to be invoked only in the most serious of circumstances. In fact, a note to Article XIV(a) of the GATS states that, "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."\(^{610}\) However, the proposition is worth exploring for two reasons: first, on the basis that many countries which maintain DCD schemes do indeed see such measures as fundamental pillars of social cohesion and national identity in their societies (even if they are not quite a matter of life and death); and second, because the analysis does provide some pointers to how a "culture exception" might be interpreted if it were added to the principal world trade treaties.

To begin, no WTO member has previously tried to rely on the public morals exception in defence of broadcast quotas or other discriminatory domestic cultural development measures. In fact, there has never been a Panel consideration of Article XX(a) - Panels have focussed

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\(^{608}\) In the GATS, Article XIV(a) excepts measures "necessary to protect public morals or to maintain public order".

\(^{609}\) See the discussion in section 3.3.4 above.

\(^{610}\) Note 5 in the treaty.
predominantly on Articles XX(b), (d) and (g).[^611] In the context of the resolution of disputes under the GATT, Article XX exceptions are frequently invoked as an alternative defence by parties where there has been a violation of another article of the GATT, and the interpretation of Article XX has been considered on several occasions by GATT and WTO Panels.[^612] Several of the more recent Panel considerations have adopted the interpretive practice familiar to common law jurisdictions of construing the Article XX exceptions narrowly, an approach supported by many legal scholars.[^613] However, other Panel decisions have been silent in this regard. Christoph Feddersen regards the principle of narrow construction to be unhelpful and urges that the Article XX exceptions be interpreted according to their ordinary meaning.[^614] It is not clear whether previously adopted GATT and WTO Panel decisions are persuasive precedents; both precedent and the interpretive tools and standards to be applied to the GATT 1994 are matters of some dispute.[^615] I will adopt Feddersen’s approach, as it considers the widest interpretation which is reasonably possible, and therefore can

[^611]: Christoph T. Feddersen, “Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and ‘Conventional’ Rules of Interpretation” (1998) 7 Minn. J. of Global Trade 75, at note 99.

[^612]: *Ibid.* at 79, 85 and p. 93; see also note 48, in which he provides a list of 16 GATT and WTO Panel decisions where an Article XX exception was considered.

[^613]: *Ibid.* at 94, and the authorities cited there


[^615]: Feddersen provides a useful summary of the various positions of legal scholars in the debate, *ibid.* at 87-91, and takes the view that Article 31(1) of the Vienna Convention on the Law of Treaties (*supra* note 281) provides authority for considering adopted Panel reports as part of the “context” which assists in interpreting an international treaty. At the very least, notes Feddersen, a recent WTO Appellate Body Report found adopted Panel reports to be part of the “GATT acquis”, which seems to accord these decisions “some” precedential weight - notwithstanding the finding of the Appellate Body that an adopted Panel report is only of effect *inter partes.* (*Ibid.* at 88-89, citing the Alcoholic Beverages / Japan Appeal Report, *supra* note 192 at 13-14.)
fully dispose of the question as to whether there is any basis for applying Article XX to broadcast quotas.

There are two legs to determine whether a measure may be excepted under Article XX, in the GATT 1994 context: first, the measure must pertain to one of the types of product\textsuperscript{616} or goals\textsuperscript{617} set out in paragraphs (a) to (j) of Article XX; and second, the measure must meet the requirement that it not be "arbitrary or unjustifiable discrimination, or a disguised restriction on international trade", as set out in the chapeau to Article XX.\textsuperscript{618} Jackson explains that the chapeau is really a "softer" version of the fundamental trade principles, MFN and national treatment, a halfway house between strict application of these principles required by the GATT (and similarly by the GATS and the Services Protocol), and the willy-nilly circumvention of those principles that would result if the Article XX exceptions were not circumscribed by the necessity test.\textsuperscript{619} Without this the backstop offered by the chapeau, the range of measures which could be claimed to serve the goal of "protecting public morals" would dilute the GATT to complete ineffectiveness. For example, the US claimed in a 1983 panel dispute resolution process that restrictions linked to a certain percentage of beverages' alcohol content were necessary to protect public morals.\textsuperscript{620}

\textsuperscript{616} For example, products of prison labour (Article XX(e)). The GATS and Services Protocol's versions of Article XX exclude the Article's list of products - since it is difficult (though not impossible) to imagine an instance where, for example, a service could be provided via prison labour.

\textsuperscript{617} For example, measures necessary to protect public morals (Article XX(a)).

\textsuperscript{618} Feddersen, \textit{supra} note 611 at 92.

\textsuperscript{619} Jackson (ii), \textit{supra} note 276 at 234.

\textsuperscript{620} \textit{United States - Measures Affecting Alcoholic and Malt Beverages}, GATT B.I.S.D. (39\textsuperscript{th} Supp.) at 206 (19 June 1983); cited by Feddersen, \textit{supra} note 611 at notes 48 and 213. Unfortunately, the Panel did not have regard to the claim. Based on the \textit{travaux preparatoires} to Article XX in the GATT 1947 negotiations, Feddersen argues \textit{ibid.} at 119-121 that the US claim would not have succeeded; however, he concedes that the \textit{travaux preparatoires} are at best a supplementary aid
Applying Feddersen's sequential analysis in the context of mass media products, the obvious use of the public morals exception is in providing a defence to countries that block the entry of television programming and other mass media products whose content is deemed to be undesirable, in terms of their domestic censorship standards, provided such measures are non-arbitrary. In respect of the first leg of the test, a universally-accepted example would be exercising control over products depicting child pornography: there would be no argument that such control was necessary to protect public morals. On the second leg of the test, if the ban on depiction of child pornography was applied to both domestic and foreign products, as would be expected to be the case, then the measure would be non-arbitrary. Consistent treatment of domestic and foreign products would lead to a conclusion that the measure was not a disguised restriction on international trade, intended to favour local industry; this conclusion would be bolstered by evidence that numerous countries apply the same measures, such that trade in products depicting child pornography is not ordinarily encouraged by any WTO member, and by demonstrating that the ban is applied with vigour in the domestic market.

Taking the leap from content control to cultural development, if "public morals" were taken to include the preservation of national identity and values, it could be claimed that broadcast quotas were precisely such a measure. The immediate response to such a claim would be to argue that, while a ban on child pornography seems to obviously pertain to the protection of public morals, the relationship between parochial cultural products and public morals is vastly more tenuous. When interpreting the scope of "public morals", per Article 32 of the Vienna Convention. There appears to be nothing in the travaux preparatoires pertaining to broadcast quotas, perhaps because the equivalent measure at the time, cinema screen quotas, had been explicitly provided for in Article IV and hence did not need to be incorporated within the text or interpretation of Article XX.
dealing with a claim that is intuitively tenuous, we would want to test the claim against the first leg of Article XX more rigorously: this test requires not only a formal definition of “public morals”, but also an enumeration of which measures may be legitimately employed to protect public morals, for Article XX(a) speaks of measures “necessary to protect public morals”. [Emphasis added.] If, as Feddersen suggests, we adopt a dictionary definition of “public morals” as “including those rules and principles in a given society which both characterise content as right or wrong and stipulate the behavioural norms in that society,” we may conclude that mass media products can have a grave impact on behavioural norms in a society, and that measures to control particularly dangerous content in mass media products are hence desirable.621 This is the outcome our intuitive defence of a ban on child pornography suggested.

The question then becomes whether product which does not promote domestic national identity and values, or which promotes the national identities and values of other countries (I shall refer to this as “neutral product”), has an equally grave impact. I will assume, for the purpose of fully exploring the argument, that the “behavioural norms” in a particular society may include norms which are particular to that country, as opposed to the norms of its trading partners and neighbours. (I shall term mass media products which depict and reinforce these particular norms as “parochial product”.) The emphasis on gun-control in Canada and the United Kingdom, as opposed to the claim to constitutional protection for the right to bear arms in the United States, is a striking example of differing societal attitudes and hence norms in different countries.622


622 See the discussion of depictions of police work in television drama serials produced in Canada and the United Kingdom, as opposed to the US, in section 2.1 above.
scheme proponents would argue that over time, neutral product may erode public morals, since the sustaining of these morals requires that they be reinforced in the mass media. This argument would explain the preferential allotment of a portion of local mass media distribution channels for parochial product, as a measure to secure public morals, satisfying the first leg of the Article XX test. The corollary, some partial exclusion of neutral product, may be justifiable on this basis.

The difficulty with the above analysis is that Article XX(a) has no distinct "ordinary meaning", since conceptions of morality and what the term includes vary from country to country. Using the interpretive tools in Article 31(1) of the Vienna Convention on the Law of Treaties, any ambiguity in the ordinary meaning of Article XX(a) can possibly be resolved by looking to the context, object and purpose of the provision. The broader context of the public morals exception is, according to Feddersen, the content of Article XX generally, which "allows GATT members to circumvent their obligations through exceptions related to their individual public policies." There are two provisions in the balance of the text of Article XX which have resonances of protection for cultural products: Article XX(d) excepts measures necessary for "the protection of patents, trade marks, and copyrights", while Article XX(f) excepts measures necessary to protect "national treasures of artistic ... value" from the application of the GATT 1994. Within this context, it is feasible that Article XX(a) could also have some application to cultural products, and more particularly, could legitimise a measure such as a broadcast quota which served to protect the distribution of domestic cultural products. (However, this interpretation of context would not be directly applicable in the case of the GATS and the Services Protocol, since they have no

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624 Feddersen, supra note 611 at 107.
comparable provisions to Articles XX(d) and (f) of the GATT 1994.) The broad object and purpose of Article XX, “is to give precedence to a contracting party’s national sovereignty over GATT 1994’s commitments to trade liberalisation.” However, allowing a contracting member’s divergent interests and standards to always trump the GATT 1994 would render it inoperable. The General Agreement, as its name suggests, must obligate its signatories to some minimum standard of internationally and supranationally binding obligations. But, unlike the case of Articles VI and XIX of the GATT where side-accords have been developed to determine such minimum standards, no such guidelines exist to assist a Panel tasked with the interpretation of Article XX(a). Because of this vacuum, there is some “wiggle room” for differing national standards, within some meta-standard of interpretive reasonableness set by the multilateral nature of the GATT 1994, as Feddersen suggests:

The panel must take into account the object and purpose of Article XX - protection of national sovereignty - while maintaining the interpretive uniformity that is indispensable for the health of internationally binding agreements. The panel must consider the national interpretation of a contracting party within the limits which GATT itself sets. These limits must be reduced to a common denominator accepted by all contracting parties and shared by a majority. These limits set the outside boundaries of the phrase “public morals” and leave only a small margin within which the individual contracting party can define the term.

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625  Ibid. at 110.

626  Ibid. at 111.

627  Agreement on Safeguards and Agreement on the Implementation of Article VI of the GATT 1994, which may be found in Annex IA to the WTO Agreement, supra note 30 [not reproduced in ILM, but available from <http://www.wto.org>].

628  Feddersen, supra note 611 at 112-113.
He argues further that, "the legal character of the phrase 'public morals' indicates a 'core' interpretation of that phrase which is shared and agreed upon by all or a vast majority of the contracting parties," and that banning the importation of indecent material would be one such "core" interpretation. Of course, public morals in respect of what constitutes indecency vary from country to country. I have suggested child pornography as an example of a universally-accepted norm under Article XX, but even that example frays at the margin, because different countries have varying ages of majority. It is only the broad category of "indecency" that constitutes a "core" interpretation of Article XX(a); while there will be substantial agreement on much of what may be covered by the term "indecency", the precise content of this category is very difficult to determine a priori. Applying the "core" interpretation test to broadcast quotas does not rule these measures out: in fact, it turns out that many countries, including the US, have "must-carry" regulations of one kind or another applicable to their broadcasters. Whether the rationale for "must-carry" provisions requiring the broadcasting of educational and community programming in the US (presumably the public policy goals, respectively, of increasing and equalising access to education, and of promoting community interaction and awareness) can be sufficiently distinguished from the rationale for local content "must-carry" rules (namely, a public policy goal of reflecting a country's distinct values and identity), accepting the first as a reasonable market intervention and rejecting the second as invalid, is questionable. Once it is accepted that some level of "must-carry" rules may be mandated by member states for broadcasters within their territory, as a function of their national sovereignty, any argument about the content of the programming that may be included within those regulations becomes as controversial as trying to define an international standard for indecent programming material.
It might be objected, in response to the above, that if the "core value" that is sought to justify a cultural exception under Article XX(a) is held to be merely the right of sovereign states to legislate some kind of "must-carry" rules for media operating in their country, that would be a particularly mechanistic approach, perhaps identifying a "core" approach used by many countries, but hardly a "value" in the sense that the internationally-shared objection to indecent material is such a value - even though the definition of what constitutes such material may not be shared. It would be argued, I concede, that differences between countries' broadcast regulatory schemes regarding what must be carried on air, could be so great as to completely distinguish "must-carry" rules in different jurisdictions from each other. While the US might oblige the carriage of educational and community material on air, and Canada might oblige the carriage of Cancon, a rogue state might require broadcasters to carry its dictator’s speeches and thereby also fit within this "must-carry" core. It is also difficult to speak of the general propensity towards some obligatory carriage of some broadcast material as a "core value", when the mechanisms for enforcing "must-carry" rules are far more intrusive in Canada (e.g. broadcast quotas) than the US (setting aside one or two channels on cable systems for community access). I nevertheless raise "must-carry" rules as a possible "core value" in the sense intended by Feddersen, because strategically, as it is the US Trade Representative who most often objects to DCID schemes, pointing to the use of "must-carry" rules by the US broadcast regulatory system might provide something of a counter-argument against the US position, in particular.

The more obvious suggestion for what might constitute the "core value" justification to invoke Article XX(a), though, would be the recognition in numerous international agreements of the right of individuals, communities, peoples and nations to preserve their cultural values and
identities. Article 19 of the Universal Declaration of Human Rights, promulgated by the General Assembly of the United Nations in 1948, recognises freedom of expression as fundamental human right. This right, Article 19 says, includes “the freedom ... to seek, receive and impart information and ideas through any media”, which would seem to provide some basis for the contention that DCID schemes enable communities and nations to exchange information and ideas with each other, in a manner and to an extent which might not otherwise be possible. This is reinforced by Article 27 of the Universal Declaration, which says that, “everyone shall have the right to freely participate in the cultural life of the community [and] to enjoy the arts ...”. However, it should be noted that while these provisions ground a right to cultural expression by peoples and nations, they are certainly not intended to be a blank cheque for cultural chauvinism: Article 19, for example, concludes by requiring that there be freedom of expression “regardless of frontiers”.

Another international agreement which supports the notion that people should be able to express their cultural identity, and communicate ideas and information with others in their society or community, is the International Covenant on Civil and Political Rights. Article 1(1) recognises the right of all peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”629 Many domestic constitutions expressly provide for cultural rights: for example, the South African Constitution630 proclaims in its Preamble that, “South Africa belongs to all who live in it, united in our diversity.” Section 6(1) of the Constitution recognises eleven national languages, nine of them vernacular languages which had enjoyed no official

629 Braun and Parker, supra note 55 at 173-174.
recognition in Apartheid South Africa. Section 30 states that, “Everyone has the right to use the language and to participate in the cultural life of their choice”. Section 16 in the Bill of Rights guarantees citizens the right to freedom of expression, including “freedom of artistic creativity”. The 1996 White Paper on Arts, Culture and Heritage released by the Department of Arts, Culture, Science and Technology in South Africa expresses the core value constituted by the freedom of cultural expression, in its South African context, as follows:

Humans are holistic beings. They not only need improved material conditions in order that they have a better quality of life. Individuals have psychological, emotional, spiritual, and intellectual expression, all of which require nurture and development for them to realise their full potential, and to act as responsible and creative citizens.

Arts and culture may play a healing role through promoting reconciliation. Our approach to culture is premised on international standards in which culture is understood as an important component of national life which enhances all of our freedom. Culture should not be used as a mechanism of exclusion, a barrier between people, nor should cultural practices be reduced to ethnic or religious chauvinism. ...

[The prime role of the national and provincial governments is to develop policy which ensures the survival and development of all art forms and genres, cultural diversity with mutual respect and tolerance, heritage recognition and advancement, education in arts and culture, universal access to funding, equitable human resource development policies, the promotion of literature and cultural industries. These are our “minimum standards”.

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631 Previously, Afrikaans and English had been recognised as official languages. The vernacular languages now recognised as being of equal status are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu.

632 S. 16(1)(c).

633 White Paper on Arts, Culture and Heritage, supra note 416 at 13 and 17, c. 1 para. 13 and c. 3 para. 3 respectively.
Therefore, the South African government, like many other governments world-wide, sees the promotion of cultural industries as being an inherent aspect of vindicating the right to cultural expression, though such promotion should not effected by chauvinism against or exclusion of imported cultural works. That balancing act, as has been seen in previous chapters, is exceedingly difficult in practice - at least if chauvinism is interpreted in its trade law definition as discrimination against imported products. However, if Feddersen’s “core values” argument is correct, then this shared core value of the right to cultural expression would justify a derogation from the strict application of trade rules to cultural products in terms of Article XX(a) of the GATT 1994 and the similar provisions in the GATS (and in the Services Protocol), while still enjoying the “soft” protection offered by the chapeau, namely that there be some test of efficacy of the measures adopted, so that they cannot be arbitrary restrictions on trade. As Trebilcock and Howse put it,

there is a justified concern that external values and goals do not lead to trade measures that are genuinely motivated by those values but which nevertheless represent a gratuitous or unnecessary restriction on trade, given the other means available for supporting and advancing those values and goals.\(^{634}\)

If ever a WTO member was to claim that the public morals exception legitimises broadcast quotas, then, it would be argued that such quotas are not a particularly effective way of achieving the preservation of public morals, and that from a world trade law perspective less trade-restrictive measures - for example, direct subsidies or the maintenance of a strong PBS presence - could be adopted to achieve the same ends. But assuming that broadcast quotas could survive this threshold objection to their use (and here my “must-carry” argument might be of some help), the only

\(^{634}\) Trebilcock and Howse, supra note 181 at 411-412, where a persuasive argument is made for a least-restrictive measures test to be adopted in determining whether measures may justifiably claim Article XX exemption.
programming which could possibly qualify would be parochial, *e.g.* in the case of Australia, programming which exhibited “Australianness” in respect of on-screen criteria. If the test for the eligibility of airing both domestic and foreign product were its content - i.e. neutral versus parochial product - then the arbitrariness test would be satisfied, in the same way as a ban on importing child pornography will typically pass the test’s second leg, because it is applied with equal effect to domestic products. On this basis, it would seem, there is at least an argument that broadcast quotas that exclusively make use of content-based criteria, might be permitted in terms of the “public morals” exception.

5.4.5  **Epilogue: Taking a Leaf Out of Canada’s Book**

The approach adopted by the ABA in its discussion paper appears to be that it will only drop those of its current protections for the Australian media industry which absolutely must go. The ABA’s past practice of continuously seeking ways in which to avoid compliance with the Services Protocol, has now been graduated to a strategy of limited retreat and damage control. However, this description should not necessarily be interpreted as criticism. Used properly, recalcitrance and studied dilatoriness are valuable tactics in trade disputes. The WTO regime, after all, is not so much a distinct body of international law as an ongoing negotiation. But it is important to distinguish between trade strategies which intentionally drive a hard bargain by obtaining commensurate reciprocal concessions from trading partners, ultimately to the benefit of the trading system as a whole, and those which simply exhibit confusion and the absence of strategy. In the latter case,

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635  *E.g.* Jackson observes that, by analogy to the process for liberalisation of trade in goods, “one can argue that there should be at least fifty years of ongoing negotiations about service concessions, and some of these negotiations will probably never end.” (Jackson (ii), *supra* note 276 at 307.)
when governments which are breaking trade rules merely filibuster to mollify domestic lobbies and ultimately back down, they are seen to be deserting domestic interests and the world trade regime is (unfairly) cast as the villain.\footnote{A recent example is the Canadian government's embarrassing reversal of its June 1997 ban on a gasoline additive manufactured in the US, MMT, which it claimed to be harmful to public health, the environment, and emission-control equipment in Canadian-produced cars. Although it had known at the time that the charges were difficult to prove, and that the ban would accordingly violate NAFTA, the government proceeded with legislation to ban MMT. On 20 July 1998, the ban was lifted due to concern about the costs of defending a NAFTA challenge, and the government agreed to pay the US manufacturer US$19.3 million in settlement of its costs and lost profit. The government argues that it fell prey to unsubstantiated claims by auto manufacturers. (Shawn McCarthy, "Gas war: the fall and rise of MMT", \textit{The [Canada] Globe and Mail} (24 July 1998) A1; Sylvia Ostry and Julie Soloway, "The MMT case ended too soon" \textit{The [Canada] Globe and Mail} (24 July 1998) A15; Shawn McCarthy, "Failed ban becomes selling point for MMT" \textit{The [Canada] Globe and Mail} (21 July 1998) A3; Terence Corcoran, "Free trade and good science rule" \textit{The [Canada] Globe and Mail} (21 July 1998) B2.)} The latter process appears to be unfolding in the \textit{Sports Illustrated} matter. In late August 1997, Canada undertook to remove the disallowed measures protecting its periodical industry, in "a reasonable amount of time", which is fifteen months in WTO parlance. At the time, the Canadian Trade Ministry pledged to continue protection of the domestic magazine industry, saying, "We just have to do it in a way that is consistent with our obligations to the WTO."\footnote{Per Leslie Swartman, spokeswoman for Trade Minister Sergio Marchi, "Canada agrees to WTO ruling on split-run magazines" \textit{[Canada] Financial Post}, (30 August 1997) 4.} However, the most obvious and transparent means of aiding the industry, namely direct domestic subsidies which would be permitted in terms of the GATT 1994,\footnote{The payment of direct subsidies exclusively to domestic producers is permitted, as an exception to the national treatment rule, by Article III:8(b) of the GATT 1994. Notwithstanding this exception, if the subsidised goods are exported, they may be countervailed in terms of Article VI of the GATT 1994, and would fall into the category of an actionable subsidy in terms of Track II of the Uruguay Round Subsidies Agreement. Of course, because Canadian magazines do not enjoy significant market penetration in the US, there would be little point to imposing a countervailing duty - which is precisely why direct domestic subsidies are the most WTO-proof of the measures available to the Canadian government in supporting its magazine industry.} was apparently deemed to be too shameful for the domestic industry to bear, and, more importantly, would make the industry hostage to federal government budget cuts whenever the fisc found itself under
financial pressure, or simply disapproved of what it read in the magazines (a variation on the “content firewall” problem in broadcast quotas). Because of these objections, the Trade Ministry’s suggestion that all magazines, local and imported, be subject to a tax which would then be used to cross-subsidise Canadian publications, was rejected.

Instead, a number of different possible measures were floated by Canadian Heritage Minister Sheila Copps in the 12 months following the ruling, ranging from an outright ban on Canadian advertising in magazines sold on the domestic market unless the majority of their editorial content was written by Canadians, to imposing taxes on domestic advertisers who buy space in split-run publications - rather than taxing the publications themselves, thereby shifting the jurisdiction from the GATT 1994 to the GATS, since provision of advertising space is a service. The banning proposal met with vocal opposition from advertisers, who raised concerns about a possible breach of constitutional guarantees of freedom of expression in the Canadian Charter of Rights and Freedoms, and the possibility that de facto discrimination against US titles on this basis might be found to be GATT-illegal by the WTO. The latter objections were also made in respect of the

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640 Heather Scoffield, “Magazines may face Canadian-content test - Cabinet eyes new rules for foreign titles” The [Canada] Globe and Mail (7 May 1998), A1. In addition to these concerns regarding direct subsidisation was a more blunt desire simply to keep split-run US magazines out of Canada altogether, which the proposed tax measure would not achieve. Instead, US titles would compete for rack space with Canadian competitors, and it was anticipated that the more heavily marketed (and perhaps better quality?) US titles would win the battle. Sounding much like Ms Britton of the Media Entertainment and Arts Alliance of Australia (supra note 581), a government source was quoted as saying that if the split-run titles were left on the shelves, even with a subsidy scheme in place, “It could spell the demise of the domestic magazine industry.” (Ibid)


taxation proposal, prompting Minister Copps to publicly deny that it was an option.\(^{643}\) It appears that measures premised on actual Canadian content were never seriously considered, despite the intimation of the *Sports Illustrated* Panel that precisely such measures would be acceptable.\(^{644}\) Finally, on 29 July 1998 Ottawa plumped for the outright ban on Canadian advertisers placing advertisements in split-runs, enforceable by a maximum fine of Can$250,000.\(^{645}\) The measures are supposedly WTO-proof because they specifically target advertising services rather than periodicals as goods\(^{646}\) - the very same Canadian argument which the Appellate Body rejected in the *Sports Illustrated* Appeal Report, on substantive grounds and not merely because Canada had been careless in the wording of its measures. The Canadian strategy in defending the new ban is the precise reverse of the EU’s approach in the recent “Bananas” matter, where the latter argued that the contested import licensing measure applied to goods (bananas) and not to services (distribution of bananas),\(^{647}\) but the underlying logic of both defences is identical: that the GATT 1994 and the GATS are hermetically sealed from each other, and that the effect of a contested measure can be argued to be constrained to goods or services alone. As noted in section 3.3.4 above,\(^{648}\) the WTO


\(^{644}\) See the Panel’s comments, note 224 *supra*, and the subsequent discussion in section 3.2.2.5 above.


\(^{647}\) Bananas Appeal Report, supra note 258 at para. 222; Law & *Practice of the WTO, supra* note 2 at 90.

\(^{648}\) See note 328 and accompanying text.
Appellate Body took the view that the “Bananas” measure was covered by both the GATT 1994 and the GATS;⁶⁴⁹ here, the same logic would simply be applied in reverse.

In the meantime, the US ambassador to the WTO had expressed frustration at Canada’s refusal to explain how it proposed to abide by the ruling,⁶⁵⁰ and it was clear that any measure which might be impugnable under the GATT 1994 or the GATS would immediately be referred by the US to a WTO dispute resolution process. “Anything they do is going to be challenged”, commented one trade law specialist, “... there is no solution, but the government can’t admit that.”⁶⁵¹ Prior to the decision finally being taken, the official explanation for the secrecy over which measures would be adopted was that, “It would be foolish to telegraph the options the government is considering so that the United States could get a head start in the next challenge it has promised to launch.”⁶⁵² In other words, to the extent that a strategy exists, it is about playing for time. If the Canadian government had been confident about its new measures surviving WTO scrutiny, it would have had no reason to keep them secret. A more likely conclusion is that the inter-departmental committee charged with coming up with a solution never could quite find one; US Trade Representative Charlene Barshefsky has rightly condemned the advertising ban as “the same old story”.⁶⁵³ The new measure, to be cast into legislation in autumn 1998, will immediately be beset by legal attack, from both the US in a new WTO case and domestic Canadian advertisers in a Charter challenge.

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⁶⁴⁹ Ibid.


⁶⁵¹ Comments of Peter Clark, cited by Scofield, supra note 641.

⁶⁵² De Gaspé Beaubien, supra note 198; Scofield, supra note 642.

⁶⁵³ Scofield, supra note 645.
It is not clear at this stage whether the ABA’s decision to decline to deal with the multilateral trade effects argument evidences the same pattern of denial that so clearly afflicts the Canadian Heritage Ministry; only if an aggrieved group representing the Japanese animation industry applies to Australian High Court for equivalent relief to that granted to Project Blue Sky, to which it may perhaps be entitled, will we know. At this stage at least, the ABA seems to have a less daunting task than the Canadian Government, since it does not have to face down a resolute US Trade Representative. But the impression one gets is that, ever more inexorably, the mechanisms underlying nations’ DCID schemes are being swarmed by their governments’ trade law commitments. While for the moment the Australian government may prefer to leave the ABA to deal with the specific problems raised by the Blue Sky judgment, and not to evaluate the impact of trade law on its cultural policy more broadly, the casuistic approach has not worked well for Canada - as illustrated by the disaster in the Sports Illustrated matter and its impending sequel.

To its credit, the Canadian government is trying to develop a more holistic approach to the tensions between domestic cultural development and international trade liberalisation:

[T]he federal government will take another, more aggressive approach to protecting Canadian magazines and other cultural industries. Ms. Copps said ... Ottawa will use its failure to protect Canadian magazines as a campaign tool to show the international community that it should define a set of rules that would leave culture out of international trade talks for good. Ms Copps and [Canadian] Trade Minister Sergio Marchi are looking for international allies to support their campaign before the WTO. “We have been working together on making sure we don’t get scooped on cultural issues like we did the last time ... The longer-term strategy for culture must be [to make] sure we have international support,” Ms. Copps said. “We have to make sure we don’t get caught in the WTO snare.”

654 Scoffield, supra note 639.
I will devote the concluding chapter of this thesis to considering whether this proposal by the Canadian government - essentially that an autonomous set of rules for cultural works be developed, a "General Agreement on Trade in Culture" - is the best strategic option, both for itself and for other countries such as Australia and South Africa, which it proposes should join it as allies in the battle.
Conclusion: Choosing a Plan for the Defence of Lilliput

After about an hour in the air, dawn lightened the terrain below. The plane had portholes, and as soon as we could see in the half-light, my comrades pressed their faces to the glass. We flew southeast, over the dry, flat plains of the Orange Free State and the green and mountainous Cape peninsula. I, too, craned to see out of the portholes, examining the scenery not as a tourist but as a strategist, looking for areas where a guerilla army might hide itself. ... When we flew over a wooded, mountainous area called Matroosberg in the Cape, I yelled to my colleagues that here was terrain where we could fight.

- Nelson Mandela, *Long Walk to Freedom*

The terrain which domestic cultural development and the international trade regime share, and in which they often conflict, is complex indeed. How, then, can DCID schemes be maintained and domestic cultural industries be strengthened, without being overrun by the principles of non-discrimination fundamental to trade law? It seems that growing tensions over cultural policy must come to a head in the next multilateral Round of the GATS negotiations, beginning in 2000. *Sports Illustrated* and *Blue Sky* are amongst the opening skirmishes of what is likely to be an interminable war. What strategies should countries such as Canada, Australia and South Africa be adopting in defence of their cultural industries? Where, on this arduous terrain, to fight?

6.1 The Canadian Initiative: a “General Agreement on Trade in Culture”?

The Canadian government is advocating that, first, like-minded countries should be working together, and second, the long-term goal should be a multilateral agreement on rules to govern trade
in culture. In December 1997, Canadian Minister of International Trade Sergio Marchi said that instead of fighting for a blanket cultural exemption in every trade deal that comes along, Canada should think about a rules-based worldwide agreement that would settle what kind of subsidies and trade restrictions are acceptable. "I would like for the WTO to be engaged," Minister Marchi is quoted as saying, "rather than simply using the exemptions rule as the response or answer to those cultural aspirations. We have to ask ourselves whether the exemption route is the answer or whether we need to square the circle by having some kind of rules on trade and culture." These views reflect the fact that the US successfully outflanked the NAFTA cultural exemption by taking the WTO dispute settlement route in the Sports Illustrated matter, demonstrating that the web of multilateral trade promises which Canada is bound by, was overwhelming its traditional exemption-based approach to cultural protection. Close the doors, was the lesson learnt from Sports Illustrated, and they'll be coming through the windows.

6.1.1 The International Meeting on Cultural Policy, Ottawa, June 1998: “Putting Culture on the World Stage”

Though Minister Marchi has presented his ideas on cultural products to the WTO, most of the campaigning for the Canadian initiative is currently being done by Canadian Heritage Minister Sheila Copps, outside the WTO framework. In March 1998, the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") sponsored the Intergovernmental Conference on Cultural Policies for Development in Stockholm, where a "Stakeholders' Action Plan" was concluded, setting out three areas of future focus for international cooperation: to build

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656 Scofield, supra note 343.
657 Ibid.
a world of inter-cultural communications, information and understanding; to meet the challenges of globalisation and technological change; and to promote the idea that cultural goods and services are unique from other goods and services.\textsuperscript{658} As the next step in carrying this agenda forward, Minister Copps sought support from “like-minded countries ... such as Greece, France, Austria, Mexico, South Africa and Britain”, to send representatives to a ministerial-level meeting in Ottawa at the end of June 1998, where a non-binding declaration would be concluded outlining “concrete steps towards international co-operation on cultural policies.”\textsuperscript{659} According to planning documents obtained by a Canadian newspaper, the federal government’s approach would be to “launch an international initiative, similar to that [of the international ban] on [anti-personnel] land mines, to promote the creation of a new instrument to support culture.”\textsuperscript{660}

The International Meeting on Cultural Policy was duly held in Ottawa, on 29 and 30 June 1998. Seeking to emphasise the common interest of the countries invited, Minister Copps said that the meeting would be “a great opportunity for participants to discover that many nations share the same cultural objectives.”\textsuperscript{661} Twenty-two countries signed on for the meeting,\textsuperscript{662} to which the US

\textsuperscript{658} Canada, Department of Canadian Heritage, “Ministers From 22 Countries Expected at Ottawa Meeting on Culture” (News release, 24 June 1998); available from <http://www.pch.gc.ca>.

\textsuperscript{659} Scoffield, supra note 342.

\textsuperscript{660} Ibid.

\textsuperscript{661} Canada, Department of Canadian Heritage, “Copps to Host International Meeting on Culture” (News release, 2 June 1998); available from <http://www.pch.gc.ca>.

\textsuperscript{662} The countries which sent delegations were Armenia, Barbados, Brasil, Croatia, Greece, Iceland, Italy, Ivory Coast, Mexico, Morocco, Poland, South Africa, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Ukraine, the UK (Canada, Department of Canadian Heritage, \textit{Official List of Participants} (International Meeting on Cultural Policy, Ottawa, 29-30 June 1998)). In addition, Minister Copps’ office had said prior to the meeting that the Dominican Republic, Egypt and Senegal would also be attending, but these countries’ representatives do not appear on the official list of participants. For the initial list, see “Ministers From 22 Countries Expected at Ottawa Meeting on Culture”, supra note 658.
was not invited.\textsuperscript{663} Joining Minister Copps in hosting the meeting were Diane Marleau, Canadian federal government Minister for International Cooperation and Minister Responsible for La Francophonie (the international organisation of French-speaking countries),\textsuperscript{664} and Lloyd Axworthy, Canadian Minister of Foreign Affairs. The latter was a leading figure in the campaign for the anti-personnel land mines ban, and he confirmed that the Canadian government would try and place its international cultural consensus project on a similar track.\textsuperscript{665} Evidence that the Canadian government would invest heavily in a grassroots-based campaign, duplicating that conducted by the land mines treaty activists, was provided by the simultaneous hosting in Ottawa of a companion conference of non-governmental arts, cultural and development organisations from around the world, by the Canadian Conference of the Arts ("CCA"). The latter organisation's Working Group on Cultural Policy for the 21st Century had issued a report in January 1998, urging the Canadian government to define its cultural policies more clearly, and to defend them more vigorously in the international arena.\textsuperscript{666} Keith Kelly, National Director of the CCA, paraphrased the federal

\textsuperscript{663} According to Minister Copps, one reason the US was not invited is that the meeting was intended to provide a forum for countries that felt culture to be unique, and the US did not - in fact, the US does not even have a ministry of culture, noted the Minister. Graham Fraser, "Copps feels heat on eve of conference" The \textit{[Canada] Globe and Mail} (27 June 1998) C3.

\textsuperscript{664} Despite the attendance of leading members of La Francophonie such as the Ivory Coast and Morocco, Minister Marleau suffered an embarrassment familiar in Canadian foreign policy, when the Quebec provincial government boycotted the conference because it would only be allowed to participate as part of the Canadian delegation, and, said provincial Culture Minister Louise Beaudoin, because she had been told by Minister Copps that she would not be permitted to discuss Québécois culture separately ("Culture meeting boycotted" The \textit{[Canada] Globe and Mail} (24 June 1998) A9).

\textsuperscript{665} "The recent success of the campaign to ban anti-personnel land mines is testimony to the results which can be achieved when artists and other members of civil society join forces with government in support of a common goal," Minister Axworthy is quoted as saying ("Ministers From 22 Countries Expected at Ottawa Meeting on Culture", \textit{supra} note 658).

government's policy by saying the conclusion of the working group was that, "what we really need is to remove culture from the area of trade agreements, which govern traditional commodities in goods and services and investment, and affirm the rights of individual nations to promote cultural policies as they see fit."667

Minister Copps' formal goals for the meeting were somewhat more restrained: in a background paper her department suggested that the Ottawa meeting would provide a forum for discussion amongst governments, and aimed "to create an informal worldwide network committed to putting culture squarely on the international policy agenda."668 By joining forces, says the Department of Canadian Heritage, participating countries could catalyse "soft power - using the power of ideas to build influence and shared values - [which] is critical to ensuring that cultural policies move front and centre into global thinking and global action."669 This reflects the predominant thinking amongst Canadian commentators and cultural policy-makers. For example, Zemans says that Canada "must create strategic alliances with other countries facing the same dilemma. Despite the fact that, in the past, countries have looked to Canada for models, cultural sovereignty is not a uniquely Canadian problem."670 Grant favours partnering with European countries in the same boat, or else be "pecked to death in negotiations".671 Bernier argues that the

667 Ibid.
669 Ibid. at 3.
670 Zemans, supra note 33 at 27.
671 Peter Grant, "Will Cable Competitors Support or Threaten Canadian Content?" (Address given at the Robarts Seminar, York University, 28 November 1995) [unpublished].
value of governments exchanging ideas would be to obtain a consensus that does not yet exist at the multilateral level regarding trade in cultural products. "The burden of proof, in the context of trade negotiations, is clearly on those States that advocate a particular treatment of cultural goods," he says. "To convince other States of the necessity of such treatment, they will have to work together to develop a compelling rationale, try to bring to their views the maximum number of States and give some clear indications of how far they are ready to go to defend their views."\textsuperscript{672} In the context of international trade in particular, the Ottawa meeting’s agenda included a focus on how cultural policy-makers in various countries could strengthen their relationship with their counterparts in the trade area\textsuperscript{673} - a vexed problem which is a particular frustration in South Africa, since three government departments have overlapping jurisdiction with respect to trade-in-culture policy.\textsuperscript{674}

6.1.2 The Results: Beginnings of a Snowball?

The outcome of the Ottawa meeting was to move Canada’s project forward a little. A “contact group” (read, “those countries which are particularly interested and have the resources to pursue the project”) was formed, initially composed of Sweden, Mexico, Greece and Canada, with Canada to provide the group secretariat for the first year. It was also agreed that annual meetings of all of the participating countries would be held, with Mexico to host the 1999 meeting, and

\textsuperscript{672} Bernier, \textit{supra} note 7 at 25.

\textsuperscript{673} \textit{Background Paper}, \textit{supra} note 668 at 6.

\textsuperscript{674} The three responsible South African government departments are the Department of Trade and Industry, the Department of Communications, and the Department of Arts, Culture, Science and Technology. At the Ottawa meeting, South Africa was represented by the last-mentioned department.
Greece to host the meeting in 2000. The trade-relevant outcomes of the meeting included: an announcement by the World Bank that it had initiated a lending program for culture and development, which it would expand upon at its first-ever conference on the subject, to be held in Washington in September 1998; support for the Organisation of American States in developing its own cultural plan; an undertaking by the CBC to lead an international PBS project to build a network of web-sites on cultural policies and best practices; and a commitment by the participating countries to support international comparative research in the area. In a “soft power” project, these and the several other outcomes of the meeting constitute the first small but significant steps that, eventually, may well snowball into an international campaign for culture, which would peak as liberalisation of trade in cultural products again becomes an issue on the WTO agenda.

6.1.3 The Trade Agenda: a More Difficult Task

Absent from the Ottawa outcomes is any hint at the long-term Canadian goal, namely an international trade instrument that deals exclusively with cultural products and industries. In functional terms, there would be little purpose to a meeting of cultural ministers taking the trade policy agenda on board, at this stage at least - particularly when one of the issues raised for debate was the difficulty, in the domestic context, of coordinating cultural and trade policy between ministeries. According to one report, Minister Marchi will follow up the Ottawa meeting with a gathering of trade ministers in October 1998, to discuss the inclusion of culture in the next WTO Round. While it has not been terribly difficult for Minister Copps to find 20 culture ministers who

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676 Scoffield, supra note 342.
support the idea of fostering domestic culture and treating cultural products as being unique, Minister Marchi will no doubt have a more difficult time finding 20 trade ministers who would risk publically antagonising the US Trade Representative and Congress. In 1989, for example, the US Congress denounced Article IV of the “Television Without Frontiers” Directive in a unanimous resolution, with one Member of Congress describing the ideological justifications for the EU broadcast quota as “the last refuge of trade scoundrels”.\(^677\) US opposition to broadcast quotas remains fierce, \textit{e.g.} Mr Valenti’s Motion Picture Association of America recently asked the US Trade Representative to take action against South Africa because of the Independent Broadcasting Authority’s (rather modest) television quotas.\(^678\)

Canada’s initiative faces an immediate political hurdle because of a related battle currently being fought out between the EU and the US, over how the next WTO Round of negotiations should be structured. The US wants the Round beginning in 2000 to proceed on a sector-by-sector basis, continuing the process in respect of financial services and basic telecommunications which followed the conclusion of the Uruguay Round, while the EU is arguing that all aspects of trade should be on the negotiating table simultaneously, in a sweeping and grandly-named “Millennium Round”.\(^679\) The EU took great advantage of the latter structure in the Uruguay Round, by stalling on any concessions in the audiovisual sector until, by the time the deadline for concluding the Round was imminent, the US had to give up on the concessions its cultural industries were demanding, else the


Round would have been scuttled. The all-encompassing approach, therefore, enables the EU to trade off concessions in one sector in order to retain trade barriers in another. The sector-by-sector approach favoured by the US, on the other hand, would diminish the opportunities for EU brinkmanship and cross-sectoral horse-trading. Canada is suggesting a compromise of negotiating “clusters” of sectors at a time, and this would suit its initiative in respect of cultural products, which would seem to require that several discrete sectors involving communications goods and services be partitioned off into their own “cluster”. Such an approach, however, would contradict the EU’s strategy of keeping audiovisuals on the same bargaining table as wheat and gaskets (or, more accurately, keeping cultural products off the table by insisting that they be exempt from the application of trade law generally). There is no certainty that the EU will support Canada’s strategy, and despite Grant’s enthusiasm for European allies, only 4 EU members turned up at the Ottawa meeting, far outnumbered by emerging economies’ representatives, and the EU itself was not formally represented. The sense that the EU has its own very distinct (and self-interested) cultural industries strategy, and is not about to hop onto the Canadian bandwagon, is only amplified by the tough tactics used by the EU against Canada in the recent dispute over Canada’s refusal to allow PolyGram equal access to the Canadian film distribution market. Another country notable by its absence from the Ottawa meeting was Australia - a country with almost identical cultural concerns and broadcast policies to Canada, but which is also a fierce competitor with Canada in international markets for English-language cultural products.

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681 See the discussion of the PolyGram dispute in note 74 supra.
Besides the tricky task of forming and maintaining international coalitions when different nations' interests do not necessarily coincide as precisely as Ottawa might suggest, the job of writing new trade treaties is monumental in scope. At present, cultural products are governed, in principle at least, by the existing GATT 1994 and GATS agreements, and removing them into their own, hermetically-sealed instrument will be difficult. This is not just the case politically (for the US is bound to object to special treatment for cultural products), but also practically: how is it possible to separate trade rules governing the provision of Internet services and broadcast services, when they are so rapidly becoming one and the same? In a recent paper, Steven Globerman and Dan Hagen warn that technological advances such as the delivery of traditional broadcast content over the Internet and the exponential multiplication of existing spectrum space by digitisation, will ultimately render current DCID scheme measures such as broadcast quotas unenforceable, and probably pointless as well.682 Their conclusion applies equally to any efforts contemplated in respect of international regulation of trade in cultural products. Of course, broadcast content regulation at the national level was meant to have been wiped out by DTH satellite ten years ago, if the prognosticators of the time were to have been believed; but despite all the promises of the 500-channel digital universe and of delivery of broadcasting over the Internet, we are still awaiting the bandwidth which would enable, and the content which would fill, this mass media cornucopia. But, given that preparations for the Uruguay Round began in 1982, and the negotiations begun in 1986 did not conclude until seven years later, with the WTO Agreement finally going into force in 1995,

Globerman and Hagen’s predictions are likely to come true sooner than Minister Marchi could have a separate agreement on trade in cultural products negotiated to completion.

A “General Agreement on Trade in Culture”, therefore, is a very ambitious and perhaps unattainable trade policy goal. But, to its credit, the Canadian government has been circumspect about its aims, advancing its agenda with deliberate prudence and in small steps. If the only result of the succession of meetings planned between the participating countries and those that join them over the coming years, is a demonstration that there does exist an international consensus regarding trade in culture, that outcome would nonetheless be of value. As Bernier argues, both the motivations advanced for treating cultural products differently to other goods and services, and the strategies which countries would look to use in the forthcoming WTO negotiations, are diverse and sometimes contradictory. 683 My discussion of the Canadian government’s sometimes skittish response to the Sports Illustrated ruling (in section 5.4.5), and the fact that the Australian Broadcasting Authority was ill-advised in contesting the Blue Sky litigation, demonstrates that even governments and regulators in OECD nations, with all the legal and financial resources they have at their disposal, are struggling to articulate defensible positions and successful strategies in the trade-in-culture debate. Talking to each other will help.

Such a consensus would be substantially enhanced if it could be demonstrated that it not only represented the opinion of governments (whom, it could be argued, had been captured by their domestic cultural industry interests), but also that of a wide range of representative non-governmental organisations in the cultural sector and civil society, throughout the world. In the bargain struck between regulators and industry when DCID schemes are implemented, it is not only

683 Bernier, supra note 7 at 24.
consumers’ interests that appear to fall by the wayside (see the discussion in sections 2.3.1 and 2.3.2), but often also the interests of artists, whose creative contribution can be marginalised by schemes which promote the production of industrial rather than parochial content. For example, while local actors, set designers, film crew, etcetera, all benefit greatly from the influx of quality film work into Toronto, both in terms of earnings and experience gained, there is legitimate concern that Canada’s achievement of critical mass in the production industry has come at the expense of a “fee-for-service” environment (see Froman’s argument in this regard, in section 2.3.1), and that more opportunities need to be placed in the hands of creators of ideas at the beginning of the value chain. In South Africa, concerns have been expressed about the PBS’ program commissioning practices, described by that country’s Independent Producers’ Organisation as “nothing short of a contemptuous relationship in which the producer as supplier of programs is disempowered at every level of the process by a system whose priorities lie anywhere but in the desire for quality information, education or entertainment programs.”684 The fact that both South Africa and Canada are trying to intervene earlier in the value chain is demonstrated by the initiatives in both countries to reform their respective intellectual property laws in order to provide greater rewards to creators and rights-holders.685 The participation of NGOs and organisations representing civil society in the international trade-in-culture initiative is valuable, not only because it will lend grassroots credibility to the consensus that will hopefully emerge, but also because organisations representing artists and cultural workers in many countries help to keep regulators and governments focussed


685 See the brief discussion of the Canadian reforms in section 1.2 above, and of the “needletime” debate in South Africa in section 4.1.3 above.
on the outcomes of DCID schemes most valuable to society, namely the production of parochial product, rather than the industrial outcomes which, though of financial benefit and crucial to obtaining critical mass in domestic cultural industries, are difficult to justify as requiring special treatment in the international trade regime.

6.2 A More Achievable, Tactical Goal: Exclusion of Bona Fide Cultural Measures from the Application of International Trade Rules

In fact, that distinction between industrial and cultural outcomes of DCID schemes is, from a trade law point of view, crucial to developing a successful strategy for defending the retention of such schemes. My discussion of the outcome of the Sports Illustrated matter in section 3.2.2.5 and of the possible application of the "public morals" exception as a last line of defence for content-based quotas in section 5.4.4, both suggest that if broadcast quotas are to be maintained as an intervention measure, some means will have to be found to have eligible programming qualify on the basis of content, and not on the basis of provenance criteria exclusively, which is the present situation. Content-based criteria would have the immediate benefit of distinguishing between industrial and cultural policies, as Bernier suggests should be done:

What is needed in reality is a twin-track approach that would recognise that cultural products, to the extent they are traded, come under the ordinary rules of international trade agreements, but at the same time would make it possible for States to intervene in order to ensure a viable domestic cultural production and to favour better access to a diversified foreign cultural production. In other words, an approach that would distinguish between the industrial and cultural objectives of government intervention.686

686 Bernier, supra note 7 at 24.
While I acknowledge the practical difficulties in determining content-based criteria for the application of quotas and the according of subsidies on a preferential basis to domestic products, the discussions Canada is initiating provide an opportunity to grasp the nettle. To the extent that some US writers argue that DCID schemes are intended to control broadcast content, the forthcoming International Meetings on Cultural Policy in Mexico and Greece, and the process accompanying them, provide an opportunity for the participating countries which have multicultural and non-hegemonic policies to establish such policies as the international "best practice". A Reference Paper of such "best practices" could be developed, and one of the most taxing difficulties of administering content-based DCID schemes, namely the need to observe the "content firewall" between the government of the day and the allocation of funding, might be partially addressed by a process of external auditing set out in the Reference Paper, which would keep domestic administrators honest. In many developing countries, the cultural and production sectors are so small that funding practices are difficult to defend, because everyone in the industry does really know everyone else, and accusations of favouritism are easy to make. It is just one more reason why objective, provenance-based criteria for DCID schemes are easier to implement than content-based criteria. International cooperation to identify "best practices" might extend to countries opening their eligibility decisions to external audit, by other countries' administrators who make use of similar schemes, which could in turn provide the necessary credibility to domestic administrators to defend decisions made on the basis of content criteria.

687 See my discussion of Shao and Price's comments, supra note 27 respectively and the accompanying text.
Ultimately, provenance criteria cannot be eliminated completely, because they are so objective as to be arbitrary in respect of content. It remains important that a film, song, or television program should be able to obtain DCID support merely because it has been created by a citizen or, preferably, by any person resident in the particular country. This arbitrariness as to content means that new, unpopular or subversive ideas can be communicated in a society, through cultural works. To the extent that the content of such works may be undesirable because, for example, it contains hate-speech or indecency, the appropriate mechanisms to defend society’s interests are domestic criminal law, human rights law, and voluntary or compulsory codes of conduct for broadcasters. Funding and access to DCID scheme support should not be used as a means of content control. However, that does not mean that content criteria cannot be introduced into the mix of factors by which eligibility for DCID scheme support is determined. In other words, what is required is the addition of content criteria to existing provenance criteria such as the MAPL system, and the structuring of the resultant criteria mix such that both a wholly foreign-made cultural work might qualify on the basis of its relevant content, and a wholly domestically-made work might qualify irrespective of its content. For South Africans, Peter Gabriel’s “Biko” has as much value as the parochial content of any song by current *kwai*to star Arthur. The South African system for recognition of eligible content should acknowledge that fact. And, not coincidentally, such a basket of criteria would be easier to defend in the international trade law regime, because it does not arbitrarily discriminate against foreign products.
6.3 The Current Domestic Debate in Canada

For Canada the choices are difficult and the pressure is mounting. The Canadian Senate Subcommittee on Communications said in 1997 that it believed Canada would experience increasing tension with its trading partners regarding the measures protecting its domestic cultural industries.\(^{688}\)

Clearly, there is a trade-off to be made between commercial opportunities abroad and domestic regulations at home. If Canada wishes to increase its exports of services and products in the communications sector, it will have to open its domestic market to foreign services and products. If this basic trade-off is accepted as necessary, Canada must review its existing policies and regulations. This is particularly necessary in the broadcasting and cultural sectors. It is in these two areas where Canada is most exposed to ‘linkage’ tactics by trading partners such as the United States.\(^{689}\)

The CRTC is undertaking a review of its policies relating to television, with public hearings scheduled to begin in September 1998, which it claims will be “broad and fundamental”.\(^{690}\) However, the Preface to the Call for Comments issued in May 1998 is decidedly traditional: it reiterates the standard ideological and industrial rationales that have formed regulation of television in Canada for the past three decades, saying, “the Commission wishes to explore how all participants in the system can work effectively to strengthen the Canadian presence on our television screens, and to support a healthy broadcasting and production industry capable of competing successfully at home and abroad.”\(^{691}\) One of the reasons for undertaking the review,

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\(^{688}\) “Wired to Win”, supra note 51 at 24.

\(^{689}\) Ibid. at 25.

\(^{690}\) Canadian Television Policy Review, supra note 123 at para. (i) of the Preface.

\(^{691}\) Ibid. at para. (iv) of the Preface.
notes the Preface, are the “increasing opportunities and challenges posed by the globalization of television production and distribution.” In particular, the CRTC is calling for participants in the inquiry to provide it with “a detailed understanding of the new forces at work in domestic and international communications, and to suggest imaginative means by which these forces can be harnessed to serve the interest of all Canadians.”

The possibility is that, in five years’ time, Canadian consumers may well be receiving music in their cars via radio receivers that can pick up 80 digital stations, or more terrifying yet for a domestic broadcast regulator, via an Internet-enabled dashboard computer that can pick up any radio station in the world that happens to be available on the ’Web. Globerman and Hagen are upbeat about the consequences of such technological advances for domestic cultural expression, arguing that if distribution capacity for media products becomes abundant, the concept of a “mass” media will erode steadily. Advertising will make way for direct payment by consumers as the chief market mechanism, and domestic cultural industries will reap economies of specialisation in the production of products for the new highly-niched audience markets which will emerge. To the extent that government intervention is required to support domestic cultural industries, the redundancy of broadcast quotas will mean that direct subsidies will be the only available option. Besides the greater tolerance by the GATT 1994 for these measures, and the absence of any definitive bar on

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692 Ibid. at para. (viii) of the Preface.
693 Ibid. at para. (xv) of the Preface.
694 Globerman and Hagen, supra note 682 at 37-38. Regarding economies of specialisation, see Schwanen, supra note 35.
695 Globerman and Hagen, ibid. at 39.
696 See the discussion of Article III:8(b) of the GATT 1994 in note 638 supra.
subsidies in the GATS,697 Globerman and Hagen point out that the benefits of using direct subsidies include lower costs than those incurred in the complex cross-subsidisation and trickle-down economics of trade restrictions, and far greater transparency. It is this transparency, they suggest, which will undermine the traditional bargain between the regulator and the industry, that has been the mechanism for delivering Cancon to date. To the extent that the special interests of industry diverge from the public interest, and that industry is using Cancon policies solely to rent-seek rather than to deliver the intended public goods, that would be exposed by the public’s refusal to support the maintenance of direct subsidies, since such behaviour by industry would manifestly fail to produce parochial media products valued by the domestic public.698

As noted in my introduction to this thesis, developing economies like South Africa simply cannot afford to deploy domestic subsidies to the extent that they are used in countries such as Canada and Australia, and the technological advances which Globerman and Hagen discuss will be slow in reaching the majority of the South African population. However, this makes the task for regulators in developing countries only more difficult: instead of dealing with a largely homogenous technological environment, where, for example, much of the population migrates to digital broadcast delivery technology simultaneously, they are required to regulate in a schismatic environment, where wealthier citizens can contract out of local content by paying a premium for DTH satellite broadcasting - Globerman and Hagen’s highly niched, consumer-pays model of the future - while the majority of less affluent people are still locked into the traditional, advertising-led and spectrum scarcity model of broadcasting markets, with its attendant industry/regulator trade-

697 See the discussion of Article XV of the GATS in section 3.3.3 above.

698 Globerman and Hagen, supra note 682 at 39-40.
offs and imperfect interventions. This schism will only become more pronounced if Internet delivery of broadcasting reaches the mass market in more advanced economies, because South Africa's sophisticated urban telecommunications infrastructure would support such delivery - but only those affluent enough to afford personal computers or WebTV receivers will be able, at least initially, to take advantage of the new technology. In such circumstances, the Canadian and Australian responses to such new technologies will be very valuable precedents for the already hard-pressed South African broadcast regulator, which must for now concentrate its resources on the traditional mass market media.

6.4 The Future International Market for Cultural Products

Globerman and Hagen's prediction of a highly-niched market for cultural products in the future, with barriers to entry and production costs falling and an abundance of delivery capacity becoming available, is partly premised on the assumption that the Internet will retain its current anarchic structure in a future broadcasting (or rather, narrowcasting) guise. The suggestion is that the Internet's packet-switching transmission and ubiquitous architecture is impervious to regulatory control or media oligopoly dominance. However, according to Streeter, the world has seen this all before. Charting the genesis of the policy of commercial broadcasting in the US, Streeter observes that, like the Internet, radio started out as a multiple-user system of communication, with order maintained by voluntary codes collectively enforced by hobbyist users. The Radio Act of

\footnote{For an excellent introductory discussion of Internet architecture, and its implications for communications policy, see Kevin Werbach, \textit{Digital Tornado: The Internet and Telecommunications Policy} (Washington, Federal Communications Commission - OPP Working Paper Series No.29, March 1997); available at \url{http://www.fcc.gov/Bureaus/OPP/working_papers/opwp29.pdf}.}
1912\textsuperscript{700} allocated all then-useful portions of the spectrum to the navy and commercial operators, and established a licensing regime. This was solely a political accomplishment - it was neither technologically inevitable nor necessarily the only "logical" economic outcome. It was only one of many possible outcomes, says Streeter:

\[\text{[The US legislation] reflected the triumph of a particular configuration of business organisation, technology, and state action, a configuration characteristic of corporate liberalism: corporate private-sector cooperation with the public sector, small business relegated to a secondary role, and grassroots nonprofit activities pushed to the fringes.}\textsuperscript{701}\]

Streeter notes the contradiction between the prevailing ethos of liberalism and individual rights in the US at the time, versus this government bequest to the Marconi company and other bureaucracies. The corporatist agenda of the legislation was justified on the ground of the public interest - \textit{e.g.}, the Titanic disaster was fresh in the minds of Congress, and emphasised the need for orderly radio communications.

\[\text{[R]adio was not a realm of autonomous individuals, it was a system that if properly organised could fulfill beneficial social functions such as public safety, the national interest, and the furtherance of technological and economic progress. To a large}\]

\textsuperscript{700} 37 Stat. 302 (1912). This Act was passed by Congress to bring US law in line with the Berlin Treaty of 1906, which had put a stop to the exclusivity of the Marconi company, by requiring maritime users of radio to communicate with all other users, regardless of the systems being used. According to Streeter the Berlin Treaty was an important lesson for Marconi in the necessity of corporate-government relationships: "The lesson of this experience for Marconi and others interested in the exploitation of radio in the corporate mould was twofold. On the one hand, a monopoly company could face serious, perhaps devastating opposition in a head-to-head conflict with the interests of nation-states. On the other, by allying itself with a particular nation-state, a corporation could find support in the international arena. In the process of establishing control of the spectrum, in other words, cooperation with national governments was beginning to be seen as perhaps beneficial and in any case necessary." [Emphasis in the original] (Streeter, \textit{supra} note 68 at 77.)

\textsuperscript{701} \textit{Ibid.} at 79.
degree, the apparently illiberal outcomes of the Act were thus reconciled with liberal
goals by framing the issue as a matter of system maintenance; maintaining the
system was less a matter of rights than one of neutral, technological necessity and
overriding public purpose - all in the service of broadly liberal goals.702

Summarising the impact of the subsequent 1927 Radio Act, which legitimated the favouring of
commercial broadcasters via a “public interest” mandate, Streeter:

If the danger of functionalist theory is tautology, the danger of functionalist social
policy is that the tautology turns into self-fulfilling prophecy. Imagined as an
integrated corporate machine, American broadcasting was turned into one; the
nonprofits and the alternatives they embodied were expelled as if they were parts
that didn’t fit. The images of neutral machinery and integrated systems obscured the
deeply political character of the choices that were being made at the time, even to
many of those who were making them.703

I cannot do justice to the deeply persuasive argument Streeter makes in his book, but these few
excerpts suffice to sow at least some doubt that Globerman and Hagen’s technological determinism
route is necessarily the way broadcasting will develop. The system of public goals achieved by
licensed private interests in a regulation-bounded market, familiar to any observer of Canadian,
Australian and South African broadcast regulation and described by Streeter as “corporate
liberalism”,704 inscribed itself on the anarchic technology of radio in the US in the early part of this
century. There is nothing to suggest that, with some assistance from the providers of the network

702 Ibid. at 79-80.
703 Ibid. at 101.
704 Streeter defines “corporate liberalism” as follows: “On the one hand, liberalism involves ideas
about markets, property, and private ownership; hence the idea of commercial broadcasting, the
idea that broadcasting can and should be a process of buying and selling. But liberalism also
involves ideas about freedom, communication, individuals and democracy; in particular, it
involves the hope that the process of buying and selling can complement or help create freedom
and democracy for individuals, especially when integrated through the rule of law.” (Ibid. at 9.)
bandwidth that will be critical to broadcast delivery on the Internet, regulators keen to see broadcasting serving the collective public interest, and governments that wish to prevent the Internet from becoming a conduit for hate-speech and indecent material, "Webcasting" will not end up looking much like broadcasting - or at least will be dominated by the same six or seven media multinationals that are ascendant in the international media market today, or perhaps by the multinational telecommunications companies and their corporate alliance structures that are increasingly moving into content creation as their basic business is commodified, or a combination of both.

The fact that the principal player arguing in favour of greater liberalisation of international trade in cultural products is the US, and its principal antagonist the EU, tends to obscure the debate somewhat. As noted in the conclusion to section 3.3.4, US media companies have invested heavily in European markets, and are themselves often owned by interests from other countries, such as Germany (Bertelsmann and Random House), Japan (Sony and Columbia Pictures), or Canada (Seagram and MCA Inc.). The fact that these companies have the ear of the US administration is no more than an alignment of interests, not the "cultural fact" claimed by some of the more enthusiastic anti-US commentators. "We are being swallowed up by the popular culture of the United States," observes Northrop Frye, "but then the Americans are being swallowed up by it too. It's just as much a threat to American culture as it is to ours."705 In her penetrating discussion of trends in international coproduction, Sharon Strover observes,

What all these communications companies share is size (large) and a temporally and culturally rooted association with a certain country, mixed with an increasing

portfolio of properties and ventures that cross national boundaries. All are eyeing global developments and opportunities to move into areas of business that portend future earnings growth, "synergies" with their current strengths, and opportunities to expand; typically the organisational form they adopt to do so entails joint ventures or independent subsidiaries with partners from other countries. With the growing variety of major media organisations, and most especially, with the new forms of doing business - notably coproductions and format licensing - that were ushered in during the 1980s, the entire notion of a business having a nationality must be called into question. ...[T]he idea that cultural hegemony or dominance is strictly identified with one country's industries must be reexamined. ... Indeed, the entire notion of a national "base" is called into question when the economic values of the companies reside in maximum profitability, no matter what the values of the country in which one is doing business or in which a headquarters exists.\footnote{706}

Even the advantageous cost and market structure in the US that for so long has been the bane of smaller countries' cultural industries, is changing. Where Collins spoke in 1990 of US television production companies recouping all of their costs at home, through first-run sales and domestic syndication,\footnote{707} by 1994 Vogel could only say that 80 per cent of costs were being recouped at home.\footnote{708} In 1997 the costs of studio film production and marketing for the Hollywood majors rose 19 per cent, taken together, the largest such single-year increase since 1989. Production costs of the average Hollywood release rose 22 per cent, and marketing costs rose 12 per cent.\footnote{709} Meanwhile, the number of filmed entertainment coproductions between Canada and European countries doubled in 1997, compared to the previous year, with 63 coproductions being completed for a cumulative

\footnote{706} Sharon Strover, "Recent Trends in Coproductions: The Demise of the National", in Corcoran and Preston, \textit{supra} note 225, 97 at 99-101.

\footnote{707} Collins, \textit{supra} note 29 at 15-16.

\footnote{708} See Vogel, \textit{supra} note 50 and the accompanying text in section 2.1 above.

\footnote{709} Statistics released by the Motion Picture Association of America, cited in "Movie-making cost more last year" \textit{The [Canada] Financial Post} (11 March 1998) B10.
budget amount of Can$501 million, itself more than double the amount in 1996.\footnote{Statistics released by Telefilm Canada, cited in “Entertainment”, \textit{The [Canada] Globe and Mail} (18 March 1998) B9.} The comparative cost structure is being changed by a combination of accelerating US production costs and the larger markets for non-US product, partly because of the great demand for content from multi-channel delivery systems. Any remaining doubt that something is indeed afoot should be erased by the news that Californian lawmakers are currently studying the Canadian provincial tax credits system, as well as new grants structures and educational initiatives to develop cultural industry talent in that state.\footnote{Radha Krishnan Thampi, “California to lure films back” \textit{The [Canada] Globe and Mail} (23 December 1997) C1.}

The factors currently at work in the international media market, then, appear to include: (1) rapidly increasing capacity for delivery of broadcast media products, which in turn exerts a strong demand-pull on production; (2) increasing production costs in the US, and the relocation of production to centres which have lower costs, particularly given the current strength of the US dollar; (3) digitisation of the intermediate stages of media production, which makes the relocation of some inputs on the value chain to other countries increasingly feasible, at low cost; (4) the emergence of truly global media companies, untethered to any one country for either production or consumption of their products; (5) the beginnings of an international reaction to the increasing homogenisation of cultural products, with the consequent desire for some means of ensuring that domestic cultures also be reflected in the onrush of new media products, and that such products more closely align with audiences’ identification of themselves and their own parochial concerns.
For students of Alfred Kahn, the above combination of factors should set off some warning bells. The current environment involves large, increasingly oligopolistic multinational media companies and the need for delivery of a public good, i.e. parochial products in many countries, particularly developing countries, whose domestic media industries have been swamped by the disadvantageous cost structures attaching to local production versus the purchase of imported programming. Could the large global media companies deliver this product in each and every viable market, in exchange for some form of incentive, e.g. as demonstrated by the race to the bottom currently being played out in Canada in respect of tax credits provided by competing provinces? One would immediately point to the absence of a global “regulator”, thereby making the extrapolation of domestic capture theory to the global market an unlikely thesis. But, in some faint measure a global regulator does exist, in putative form: the WTO, its trade rules, and the dispute settlement mechanism already invoked in several matters affecting cultural industries. While I would readily concede that my suggestion here is most speculative, I would argue that the chief danger of any proposed “General Agreement on Trade in Culture” might be that it would create fertile conditions for a trade-off between leading companies in the global media industry and national governments, with a quasi-capture outcome. These companies would exchange commitments to media production in smaller countries for advantageous cost structures created by national governments at the expense of consumers, probably with the side-effect of marginalising distinctive domestic artists and creators as well, as the more homogenous the product made, the less its “cultural discount” and the greater its potential saleability will be elsewhere in the world. One comfort in the approach that the Canadian government is taking in its new initiative, it is that much of the campaign is being conducted entirely outside the WTO structure, in UNESCO and new,
purpose-created fora. To the extent that the argument for distinctive treatment of cultural products must be made within the WTO context (as it must, for the fact is that cultural products are freely bought and sold), that argument will have to reflect an emerging consensus which the GATT 1994 and the GATS texts themselves recognise as conceivable, in Articles XX and XIV respectively, but whose logic is located outside the parameters of normal trade law principles: namely, that there are products which are traded, but nevertheless have special characteristics and a unique impact within society, and hence deserve special treatment by the trade regime.

6.5  A Final Comment

The trade-offs in cultural industry politics can be shabby, with special interest groups unfairly capturing rents paid for by consumers, cultural industry bureaucrats inventing purposes for their existence by needlessly imposing regulation on areas of the media industry where it does not properly belong, and all the stakeholders routinely wrapping themselves in the national flag and claiming they are acting in the country’s best interests. All the criticisms made by Stanbury, Globerman, etcetera, do have an element of truth to them, and any person who has worked in the field of media regulation in countries such as Canada, Australia and South Africa would be hard-pressed to deny this.

However, it is worthwhile to step back occasionally and observe some of the more positive outcomes of domestic cultural industry development schemes. Recently, the CBC aired a documentary on Susan Aglukark, an Inuit singer from Rankin Inlet in the Northwest Territories, Canada’s desolate Arctic region.\textsuperscript{712} Aglukark’s music would be characterised as light popular

\textsuperscript{712} The documentary was entitled, “Susan Aglukark: Polarities”.

Western-style ballads, with a minor world music influence, and thus she is what broadcast executives would describe as “radio-friendly” - pleasing music for North American ears. The subject-matter of her music, however, is deeply disturbing: one of her songs is about a cousin who committed suicide - Inuit communities have a suicide rate which is four times the national average - another is about the scourge of alcoholism amongst Inuits, a disease unknown to this community until the arrival of European settlers. Aglukark was a victim of sexual abuse as a child, and is outspoken about her experiences when she returns to her community. She is regarded as one of the most articulate spokespersons in Canada for the Inuit, and as a valuable role model for a community that faces many disadvantages. Because Aglukark sings about experiences deeply felt by her community, she is important to them; however, her music is also popular in the rest of Canada, so much so that her first album went platinum, and in this way she communicates her community’s concerns, achievements and culture to her fellow Canadians.

The documentary on Susan Aglukark was a product of all the pillars of Canadian cultural policy: screened by the CBC, it was produced with the aid of Telefilm Canada, and told a moving and dramatically compelling story about a singer who would likely never have seen the inside of a recording studio, had EMI Canada not been able to rely on the guarantee of airtime, and hence sales for quality product, that Cancon radio quotas provide. Without Canadian cultural policy, Susan Aglukark’s story would not have been told, in fact there may never have been a Susan Aglukark story.

So, it may well be true that there are better ways to design and implement cultural policy than the approaches currently used. But what has been achieved thus far, for all its problems, has been worthwhile.
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