

Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products

Christopher M. Bruner*

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* Assistant Professor of Law, Texas Tech University School of Law. A.B., University of Michigan; M.Phil., Oxford University; J.D., Harvard Law School. For thoughtful comments and suggestions, I would like to thank Susan Saab Fortney, Nicolas Jondet, Rolf H. Weber, and participants in workshops at the International Conference on Business, Law, and Technology (Copenhagen, Denmark) and Texas Tech University School of Law. Any errors or omissions are of course mine.

If they could read their stuff, they'd stop writing.

– Will Rogers, on Hollywood

I. From Hollywood to Cannes

Perhaps nowhere are the forces, tensions, and contrasts of cultural globalization more evident than the Cannes Film Festival. Held annually since 1946 (with only two interruptions) in the French Riviera resort town of Cannes, the festival has grown from a modest showcasing of cinematic art to a “highly mediatized” event attracting thousands of journalists and corporate interests. Though founded through the efforts of the Association Française d’Action Artistique (French Association for Artistic Action), and sponsored by France’s Ministère des Affaires Etrangères (Ministry of Foreign Affairs), Ministère de l’Education Nationale (Ministry of National Education) and Centre Nationale de la Cinématographie (National Cinema Center), the Cannes Film Festival today styles itself as “an annual tribune for international film, where all styles, schools and genres have their place.”¹

Of course this includes not only auteur cinema,² but high-budget, star-studded, special-effects-laden Hollywood productions. And there’s the rub. As *New York Times* film critics Manohla Dargis and A.O. Scott have observed, each year brings “the same complaints: from purists who accuse the Cannes Film Festival of selling out its tradition of artistic prestige for the glamour and lucre of Hollywood, and from the more commercially minded scenesters who wonder why Cannes lavishes so much attention on esoteric, difficult films bound for an ever-shrinking audience of cognoscenti.”³ Cannes’ organizers, perhaps making lemonade of the lemons in hand, write that “the Festival has become famed for the balance it has established between artistic quality of films and commercial impact.”⁴ But not all share that view. Lynn Hirschberg, also of *The New York*

¹ Festival de Cannes, *Background*, available at <http://www.festival-cannes.fr/organisation/histoire.php?langue=6002> (accessed Sept. 8, 2006).

² “Auteur” is used in film theory to describe a director “whose personal influence and artistic control over his or her films are so great that he or she may be regarded as their author.” “Auteur theory” likewise is “a critical theory ... based on a belief that a film-maker may be considered as the creator of a body of art, with individual styles, themes, and techniques identifiable throughout their work.” OXFORD ENGLISH DICTIONARY ONLINE, “auteur,” Mar. 2002.

³ Manohla Dargis & A.O. Scott, *At the Cannes Film Festival, Brows Range From High to Middling*, INT’L HERALD TRIB., May 17, 2006, available at http://www.iht.com/bin/print_ipub.php?file=/articles/2006/05/17/arts/web.0517cannes.php (accessed Sept. 7, 2006).

⁴ Festival de Cannes, *Background*, *supra* note 1.

Times, wrote of the 2004 festival that it “epitomized the extraordinary global reach of American films – sometimes to the point of absurdity.”⁵

While other countries’ entries appeared reflective and probing, taking “globalism as a chance to reveal their national psyches and circumstances through film,” America offered up “*Shrek 2*” – a computer-animated sequel from DreamWorks depicting the on-going adventures of a green ogre, his princess bride, and a donkey.⁶ In this contrast, Hirschberg detected an unsettling feature of the image of America projected to the world by Hollywood. Perhaps ironically, in an effort to maximize the global audience, big Hollywood film companies had moved away from stories exploring American life and culture, gravitating rather – by the pull of “corporate finances” – toward lowest-common-denominator themes scrubbed of cultural specificity in order to give the film the best chance of resonating across cultures and selling across borders: not nuanced dialogue, but action and special effects, and certainly not America, but “an invented, imagined world, or one filled with easily recognizable plot devices.” Evidently it works. As of November 2004, “*Shrek 2*” was the third-highest grossing film ever.⁷ But of course this is not the only way to maximize revenues. Oliver Goodenough has identified another means of expanding the global audience in Hollywood’s “devotion to pushing the hot-buttons of human gratification, ... pour[ing] out high-violence, high-sex, high-materialist product” – what he aptly terms “the salt, fat and sugar of the human psyche” – which, like McDonald’s fries, readily appeal to the human animal the world over.⁸

⁵ Lynn Hirschberg, *What Is an American Movie Now?*, N.Y. TIMES MAG., Nov. 14, 2004, at 88, 90.

⁶ *Id.* at 90. Of course 2004 was also the year that Michael Moore’s “*Fahrenheit 9/11*” won Cannes’ highest award. *Id.*, although it was widely speculated that the award had more to do with politics than art. See, e.g., David Gritten, *Cannes jury told to vote for the film, not politics*, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/05/12/wcann12.xml> (accessed Jan. 25, 2007).

⁷ Hirschberg, *supra* note 5, at 90-91. DreamWorks’ reliance on *Shrek* may, however, have proven excessive. In 2005 the company had to restate earnings estimates due to miscalculation of “*Shrek 2*” DVD sales (leading to an informal inquiry by the Securities and Exchange Commission), and by early 2007 the studio risked “looking like a one-trick pony whose only trick is the popular ‘*Shrek*’ franchise.” Plans to remedy this included doubling the production schedule from one year to two in order to produce better products – though the company did anticipate at least two more *Shrek* films, which would bring the total to five. According to a DreamWorks executive, while sequels are more expensive (due to the “higher costs involved in luring back the talent”), they involve less risk and tend to do better overall. Merissa Marr, *DreamWorks Reboots for Life Beyond ‘Shrek,’* WALL ST. J., Jan. 23, 2007, at B1.

⁸ Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada’s Cultural Preoccupation*, 15 ARIZ. J. INT’L & COMP. LAW 203, 226 (1998), available at Lexis.

The French and many others around the world – notably the Canadians – find themselves of two minds when it comes to Hollywood production. As consumers, they appear all too ready to buy what Hollywood sells, and Hollywood’s domination of international film markets reflects it. Whereas one percent of films shown in the United States are foreign, Hollywood production represents 85 percent of ticket sales globally,⁹ reportedly grossing \$9.2 billion in 2004 alone – an 80 percent increase over the prior decade.¹⁰ The Motion Picture Association of America (MPAA), Hollywood’s trade and lobbying group, along with its “international counterpart,” the Motion Picture Association (MPA), have trumpeted Hollywood’s global dominance, observing that “U.S. films are shown in more than 150 countries worldwide,” and that the “U.S. film industry provides the majority of home entertainment products seen in millions of homes throughout the world.”¹¹

In this light, it is surprising neither that film companies in other countries have found it difficult to make it, continually losing domestic market share to their larger and better endowed American competitors, nor that their governments have stepped in, endeavoring to support their efforts through various regulatory measures. The impact of American popular culture has been especially great in Canada, where 75 percent of the population is estimated to live within 100 miles of the U.S. border,¹² and which accounted for only 2.7 percent of its own cinema ticket sales in 2003.¹³ The Canadian government, in response to the omnipresence of American media, has maintained a raft of legal mechanisms aimed at protecting and promoting domestic producers of cultural goods and services, ranging from subsidies, to tax incentives, to quotas requiring that specified quanta of “Canadian content” be shown in Canadian cinemas and broadcast by Canadian television and radio stations.¹⁴ Many other countries, including France, have maintained similar domestic policies for similar reasons.¹⁵

⁹ Eireann Brooks, Note, *Cultural Imperialism vs. Cultural Protectionism: Hollywood’s Response to UNESCO Efforts to Promote Cultural Diversity*, 5 J. INT’L BUS. & L. 112, 134 (2006), available at Lexis.

¹⁰ Alison James, *Gaul won’t stall H’wood anytime soon*, VARIETY, Nov. 6, 2005, at 8, available at Lexis.

¹¹ Motion Picture Association of America [hereinafter MPAA], *About Us*, available at <http://www.mpa.org/AboutUs.asp> (accessed Sept. 6, 2006).

¹² See National Geographic Society, *Canada*, available at http://plasma.nationalgeographic.com/places/countries/country_canada.html (accessed Sept. 8, 2006).

¹³ See James, *supra* note 10.

¹⁴ See generally Goodenough, *supra* note 8.

¹⁵ See Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), *NEW STRATEGIES FOR CULTURE AND TRADE: CANADIAN CULTURE IN A GLOBAL WORLD* [hereinafter SAGIT Report] (Feb. 1999), “How Do Canada’s Cultural Policies Compare with Those of Other

Hollywood, of course, loathes such policies. The MPA was established in 1945 in part “to respond to the rising tide of protectionism resulting in barriers aimed at restricting the importation of American films,”¹⁶ and has made amply sure that Congress understands that what they term “the content industries” (film, television, home video, publishing, software) “are America’s most successful exporters,” with higher international revenues than any other industry, and “creat[ing] jobs in the United States at three times the rate of the rest of the economy.”¹⁷ In 2001 the U.S. audiovisual industry made over \$530 billion (over 5 percent of gross domestic product) and exported \$90 billion worth of its products to other countries.¹⁸ The MPAA’s long-time (former) leader, Jack Valenti, who would be recognized by the mid-1990s as the “most formidable trade lobbyist” in the United States,¹⁹ liked to describe these industries as “the jewel in America’s trade crown.”²⁰

Given the demonstrated export value of these “content industries” and their magnitude relative to the overall U.S. economy, U.S. trade negotiators have enthusiastically responded to the MPAA’s call, pushing hard over the course of recent decades for the maximum degree of audiovisual trade liberalization attainable – wherever they can get it. At virtually every turn, however, they have met concerted opposition. Though desirous of U.S. market access, other countries negotiating trade deals with the United States often express strong resistance to perceived U.S. media domination, and a desire to minimize the cultural homogenization popularly associated with globalization. Thus U.S. trade negotiators’ results in liberalizing the audiovisual sector have been mixed at best, their successes to date reflecting not a meeting of the minds so much as varying levels of leverage over various counterparties in differing fora. For example, the United States has essentially had its way in bilateral trade

Countries?,” available at <http://www.dfait-maeci.gc.ca/tna-nac/canculture-en.asp?> (accessed Aug. 28, 2006).

¹⁶ MPAA, *About Us*, *supra* note 11.

¹⁷ Bonnie J.K. Richardson, Vice President, Trade & Federal Affairs, Motion Picture Association of America, Testimony before the House Commerce Committee Subcommittee on Commerce, Trade & Consumer Protection, May 22, 2001.

¹⁸ Joe Middleton, *The Effectiveness of Audiovisual Regulation Inside the European Union: The Television Without Frontiers Directive and Cultural Protectionism*, 31 DENV. J. INT’L L. & POL’Y 607, 608 (2003), available at Lexis.

¹⁹ Vincent Cable, *The New Trade Agenda: Universal Rules Amid Cultural Diversity*, 72 INT’L AFF. 227, 235 (1996), available at JSTOR; see also LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 116 (Penguin Press 2004) (“In his almost forty years of running the MPAA, Valenti has established himself as perhaps the most prominent and effective lobbyist in Washington.”).

²⁰ Richardson, *supra* note 17 (quoting Valenti, internal quotation marks omitted).

negotiations with weaker countries; found mixed success in the North American Free Trade Agreement (NAFTA), under which Canada preserved its “culture exception” from the pre-existing bilateral agreement, though explicitly subject to retaliation by the United States should Canada use it; and essentially been stymied in multilateral negotiations in the World Trade Organization (WTO), where the best it could do was an “agreement to disagree” – formalizing the parties’ commitment to continue good faith negotiation toward liberalization under the General Agreement on Trade in Services (GATS).²¹

The differences in perspective could not be more stark. So far as the MPAA and U.S. government officials are concerned, films, television shows, and the like are simply entertainment commodities. The reason they sell well abroad, according to this view, is because discerning global consumers voting with their money deem American products superior.²² And as such, there is no reason they should not be governed by the multilateral trade regime. Viewed through this lens, any attempt to “protect” domestic cultural products²³ from international competition would appear suspect – not only as inefficient “protectionism” (used pejoratively), but also by reference to widely accepted human rights-based principles of free speech and access to ideas.²⁴ The prevailing view in many other countries, meanwhile, is that cultural products should be conceptualized not as commodities like any other, but as a special category of products significantly impacting cultural development and national identity. As the authors of an influential Canadian-government-sponsored report posed the issue

²¹ See *infra* part III.

²² See, e.g., Middleton, *supra* note 18, at 614 (“Jack Valenti, the former president of the [MPAA] has argued that Europeans prefer American programming, claiming that Europeans ‘like, admire, and patronize what we offer them.’”).

²³ I follow the convention, employed elsewhere, of referring to cultural goods and services collectively as “cultural products.” See, e.g., SAGIT, *supra* note 15, “Pressures for Change.” Drawing a clear, categorical distinction between “goods” and “services” has presented a vexing problem in the trade realm. *The Economist* has, perhaps glibly, defined “services” as “[p]roducts of economic activity that you can’t drop on your foot.” *The Economist*, Economics A-Z, “Services,” available at

<http://www.economist.com/research/Economics/alphabetical.cfm?term=services> (accessed Sept. 28, 2006). The WTO Appellate Body has stated that a given product might contain attributes both of goods and of services, and that the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services might both apply to a given product. See Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, at 17, 19, WT/DS31/AB/R (June 30, 1997).

²⁴ See, e.g., Krista Boryskavich & Aaron Bowler, *Hollywood North: Tax Incentives and the Film Industry in Canada*, 2 ASPER REV. INT’L BUS. & TRADE L. 25, 26 (2002), available at Lexis; U.S. Ambassador to UNESCO Louise Oliver Speaks With Foreign Journalists, STATES NEWS SERVICE, Nov. 8, 2005, available at Lexis; Richardson, *supra* note 17.

in 1999, “[d]o we define ourselves simply as the producers and consumers of tradeable goods and services? Or are we prepared to ... reaffirm the importance of cultural diversity and the ability of each country to ensure that its own stories and experiences are available both to its own citizens and to the rest of the world?” Pursuing the latter course, Canada’s “cultural policy” has aimed “to foster an environment in which Canada’s cultural products are created, produced, marketed, preserved and shared with audiences at home and abroad” – a policy both requiring and legitimating insulation of Canadian cultural products from unfettered competition under a liberalized trade regime.²⁵ Europe (notably, France) has generally shared this viewpoint and embraced a substantially similar protectionist policy, though with the added complexity of ensuring not only viable domestic cultural spaces, but also the coalescence of a nascent European identity.²⁶

Against this backdrop, an extraordinary legal instrument purporting to govern the pursuit of “cultural diversity” has been negotiated – and overwhelmingly approved – in an unlikely forum. By a vote of 148 to 2 (with 4 abstentions), the “Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (the Culture Convention) was adopted on October 20, 2005 by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO).²⁷ To be clear, the document is not a “statement” or “declaration” or “recommendation”; it is a treaty, and by its terms becomes binding international law for the countries that ratify it three months after thirty countries have done so.²⁸ The thirtieth ratification having been deposited on December 18, 2006, the Culture Convention takes effect March 18, 2007.²⁹ The United States, which (along with Israel) voted against the Culture

²⁵ SAGIT, *supra* note 15; *see also infra* parts III.B and V.A.

²⁶ *See generally* Middleton, *supra* note 18 (discussing the EU’s Television Without Frontiers Directive); Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament Towards an international instrument on cultural diversity* [hereinafter *Communication to the Council and the European Parliament*], COM(2003) 520 final (Aug. 28, 2003); European Parliament resolution on preserving and promoting cultural diversity: the role of the European regions and international organisations such as UNESCO and the Council of Europe, EUR. PARL. DOC. P5_TA(2004)0022 (2004); European Parliament resolution on working towards a Convention on the protection of the diversity of cultural content and artistic expression, EUR. PARL. DOC. P_TA(2005)0135 (2005); *see also infra* parts III.C and V.B.

²⁷ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005 [hereinafter *Culture Convention*].

²⁸ *Id.*, art. 29.

²⁹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions: States Parties*, available at http://portal.unesco.org/la/convention_p.asp?order=alpha&language=E&KO=31038 (accessed Jan. 17, 2007).

Convention,³⁰ obviously will not be bound by its terms. That does not, however, mean that the United States will not be impacted by it. Not only does the Convention “reaffirm [the] sovereign right to formulate and implement ... cultural policies and to adopt measures to protect and promote the diversity of cultural expressions,” but it also takes aim at other international instruments that might impede the exercise of such rights,³¹ widely understood to mean international trade agreements.³²

As a legal instrument, the Convention is – by any measure – a muddle. As U.S. officials have lamented, the Culture Convention offers no definitions for “culture” and “cultural identity,” key concepts upon which the operative terms and central rights and obligations of the document are constructed.³³ As a consequence, the scope of the document’s application is hard to predict. As Louise Oliver, the United States’ Ambassador to UNESCO, observed, “the French and others are expanding the lists of cultural objects ... to now include wine and foie gras.... And therefore, for us, a question would be where will it end?”³⁴

And as if the Convention’s conceptual indeterminacy were not vexing enough for U.S. policymakers, the article on its relationship to other international legal instruments is confusing and apparently contradictory. While stating that “[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties,” it also states that, “without subordinating this Convention to any other treaty,” the parties are obliged “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, ... [to] take into account the relevant provisions of this Convention.”³⁵ Oliver expressed concern that such provisions “could be misinterpreted to undermine the clear and unambiguous obligations undertaken by governments in other international agreements, such as in the fields of human rights or trade,”³⁶ though she omits to note the relatively clear provisions barring invocation of the Convention “in order to infringe human rights and fundamental freedoms enshrined in the

³⁰ See Alan Riding, *U.S. backs Hollywood at Unesco; It votes against plan to fight globalization on the cultural level*, INT’L HERALD TRIB., Oct. 22, 2005, available at Lexis. The four abstaining countries were Australia, Nicaragua, Honduras, and Liberia. *Id.*

³¹ Culture Convention, *supra* note 27, arts. 5, 20.

³² See *infra* part V.

³³ Culture Convention, *supra* note 27, art. 4.

³⁴ *U.S. Ambassador to UNESCO Louise Oliver Speaks With Foreign Journalists*, *supra* note 24.

³⁵ Culture Convention, *supra* note 27, art. 20.

³⁶ *U.S. Ambassador to UNESCO Louise Oliver Speaks With Foreign Journalists*, *supra* note 24.

Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.”³⁷ What we are really talking about, then, is trade agreements (for which the Convention includes no such carve-out), and on this score, the Convention’s relation to existing international legal obligations is far from obvious.

The political meaning of the Convention, however, is considerably more clear. As one commentator has observed, whereas France may have been seen as the “lunatic fringe” in the 1990s for its strenuous opposition to bringing cultural products within the scope of WTO negotiations, the Culture Convention’s resounding approval – including by the United Kingdom and other close U.S. allies – “shows that international opinion has swung into line with them since.”³⁸ As this paper will argue, it is in large part by reference to the dynamics of diplomacy, domestic politics, and on-going negotiation – and not solely as a legal instrument taking its place amidst existing international legal obligations – that we can best make sense of this otherwise opaque and contradictory document. Indeed, viewed within a broader historical context, UNESCO’s Culture Convention is strikingly consistent with the approach to globalization long pursued by so-called “middle powers” like France and Canada (the Convention’s principal proponents). To the degree they have embraced economic and financial globalization, they have typically done so through regimes thought capable of curbing its excesses – by and large associated with America’s power and influence – and ensuring their representation at the table.³⁹

This paper aims to identify the Culture Convention’s true legal and diplomatic significance. Starting with a brief look at theoretical and practical conceptions of “culture,” the paper then examines the treatment of cultural products in the WTO system, the North American Free Trade Agreement, the nascent Free Trade Area of the Americas, the European Union, and in recent bilateral trade agreements involving the United States. The paper then traces the history of UNESCO and its efforts toward the preservation of cultural diversity, including the United States’ cool relationship with this UN body. The origins, negotiation and drafting of the Culture Convention are then examined, with special attention paid to the efforts of Canada, France, and the European Union to ensure its adoption. The paper concludes that the Culture Convention will

³⁷ Culture Convention, *supra* note 27, art. 1.

³⁸ See James, *supra* note 10.

³⁹ See *infra* part V; *cf.*, generally, RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (forthcoming Feb. 2007) (contrasting America’s preference for “ad hoc globalization” with France’s preference for “managed globalization” and tracing their effects in the liberalization of capital flows under various regimes).

likely have little effect on existing trade obligations, but that it will have a significant impact on future negotiations toward greater audiovisual liberalization under the WTO system – a major trade policy goal of the United States.

The efficacy of the Culture Convention as a means of resisting audiovisual trade liberalization will ultimately depend on the perceived normative legitimacy of the broader argument for the protection of cultural diversity through domestic protectionist measures. The final sections of the paper address the trade and culture debate in these broader terms. Based on an examination of the media market, Hollywood’s prevailing business model, and the construction of trade rhetoric and deployment of human rights arguments by U.S. trade negotiators and corporate interests, I argue that the burden remains squarely on the United States to demonstrate that the liberalization of trade in cultural products is in fact necessary or desirable.

The Culture Convention can perhaps afford to be so vague on its relation to existing trade obligations precisely because it is not really about existing trade obligations at all. The purpose of the Culture Convention is to put a brake on future liberalization of culturally sensitive products – notably under the GATS regime. In substance it is equal parts political declaration and negotiating tactic.⁴⁰ Though ostensibly a legal instrument purporting to regulate “cultural” policies and disputes that may arise, in political and diplomatic terms it need be no more specific or articulate than, say, France’s no-vote on the proposed EU constitution.⁴¹ First and foremost, it is an expression of dissatisfaction with the direction in which cultural globalization is perceived to move, and as such need not say what “culture” and “cultural identity” are because the document is really about what they are not. More specifically, in the view of the 148 countries that voted for it, it is a rejection of the market as sole arbiter of cultural content worthy of creation and transmission.

Though easily dismissed as anti-Americanism,⁴² it is better described as non-Americanism – but that of a very specific sort. As described below, U.S.

⁴⁰ See *infra* parts V and VI.

⁴¹ For background, see generally Richard E. Baldwin, *Trail to Failure: History of the Constitutional Treaty’s Rejection and Implications for the Future*, Centre for European Policy Studies Policy Brief No. 104, May 2006, available at http://shop.ceps.be/BookDetail.php?item_id=1332 (accessed Sept. 7, 2006).

⁴² See, e.g., Frederick Scott Galt, Note, *The Life, Death, and Rebirth of the “Cultural Exception” in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture’s Hegemony*, 3 WASH. U. GLOBAL STUD. L. REV. 909, 920-21 (2004), available at Lexis.

policymakers and corporate interests strain to frame the debate by reference to established universal norms and obligations, notably human rights principles, and would-be universal norms and obligations, notably trade principles, in order to obfuscate the fact that this is really about future negotiations regarding potential further liberalization. The true subject matter of the Convention is a terrain that, by hypothesis, remains politically and diplomatically contestable. And the evil feared, it turns out, is not really “America” at all; Hollywood represents a quintessentially global business model, if one that could only have taken root in the United States.⁴³

Hollywood, it turns out, is both further from and closer to Cannes than we might have thought.

II. Culture and National Identity: Imagined and Re-Imagined

The drafters of the Culture Convention might take solace in the fact that, if they failed to identify clear and comprehensive definitions of “culture” and “cultural identity,” so has everyone else. Whether modes of cultural production can be identified, and whether they can be made the subject of useful regulation are, however, distinct questions.

A. The Elusive Concept of Culture

In his seminal work on the phenomenon of nationalism, Benedict Anderson argued that whatever else nations (“notoriously difficult to define”) might be, they are fundamentally “imagined” communities. They are imagined, he observes, in the literal sense that “members of even the smallest nation will never know most of their fellow-members.” Furthermore, they are imagined in the minds of their constituents to be “limited” in the sense that they are assumed to have “finite, if elastic, boundaries, beyond which lie other nations”; to be “sovereign” in the post-Enlightenment sense that they “dream of being free, and, if under God, directly so”; and to be a “community” in that, “regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.”⁴⁴ At the core of one’s sense of national identity lay these essentially imaginary parameters of association.

Others such as cultural theorist Homi Bhabha, building on Anderson’s work, have emphasized the “ambivalence of modern society” that lies at its heart, an equivocal posture resulting in part from the “conceptual indeterminacy” of national identity itself. To the degree that language and art endeavor to

⁴³ See *infra* part VI.B.

⁴⁴ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 3, 6-7 (revised ed., Verso 2000) (1983) (emphasis omitted).

represent the national culture, they also construct and alter it. Bhabha sees in a nation's art "the nation-space in the *process* of the articulation of elements: where meanings may be partial because they are *in medias res*; and history may be half-made because it is in the process of being made; and the image of cultural authority may be ambivalent because it is caught, uncertainly, in the act of 'composing' its powerful image." The critical perspective that Bhabha terms "nation as narration" endeavors to shine a bright light on "the cultural boundaries of the nation" precisely to reveal the fluidity and indeterminacy that emerge in all efforts to articulate what the nation actually is. Cultural boundaries are "Janus-faced and the problem of outside/inside must always itself be a process of hybridity, incorporating new 'people' in relation to the body politic, generating other sites of meaning and, inevitably, in the political process, producing unmanned sites of political antagonism and unpredictable forces for political representation."⁴⁵

Though no diplomat or trade negotiator in the U.S. government would likely put it in such terms, the basic idea – the fundamental fluidity, hybridity, and indeterminacy of any national culture – does a lot of rhetorical work to advance the U.S. position on trade in cultural products. Ambassador Oliver, for example, has emphasized that the "United States, the most culturally diverse country in the world, is a vigorous proponent of cultural diversity,"⁴⁶ and argued (in explaining the United States' no-vote on the Culture Convention) that the "United States has achieved the vibrant cultural diversity that so enriches our society by our commitment to freedom and our openness to others, and by maintaining the utmost respect for the free flow of ideas, words, goods and services."⁴⁷ Put differently, if "cultural diversity" is hybridity, then the most direct and comprehensive means of achieving cultural diversity is the dismantling of border impediments to "the free flow of ideas, words, goods and services." A crucial assumption, of course, is that the desired "diversity" would continue to exist in a wholly liberalized market, an assumption examined below.⁴⁸ But for the moment, observe the ease with which trade, human rights,

⁴⁵ Homi K. Bhabha, "Narrating the Nation," in *NATIONS AND IDENTITIES* 359-63 (Vincent P. Pecora ed., Blackwell Publishers 2001).

⁴⁶ Ambassador Louise V. Oliver, Statement to 172nd UNESCO Executive Board, Sept. 20, 2005, available at <http://www.state.gov/p/io/rls/rm/53915.htm> (accessed Sept. 7, 2006).

⁴⁷ Ambassador Louise V. Oliver, Statement to 33rd UNESCO General Conference, Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, at 1, Oct. 20, 2005, available at http://www.usunesco.org/texts/GenConf33_Amb_Intervention_CD_Vote.pdf (accessed Sept. 7, 2006).

⁴⁸ See *infra* part VI.

and cultural terminology flow together in this formulation, implicitly aligning with the angels Hollywood's economic interest in unfettered markets.

So what does UNESCO – presumably the UN's authority on the matter – think “culture” means? Helpfully, UNESCO has assembled a list of “Questions and Answers” on the intersection of trade and culture, though “culture” itself remains undefined. The omission is unsurprising, given the *de facto* impossibility of doing so in any clear and comprehensive way, which appears to be a principal upshot of the cultural studies literature (at least from a lawyer's point of view). UNESCO does offer a narrative description of “cultural industries,” though these are defined circularly as “those industries that combine the creation, production and commercialisation of contents which are intangible and cultural in nature.” “Cultural goods” are unhelpfully described as “those consumer goods [that] convey ideas, symbols, and ways of life” (though a list of examples is provided, including books, magazines, multimedia, software, records, films, videos, audiovisual programs, crafts, and fashion). “Cultural services” are, predictably, services that aim at “satisfying cultural interests or needs.”⁴⁹ The indeterminacy of “culture” and related concepts would appear to work strongly in favor of the American view; the United States need not define them because the impulse is deregulatory. If in fact regulating “cultural industries” requires defining culture (a question taken up below), UNESCO would appear to be in big trouble.

In any event, while UNESCO may have a hard time saying precisely what makes certain industries, goods, and services “cultural” in the pertinent sense, it has less trouble quantifying the economic impact of the industries identified as examples. UNESCO observes that flows in this area have “grown exponentially” over recent decades, with “annual world trade of printed matter, literature, music, visual arts, cinema, photography, radio, television, games and sporting goods surg[ing] from US\$95.340 to \$387.927 millions” between 1980 and 1998. The extraordinary “global reach of the North American film industry” is likewise observed, Hollywood reportedly bringing in half of its revenues overseas – up from 30 percent in 1980.⁵⁰

As it happens, the gesture toward economic impacts suggests – if inadvertently – a potential clarification of what we actually mean when we talk about “culture” in the context of trade. Oliver Goodenough has distinguished

⁴⁹ United Nations Educational, Scientific and Cultural Organization [hereinafter UNESCO], *Culture, trade and globalisation: Questions and Answers*, nos. 1, 2, available at http://www.unesco.org/culture/industries/trade/html_eng/question.shtml (accessed Aug. 31, 2006).

⁵⁰ *Id.*, nos. 3, 4.

between “high” culture, by which he refers to “opera, ballet, classical music,” and the like, and “popular” culture, “such as entertainment film and television, pop music, popular fiction, popular journalism, ‘soft’ news, and commercial architecture.” Though certainly “neither fully descriptive nor fully discrete,” Goodenough’s distinction does permit a refinement of the debate. As he observes, “the fight here is seldom over ‘high’ culture.” The United States, like many other nations, “openly subsidize[s] opera, ballet and fine arts and nobody complains.” What is really at stake is control over the flow of, and capacity to profit from, popular culture. “This is the intrusive stuff, and this is where there is money at stake.”⁵¹

Viewed in this light, a precise definition of “culture” would appear to be less crucial. The legal and normative legitimacy of national governments undertaking to identify and protect such industries is addressed below,⁵² but for the moment it will suffice to observe that what we are after is less a comprehensive concept of “culture” than a pragmatic delineation of industries, the broad-stroke cultural impact – and profit potential – of which are substantial enough both to lead well-healed producers to look abroad for new markets, and to lead cultural ministries and trade negotiators to think twice before allowing them in.

B. Knowing Culture Backward and Forward

Before turning to the degree of recognition currently accorded cultural products under existing trade regimes, however, there is an additional refinement of the “culture” concept that serves further to clarify what is – and what is not – at stake in the debate about trade and culture. C. Edwin Baker has observed that free trade advocates “typically invoke ... a ‘museum,’ ‘commodity,’ or ‘artifact’ conception of culture,” which implicitly characterizes claims regarding cultural values as “relatively static, largely *backward*-looking, and very much *content*-oriented.” If this is what “culture” means, then protectionist policies are vulnerable to the charge that they represent an effort by the powerful – who may benefit from prevailing conceptions of national culture

⁵¹ Goodenough, *supra* note 8, at 209-10. Goodenough further identifies a third category, termed “ethnic” culture, “such as ‘folk’ music, ‘folk’ dance, story-telling and folklore, ‘traditional’ arts, craftwork, and vernacular architecture.” *Id.* at 209. See also Alan Riding, *American culture: A French appreciation*, INT’L HERALD TRIB., Dec. 28, 2006, at 8, available at Lexis (observing that “nonprofit foundations, philanthropists, corporate sponsors, universities and community organizations” that promote cultural undertakings in the United States “in practice do receive indirect government support in the form of tax incentives”).

⁵² See *infra* part VI.

– to keep out the winds of “liberating change” from abroad.⁵³ In actuality, however, cultural protectionism is typically underwritten by a very different notion, which Baker terms “the ‘discourse’ or ‘dialogic’ conception of culture.” Used in this way, “culture” refers to “a living practice” in which “it matters who the speaker and who the audience are,” though others to be sure may listen and find universal value in what is communicated. An element of shared “heritage” is relevant, but only as a conceptual context for “discourses of identity and value” in the present and future. The cultural protectionist, then, aims not to protect “specific, backward-looking content,” but rather “to assure an adequate context for participation in cultural, social, and democratic dialogue and to provide resources needed for dialogic participation by all members of the cultural community” – including “meaningful opportunities to be cultural ‘speakers.’”⁵⁴

Thus it would appear that pro-trade and protectionist voices in the trade and culture debate essentially speak past one another, though as it is the actions of protectionists that tend to be the principal subject of debate, one might rather describe this state of affairs as an obfuscation of what is actually going on, and what is actually at stake, by pro-traders in particular. Deriving substantial rhetorical benefit from the ultimate indeterminacy of “culture,” pro-traders emphasize the resulting inability to define precisely what protectionists would have us regulate, looking past the fact that there is actually a relatively discrete set of *popular*-cultural industries to which cultural protectionists direct their strongest claims. And deriving political benefit from the characterization of cultural protectionists as power-hungry mind-controllers endeavoring to keep foreign influences out in order to perfect a static, self-serving conception of national culture, they likewise ignore that cultural protectionist arguments tend to be forward-looking and discourse-oriented, aiming at the creation of speech opportunities where market forces might have precluded them.⁵⁵

⁵³ C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 249-50 (New York: Cambridge University Press, 2002).

⁵⁴ *Id.* at 250-51. Sarah Owen-Vandersluis has similarly drawn a distinction between “market-based” and “community-based” modes of cultural policy, the difference lying (at least in part) in the presumed means of preference formation – the former emphasizing the individual and the latter emphasizing participation in the collective construction of culture. See SARAH OWEN-VANDERSLUIS, *ETHICS AND CULTURAL POLICY IN A GLOBAL ECONOMY* 27-41 (2003).

⁵⁵ It has been observed that the identification of autonomy and meaningful choice with unfettered market exchange is deeply embedded in the psychology of welfare economics. See, e.g., OWEN-VANDERSLUIS, *supra* note 54, at 40-49. It should be observed, however, that this is not inconsistent with the claim that the rhetoric of liberalism has been consciously deployed in a strategic manner, as this paper will argue *infra*.

III. The “Culture Exception” and Agreeing to Disagree

Literally hundreds of trade agreements – bilateral, regional, and multilateral – have been negotiated over recent decades,⁵⁶ and their treatment of cultural products differs as greatly as the historical circumstances, national interests, and relative negotiating leverage of the parties that have entered into them.

A. General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade, originally signed in 1947 and incorporated into the WTO agreements (along with various protocols and understandings, the GATT), forms the historical and conceptual core of the world trading system.⁵⁷ The most important undertakings that a country makes pursuant to the GATT are so-called “most-favoured-nation treatment” (MFN) and “national treatment” under Articles I and III, respectively. MFN treatment requires generally that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁵⁸ In other words, the best treatment extended to any has to be extended to all. National treatment, then, provides generally that “products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject ... to internal taxes or other internal charges of any kind in excess of those applied ... to like domestic products.”⁵⁹ In other words, do unto others as you do unto yourself. Terms such as “like products” obviously leave ample room to litigate,⁶⁰ but the basic commitments are conceptually straightforward.

The GATT, since its inception in 1947, has included provisions ostensibly giving national governments some room to maneuver when it comes to cultural

⁵⁶ In addition to the WTO agreements themselves, the WTO indicates that the GATT received notifications of 124 regional trade agreements (including bilaterals) between 1948 and 1994, and that the WTO, since its creation in 1995, has received notification of over 130 more. See World Trade Organization, *Regional Trade Agreements: Facts and figures*, available at http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (accessed Sept. 13, 2006). For lists of these agreements, see World Trade Organization, *Regional Trade Agreements*, available at http://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed Sept. 13, 2006).

⁵⁷ See General Agreement on Tariffs and Trade 1994 [hereinafter GATT], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

⁵⁸ *Id.*, art. I:1.

⁵⁹ *Id.*, art. III:2.

⁶⁰ See, e.g., Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS11/AB/R (Oct. 4, 1996) (among other things, affirming a Panel’s finding that shochu and vodka are “like products” and that Japan violated GATT Article III:2 by taxing imported vodka more heavily).

goods. Article IV permits “screen quotas” that “require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized ... in the commercial exhibition of all films of whatever origin.”⁶¹ This provision reflects the fact that the film industry in Europe, “slowly recovering from the devastation of World War II” at the time of the GATT’s signing, had just witnessed the post-war release of years of pent-up Hollywood supply – literally thousands of American films – that had not been previously released in Europe due to the war.⁶² Additionally, Article XX includes more broadly worded language creating a general exception for measures “necessary to protect public morals” and those “imposed for the protection of national treasures of artistic, historic or archaeological value.”⁶³

It would be quite a stretch, however, to characterize such provisions as creating a “culture exception” from the GATT regime. The more explicit of these provisions applies specifically to “commercial exhibition” of films, suggesting that this exception should not even reach, say, televised films, let alone made-for-television programming.⁶⁴ And the more general exception for protecting “national treasures of artistic, historic or archaeological value” would not appear to embrace the category of “popular” culture very comfortably.⁶⁵ Actual “culture exceptions” would come only later, and in regional settings.

B. Free Trade in North America

Something approaching a true culture exception appears in the North American Free Trade Agreement (NAFTA), as between Canada and each of the United States and Mexico (but interestingly, not as between the United States and Mexico). Its practical utility to Canada is substantially undercut, however, by an accompanying provision of the agreement.

⁶¹ GATT, *supra* note 57, art. IV(a).

⁶² See Hernan Galperin, *Cultural Industries in the Age of Free-Trade Agreements*, 24 CAN. J. COMM. (1999), available at <http://info.wlu.ca/~wwwpress/jrls/cjc/BackIssues/24.1/galperin.pap.html> (accessed Aug. 30, 2006).

⁶³ GATT, *supra* note 57, art. XX(a), (f). The GATT also includes a general safety-valve provision permitting the suspension of obligations under certain circumstances where imports “cause or threaten serious injury to domestic producers ... of like or directly competitive products.” *Id.*, art. XIX.

⁶⁴ See Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect Or Is It Affected By the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 287-89 (1997), available at Lexis; see also Galt, *supra* note 42, at 912.

⁶⁵ See Galt, *supra* note 42, at 913. This general exception has, however, been read aggressively by some to embrace “copyrightable goods.” See Cahn & Schimmel, *supra* note 64, at 284-85.

In the pre-existing Canada-U.S. Free Trade Agreement (CUSFTA), negotiated under the pro-market administrations of Ronald Reagan and Brian Mulroney, a broadly worded culture exception was coupled with a provision permitting retaliation for its use.⁶⁶ Article 2005 of the CUSFTA provides generally that “[c]ultural industries are exempt from the provisions of this Agreement,” but that either party could nevertheless “take measures of equivalent commercial effect in response to [such] actions.”⁶⁷ The practical upshot was that an exception intended to comfort the Canadian cultural sector was effectively blunted by a mechanism ensuring that cultural products would be treated like others.⁶⁸

The NAFTA goes no further than the CUSFTA did, simply incorporating by reference the aforementioned provisions of the prior agreement. NAFTA Article 2106 and the accompanying annex provide generally that cultural industries, as between Canada and each of the United States and Mexico (but not as between the latter two parties⁶⁹), would be governed by the applicable provisions of the CUSFTA⁷⁰ – including the retaliation provision. While Canada has argued that the United States’ capacity to retaliate under NAFTA should be limited to Canadian measures that would violate the CUSFTA, which did not extend to audiovisual services and intellectual property rights, U.S. officials have rejected this interpretation and have not shied away from threatening retaliation in the

⁶⁶ See Boryskavich & Bowler, *supra* note 24, at 28-30.

⁶⁷ Canada-U.S. Free Trade Agreement [hereinafter CUSFTA], art. 2005, Jan. 2, 1988, *available at* <http://www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf> (accessed Sept. 14, 2006). *See also id.*, art. 2012 (defining “cultural industry”).

⁶⁸ See Boryskavich & Bowler, *supra* note 24, at 30.

⁶⁹ Galperin suggests that Mexico’s relative lack of concern regarding U.S. cultural products results from “a combination of relatively strong domestic industries, the limited appeal of American products in some sectors due to cultural distance factors, and the neoliberal orientation of its communication policies.” Galperin, *supra* note 62.

⁷⁰ North American Free Trade Agreement [hereinafter NAFTA], art. 2106 and Annex 2106, Dec. 17, 1992, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (accessed Sept. 14, 2006). For additional background on Canada’s cultural policies and the range of international agreements impacting Canada’s cultural products, see Media Awareness Network, *Canadian Content Rules (Cancon)*, *available at* http://www.media-awareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm (accessed Aug. 31, 2006); Media Awareness Network, *Canada’s Cultural Policies*, *available at* http://www.media-awareness.ca/english/issues/cultural_policies/canada_cultural_policies.cfm (accessed Aug. 31, 2006); Media Awareness Network, *International Agreements and Canadian Identity*, *available at* http://www.media-awareness.ca/english/issues/cultural_policies/international_agreements.cfm (accessed Aug. 31, 2006); Media Awareness Network, *Media and Canadian Cultural Policies Chronology*, *available at* http://www.media-awareness.ca/english/issues/cultural_policies/cultural_policy_chronology.cfm (accessed Aug. 31, 2006).

audiovisual sector.⁷¹ Indeed, it has been observed that the capacity to retaliate in the cultural products context under the NAFTA is even more substantial than in other areas, in that retaliation is “only available under normal trade rules after a process of dispute settlement and the opportunity to remedy the offending action or to offer compensation.”⁷² Moreover, it is widely agreed that retaliatory action is not limited to such cultural industries themselves,⁷³ such that the United States would be permitted to impose a *de facto* tax-and-transfer within Canada, for the benefit of Canada’s cultural industries, and to the detriment of whatever industry the United States decided to hit – presumably chosen to maximize the detriment to Canadian interests overall.⁷⁴

More recently, Canada has continued to advocate substantial latitude for domestic cultural policies in a broader “regional” forum. The Free Trade Area of the Americas (FTAA), which would create a free trade area embracing the 34 democratic countries of the Western Hemisphere (thus excluding Cuba), has been under negotiation since 1994, and has foundered on a number of contentious trade and related issues.⁷⁵ Among other things, Canada has insisted that language on cultural products be included in the FTAA’s preamble, and has further advocated a comprehensive culture exception,⁷⁶ both of which appear (bracketed) in the current FTAA draft.⁷⁷

⁷¹ See W. A. Dymond & Michael M. Hart, *Abundant Paradox: The Trade and Culture Debate* (Nov. 2001), at 5-6, available at <http://www.carleton.ca/ctpl/pdf/papers/culture.pdf> (accessed Aug. 29, 2006); Cahn & Schimmel, *supra* note 64, at 308-10.

⁷² Dymond & Hart, *supra* note 71, at 5.

⁷³ See Cahn & Schimmel, *supra* note 64, at 310.

⁷⁴ See, e.g., OWEN-VANDERSLUIS, *supra* note 54, at 142 (observing that retaliation against Canada threatened by the United States in connection with a dispute over trade in periodicals would have applied “across-the-board ..., including key sectors such as steel and finance,” an approach “meant to create divisions within Canadian society” and bring internal pressure to bear upon the Canadian government).

⁷⁵ See generally Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)*, 33 U. MIAMI INTER-AM. L. REV. 1 (2002).

⁷⁶ See *Cultural Diversity in the FTAA – Canada’s Position* (updated Oct. 1, 2003), available at <http://www.dfait-maeci.gc.ca/tna-nac/C-P&P-en.asp> (accessed Aug. 28, 2006); *Cultural Diversity in the FTAA – Canada’s Position: Government of Canada Paper on Cultural Diversity in the FTAA Negotiations* (Feb. 2003), available at http://www.dfait-maeci.gc.ca/tna-nac/cpp_neg-en.asp (accessed Aug. 28, 2006); *Canada’s Proposal for a Cultural Exemption* (updated Sept. 23, 2003), available at <http://www.dfait-maeci.gc.ca/tna-nac/FTAA/culture-en.asp> (accessed Aug. 28, 2006).

⁷⁷ Free Trade Area of the Americas Draft Agreement, Preamble, ch. XXII art. 7, Nov. 21, 2003, available at http://www.ftaa-alca.org/FTAADraft03/Index_e.asp (accessed Aug. 29, 2006).

C. The European Union: Unity and Diversity

It would not be an overstatement to say that cultural concerns lay at the very heart of the European project, though European cultural policies reflect an uneasy division of competencies between national and continental authorities.

Article 151 of the Treaty Establishing the European Community provides that the Community “shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”⁷⁸ – generally referred to as the principle of “unity in diversity.”⁷⁹ Articulating wherein that “unity” resides, however – or more precisely, saying what it means to be “European” – has proven difficult. Article 49 of the Treaty on European Union provides that any “European” country “may apply to become a member of the Union,”⁸⁰ though “European” is never defined, and some have contended that the European Union (EU) “needs a stronger identity to be viable.”⁸¹ The theme of “unity in diversity” is also emphasized in the Charter of Fundamental Rights of the European Union, the preamble of which notes the “common values” of Europe – including “human dignity, freedom, equality and solidarity,” as well as “principles of democracy and the rule of law” – and characterizes the EU as “contribut[ing] to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.”⁸² The Charter affirms both “the right to freedom of expression,” including the freedom “to receive and impart information and ideas without interference by public authority and regardless of frontiers,” while at the same time stating that the EU “shall respect cultural, religious and linguistic diversity.”⁸³

The project of European integration has long been marked by the struggle to forge a coherent European identity, and one of the means through which policymakers have endeavored to achieve this is through a continental

⁷⁸ Consolidated Version of the Treaty Establishing the European Community, art. 151, Dec. 24, 2002, 2002 O.J. (C325/33).

⁷⁹ EurActiv, *European values and identity*, updated May 23, 2006, available at http://www.euractiv.com/en/constitution/eurpean-values-identity/article-154441?_print (accessed Aug. 24, 2006).

⁸⁰ Consolidated Version of the Treaty on European Union, art. 49, Dec. 24, 2002, 2002 O.J. (C325/5).

⁸¹ EurActiv, *European values and identity*, *supra* note 79.

⁸² Charter of Fundamental Rights of the European Union, Preamble, Dec. 7, 2000, 2000 O.J. (C364/8).

⁸³ *Id.*, arts. 11:1, 22.

audiovisual policy embodied in the “Television Without Frontiers” Directive.⁸⁴ According to a preceding green paper, both unity and diversity could be achieved through a common liberalized audiovisual policy precisely because such an approach would help identify a “common European heritage” as broadcasters competed for pan-European audience share.⁸⁵ In practice, however, the liberalization of European audiovisual markets has not resulted in the coalescence of a truly European media landscape. As one scholar put it, “the idea that the free flow of cultural products would bring to the fore the ‘common European identity,’ thus creating a pan-European audience, has proven overly simplistic.”⁸⁶

Indeed, recent surveys suggest that Europeans still tend to think of themselves in predominantly national terms, one study finding that just 47 percent of respondents considered themselves citizens both of their country and Europe, and that 92 percent felt greater attachment to their home countries.⁸⁷ Ironically, the liberalization of audiovisual policy may have made things worse: “European culture, never a well-defined concept to begin with, is becoming the culture of those Member States who have the most competitive media corporations – France, the United Kingdom, and Germany.”⁸⁸ Though some, like former European Commission President Jacques Delors, urge that Europeans

⁸⁴ See Council Directive 89/552/EEC 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; Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [hereinafter, together, the Amended TWF Directive], each available at <http://europa.eu/scadplus/leg/en/lvb/l24101.htm> (accessed Sept. 14, 2006). Efforts to update and modernize the Television Without Frontiers Directive continue. See *Legislative Proposal for an Audiovisual Media Services Directive: Towards a modern framework for audiovisual content*, available at http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm (accessed January 25, 2007).

⁸⁵ Galperin, *supra* note 62 (internal quotation marks omitted).

⁸⁶ *Id.*

⁸⁷ See EurActiv, *European values and identity*, *supra* note 79.

⁸⁸ Middleton, *supra* note 18, at 625. Similarly, Owen-Vandersluis observes that the liberalism at the heart of the common market project substantially narrows the scope of cultural “diversity” compatible with it; there is a level of comfort in “giving primacy to the community and espousing diversity precisely because it views liberal values as the only natural basis for that community.” Owen-Vandersluis presciently anticipates greater tension, however, as expansion of the European Union introduces a degree a cultural “diversity” that increasingly confounds attempts to specify the content of the much heralded “European identity.” OWEN-VANDERSLUIIS, *supra* note 54, at 171-72.

“proceed further in this quest for a European identity,”⁸⁹ it has remained difficult – particularly in light of enlargement concerns – to say what European identity might amount to, other than by contrast with America.⁹⁰ Similarly, regarding the failure of a truly European polity to emerge, one observer suggested that a “factor that could help” forge such a polity was “growing anxiety among Europeans about US hegemony.”⁹¹

Nevertheless the EU, spearheaded by France, has strongly defended at the global level the capacity of member states to pursue cultural policies. As described below, the EU steadfastly refused to make liberalization commitments on audiovisual services within the WTO framework,⁹² and the EU Parliament has more recently expressed continued support for the European Commission’s approach to the Doha round of WTO negotiations, making “no offers of liberalisation ... in the health, education and audiovisual sectors,” and affirming that “each Member State should have the legal flexibility to take all necessary measures in the areas of cultural and audiovisual policy so as to preserve and promote cultural diversity.”⁹³

⁸⁹ Jacques Delors, *Europe’s self-doubting also proves to be asset*, SUNDAY PATRIOT-NEWS (Harrisburg), Sept. 17, 2000, at B15, available at Factiva.

⁹⁰ See Sarah Lyall, *Under One Flag: For young Europeans, identity questions*, INT’L HERALD TRIB., March 5, 2004, available at http://www.ihl.com/bin/print_ipub.php?file=/articles/2004/03/05/flag5_ed3_.php (accessed Sept. 6, 2006). On the failed constitutional referenda in France and the Netherlands and the relationship to national politics, notably concerns regarding the voting structure in an expanded EU, see generally Baldwin, *supra* note 41. See also EurActiv, *Merkel: EU needs a rethink*, updated Aug. 22, 2006, available at http://www.euractiv.com/en/agenda2004/merkel-eu-needs-rethink/article-155193?_print (accessed Aug. 24, 2006) (German Chancellor Angela Merkel arguing that “[w]e need the constitutional treaty,” and that including a “catalogue of European fundamental values” would help to clarify a European identity, internal quotation marks omitted). Like the treaties it would replace, the proposed constitution is open to “European” countries (undefined), and includes the “unity in diversity” principle. Treaty Establishing a Constitution for Europe, arts. I-58 and III-280, Dec. 16, 2004, 2004 O.J. (C 310/1).

⁹¹ Raphael Minder, *‘Elections fought on Europe-wide themes have failed to materialise,’* FIN. TIMES, June 7, 2004, at 11. Minder likewise observes the weakness of the EU Parliament, the only directly representative EU institution. *Id.*; cf. MICHAEL EFLER & PERCY ROHDE, CRITICAL ANALYSIS OF THE DEMOCRATIC ASPECTS OF THE EU, English translation of German version for Mehr Demokratie e.V., at 17, May 5, 2005, available at http://www.mehr-demokratie.de/fileadmin/bund/pdf/EU-Kritik_20050505_en.pdf (accessed Sept. 6, 2006) (observing the absence of a truly European polity and advocating greater direct democratic participation in EU institutions).

⁹² See Galt, *supra* note 42, at 914.

⁹³ European Parliament resolution on the General Agreement on Trade in Services (GATS) within the WTO, including cultural diversity, ¶¶ 6, 12, EUR. PARL. DOC. P_5TA(2003)0087 (2003).

D. General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS), another agreement incorporated into the WTO framework,⁹⁴ creates obligations more modest in scope than those under the GATT – reflecting in large part the influence of France in its negotiation. In the face of “very powerful lobbying from the US film industry that market access for its products was a key negotiating issue,”⁹⁵ France pushed for the opposite extreme – complete “exclusion of the audiovisual sector from GATS talks.”⁹⁶ Ultimately the parties settled on an uneasy “Agreement to Disagree,” under which the audiovisual sector would not be formally excluded, but countries could decline to make commitments in the area with the understanding that negotiations would resume within five years.⁹⁷ For purposes of on-going negotiations, the WTO has described “audiovisual services” as including “motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services, [and] sound recording.”⁹⁸ As digital technologies advance, however, the substantive distinction between goods and services of this sort appears increasingly arbitrary.⁹⁹

⁹⁴ General Agreement on Trade in Services [hereinafter GATS], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B.

⁹⁵ Cable, *supra* note 19, at 234.

⁹⁶ Cahn & Schimmel, *supra* note 64, at 295. France played a similar role in the failed effort toward a Multilateral Agreement on Investments (MAI), withdrawing from MAI negotiations with concerns regarding labor, the environment, and “particularly ... the ability of governments to apply policies for the development and promotion of strategic sectors such as cultural industries.” UNESCO, *Culture, trade and globalisation: Questions and Answers*, *supra* note 49, no. 20.

⁹⁷ See Galt, *supra* note 42, at 914; Cahn & Schimmel, *supra* note 64, at 291-301; Galperin, *supra* note 62, at 15. Very few commitments affecting popular culture have been made. See Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT’L ECON. L. 515, 526 (2006).

⁹⁸ World Trade Organization, *Audiovisual services*, available at http://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm (accessed Oct. 27, 2005). The WTO Secretariat has observed that it can be difficult to distinguish “radio and television transmission services” characterized as “telecommunications” from those characterized as “audiovisual services,” but that as “a general rule of thumb ... it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications.” World Trade Organization Council for Trade in Services, *Audiovisual Services: Background Note by the Secretariat*, at 2, S/C/W/40, June 15, 1998.

⁹⁹ Michael Hahn observes that it is largely “arbitrary from a policy standpoint that a Hollywood blockbuster would be subjected to a completely different legal regime if it was to be projected onto foreign screens not from a cinematographic film [a good governed by GATT], but by using

Article XVII of the GATS requires that national treatment be extended by a country only to services sectors “inscribed in its Schedule, and subject to any conditions and qualifications set out therein.”¹⁰⁰ Article XIX, then, requires that “Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization.” Crucially, however, Article XIX also includes a limiting principle, providing that this “process of liberalization shall take place with due respect for national policy objectives.”¹⁰¹ This limiting principle, it is argued below, is crucial to understanding the purpose and practical significance of UNESCO’s Culture Convention, which above all else speaks to a national policy objective of great importance to the countries that adopted it, and further requires that the principles it embodies be taken into account in negotiations in other fora.

E. Bilateral Trade with the United States

While multilateral GATS negotiations have taken the so-called “positive” approach to liberalization, applying trade disciplines only in those sectors explicitly scheduled, the United States far prefers – and in recent bilateral negotiations, has pursued – the “negative” approach of imposing broad-reaching disciplines and then requiring that any deviations from liberalization be scheduled. In the bilateral negotiation setting, as Ivan Bernier has observed, the United States is much better positioned to demand the more comprehensive “negative” approach to trade liberalization, and the results are reflected in the degree of liberalization secured by the United States in bilateral agreements entered since 2002 with Chile, Singapore, Central American countries, Australia, and Morocco, respectively.¹⁰²

digitally transmitted data sent from some central distribution point [a service governed by GATS].” Hahn, *supra* note 97, at 527.

¹⁰⁰ GATS, *supra* note 94, art. XVII:1.

¹⁰¹ *Id.*, art. XIX:1-2. Services have been included in WTO negotiations since January 2000, see World Trade Organization, *Services trade*, available at http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (accessed Sept. 1, 2006), but these negotiations were suspended in July 2006 due to lack of overall progress, notably in agriculture. See Report of Director-General Pascal Lamy, chair of the Trade Negotiations Committee, to the General Council, July 27, 2006, available at http://www.wto.org/english/news_e/news06_e/tnc_chair_report_27july06_e.htm (accessed Sept. 1, 2006).

¹⁰² See Ivan Bernier, *The Recent Free Trade Agreements of the United States as Illustration of Their New Strategy Regarding the Audiovisual Sector*, available at http://www.mcc.gouv.qc.ca/diversite-culturelle/eng/pdf/conf_seoul_ang_2004.pdf (accessed Sept. 15, 2006).

Beyond use of the negative approach, Bernier identifies some interesting trends that emerge in these negotiations. First, the United States has gladly permitted limited reservations for existing quotas and other restrictions keyed to “traditional technologies,” saving its sterner demands for the digital technologies of the future. And second, the relative ability of these negotiating parties to withstand American demands for liberalization of trade in cultural products “reflect quite accurately the negotiating capacity of the States involved” – meaning that “as usual, the least able to protect themselves ... end up paying the higher price.”¹⁰³ Australia, “the only developed country among the States involved in the recent trade agreements,” insisted upon “the most elaborate and complex of all lists of reservations in the audiovisual sector,” among other things preserving existing quotas for commercial television and commercial radio. “The only thing that was lost in that regard was the capacity to adopt higher quotas or more restrictive measures.”¹⁰⁴ Likewise Singapore and Chile managed to include relatively significant reservations, as did Costa Rica and the Dominican Republic, parties to the Central American Free Trade Agreement (CAFTA), and Morocco.¹⁰⁵ At the other end of the spectrum, however, the least affluent participants in the CAFTA negotiations – Guatemala, Honduras, El Salvador, and Nicaragua – evidently “all opted to leave their audiovisual sector wide open to imports.”¹⁰⁶ Indeed, it is interesting to note that Bernier’s conclusions regarding the relative ability of these countries to withstand U.S.

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.* at 13. The United States and Australia, of course, each presented the agreement as a victory to their constituents. Whereas the Office of the U.S. Trade Representative claimed that in “broadcasting and audiovisual services, the FTA contains important and unprecedented provisions to improve market access for U.S. films and television programs over a variety of media including cable, satellite, and the Internet,” emphasizing the new technologies, Australia’s Department of Foreign Affairs and Trade focused rather on the maintenance of “existing local content requirements” as well as “Australia’s right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements.” See Press Release, Office of the United States Trade Representative, U.S. and Australia Complete Free Trade Agreement: Trade Pact With Australia Will Expand U.S. Manufacturing Access to Key Pacific Rim Market, Press Release No. 04-08, Feb. 8, 2004; Australian Government, Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*, available at http://www.dfat.gov.au/trade/negotiations/us_fta/backgroundunder/audiovisual.html (accessed Sept. 6, 2006); see also Australian Government, Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement: Key Outcomes*, available at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/02_key_outcomes.html (accessed Sept. 6, 2006).

¹⁰⁵ Bernier, *supra* note 102, at 10-15.

¹⁰⁶ *Id.* at 11-12.

demands for liberalization of cultural products map well onto per capita gross domestic product for each of these countries.¹⁰⁷

In any event, the bilateral setting would appear to offer the United States enormous benefits in terms of the capacity to establish useful precedents for future negotiations in other fora.¹⁰⁸ It is considerably easier for the United States to get what it wants in bilateral negotiations than it is multilateral negotiations, and Bernier's analysis clearly bears this out in the context of recent bilateral negotiations including commitments on cultural products. At the same time, however, commitments undertaken by countries that ratify UNESCO's Culture Convention would seem – at least in theory – to problematize U.S. trade strategies in the bilateral context just as much as in the multilateral context. Again, the Culture Convention requires that “when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention”¹⁰⁹ – a commitment that would apply in bilateral and regional fora just as it would at the multilateral level. Less affluent countries negotiating one-on-one with the United States will undoubtedly remain subject to greater pressure to liberalize trade in cultural products, as in other areas,¹¹⁰ but the Culture Convention could nevertheless present a real legal and diplomatic hurdle to the attainment of the United States' trade agenda if bilateral negotiating parties can point to existing international legal obligations toward the preservation of cultural diversity.

IV. UNESCO and Cultural Diversity

UNESCO, like the GATT, was born of a post-war desire to secure the peace by facilitating international connections and modes of exchange. Just as the architects of the GATT believed that the extreme protectionism of the 1930s had contributed to the outbreak of war, and that free trade constituted an essential

¹⁰⁷ According to the International Monetary Fund's World Economic Outlook Database, the purchasing-power-parity per capita gross domestic product of each of these countries (in current international dollars) for 2006 is estimated to be: Australia, \$32,127.483; Singapore, \$29,742.848; Chile, \$12,737.111; Costa Rica, \$10,747.292; Dominican Republic, \$8,018.117; Morocco, \$4,818.552; El Salvador, \$4,619.982; Guatemala, \$4,265.803; Nicaragua, \$3,769.531; and Honduras, \$3,130.951. International Monetary Fund, World Economic Outlook Database, *available at* <http://www.imf.org/external/pubs/ft/weo/2006/02/data/index.aspx> (accessed Sept. 15, 2006).

¹⁰⁸ For an exploration of such negotiating tactics in the FTAA negotiations, see Bruner, *supra* note 75, at 38-52.

¹⁰⁹ Culture Convention, *supra* note 27, art. 20:1(b).

¹¹⁰ See, e.g., International Centre for Trade and Sustainable Development (ICTSD), *UNESCO Overwhelmingly Approves Cultural Diversity Treaty*, 9 BRIDGES WKLY. TRADE NEWS DIG., Oct. 26, 2005, *available at* <http://www.ictsd.org/weekly/05-10-26/story4.htm> (accessed Sept. 7, 2006).

step in achieving economic recovery, stability, and security,¹¹¹ so UNESCO's founders stated in the organization's 1945 constitution that "ignorance of each other's ways and lives has been a common cause ... of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war," and that "the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind."¹¹²

The primary purpose of UNESCO, then, is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed ... by the Charter of the United Nations."¹¹³ Crucial questions, of course, include how UNESCO best achieves this, and what specific goals the organization can pursue consistent with this expressed purpose. UNESCO's constitution identifies certain means of "realiz[ing] this purpose," including recommending "such international agreements as may be necessary to promote the free flow of ideas by word and image"¹¹⁴ – language well suited to the United States' liberalizing agenda in today's trade and culture debate.¹¹⁵ At the same time, however, UNESCO's constitution does recognize and endorse the preservation of "the independence, integrity and fruitful diversity of the cultures and education systems of the States Members of the Organization."¹¹⁶ Although this language technically goes to what the organization will refrain from doing (i.e. interfering in domestic policy), there is broader language that further legitimates UNESCO's actions in the area of cultural diversity – notably, its mandates to "[c]ollaborate in

¹¹¹ WTO Director-General Renato Ruggiero, *From Vision to Reality: The Multilateral Trading System at Fifty*, Address to the Brookings Institution Forum "The Global Trading System: A GATT 50th Anniversary Forum," Mar. 4, 1998, *available at* http://www.wto.org/english/news_e/sprr_e/wash_e.htm (accessed Sept. 16, 2006).

¹¹² Constitution of UNESCO, Preamble, Nov. 16, 1945, *available at* http://portal.unesco.org/en/ev.php-URL_ID=6206&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed Sept. 15, 2006).

¹¹³ *Id.*, art. I:1.

¹¹⁴ *Id.*, art. I:2(a).

¹¹⁵ *See, e.g.,* Oliver, *supra* note 47, Statement to 33rd UNESCO General Conference, Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (U.S. Ambassador Louise Oliver citing this language in explaining the United States' no vote on the Culture Convention). Incidentally, the United States has also emphasized its role in the founding of UNESCO, including the drafting of the preamble to UNESCO's constitution by American author Archibald MacLeish. *See* U.S. Department of State, *About U.S. and UNESCO*, *available at* <http://www.state.gov/p/io/unesco/usunesco/> (accessed Sept. 15, 2006).

¹¹⁶ Constitution of UNESCO, *supra* note 112, art. I:3.

the work of advancing the mutual knowledge and understanding of peoples”; to further conservation of “books, works of art and monuments of history and science”; and to facilitate “methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.”¹¹⁷ Though none of this speaks directly to cultural protectionist policies of the type later embraced in an era of globalization – unsurprising, given the recent history of extreme isolationism and global war preceding UNESCO’s creation in 1945 – these broadly worded mandates do suggest that the organization’s founders envisioned it pursuing various courses of action to further mutual understanding among the peoples and cultures of the world. The Culture Convention, which aims to legitimate the use of domestic policies not to keep foreign words and images out, but to preserve the means of local cultural production – expected to redound to the benefit of other cultures as well¹¹⁸ – would appear in harmony with UNESCO’s broad purpose.

A. Culture as Organism

UNESCO has facilitated the adoption of a number of instruments relating to cultural preservation,¹¹⁹ which have increasingly conceptualized cultural diversity as a form of public good. Notably, in the Universal Declaration on Cultural Diversity (UDCD) adopted in 2001, cultural diversity, “embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind,” is described as being “as necessary for humankind as biodiversity is for nature.” Cultural diversity is likened to genetic diversity; it is “a source of exchange, innovation and creativity.”¹²⁰

Elsewhere UNESCO has built on this conception, stating that “cultural ecosystems’ made up of a rich and complex mosaic of cultures, more or less powerful, need diversity to preserve and pass on their valuable heritage to future generations.”¹²¹ Having taken the position that the very diversity of cultures is itself a good, the UDCD continues that while “ensuring the free flow of ideas by

¹¹⁷ *Id.*, art. I:2.

¹¹⁸ The Culture Convention, in its Preamble, expresses the view that “cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all,” while also stating that “cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures.” Culture Convention, *supra* note 27, Preamble.

¹¹⁹ See, e.g., Recommendation on the Safeguarding of Traditional Culture and Folklore, Nov. 15, 1989; Universal Declaration on Cultural Diversity [hereinafter UDCD], Nov. 2, 2001; Charter on the Preservation of Digital Heritage, Oct. 15, 2003; Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003; see also Brooks, *supra* note 9, at 114-20.

¹²⁰ UDCD, *supra* note 119, art. 1.

¹²¹ UNESCO, *Culture, trade and globalisation: Questions and Answers*, *supra* note 49, no. 18.

word and image” is obviously important, “care should be exercised that all cultures can express themselves and make themselves known.”¹²² If the aim to limit the perceived homogenizing influence of free trade were not already clear enough, the UDCD adds that “cultural goods and services ... as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.”¹²³ Because “[m]arket forces alone cannot guarantee the preservation and promotion of cultural diversity,” each country must, “with due regard to its international obligations, ... define its cultural policy and ... implement it through the means it considers fit.”¹²⁴

That this should not come at the expense of individual rights of free speech and expression – including the right to receive information of one’s choosing – is reflected in the uneasy use of qualifiers (“While ensuring the free flow of ideas by word and image ...”; “While ensuring the free circulation of ideas and works ...”).¹²⁵ But at the same time, the document refers explicitly to guarantees of “cultural rights” – that is, the right to participate in the cultural life of one’s community – appearing in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.¹²⁶

Perhaps most significantly, however, the UDCD asserts that “the pre-eminence of public policy ... must be reaffirmed,”¹²⁷ suggesting that in the view of those standing behind this document, the political prerogative had been displaced by liberal economics. The attached action plan, then, places at the top of the list “consideration of the advisability of an international legal instrument on cultural diversity,”¹²⁸ a step presumably aimed at bolstering the reassertion of domestic policy autonomy in an area increasingly dominated by free trade obligations.

B. The United States’ Love-Hate Relationship with UNESCO

Notwithstanding its involvement in the organization’s founding, the United States actually parted ways with UNESCO for about twenty years starting in 1984, a move described by the State Department as reflecting “a growing

¹²² UDCD, *supra* note 119, art. 6.

¹²³ *Id.*, art. 8.

¹²⁴ *Id.*, arts. 9, 11.

¹²⁵ *Id.*, arts. 6, 9.

¹²⁶ *Id.*, art. 5. See also Universal Declaration of Human Rights, art. 27, Dec. 10, 1948, available at <http://www.un.org/Overview/rights.html> (accessed Sept. 16, 2006); International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR], arts. 13, 15, Jan. 3, 1976, available at http://www.unhcr.ch/html/menu3/b/a_ceschr.htm (accessed Aug. 30, 2006).

¹²⁷ UDCD, *supra* note 119, art. 11.

¹²⁸ *Id.*, Action Plan ¶ 1.

disparity between U.S. foreign policy and UNESCO goals.”¹²⁹ More specifically, the rift reflected diverging views on the propriety of “free-market dominance of the world communications order” between the United States and developing countries.¹³⁰ A 1980 UNESCO-sponsored report by a commission led by Irish diplomat Sean MacBride recommended, among other things, that public funding be made available for “non-commercial forms of mass communication” as a means of improving the communications order. Although the report specifically rejected government censorship and affirmed as basic human rights the ability to speak and receive information freely, the report was nevertheless tarred by the U.S. government and the American Bar Association as an assault on First Amendment principles. C. Edwin Baker speculates that “the U.S. response to [the report] was totally captured by an intersection of corporate interests and Cold War fears,” observing that the U.S. position “seemed to equate corporate interests – free trade and commercial dominance – with the meaning of the First Amendment and international human rights,” notwithstanding U.S. courts’ general rejection of arguments that the First Amendment should be interpreted to shield commercial media from labor, antitrust, and structural regulations.¹³¹

The United States returned to UNESCO in 2003, President George W. Bush explaining that the organization “has been reformed.”¹³² In light of the Universal Declaration on Cultural Diversity adopted in 2001, however, including what U.S. officials must have considered an ominous gesture toward a potential treaty to be negotiated in a forum in which the United States had no formal input, one might reasonably question whether the real impetus for the return to UNESCO was precisely that it had *not* “reformed,” and in fact seemed to be moving more decidedly in what U.S. officials considered the wrong direction. An unnamed “U.S. official” speaking to a journalist in the wake of the Culture Convention’s adoption reportedly “insisted that the United States did not rejoin specifically to address the cultural diversity treaty,”¹³³ but in any event, as described below, opposition to the Culture Convention – or at least the attempt to defang it – would become a major preoccupation for U.S. representatives upon rejoining UNESCO.

¹²⁹ U.S. Department of State, *About U.S. and UNESCO*, *supra* note 115.

¹³⁰ Baker, *supra* note 53, at 218.

¹³¹ *Id.* at 271-73 (internal quotation marks omitted).

¹³² U.S. Department of State, *About U.S. and UNESCO*, *supra* note 115.

¹³³ William New, *U.N. Group Oks Diversity Treaty Over U.S. Objections*, *TECH. DAILY*, Oct. 17, 2005, available at Lexis (paraphrasing an unnamed “U.S. official”).

V. The Culture Convention

Although the explicit drive toward a treaty on cultural diversity most clearly emerged within UNESCO in the 2001 Universal Declaration on Cultural Diversity, countries that felt particularly vulnerable to U.S. media domination had for years actively advocated such an international instrument. Chief among them were Canada and France¹³⁴ – developed nations and allies with whom the United States had long maintained significant trade and cultural ties.

A. Canada

Canada's concerns regarding U.S. media dominance are long-standing, the Canadian Broadcasting Corporation itself having been created in the early 20th Century amidst fears that "U.S. radio programming would dominate Canadian airwaves."¹³⁵ Today, the principal governmental body responsible for cultural policy is the Department of Canadian Heritage, and the broad range of domestic legal structures aimed at the preservation of Canadian culture includes content regulations, ownership restrictions, language policies, subsidies, and tax measures.¹³⁶ Content regulation involves a system of quotas requiring that specified amounts of "Canadian content" be broadcast through a given medium, and whether a given musical performance or television program qualifies as "Canadian" for these purposes turns generally on whether a critical mass of creative decision making was performed by Canadians.¹³⁷ In essence this system permits the employment of "Canadianness" as a regulatory concept without directly involving the government in specifying the concept's content.¹³⁸ For example, radio stations are required to "ensure that 35% of their popular musical selections are Canadian each week" (in addition to other restrictions, notably that French-language stations "ensure that at least 65% of the popular vocal music selections ... are in the French language"), and private television stations, networks and "ethnic TV" are generally required, over the course of each year, to ensure that 60 percent of daytime programming (6:00 a.m. to midnight) and 50

¹³⁴ See, e.g., Brooks, *supra* note 9, at 120 (observing that Canada and France were "the driving forces behind" the Culture Convention).

¹³⁵ Media Awareness Network, *Media and Canadian Cultural Policies Chronology*, *supra* note 70.

¹³⁶ See generally Media Awareness Network, *Canada's Cultural Policies*, *supra* note 70.

¹³⁷ See generally Media Awareness Network, *Canadian Content Rules (Cancon)*, *supra* note 70.

¹³⁸ See OWEN-VANDERSLUIS, *supra* note 54, at 130. Owen-Vandersluis points out that "Canadian" content requirements exclude residents lacking formal citizenship, as well as "cultural outsiders" desiring to participate in domestic Canadian debates, and argues that requiring "original" content – that is, content "produced for the Canadian market" – would offer a superior regulatory approach more consistent with cultural diversity concerns. *Id.* at 148-49.

percent of evening programming (6:00 p.m. to midnight) be Canadian content.¹³⁹ Whether music is sufficiently Canadian is assessed according to the “MAPL” system (generally requiring that at least two of the “music,” “artist,” “production” and “lyrics” be Canadian or the work of Canadians), and television programs can be certified as Canadian if the key producer and “creative personnel” are Canadians and “75% of service costs and post-production lab costs are paid to Canadians.”¹⁴⁰

Canada has likewise sought to protect its capacity to enact and enforce such cultural policies, as discussed above, by insisting that various trade agreements include special provisions governing cultural products or exempting them altogether.¹⁴¹ The importance of cultural policy to Canadians is reflected in the *Canadian Charter of Rights and Freedoms*, a component of the Constitution of Canada, which affirms “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication,” while providing that the Charter “be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”¹⁴²

A 1999 report produced by the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), a group advising Canada’s Department of Cultural Heritage and its Department of Foreign Affairs and International Trade, makes clear that the thrust of Canada’s cultural policy is directed at a discrete range of popular media. “Canadian books, magazines, songs, films, new media, radio and television programs reflect who we are as a people.” Globalized and increasingly liberal markets, however, had made it “more challenging to negotiate trade agreements that recognize cultural diversity and the unique nature of cultural products.” SAGIT identified and considered four possible responses to this dilemma. Canada could (1) push for a “broadly-worded cultural industries exemption” in new trade agreements; (2) make sectoral reservations for cultural industries; (3) “initiate a new international instrument, which would lay out the ground rules for cultural policies and trade”; or (4) negotiate industry-specific agreements regarding cultural policies and trade.

¹³⁹ See Canadian Radio-television and Telecommunications Commission, *Canadian Content for Radio and Television*, modified Apr. 2, 2004, available at http://www.crtc.gc.ca/eng/INFO_SHT/G11.htm (accessed Sept. 21, 2006).

¹⁴⁰ See Canadian Radio-television and Telecommunications Commission, *The MAPL System*, modified May 31, 2001, available at http://www.crtc.gc.ca/eng/INFO_SHT/R1.htm (accessed Sept. 21, 2006); Canadian Radio-television and Telecommunications Commission, *Canadian Content for Radio and Television*, *supra* note 139.

¹⁴¹ See *supra* part III.B.

¹⁴² CANADIAN CHARTER OF RIGHTS AND FREEDOMS arts. 2(b), 27, available at <http://laws.justice.gc.ca/en/charter/index/html> (accessed Aug. 28, 2006)

SAGIT concluded that the best option would be “a new international instrument on cultural diversity,” which among other things would permit countries to implement and maintain domestic legal structures promoting “cultural and linguistic diversity,” and clarify which types of measures would be permitted without raising the specter of retaliatory trade measures.¹⁴³

In its report, SAGIT observed that “cultural industries not only help us exchange ideas and experiences, they make a significant contribution to our economy.”¹⁴⁴ The economic contribution of cultural production, however, has a double-edged cultural effect, as Canada has sought not only to spur domestic cultural production and bolster the competitiveness of Canadian cultural producers, but also to lure lucrative Hollywood production across the border. Ironically, while the purpose of the former is to maintain cultural distance from the United States, the practicality of the latter depends critically on Canada’s cultural and geographic proximity to the United States.¹⁴⁵ Ultimately the impacts are difficult to ascertain, though scholars examining the effects of a tax incentive scheme aimed at attracting film producers to Manitoba found that in subsequent years foreign production activities increased substantially while Canadian production activities in the province actually declined.¹⁴⁶

Much like the view that would be reflected in the Universal Declaration on Cultural Diversity (2001),¹⁴⁷ SAGIT’s 1999 report characterizes local cultural production as a sort of public good, observing that the “Canadian government invests in promoting culture, just as it invests in other activities that benefit its citizens, such as protecting the public health, protecting the environment and maintaining a defense force.”¹⁴⁸ Many have observed that media products themselves exhibit the two principle characteristics of “public goods” in the economic sense: (1) non-exclusive use, meaning that once the media product is created, the use of the product by one person does not impinge on its use by another person (which in turn suggests that the cost of providing it to each additional person will be less than the average cost of providing it to all); and (2) non-excludability, meaning that those who do not help defray its cost can get the same benefit as those who do.¹⁴⁹ As the SAGIT report implies, however, the benefits that a society derives from maintaining its own cultural production

¹⁴³ SAGIT Report, *supra* note 15.

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g.,* Boryskavich & Bowler, *supra* note 24, at 30-39.

¹⁴⁶ *Id.* at 33.

¹⁴⁷ *See supra* part IV.A.

¹⁴⁸ SAGIT Report, *supra* note 15.

¹⁴⁹ *See, e.g.,* BAKER, *supra* note 53, at 8-9; Galperin, *supra* note 62.

capacities – “a better understanding among people in Canada,” “a healthy multicultural society,” “a sense of community”¹⁵⁰ – is also, in a broader sense, a sort of public good that, in the SAGIT’s view, only government policy can facilitate with concerted effort. Just as the very same government policymakers who might want a vibrant Canadian audiovisual industry might nevertheless find it hard to turn down the economic benefit that comes from actually facilitating Hollywood production in Canada, so individual consumers who might, if asked, favor policies buffering domestic cultural producers might themselves, as consumers, choose rather to buy (or watch or listen to) American cultural production.¹⁵¹ SAGIT’s 1999 report is not entirely clear as to precisely why the group favored a new international instrument over the culture exception approach, though these internal tensions may offer a partial explanation. An instrument hashing out once and for all the scope of acceptable deviations from trade disciplines in the area of cultural production – or at least broadly legitimizing such deviations – would remove the temptation to give too much in trade negotiations, a temptation that could be expected to recur and proliferate over time if left unchecked.

At the same time, however, SAGIT’s preference for a new international instrument presumably also reflects its perception that culture exceptions embedded in trade agreements could not be relied upon to provide sufficient protection – a conclusion reinforced by actual trade disputes between Canada and the United States.¹⁵² For example, Canada had long banned the importation of so-called “split-run” periodicals – essentially editions of foreign periodicals with advertisements directed at a Canadian audience.¹⁵³ The American publishers of *Sports Illustrated*, however, in 1993, struck on an end-run around this ban by electronically transmitting the Canadian edition to Canadian facilities for printing. In response, Canada imposed an 80 percent excise tax on the value

¹⁵⁰ SAGIT Report, *supra* note 15; cf. *Canadian Content and Culture Working Group*, available at http://www.pch.gc.ca/pc-ch/pubs/ihac/tm_e.cfm (accessed Feb. 21, 2004) (arguing for “the need to protect the Canadian mirror” of cultural production).

¹⁵¹ See, e.g., SAGIT Report, *supra* note 15 (observing that the vast majority of Canadians live near the U.S. border; that “the fact that we share a common language makes it very easy for English-speaking Canada to become an extension of the American market and for American cultural products to spill over the border”; that 94-97 percent of Canadian screen time is dominated by foreign films; and that “Hollywood studios have historically treated Canada as part of the U.S. market”); *Canadian Content and Culture Working Group*, *supra* note 150 (observing “the often conflicting interests of the consumer and citizen that exist within each and every Canadian”).

¹⁵² SAGIT Report, *supra* note 15 (citing “challenges to [Canada’s] cultural policies” including disputes with the United States).

¹⁵³ See OWEN-VANDERSLUIS, *supra* note 54, at 127-48.

of advertisements in such split-run magazines.¹⁵⁴ The United States decided to challenge the legitimacy of this excise tax, but rather than doing so through NAFTA, which included the culture exception from the prior bilateral agreement, opted to do so under the WTO framework.¹⁵⁵ At the WTO, Canada's primary argument was that advertising is a service falling within the GATS, under which Canada had made no commitments relating to advertising.¹⁵⁶ Ultimately, however, the WTO's Appellate Body rejected this argument, observing in its June 1997 report, among other things, that the tax was actually imposed on the periodical itself, not the advertising directly, and that "a periodical is a good comprised of two components: editorial content and advertising content" – though both could "be viewed as having services attributes."¹⁵⁷ The more onerous disciplines of the GATT therefore applied, and the excise tax was found to have violated Canada's obligations under GATT Article III:2 (national treatment).¹⁵⁸ Canada set about repealing the tax and making other domestic legal changes required to comply with the decision,¹⁵⁹ as U.S. Trade Representative Charlene Barshefsky crowed that the decision affirmed that "WTO rules prevent governments from using 'culture' as a pretense for discriminating against imports."¹⁶⁰ The episode could only have left Canadian observers wondering where the "culture exception" that was supposed to have saved them from American media inundation had gone.¹⁶¹

¹⁵⁴ See Goodenough, *supra* note 8, at 214.

¹⁵⁵ See Galt, *supra* note 42, at 925 n. 118. Proceeding under the WTO rather than NAFTA not only gave the United States a better chance of success, but also permitted a broader global message to be sent regarding the United States' position on the trade treatment of cultural products. See OWEN-VANDERSLUIJ, *supra* note 54, at 139.

¹⁵⁶ See Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, *supra* note 23, at 4.

¹⁵⁷ *Id.* at 17-18.

¹⁵⁸ *Id.* at 35.

¹⁵⁹ SAGIT Report, *supra* note 15.

¹⁶⁰ Press Release, Office of the United States Trade Representative, WTO Appellate Body Expands U.S. Victory in Challenge to Canada's Restrictions on U.S. Magazine Exports, Press Release No. 97-62, June 30, 1997.

¹⁶¹ Cf. Galt, *supra* note 42, at 926 (observing that Canada's loss at the WTO "constitut[ed] a dramatic setback to cultural exception proponents around the world"). This case essentially represents the totality of WTO case law on the trade treatment of cultural products, as such. In 1998 the European Communities requested GATS consultations regarding certain "measures affecting film distribution services" in Canada, but ultimately the matter was not pursued. Likewise a U.S. challenge of a Turkish "tax on box office receipts from the showing of foreign films" was not pursued beyond consultations because Turkey agreed to "equalize" the tax as between domestic and foreign films. See Request for Consultations by the European Communities, *Canada – Measures Affecting Film Distribution Services*, WT/DS117/1 (Jan. 22, 1998); Notification of Mutually Agreed Solution, *Turkey – Taxation of Foreign Film Revenues*, WT/DS43/3

In any event, the Canadian government was broadly in agreement with the conclusions of SAGIT's 1999 report, though it endeavored to finesse the obvious protectionist aim of such an undertaking. As the Department of Foreign Affairs and International Trade would put it, "[t]he Government agrees that Canada should pursue a new international instrument on cultural diversity," characterizing SAGIT's aim in somewhat muted terms as being "to enable Canada and other countries to maintain policies that promote their culture while respecting the rules of the international trading system and ensuring markets for cultural exports."¹⁶²

By 2002, however, Canada had made clear that it would not negotiate further audiovisual liberalization under GATS until a multilateral instrument safeguarding domestic cultural policies was in place,¹⁶³ and SAGIT had produced a "model" instrument to do just that. Characterizing its 1999 report as having "concluded that there was a need for a new international rules-based approach to managing the interface between cultural policy objectives and trade obligations," and observing among other things the adoption in the meantime of the Universal Declaration on Cultural Diversity by UNESCO's General Conference in 2001, SAGIT describes the model agreement as recognizing "the need to ensure that the international trading system is compatible with the goal of preserving and enhancing cultural diversity." SAGIT registered alarm and dissatisfaction that "there are WTO members who wish to see further services liberalization in a sector with large cultural implications" (i.e. audiovisual services) and that in the FTAA negotiations "the issue of how to treat cultural industries and domestic cultural policies will arise."¹⁶⁴ The model agreement itself extended broad latitude "to take measures with respect to the creation,

(July 24, 1997); *see also* Hahn, *supra* note 97, at 527-30; Rolf H. Weber, Cultural Diversity and International Trade – Taking Stock and Looking Ahead 14-16 (unpublished manuscript, on file with the author).

¹⁶² Department of Foreign Affairs and International Trade, CANADA AND THE FUTURE OF THE WORLD TRADE ORGANIZATION: GOVERNMENT RESPONSE TO THE REPORT OF THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE (1999), *available at* <http://www.dfait-maeci.gc.ca/tna-nac/canwto-en.asp> (accessed Sept. 6, 2006); *see also* Ambassador Sergio Marchi, Speaking Notes for Address at Canadian Association of Broadcasters Third Annual International Broadcasters Dialogue, Banff Television Festival, June 10, 2002, *available at* http://www.dfait-maeci.gc.ca/tna-nac/cab_speech-en.asp (accessed Sept. 6, 2006) ("The SAGIT argued the time was right to lay out ground rules to enable Canada and others to maintain policies that promote culture, while respecting trade rules and ensuring markets for cultural exports.").

¹⁶³ *See* Hahn, *supra* note 97, at 516.

¹⁶⁴ Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), AN INTERNATIONAL AGREEMENT ON CULTURAL DIVERSITY: A MODEL FOR DISCUSSION (Sept. 2002), *available at* http://www.dfait-maeci.gc.ca/tna-nac/sagit_paper-en.asp (accessed Sept. 6, 2006).

production, distribution and exhibition of cultural content,”¹⁶⁵ with an “illustrative list of measures that may be taken” provided in an Annex,¹⁶⁶ and provided for a relatively robust dispute resolution body.¹⁶⁷ Pointedly, explicit exceptions subordinating the draft agreement to “legal guarantees of freedom of expression” and “international treaties respecting the protection of intellectual property” were included, but no such exception for a party’s trade obligations appears in the model agreement.¹⁶⁸

B. France and the European Union

As in Canada, the European effort toward an international instrument on cultural diversity – spearheaded by France – has been explicitly linked with cabining trade obligations. As discussed above,¹⁶⁹ Article 151 of the Treaty Establishing the European Community enshrines the “unity in diversity” principle, establishing the dual pursuit of European and distinct national identities within Europe – a principle reinforced in the Charter of Fundamental Rights of the European Union. The Television Without Borders Directive represents an attempt to encourage both exposure to other national cultures within Europe, as well as the coalescence of a distinctive pan-European culture, while buffering both from U.S. media dominance. Meanwhile the EU has refused to make any commitments in the audiovisual sector under the GATS, a position adhered to by the European Commission throughout the Doha round of negotiations, with the resounding support of the European Parliament.

The market landscape and cultural concerns that prompted the Television Without Frontiers Directive reflect fears of U.S. media domination markedly similar to those in Canada. In the late 1980s, the prevalence of U.S. media products on European television screens grew as European networks increasingly purchased far less expensive American programs.¹⁷⁰ The U.S. audiovisual industry “had the good fortune of maturing early,” greatly reducing production costs by the 1980s relative to those of European competitors. Indeed, by 1986, it cost about \$4 million to produce an hour-long drama in Europe (on average), while the cost to produce such a program in the United States was just \$350,000. Even worse, that American program could be broadcast by a European media company for just \$12,000.¹⁷¹ Europe’s solution to this dilemma was the

¹⁶⁵ *Id.*, art. VI:1.

¹⁶⁶ *Id.*, art. VI:2, Annex 1.

¹⁶⁷ *Id.*, arts. X-XIV.

¹⁶⁸ *Id.*, art. VII:1.

¹⁶⁹ *See supra* part III.C.

¹⁷⁰ *See* Middleton, *supra* note 18, at 610-11.

¹⁷¹ *Id.* at 619-20.

Television Without Frontiers (TWF) Directive, which essentially binds European broadcasters' hands. Among other things, the TWF directive aims for "the protection of European culture through the means of quotas for the broadcasting of European works,"¹⁷² much like the "Canadian content" requirements described above.¹⁷³ Under the TWF Directive, as amended to date, Member States must generally "reserve for European works ... a majority proportion of their transmission time" and at least 10 percent of transmission time or 10 percent of their programming budget "for European works created by producers who are independent of broadcasters" (in all cases with the major exception of "time appointed to news, sports events, games, advertising, teletext services and teleshopping").¹⁷⁴ The term "European works," like the term "Canadian content," is defined by reference to creative decisionmaking.¹⁷⁵

For its part, France has gone further than the TWF Directive mandates. France has required that broadcasters show 60 percent European works and 40 percent French works, and – to the consternation of U.S. officials – has applied these heightened quotas "to both the 24-hour day and prime time slots," with "the definition of prime time differ[ing] from network to network." As the Office of the U.S. Trade Representative complained in a recent report, the "prime time rules are a significant barrier to access of U.S. programs to the French market." This report also took aim at "radio broadcast quotas, which have been in effect since 1996 (40 percent of songs on almost all French private and public radio stations must be Francophone)," which quotas obviously "limit broadcasts of American music."¹⁷⁶

In a 2003 consultation piece on the GATS negotiations, the European Broadcasting Union (EBU) urged the EU to hold out on any GATS commitments in the audiovisual sector in order to ensure that an international agreement on cultural diversity could be put in place before such negotiations could proceed. Noting, among other things, the "cultural, political and social role and

¹⁷² *Id.* at 612-613.

¹⁷³ See *supra* text accompanying notes 136-137. Europe and Canada are of course not alone in the use of content quotas. See, e.g. *supra* text accompanying notes 103-104 (discussing Australia's insistence on the preservation of existing quotas in its bilateral trade negotiations with the United States); SAGIT, *supra* note 15 (observing that "[c]ontent requirements are a common cultural policy tool," and citing examples in the EU, France, Italy, Spain, Mexico, and Australia).

¹⁷⁴ Amended TWF Directive, *supra* note 84, arts. 4-5.

¹⁷⁵ See *id.*, art. 6.

¹⁷⁶ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2006 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, at 264, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_NTE_Report/asset_upload_file929_9220.pdf (accessed Sept. 21, 2006).

importance” of audiovisual services; the production advantage enjoyed by those with larger home markets (permitting cost recovery at home and exporting at lower prices); the pressures of “progressive liberalization” under GATS Article XIX, which would put even limited commitments at risk of expansion in later rounds of negotiations; and the absence of any conceptual mechanism for distinguishing legitimate from illegitimate cultural protectionist policies under existing trade rules,¹⁷⁷ the EBU argued that a “Convention on cultural diversity could help to clarify the legitimacy of cultural and audiovisual policy measures at the national or regional level.” What was needed, in the EBU’s view, was a “‘cultural pillar’, set apart from the existing ‘trade pillar’ – the multilateral WTO Agreements” – in order to ensure “more balanced” discussions, as had occurred in other areas involving labor, environmental, and other issues.¹⁷⁸

In a 2003 communication to the Council of Europe and the European Parliament, the European Commission addressed the issue of an international cultural diversity instrument. Noting the “unity and diversity” principle and cultural policies like those in the TWF Directive that it has enabled, the Commission stressed that the EU had reserved its ability to pursue cultural policies in WTO negotiations.¹⁷⁹ With respect to future negotiations, the Commission concluded that “a legally binding instrument to preserve and promote cultural diversity would be necessary, in order to consolidate certain cultural rights,” though it added that “such instrument would not affect and be without prejudice to the international legal framework applicable to exchanges of cultural goods and services – in particular as regards their trade and intellectual property rights aspects.”¹⁸⁰

The European Parliament took this up, expressing a much stronger position on the need for such an instrument. The Parliament stated in a resolution that Europe “must continue in [the] future to have the legal right to take all measures in the fields of culture and the audiovisual media necessary to uphold and promote cultural diversity,” and explicitly characterized the prospect of new GATS negotiations as threatening “an ongoing liberalisation,” the result of which would be that such protections “would be reviewed and consequently

¹⁷⁷ European Broadcasting Union, *Audiovisual services and GATS negotiations: EBU contribution to the public consultation on requests for access to the EU market*, DAJ/MW/mp, Jan. 17, 2003, at 2-4.

¹⁷⁸ *Id.* at 6-7.

¹⁷⁹ Commission of the European Communities, *Communication to the Council and the European Parliament*, *supra* note 26, at 3-4.

¹⁸⁰ *Id.* at 6-7.

dismantled.”¹⁸¹ Adding that “the principle of cultural diversity is still not recognised as a fundamental right under international law,” the Parliament stressed the view that cultural products “are not merchandise or consumer goods like any other” and should, “in light of their dual nature as economic and cultural goods,” be the subject of “special conditions” reflecting that “the market cannot be the measure of all things” and “guarantee[ing] in particular diversity of opinion and pluralism.”¹⁸² In stark contrast with the Commission’s more deferential view, the Parliament called for outright exemption of cultural products from any liberalization under the WTO agreements, and likewise called upon the EU “to engage in multilateral talks within the forthcoming negotiations on a Convention on cultural diversity in UNESCO.”¹⁸³ Like the EBU, the Parliament took the view that GATS negotiations should be put on hold, and “stresse[d] that protection of support instruments, and thus of cultural diversity, cannot be achieved in the context of the WTO and GATS, but can only be promoted by negotiating a Convention within the framework of UNESCO.” The Parliament even went so far as to call on “the UNESCO General Conference to insist that the Member States do not undertake commitments in other international fora or bilateral agreements which would run counter to the protection and promotion of cultural diversity.”¹⁸⁴ The European Parliament’s view on the necessity of a culture convention to the preservation of cultural sovereignty, and the perception that the clearest threat against which Europe required such protection lay in potential GATS audiovisual negotiations, could not have been made more clear.

C. Drafting and Negotiations

The effort toward a culture convention within UNESCO began with the appointment by the Director-General of a “multidisciplinary international group of 15 independent experts” in various areas thought pertinent to the task (anthropology, international law, economics of culture, and philosophy), who were charged with making recommendations on the overall structure and drafting of the convention.¹⁸⁵ In defining the scope of the convention, this

¹⁸¹ European Parliament resolution on preserving and promoting cultural diversity: the role of the European regions and international organisations such as UNESCO and the Council of Europe, *supra* note 26, ¶¶ L-M.

¹⁸² *Id.*, ¶¶ 3, 16.

¹⁸³ *Id.*, ¶¶ 18-19.

¹⁸⁴ *Id.*, ¶¶ 23, 35.

¹⁸⁵ Preliminary draft convention on the protection of the diversity of cultural contents and artistic expressions: Preliminary report of the Director-General, CLT/CPD/2004/CONF.201/1, July 2004, at 2.

committee determined that “precise, but not fixed, definitions” should be employed to reflect “the very broad and constantly evolving field that is the subject of the convention.” Hence terms like “culture” and “cultural diversity” would not be used “in the full range of their acceptations and manifestations, but only in relation to the term ‘cultural expressions’ ... transmitted by means of ‘cultural goods and services’, having due regard for the Universal Declaration of Human Rights.”¹⁸⁶ With respect to how the contemplated instrument would relate to other international legal instruments, the committee considered two possibilities. Either it would have no effect on other international legal obligations, or it “could affect them wherever exercise of those rights or compliance with those obligations might give rise to serious damage to the diversity of cultural expressions or might threaten such diversity, except in the case of international instruments concerning intellectual property rights.”¹⁸⁷ Put differently, it would appear that in the committee’s view, the convention should in no way affect intellectual property-related rights and obligations, and the only real question was whether trade-related rights and obligations should be affected. The July 2004 preliminary draft of the convention prepared by this committee accordingly offered two options for a provision on the convention’s relationship to other instruments. Either (1) the provision would state that “[n]othing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments,” or (2) it would state that it did not affect existing intellectual property rights and obligations, but that existing rights and obligations would be affected – in an unspecified manner – “where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.”¹⁸⁸

Other international bodies were to weigh in on the coalescing culture convention, and generally they registered concern regarding potential incursions on the turf of the trade regime. Another UN body, the United Nations Conference on Trade and Development (UNCTAD), observed that “the fact that the draft seems to try to devise ways for countries to maintain policies that promote cultural diversity in spite of existing trade and other agreements give the impression that WTO agreements currently do not allow governments to maintain such policies.” UNCTAD worried that this could actually hurt developing countries’ ability to negotiate for greater developed market access through the WTO. Though sympathetic with the goal of preserving cultural diversity, UNCTAD felt that “from the trade and development point of view,

¹⁸⁶ *Id.* at 3.

¹⁸⁷ *Id.*, at 4.

¹⁸⁸ *Id.*, art. 19.

protectionism should not be encouraged in the name of culture.” UNCTAD also expressed concern about the breadth of the definitions employed, which appeared to “leave[] the scope and coverage of the convention completely open.”¹⁸⁹ UNCTAD argued that GATS was sufficiently flexible to permit protection of cultural diversity, and observed that Article 13 of the draft, which “provide[d] that parties shall bear in mind the objectives of this convention when making any international commitments,” might be read “to refer to specific commitments made under the trade negotiations including the GATS.” UNCTAD felt that this should be clarified, and that the provision on the convention’s relationship to other international instruments should be eliminated, given that the Vienna Convention on the Law of Treaties already sets out principles governing the interpretation of treaties, over which the draft convention offered no improvement.¹⁹⁰

The WTO, for its part, summarized the views expressed by its members during an “informal discussion” of the draft UNESCO convention. The WTO reported that “a majority of the delegations that took the floor expressed concerns of varying degrees,” notably “the potential for conflict or inconsistencies with WTO obligations and ongoing negotiations in various areas.” Among other things, “[m]any” delegations “considered that the proposed definitions . . . , in particular that of cultural goods and services, were overly broad and imprecise,” giving rise to “potential to intersect with various aspects of WTO Agreements.” Given the “lack of precision,” apparently “almost anything could be said to be a cultural good or service.” The cultural policies legitimized by the draft convention, it was feared, “could be used to justify actions inconsistent with WTO obligations and invite protectionist abuse.” The requirement that signatories take the convention into account when entering

¹⁸⁹ Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, Presentation of Comments and Amendments, Part IV: Comments Proposed by the IGOs [hereinafter IGO Comments], CLT/CPD/2004/CONF.607/1, Dec. 2004, at 6-7.

¹⁹⁰ *Id.* at 7-9. Note that while UNCTAD points to Article 31 of the Vienna Convention on the Law of Treaties and “other general principles of public international law,” *id.* at 9, in suggesting that the draft culture convention would create confusion by specifying its relationship with other treaties, the Vienna Convention actually establishes rules in Article 30 addressing situations in which successive treaties address the same subject matter. Vienna Convention on the Law of Treaties, art. 30, May 22, 1969 [hereinafter Vienna Convention]. In particular, Article 30:2 states that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” The Vienna Convention thus clearly contemplates treaty provisions explicitly delineating a given treaty’s relationship to other treaties. See *infra* text accompanying notes 246-251 for further discussion of the Culture Convention’s provision addressing its relationship to other treaties, and its interpretation in light of the Vienna Convention.

other agreements left some WTO delegations “fear[ing] that such a provision might negatively affect WTO negotiations by inciting Members not to make offers in certain areas out of concern that these might conflict with the objectives of the UNESCO Convention.” As to the provision on the convention’s relationship with other treaties, with its two options, the “majority of delegations” preferred the option subordinating the convention to all existing international rights and obligations, while “a few” preferred the other option out of concern for the protection of cultural diversity. One delegation took the view that neither was necessary in light of the Vienna Convention on the Law of Treaties.¹⁹¹

In late 2004 the drafting moved into a second stage in which government representatives took over from the committee of experts.¹⁹² At a meeting in September “all those who spoke agreed that [the preliminary draft] could be taken as a sound basis for their work,” though the “definition of ‘cultural goods and services’, and the very use of such terminology (sometimes regarded as too commercial), were the subject of debate.” The provision on the convention’s relationship to other instruments also “provoked considerable comment.”¹⁹³ By December the document had swelled to 130 pages as countries contributed different options for various provisions.¹⁹⁴ As the negotiations continued, it apparently emerged that a number of delegations preferred to use neither variant regarding the relationship to other instruments, opting rather to “look at some third way ... establish[ing] that there was to be no precedence among international instruments and ... ensuring that they were complementary.”¹⁹⁵

The European Parliament, meanwhile, looking into the negotiations from the outside, expressed the view that the convention’s relation to trade disciplines was “a key aspect” that should “be approached in such a way that the protection of cultural diversity is given at least the same priority as other policies, and on no account a lesser priority.” The Parliament also advocated a binding dispute

¹⁹¹ IGO Comments, *supra* note 189, at 23-26.

¹⁹² Preliminary Report By the Director-General Setting Out the Situation to be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied By the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions [hereinafter Director-General Report], 33 C/23, Aug. 4, 2005, at 5.

¹⁹³ *Id.* at 5-6.

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *Id.* at 10.

resolution mechanism to develop an international “case-law relating to cultural diversity.”¹⁹⁶

By June 2005 a revised draft had been prepared,¹⁹⁷ and by all indication it was the product of heated negotiations. The United States found little to like in the document, raising formal objections relating to a number of provisions including:

- Preamble paragraph 18, stating that “cultural activities, goods and services have both an economic and a cultural nature ... and must therefore not be treated as solely having commercial value”;
- Article 1(g), establishing as an objective giving “recognition to the distinctive nature of cultural activities, goods and services”;
- Article 2.4, establishing as a principle “enabling countries ... to create and strengthen their means of cultural expression, including their cultural industries”;
- Article 4’s definitions of “cultural expressions,” “cultural activities, goods and services,” “cultural industries,” “cultural policies,” and “protection”;
- Article 6.2(b)-(c), permitting the adoption of measures that “provide opportunities for domestic cultural activities, goods and services ... for their creation, production, dissemination, distribution and enjoyment” (including with respect to language), and those “aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution”; and
- Article 20, providing that the agreement would not “modify[] rights and obligations ... under any other treaties,” but that at the same time, “without subordinating this Convention to any other treaty,” parties would be obliged to “foster mutual supportiveness” with other treaties

¹⁹⁶ European Parliament resolution on working towards a Convention on the protection of the diversity of cultural content and artistic expression, *supra* note 26, ¶¶ 1, 15, 16. The Council of Europe agreed in November 2004 to authorize the European Commission to negotiate those aspects of the draft UNESCO convention potentially affecting EU law. The Parliament, however, “[i]nsists that the Commission should not only provide the Council with updates on the negotiations within UNESCO, but most also ensure that Parliament is kept fully informed.” *Id.*, ¶¶ E, F, 4.

¹⁹⁷ Director-General Report, *supra* note 192, at 12-13.

and to “take into account the relevant provisions of this Convention” when interpreting or entering into other treaties.¹⁹⁸

In essence, the United States objected to the provisions that would ultimately be the heart of the document, and the U.S. proposals for amendments were roundly rejected. Among other things, the United States had sought to include language recognizing “the need to take measures that are consistent with other international obligations when protecting the diversity of cultural expressions” in order to “clarify that nothing in this Convention can be interpreted as allowing states to violate international agreements in the fields of trade, human rights, or other areas”¹⁹⁹ (though of course Article 2.1 already established that the convention could not be invoked “to infringe human rights and fundamental freedoms,”²⁰⁰ leaving only the trade regime out in the cold). The United States also wanted language to the effect that globalization can enhance cultural diversity, not just detract from it. Ambassador Oliver expressed exasperation at the language of Article 20, which the Director-General’s report describes as “a compromise solution ... found at the end of the session,”²⁰¹ and which Rapporteur Artur Wilczynski characterizes as an “expression of the Plenary’s will,” having received the support of “an overwhelming number of delegations” (though conceding that this article was indeed “the subject of intense discussions for the duration of the negotiation”).²⁰² “In our conversations with delegations over the past few weeks,” Oliver wrote a few days before the convention’s adoption, “it has been made clear to us that this Article is intended to mean that nothing in this Convention can be interpreted as modifying, or prevailing over, the rights and obligations of Parties arising under other international

¹⁹⁸ *Id.* at 13-14, Annex V (providing the text of the June 2005 draft convention); Oral report of the Rapporteur, Mr. Artur Wiczynski at the Closing of the Third session of the Intergovernmental Meeting of Experts on the Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions, May 25 – June 3, 2005, at 4-8.

¹⁹⁹ Ambassador Louise V. Oliver, Intervention at the 33rd UNESCO General Conference, Draft Resolution submitted by the United States of America to Item 8.3 – Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions and Report by the Director-General Thereon [hereinafter Intervention on Item 8.3], Oct. 17, 2005, *available at* http://www.usunesco.org/texts/GenConf33_Amb_Intervention_CD_Amendments.pdf (accessed Sept. 7, 2006).

²⁰⁰ Director-General Report, *supra* note 192, at Annex V. Ambassador did recognize Article 2.1 in her intervention, but added that “we remain troubled by other provisions of the Convention that seem to provide undue scope for interference by governments with freedom of expression, information and communication.” Oliver, Intervention on Item 8.3, *supra* note 199.

²⁰¹ Director-General Report, *supra* note 192, at 14.

²⁰² Oral report of the Rapporteur, *supra* note 198, at 7-8.

agreements. So why can't we just say that?"²⁰³ The United States had supported sending two texts of Article 20 to the General Conference for consideration, but this proposal was rejected in favor of the single text described above.²⁰⁴

Over the months preceding the convention's adoption on October 20, 2005, Ambassador Oliver repeatedly advanced the argument that the document was poorly drafted and susceptible to abuse, appealing to the negotiating parties to adhere to consensus procedures, but her statements met with a cool response at best. In a speech delivered in September 2005, Ambassador Oliver argued that while "some countries feel their cultural expressions are threatened by globalization, ... throughout history, cultural exchanges across the globe have strengthened cultures and nations, not weakened them." The issue, ultimately, was "the individual's fundamental right to choose," and the draft agreement appeared susceptible to being "used to restrict cultural exchange and individual freedom." Oliver also took issue with Canada's push for a deviation from the consensus approach, characterizing it as an attempt "to prevent further discussion on the preliminary text."²⁰⁵ Later, in an intervention on October 17, 2005, Oliver argued again that "ambiguities in the text might be misused by a government as a justification for adopting policies and measures that would protect and promote the majority culture within its territory, at the expense of minority cultures." She also reiterated U.S. concerns regarding "the lack of clarity in Article 20," arguing that "as drafted, any State, in the name of cultural diversity, might invoke the ambiguous provisions of this convention to try to assert a right to erect trade barriers to goods or services that are deemed to be cultural expressions" – a term that had "never been clearly defined and therefore is open to wide misinterpretation."²⁰⁶

Oliver expressed frustration in the waning moments of the negotiations that over "the past four months, we have been told constantly by various states that it was too late to negotiate this text – that not a single comma could be changed."²⁰⁷ As she would later put it, "the process ... disturbed us as much as the substance because in this case, the process did not lead to negotiation and it did not lead to

²⁰³ Oliver, Intervention on Item 8.3, *supra* note 199.

²⁰⁴ Oral report of the Rapporteur, *supra* note 198, at 7; *see also* Recommendation of the third intergovernmental meeting of experts on the preliminary draft convention on the protection of the diversity of cultural contents and artistic expressions, June 3, 2005.

²⁰⁵ Oliver, Statement to 172nd UNESCO Executive Board, *supra* note 46.

²⁰⁶ Ambassador Louise V. Oliver, Intervention at the 33rd UNESCO General Conference, Item 8.3 – Preliminary Report on the Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, Oct. 17, 2005, *available at*

http://www.usunesco.org/texts/GenConf33_Amb_Intervention_CD.pdf (accessed Sept. 7, 2006).

²⁰⁷ *Id.*

U.S. concerns being incorporated within this Convention.” Noting that “in mid-April [2005], we were given a completely new text ... and we were told to negotiate that new text in May,” Oliver complained that over the course of subsequent months “every attempt” to reflect U.S. concerns in the document “was rebuffed.”²⁰⁸ As one European diplomat said during the week prior to the Culture Convention’s adoption, the “US is trying to do everything it can to reopen the negotiations when the rest of the world is in favour of the current text.”²⁰⁹ Once the writing was on the wall, the United States evidently shifted gears, enlisting the likes of Secretary of State Condoleeza Rice, as well as U.S. ambassadors, to pressure countries not to vote to adopt the convention, an effort that proved unsuccessful.²¹⁰

D. The Final Text and Reactions

On October 20, 2005, the UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions by a vote of 148-2, with the United States and Israel in opposition and four countries abstaining from the vote.²¹¹ The United States’ efforts to amend the document or avert its adoption having failed, the Culture Convention would become a binding international instrument among countries ratifying it, giving legal effect to everything the United States had found objectionable about the draft. The document affirms that “cultural activities, goods and services have both an economic and a cultural nature ... and must therefore not be treated as solely having commercial value,”²¹² and includes as an objective “to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”²¹³ The Culture Convention

²⁰⁸ *U.S. Ambassador to UNESCO Louise Oliver Speaks With Foreign Journalists*, *supra* note 24.

²⁰⁹ Bob Sherwood & Frances Williams, *US at odds with world on cultural treaty*, FIN. TIMES (London), Oct. 14, 2005, at 9, *available at* Lexis (quoting “a Paris-based European diplomat,” internal quotation marks omitted).

²¹⁰ *See* Graham Fraser, *Cultural diversity policy voted in*, TORONTO STAR, Oct. 18, 2005, at C05, *available at* Lexis.

²¹¹ Press Release, United Nations Educational, Scientific and Cultural Organization (UNESCO), General Conference adopts Convention on the protection and promotion of the diversity of cultural expressions, Press Release No. 2005-128, Oct. 20, 2005, *available at* http://portal.unesco.org/culture/en/ev.php-URL_ID=29078&URL_DO=DO_TOPIC&URL_SECTION=201.html. The four abstaining countries were Australia, Nicaragua, Honduras, and Liberia. *See* Riding, *U.S. backs Hollywood at Unesco*, *supra* note 30.

²¹² Culture Convention, *supra* note 27, Preamble.

²¹³ *Id.*, art. 1(h); *see also* art. 2.

requires that the parties “endeavour to create in their territory an environment which encourages individuals and social groups ... to create, produce, disseminate, distribute and have access to their own cultural expressions,” while also requiring that they “have access to diverse cultural expressions from within their territory as well as from other countries of the world,” and prohibiting the instrument’s invocation “in order to infringe human rights and fundamental freedoms.”²¹⁴ It further provides for an International Fund for Cultural Diversity, to be funded in part by UNESCO,²¹⁵ as well as an Intergovernmental Committee²¹⁶ and a conciliation mechanism for disputes.²¹⁷ The Culture Convention, by its terms, enters into force three months following the thirtieth ratification, acceptance, approval, or accession,²¹⁸ and by December 2006, thirty countries had deposited such instruments – Canada having been the first to do so (on November 28, 2005). As a result, the Convention would enter into force on March 18, 2007.²¹⁹ By May 2006 the EU’s Council of Ministers had endorsed the Culture Convention,²²⁰ and France and Quebec had reportedly “join[ed] forces in an attempt to convince countries” to support it.²²¹

While the United States disliked the very notion of legitimizing cultural protectionist measures from the outset, it was clearly most troubled by the vagueness and breadth of the Culture Convention’s scope, as well as the ambiguity of its relationship with existing international legal regimes – notably the trade regime. The Culture Convention applies, by its terms, to policies and measures “related to the protection and promotion of the diversity of culture expressions,” which “may include” any or all of a broadly worded – and circular – laundry list of policies, which itself includes “regulatory measures aimed at

²¹⁴ *Id.*, arts. 2:1, 7:1.

²¹⁵ *Id.*, arts. 14(d)(i), 18.

²¹⁶ *Id.*, art. 23.

²¹⁷ *Id.*, art. 25, Annex.

²¹⁸ *Id.*, art. 29.

²¹⁹ See *Convention on the Protection and Promotion of the Diversity of Cultural Expressions: States Parties*, *supra* note 29. As of January 2007, the Culture Convention had been ratified by 39 countries and the European Community. *Id.*

²²⁰ See European Report, *Cultural Diversity: MEPs Recommend Signing UNESCO Convention*, EUR. REP., no. 3078, May 4, 2006, available at Lexis; European Report, *EU/UNESCO: UNESCO Convention on Cultural Diversity Can Be Signed*, EUR. REP., no. 3090, May 22, 2006, available at Lexis.

²²¹ Fort McMurray Today (Alberta), *Quebec, France Push For UNESCO Treaty to Protect Diversity*, FORT MCMURRAY TODAY (Alberta), July 21, 2006, at A2, available at Lexis. In celebrating the Culture Convention, Canadian officials made sure to acknowledge the special role Quebec had played in securing its adoption. See *Canada’s New Government Welcomes the Entering Into Force of UNESCO Convention on Protection and Promotion of Diversity of Cultural Expressions*, CAN. CORP.NEWSWIRE, Dec. 18, 2006, available at Lexis.

protecting and promoting diversity of cultural expressions.”²²² The definitions of key terms, then, offer little or no illumination of the contemplated scope. “Cultural industries” is defined by reference to “cultural goods or services,” which is defined by reference to “cultural expressions,” which is defined by reference to “cultural content,” which is defined by reference to things that “originate from or express cultural identities.” The concept of “cultural identities” is itself undefined. Similarly, “cultural policies and measures” is defined by reference to “culture.” The concept of “culture” is itself undefined.²²³ In essence, United States officials are correct that the theoretical limits of the document are unknowable.

Equally troubling for the United States is the document’s ambiguous relationship to other international regimes. Article 20 retains the structure that the United States had found so objectionable in the negotiations, both confirming that the Culture Convention would not “modify[] rights and obligations ... under any other treaties,” and that “without subordinating [it] to any other treaty,” the parties are obliged to “foster mutual supportiveness” with other treaties and to “take into account the relevant provisions” when applying or entering into other treaties.²²⁴ Similarly, the parties “undertake to promote the objectives and principals of this Convention in other international forums.”²²⁵ In an apparent endeavor to assert that the Culture Convention could co-exist amicably with existing trade regimes in “mutual supportiveness,” the provision renders utterly unclear how parties are obligated to address the inevitable conflicts with existing trade obligations.

The Director-General’s report of August 2005 itself reflects a studied ambiguity with respect to such concerns. For example, “[t]hough some experts made the point that the notion of ‘cultural goods and services’ evokes the vocabulary used in agreements on international trade, the Group felt that the proposed definition boiled down to a more cultural conception of this notion.” This, evidently, would “allow[] for a distancing from the strictly trade-related understanding, while recognizing the dual nature of these goods and services.”²²⁶ This convoluted verbiage, though endeavoring to distinguish the Culture Convention from trade concepts, nevertheless tends to confirm that the Culture Convention deliberately employs trade terminology with a view to asserting the relevance of cultural diversity concerns in that context. The Director-General’s

²²² Culture Convention, *supra* note 27, arts. 3, 6:2.

²²³ *Id.*, art. 4.

²²⁴ *Id.*, art. 20.

²²⁵ *Id.*, art. 21.

²²⁶ Director-General Report, *supra* note 192, at 2.

report likewise declines to illuminate the meaning and proper understanding of the article on the Culture Convention's relationship to other instruments, simply characterizing it as "a compromise solution." The report concludes by mentioning that "[s]everal statements stressed the positive contribution of the text to the development of international law, noting that its adoption would be a significant step in the history of contemporary international relations in which culture is required to play a growing role" – a conclusion from which the United States "disassociated itself."²²⁷

Responses to the Culture Convention in the United States and elsewhere differed sharply, but were generally predictable. As if to confirm U.S. fears, a number of accounts in the popular press described the agreement as "exempt[ing] certain cultural products from free-trade agreements."²²⁸ A co-chair of a Canadian organization called the Coalition for Cultural Diversity reportedly "said ... that it was urgently important to have the UNESCO convention in place because of the pressure that countries were facing in trade negotiations to give up the right to protect their cultures,"²²⁹ and a statement by the International Liaison Committee of Coalitions for Cultural Diversity highlighted the "principle of non-subordination" in the Culture Convention, which it characterized as "meaning the legal status of the convention in international law will be equal to that of other international treaties, including trade agreements."²³⁰ Likewise the Minister of Canadian Heritage and Minister responsible for Status of Women called it "a great day for the cultural community" in a statement describing the Culture Convention as being "on an equal footing with other international treaties."²³¹ At least one U.S. official claimed that some countries that voted for the Culture Convention would not in fact ratify it, including the United Kingdom,²³² although the UK's then-

²²⁷ *Id.* at 16.

²²⁸ Fraser, *supra* note 210.

²²⁹ *Id.* (paraphrasing Pierre Curzi, co-chair of the Coalition for Cultural Diversity).

²³⁰ International Liaison Committee of Coalitions for Cultural Diversity (ILC), *Coalitions for Cultural Diversity Hail Adoption of UNESCO Convention on Cultural Diversity; Urge Countries to Ratify on Urgent Basis*, Oct. 21, 2005, available at http://www.cdc-cdd.org/Anglais/Liensenanglais/nouveautes_eng/ENG_Press_Rel_ILC_21-10-05.pdf (accessed Sept. 7, 2006).

²³¹ Press Release, Office of the Minister of Canadian Heritage and Minister responsible for Status of Women, *Convention on cultural diversity is adopted at UNESCO General Conference*, Oct. 20, 2005, available at http://www.pch.gc.ca/newsroom/index_e.cfm?fuseaction=displayDocument&DocIDCd=5N0275 (accessed Sept. 7, 2006) (internal quotation marks omitted).

²³² New, *supra* note 133; cf. Coalition for Cultural Diversity, *Adoption of UNESCO Convention on Cultural Diversity a Watershed Victory in the Campaign to Ensure Countries Retain the Right to Have*

presidency of the EU was “winning plaudits for spearheading the European campaign” to promote the Culture Convention,²³³ and UK ambassador Timothy Craddock celebrated the “great day for UNESCO,” saying that a “new fundamental law on culture, for so long missing from the global governance system, has been adopted.”²³⁴

Conservative American columnist George Will, however, took a decidedly dimmer view of the Culture Convention, characterizing it as “mischief tinged with anti-Americanism” of the sort that had led to America’s withdrawal from UNESCO in the 1980s. Will derided the “pernicious idea” that governments could “be trusted to sensibly define and prudently cultivate the proper content of culture and artistic expression,” describing its aim as being to “cloak” cultural protectionism “in Orwellian language praising what the convention actually imperils.” Reserving choice words for the Culture Convention’s strongest proponent in Europe, Will added that France’s “vanity about the glory of its culture is not matched by confidence in the power of that culture to thrive unless protected.” Will reads the Culture Convention as “implicitly establish[ing] that cultural protectionism is not inhibited by standard free trade agreements,” and foresees a slippery slope reaching the likes of “wine, coffee, [and] textiles.”²³⁵

The MPAA likewise had nothing good to say about the Culture Convention, Chairman Dan Glickman observing that “the Convention appears to be more

Cultural Policies, Oct. 17, 2005, available at http://www.cdc-cdd.org/Anglais/Liensenanglais/nouveautes_eng/EN_CCD_News_Release_10_17_05.pdf#search=%22%22cultural%20diversity%20a%20watershed%20victory%22%22 (accessed Sept. 7, 2006) (observing “the intense opposition to the convention from the United States throughout the negotiations, opposition now expected to be channelled into pressure on other countries not to ratify”).

²³³ Paul Betts, *Culture Wars*, FIN. TIMES (London), Oct. 21, 2005, at 17, available at Lexis.

²³⁴ Emma-Kate Symons, *US fumes over cultural snub*, AUSTRALIAN, Oct. 22, 2005, at 27, available at Lexis (quoting Craddock, internal quotation marks omitted).

²³⁵ George F. Will, *A Soldier in the Culture Wars*, AUGUSTA CHRON., Oct. 16, 2005, at A04, available at Lexis. A commentator for *The Washington Times* would similarly characterize the Culture Convention as an “Orwellian” attempt at “limiting cultural diversity, not expanding it,” and again takes aim at the “French conspiracy mill” thought to be fanning the flame of anti-American sentiment. Helle Dale, *Clash of cultures; France takes on America*, WASH. TIMES, Oct. 26, 2005, at A19, available at Lexis. At least one commentator for London’s *The Times* shared these views, reiterating the slippery slope argument, and observing that the “circular” definitional provisions meant that “[a]ny industry or activity that looks trad or a bit ethnic fits the culture bill and deserves protection.” And as for its assertion of “equal status with other international treaties,” UNESCO’s “whining voice will be heard in the Doha Round of world trade talks.” Carl Mortished, *Who are the culture police at UNESCO protecting?*, TIMES (London), Oct. 26, 2005, at 64, available at Lexis.

about trade and commercial activities than about the promotion of cultural diversity.” The MPAA statement further observes that “many in the U.S. business community fear that it is a stalking horse for trade restrictions,” and Glickman likewise expressed “concern[] that this Convention could become an instrument some governments might employ to undermine commitments made in the WTO or in other international agreements.”²³⁶ As Glickman would add in an interview, “[w]e’re going to have to monitor this closely to make sure this doesn’t become a serious problem.”²³⁷

And once again, America’s near isolation was itself a topic of discussion. The United States’ dissent was analogized to its opposition to the Kyoto Protocol on climate change and the creation of an International Criminal Court, with the anticipation that the United States would again “likely remain a critical and perhaps interventionist outsider.”²³⁸ A reporter for *The Australian* noted that “[n]ot since the Iraq war has the US been as isolated in a UN forum,” though Australia – which had also sided with the United States on the Kyoto Protocol as well as many trade issues – was also isolated as one of the four abstaining countries.²³⁹ Indeed to some it appeared that the United States practically relished its isolation in the UN, an apparent stance symbolized by the appointment of Ambassador John Bolton, a man with a “history of deep skepticism toward international organizations, particularly this one, and a demonstrated aversion to commitments that could entangle the United States.” Barbara Crossette, in an article (styled a memorandum to Condoleeza Rice) published in *Foreign Policy*, pointed to the United States’ handling of the Culture Convention negotiations as a case in point. The “disastrous” approach to the negotiations included “vot[ing] against the agency’s budget” in retaliation for the United States’ proposed amendments being voted down, a move that

²³⁶ Press Release, Motion Picture Association of America (MPAA), *Glickman Expresses Disappointment at Outcome of Cultural Diversity Discussions*, Oct. 21, 2005, on file with author (internal quotation marks omitted).

²³⁷ Richard Verrier, *Treaty Vote Distresses Hollywood*, L.A. TIMES, Oct. 22, 2005, at C1, available at Lexis (internal quotation marks omitted).

²³⁸ Alan Riding, *Next lone U.S. dissent: Cultural diversity pact; Entr’acte*, INT’L HERALD TRIB., Oct. 13, 2005, at 2, available at Lexis; cf. Alan Riding, *U.S. Stands Alone on Unesco Cultural Issue*, N.Y. TIMES, Oct. 13, 2005, at 3, available at Lexis (reporting the view of “some Unesco officials” that “the convention’s principal significance is as a symbol of how the United States and some of its closest allies view the world differently – and not only on culture”).

²³⁹ Symons, *supra* note 234.

particularly angered the Japanese, and left Crossette feeling that the United States needed to learn “when to quit debating and cut a deal” at the UN.²⁴⁰

But what would the Culture Convention’s impact actually be – as an instrument of law, and otherwise? Speculations were all over the map in the days leading up to and following its adoption. As mentioned above, some feared – and others relished – the notion that it might legally legitimate departures from trade regimes.²⁴¹ As one U.S. diplomat reportedly put it, “[t]his is international law.... This is not just a feel-good statement, this is a treaty” saying “that governments should be the determinants of what cultural products are available in a market.”²⁴² Others, however, tended to doubt that the Culture Convention would have much practical impact on a trade panel assessing a dispute regarding goods or services already subject to trade disciplines.²⁴³

Observers on both sides of the issue, however, seemed to recognize that Article 20 of the Culture Convention, addressing its relationship to other international instruments, was perhaps the critical provision of the treaty – and that the drafting was a mess. Observing its apparently contradictory language, contemplating both that the Culture Convention would impact the application of other treaty regimes while at the same time – somehow – not modifying rights and obligations under them, one commentator stated that “Canada and France won broad support for the convention partly by blurring the question of its impact on trade liberalization or future trade talks.”²⁴⁴ But at the same time, “US lobbying is thought to have significantly influenced the evolution of the convention, specifically with regard to its explicit link to existing treaties,” whereas “France and Canada had initially hoped to secure a wholesale

²⁴⁰ Barbara Crossette, *How to defuse the Bolton bomb*, FOREIGN POL’Y, July 1, 2006, at 68, available at Lexis. Ambassador Oliver, when asked about the United States’ no vote on the budget shortly after the Culture Convention’s adoption, confirmed that the vote “emphasizes the fact that we are unhappy with the budget in terms of the fact that it does support a Convention that we oppose.” She added that the two-year budget had been approved by the requisite two-thirds vote of member states, but declined to comment regarding whether the United States would withhold its dues. The United States’ share of the two-year \$610 million budget amounts to \$134 million. *U.S. Ambassador to UNESCO Louise Oliver Speaks With Foreign Journalists*, supra note 24.

²⁴¹ See, e.g., supra text accompanying notes 228-231, 236-237.

²⁴² Symons, supra note 234 (internal quotation marks omitted).

²⁴³ See, e.g., Luke Eric Peterson, *UN Cultural Diversity Treaty Welcome, But Won't Solve Trade Tensions*, EMBASSY, Oct. 5, 2005, available at http://www.embassymag.ca/html/index.php?display=story&full_path=/2005/october/5/un/ (accessed Sept. 7, 2006) (reporting the view of Michelle Swenarchuk, “a Toronto-based environmental lawyer who follows international negotiations closely”).

²⁴⁴ Riding, *U.S. backs Hollywood at Unesco*, supra note 30; cf. ICTSD, supra note 110 (observing the apparently contradictory language of Article 20).

exemption of cultural products from the WTO.”²⁴⁵ What the Director-General’s report characterized as a compromise would appear simply to represent the glomming together of two incompatible views regarding whether the Culture Convention should, or should not, affect existing trade obligations. In any event, “[c]ontradictory statements from different governments about how the treaty will affect existing and future trade agreements ... suggest that the picture is blurred,” though France has emphasized Article 20’s potential to “bolster[] the legal case of countries that are resisting pressure in future trade negotiations to open their cultural sectors to foreign imports,” suggesting that despite the contradictory language on existing international obligations, the Culture Convention is really a forward-looking document in the eyes of its major proponents.

VI. Markets and Politics: The Future of International Trade in Cultural Products

The best interpretation of Article 20 (reproduced below for ease of reference²⁴⁶) is that the Culture Convention is primarily about enhancing negotiating capacity under the GATS regime for countries desiring to protect local cultural producers, and only secondarily (if at all) about affecting the application or scope of existing trade obligations. As previously observed, the language in part 1 of the provision stating that it should be interpreted “without subordinating this Convention to any other treaty” appears to contradict the language in part 2 stating that “[n]othing in this Convention shall be interpreted as modifying rights and obligations ... under any other treaties to which they are parties.”²⁴⁷ By reading narrowly the requirement imposed by part 1 with respect to pre-existing international obligations, however, the two parts of the provision can be squared with one another. The specific obligation under part 1 is to “take

²⁴⁵ ICTSD, *supra* note 110.

²⁴⁶ Article 20 states:

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
 - (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
 - (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Culture Convention, *supra* note 27, art. 20.

²⁴⁷ *Id.*

into account the relevant provisions of this Convention” when “interpreting and applying the other treaties,” which might be read to obligate countries that are parties both to the Culture Convention and the WTO agreements simply to make a good faith effort to behave within the trade regime in a manner consistent with obligations under the Culture Convention. A plain language reading of “take into account” would not appear to require more.

Additionally, this narrow reading of the language of part 1 is reinforced by the more straightforward language of part 2, which – as Michael Hahn has observed – closely tracks Article 30:2 of the Vienna Convention on the Law of Treaties. The Vienna Convention provides that “[w]hen a treaty specifies that it is subject to, *or that it is not to be considered as incompatible with*, an earlier or later treaty, the provisions of that other treaty prevail.” Article 20:2 of the Culture Convention, then, stating that it does not modify rights or obligations under other treaties, effectively constitutes a statement that “it is not to be considered as incompatible with” prior treaties within the meaning of Article 30:2 of the Vienna Convention, thus resulting in the primacy of pre-existing treaty obligations – including those under the WTO agreements.²⁴⁸ The language in part 1 to the effect that the Culture Convention is not to be subordinated to other treaties (and that “mutual supportiveness” is to be fostered), in this light, may be read as a sort of corollary to the first sentence of the article, requiring that all treaties be performed in “good faith” (itself a restatement of Article 26 of the Vienna Convention), though subject to the more specific language following in parts 1(b)

²⁴⁸ See Vienna Convention, *supra* note 190, Article 30:2 (emphasis added); Hahn, *supra* note 97, at 544. Hahn in fact goes further, arguing that the specific language of part 2 – that the Culture Convention is not to be interpreted as “modifying rights and obligations” under pre-existing treaties – should be read as a nod to Article 41:1 of the Vienna Convention, which permits parties to “modify” a treaty as between themselves only if (1) the treaty explicitly permits such modification, or (2) such modification is “not prohibited” and would not preclude the achievement of the treaty’s “object and purpose” or the “enjoyment by the other parties of their rights under the treaty.” This, says Hahn, precludes parties from arguing that the Culture Convention should trump the WTO Agreement as among themselves because this would “compromise the WTO Agreement’s object and purpose to provide a comprehensive basis for all trade relationships,” and “restrictive trade measures” would “affect potentially all WTO members.” *Id.* at 544-46. Hahn does suggest, however, that the WTO would be “ill-advised to not try to accommodate” the Culture Convention’s aims, and suggests that either general exceptions might be interpreted broadly – or the concept of “like” products might be interpreted narrowly – in light of it. The viability of either mode of interpretation, however, would obviously depend critically on the Culture Convention’s ratification rate among WTO members. See *id.* at 546-52; see also Weber, *supra* note 161, at 12-14, 17-19.

and 2.²⁴⁹ If Article 20 can be read in this fashion to require nothing more than good faith effort to interpret prior treaties in a manner consistent with the Culture Convention's goals, then there is real reason to doubt that a WTO dispute resolution panel would exert itself to locate outcome-determinative rules in the Culture Convention²⁵⁰ – particularly when the little relevant WTO case law indicates that cultural products will not be treated differently from anything else subject to trade disciplines.²⁵¹

The obligation to take Culture Convention obligations into account “when entering into other international obligations,”²⁵² however, is another matter entirely. With respect to future negotiations, there is no conflicting language under Article 20 of the Culture Convention because, by hypothesis, there are no existing obligations with which to conflict. Recall that Article XIX of the GATS, reflecting the “agreement to disagree” between the United States and others (notably France), does require that parties “enter into successive rounds of negotiations ... with a view to achieving a progressively higher level of liberalization.” The provision includes a limiting principle, however, stating that such “process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.”²⁵³ When a country declines to liberalize a sector like audiovisual services, one would anticipate that the United States would claim that the country in question had not in fact negotiated in good faith “with a view to achieving a progressively higher level of liberalization,” as Article XIX requires. With the Culture Convention in place, however, the 148 nations that voted for its adoption have, in essence, resoundingly endorsed the recognition of domestic cultural policies as important “national policy objectives” justifying exempting them from this process of liberalization by Article XIX's own terms.

Of course the efficacy of the Culture Convention in this respect depends critically on the circumstances of the country in question – and specifically the

²⁴⁹ See Hahn, *supra* note 97, at 540; Culture Convention, *supra* note 27, art. 20; Vienna Convention, *supra* note 190, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

²⁵⁰ Cf., e.g., *supra* text accompanying note 243.

²⁵¹ See Hahn, *supra* note 97, at 530; see also *supra* note 161 (observing that the split-run periodicals dispute between the United States and Canada effectively represents the totality of WTO case law on the treatment of cultural products as such). It is also worth recalling in this regard that in its dispute with the United States over split-run periodicals, the NAFTA culture exception availed Canada nothing. See *supra* text accompanying notes 155-161.

²⁵² Culture Convention, *supra* note 27, art. 20:1(b).

²⁵³ GATS, *supra* note 94, art. XIX:1-2.

degree to which they need or desire U.S. market access.²⁵⁴ But even in the case of more potent negotiating adversaries like Canada and France, it will depend critically on the perceived normative legitimacy of the broader argument for the protection of cultural diversity through national protectionist policies. The remaining sections of the paper examine the incentives and goals of Hollywood and the U.S. government, the historical development of pertinent trade norms, and the relative weakness of human-rights based attacks on the Culture Convention, concluding that the burden rests squarely on the United States to demonstrate that such liberalization is in fact necessary or desirable.

A. Hybridity and Choice

Philosopher and cultural theorist Kwame Anthony Appiah, in a *New York Times Magazine* article published New Years Day 2006, advanced an impassioned argument for what he termed a “new cosmopolitanism,” which he contrasted with “cultural protectionism.” Noting the “fear ... that the values and images of Western mass culture, like some invasive weed, are threatening to choke out the world’s native flora,” Appiah paints a picture of naïve cultural “purists” endeavoring to defend “some primordial authentic culture” that in fact does not exist.²⁵⁵ As evidence of the inevitable hybridity of culture even in the face of pervasive American media, he cites the vastly differing perspectives that researchers have documented on the global hit television show “Dallas,” emphasizing that the show’s meaning takes shape only in the mind of a viewer, as refracted through their own attitudes and before the backdrop of local cultural conditions. While the Dutch, for example, found “a reminder that money and power don’t protect you from tragedy,” Israeli Arabs found “a program that confirmed that women abused by their husbands should return to their fathers.” As Appiah points out, “cultural consumers are not dupes. They can adapt products to suit their own needs, and they can decide for themselves what they do and do not approve of.”²⁵⁶ What we ought to pursue, concludes Appiah, is a “new cosmopolitanism” built on the creative “contamination” of cultures:

.... I am urging that we should learn about people in other places, take an interest in their civilizations, their arguments, their errors, their achievements, not because that will bring us to agreement but

²⁵⁴ Cf. *supra* text accompanying notes 103-107 (discussing such dynamics in the context of bilateral negotiations with the United States).

²⁵⁵ Kwame Anthony Appiah, *The Case For Contamination*, N.Y. TIMES MAG., Jan. 1, 2006, at 30, 32, 34.

²⁵⁶ *Id.* at 34-35.

because it will help us get used to one another – something we have a powerful need to do in this globalized era.²⁵⁷

No credible policymaker could disagree. Indeed, Appiah's conclusion could practically have been a paraphrase of the UNESCO constitution, written in 1945, which states that "ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war."²⁵⁸ The idea, in both instances, is to ensure contact among diverse cultures toward mutual understanding and, ultimately, peace. And yet interestingly, Appiah points to UNESCO's Culture Convention as expressing the "purist" perspective, implicitly comparing it with "visitors from England and the United States" who, in his native Ghana, "wince at what they regard as the intrusion of modernity on timeless, traditional rituals – more evidence, they think, of a pressure in the modern world toward uniformity."²⁵⁹ Appiah's misconception of the Culture Convention – both its purpose and its likely impact – is striking. Setting aside that scores of developing countries signed onto the agreement, and that its major proponents – France and Canada, both developed countries – were motivated largely, if not entirely, by their own domestic political concerns (though a confluence of interests with the developing world was surely welcome), Appiah suggests that this is yet another example of Western "purists" seeking to enforce cultural "authenticity" on others – more "telling other people what they ought to value in their own traditions."²⁶⁰ By depicting the Culture Convention as a form of censorship, Appiah erects a straw man that is easily torn down. The problem of course, is that this depiction bears no resemblance to reality. Not only does the Culture Convention explicitly prohibit its own invocation to justify deviations from established human rights principles,²⁶¹ but its entire purpose is to enhance speech opportunities by enabling local production capacity alongside imports from America and elsewhere. Like proponents of liberalized trade in the United States and elsewhere, Appiah's rhetorical move is to characterize the aim as being to insulate a static heritage, without acknowledging or engaging with the forward-looking "discourse" conception of culture that generally animates cultural protectionist arguments.²⁶² The hybridized meaning of an American television

²⁵⁷ *Id.* at 52.

²⁵⁸ Constitution of UNESCO, Preamble, *supra* note 112.

²⁵⁹ Appiah, *supra* note 255, at 32.

²⁶⁰ *Id.* at 34.

²⁶¹ See Culture Convention, *supra* note 27, art. 2:1.

²⁶² See BAKER, *supra* note 53, at 250-51; *supra* part II.B.

show like “Dallas” in the minds of, say, Ghanaians, though fascinating, is simply irrelevant to the issue at hand, because no one is suggesting that people in Ghana or anywhere else should not have access to Western media.²⁶³ The Culture Convention would legitimate policy measures to facilitate the production of alternatives, but they would be just that – alternatives. Because Appiah does not seriously grapple with the nature of markets in cultural products²⁶⁴ – media markets in particular – he simply stares past the possibility that the dominance of a single set of voices, facilitated by the liberalization of trade in cultural products, might ultimately prove to be the greatest barrier to the creative cultural “contamination” for which he argues.

B. Media Markets and the Hollywood Model

The centrality of media markets – and film in particular – in the push for a Culture Convention naturally gives rise to several questions. Who, precisely, is “Hollywood” anyway? Is Hollywood “American,” or something else? What is Hollywood’s business model? Can we rely on this business model, in the hands of whoever pursues it, and in a liberalized media market, to bring about the fruitful “contamination” that Appiah and (I would argue) the drafters of the Culture Convention are after?

The Motion Picture Association of America (MPAA) is, literally, a group of corporations. According to the MPAA’s website, it is comprised of Paramount, Disney Pictures, Sony Pictures, 20th Century Fox, Universal Pictures, and Warner

²⁶³ Appiah’s distinction between “purists” and “cosmopolitans” essentially maps onto what one anthropologist has called the “diffusionist” camp, viewing “the flow of commodified cultural forms from center to periphery as synonymous with cultural homogenization,” and the “ecumenist” camp, viewing this as “a cultural interaction that generates and organizes new diversities – ‘creolized’ cultural forms.” See Robert J. Foster, *Making National Cultures in the Global Ecumene*, 20 ANN. REV. ANTHROPOLOGY 235, 251-52 (1991), available at JSTOR. Foster also cites studies of varying interpretations of “Dallas” in different cultures, arguing that “national cultures that sediment out of global cultural interactions are emphatically not self-contained, closed realities, isomorphic with delimited territorial spaces.” *Id.* at 251. Again, however, this is irrelevant to assessment of the Culture Convention. While Foster’s points are excellent, the Culture Convention simply does not aim to insulate cultures from one another, but to sustain the very diversity that underwrites such hybridization.

²⁶⁴ Appiah makes brief reference to the potential for cheap Western clothing to displace traditional dress in a given country, conceding that if people cannot afford to wear what they like, it is “a genuine problem,” though he dismisses this concern as one affecting all who are “too poor to live the life they want to lead” in any country or culture. Appiah, *supra* note 255, at 34. He does not, however, engage with media markets – at the core of concerns prompting the Culture Convention and the principal sector in which it is expected to have impact – or otherwise entertain the notion that government measures on cultural products could be speech enhancing.

Brothers.²⁶⁵ These well-known film studios are, in turn, owned and controlled by some of the largest and best endowed businesses in the world. Paramount is controlled by Viacom Inc. (Sumner Redstone's company);²⁶⁶ Disney Pictures is controlled by The Walt Disney Company;²⁶⁷ Sony Pictures is controlled by Sony Kabushiki Kaisha (Sony Corporation);²⁶⁸ 20th Century Fox is controlled by News Corporation (Rupert Murdoch's company);²⁶⁹ Universal Pictures is controlled by General Electric Company;²⁷⁰ and Warner Brothers is controlled by Time Warner Inc.²⁷¹ All household names, anyone who has not lived under a rock for the last thirty years will immediately recognize the sheer wealth, power, and drive for profit that these names represent.²⁷² The combined fiscal year 2005 revenues of these six companies totaled over \$323.7 billion²⁷³ – a figure exceeding the 2005 gross domestic product of all but 20 nations on Earth.²⁷⁴

²⁶⁵ See MPAA/MPA web site, *available at* <http://www.mpa.org> (accessed Sept. 29, 2006).

²⁶⁶ See Viacom Inc., Annual Report on Form 10-K for the fiscal year ended December 31, 2005 [hereinafter Viacom 10-K], at I-2; Viacom Inc., Definitive Proxy Statement on Schedule 14A filed April 14, 2006, at 13-14.

²⁶⁷ See The Walt Disney Company, Annual Report on Form 10-K for the fiscal year ended October 31, 2005 [hereinafter Disney 10-K], at 16.

²⁶⁸ See Sony Kabushiki Kaisha, Annual Report on Form 20-F for the fiscal year ended March 31, 2006 [hereinafter Sony 20-F], at 19.

²⁶⁹ See News Corporation, Annual Report on Form 10-K for the fiscal year ended June 30, 2006 [hereinafter News Corporation 10-K], at 2; Definitive Proxy Statement on Schedule 14A filed September 7, 2006, at 28.

²⁷⁰ See General Electric Company, Annual Report on Form 10-K for the fiscal year ended December 31, 2005 [hereinafter General Electric 10-K], at 11.

²⁷¹ See Time Warner Inc., Annual Report on Form 10-K for the fiscal year ended December 31, 2005 [hereinafter Time Warner 10-K], at 11.

²⁷² For recent financial reports, see the annual reports cited in notes 266-271.

²⁷³ See Viacom 10-K, *supra* note 266, at II-2 (reporting revenues of \$9,609.6 million); Disney 10-K, *supra* note 267, at 31 (reporting revenues of \$31,944 million); Sony 20-F, *supra* note 268, at 5-6 (reporting revenues of ¥ 7,475,436 million and a period-end exchange rate of 117.78 yen per U.S. dollar, or approximately \$63,469.5 million); News Corporation 10-K, *supra* note 269, at 39 (reporting revenues of \$25,327 million); General Electric 2005 Annual Report to Shareowners for the fiscal year ended December 31, 2005, at 49, filed as Exhibit 13 to General Electric 10-K, *supra* note 270 (reporting revenues of \$149,702 million); Time Warner Inc., Annual Report on Form 10-K/A (Amendment 1) for the fiscal year ended December 31, 2005 (reporting revenues of \$43,652 million).

²⁷⁴ World Bank, *Total GDP 2005*, *available at* <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf#search=%22%22world%20bank%22%20%22total%20GDP%202005%22%22> (accessed October 1, 2006) (providing gross domestic product data by country in U.S. dollars). Gross domestic product is "the sum of the gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products." World Bank, *Data & Statistics: Technical Notes*, *available at*

Even this brief survey of the group's constituents reveals that the Motion Picture Association of America is not solely "American," culturally speaking. Sony Corporation is itself a Japanese incorporated and headquartered entity.²⁷⁵ And News Corporation, though a U.S.-based business,²⁷⁶ is the product of Rupert Murdoch's spectacularly successful career. Though his greatest business successes have occurred in the United States and the United Kingdom, and he "even became a US citizen in 1985 to comply with the country's media ownership laws," Murdoch was born and raised in Australia.²⁷⁷

Nevertheless, five of the six companies that comprise the MPAA are U.S. businesses, and more particularly, four of them are incorporated in the state of Delaware,²⁷⁸ long recognized as the predominant jurisdiction for incorporation in the United States – particularly among large public companies.²⁷⁹ In light of this, it is worth pausing for a moment to consider the fundamental principle guiding the exercise of decision-making authority within U.S. corporations. As students of corporate law in the United States quickly learn, "[t]hat director loyalty to the 'corporation' is, ultimately, loyalty to equity investors is an important theme of U.S. corporate law."²⁸⁰ As one famous case put it, it is "not within the lawful powers of a board to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others."²⁸¹ While other corporate governance systems around the

<http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20437349~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (accessed October 1, 2006).

²⁷⁵ See Sony 20-F, *supra* note 268.

²⁷⁶ See News Corporation 10-K, *supra* note 269.

²⁷⁷ Andrew Walker, *Rupert Murdoch: Bigger than Kane*, BBC NEWS WORLD ED., July 31, 2002, available at http://news.bbc.co.uk/2/hi/uk_news/2162658.stm (accessed Oct. 2, 2006). Goodenough, writing in 1998, describes more extensive international connections in the past, with "[o]nly Warner Brothers and Disney hav[ing] consistently been in unequivocally U.S. hands." See Goodenough, *supra* note 8, at 232.

²⁷⁸ News Corporation, Viacom, and Time Warner are all incorporated in Delaware and headquartered in New York, Disney is incorporated in Delaware and headquartered in Burbank, California, and General Electric is incorporated in New York and headquartered in Connecticut. Sony is headquartered in Tokyo. See the annual reports cited in notes 266-271.

²⁷⁹ The Division of Corporations of the Delaware Department of State reports that over 50 percent of U.S. publicly traded companies and 60 percent of the Fortune 500 are incorporated in Delaware. See Division of Corporations, Delaware Department of State, *Why Choose Delaware as Your Corporate Home?*, available at <http://www.state.de.us/corp> (accessed Oct. 2, 2006).

²⁸⁰ WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 286 (Aspen, 2003).

²⁸¹ *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919), quoted in ALLEN & KRAAKMAN, *supra* note 280, at 287.

world emphasize the interests of other stakeholders to varying degrees (e.g. employees, the community), corporate law in the United States has remained relatively shareholder-centric.²⁸² In the simplest formulation, then, a corporate director's job – as decision-maker for a U.S. company – is to maximize investment return for the benefit of shareholders.²⁸³ Indeed, modern state statutes do not even require corporations to pretend they have any more fundamental objective, or that the “purpose” is to produce a useful or socially beneficial product. The Delaware statute, for example, provides that in describing “the business or purposes to be conducted” in the corporate charter, it is “sufficient to state ... that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized.”²⁸⁴ Maximization of shareholder wealth (within the bounds of the law, of course) is the embracing “purpose” guiding the companies comprising the MPAA.²⁸⁵

The question facing the MPAA's constituents, then, is how best to achieve this – how best to maximize profit on the sale of media products? Two important elements of the equation turn critically on intellectual property law and international trade law. Disney, for example, in its annual report, observes

²⁸² Whether corporate governance systems will “converge” upon a global set of best practices remains an open question, though it is clear that many other jurisdictions have settled upon workable systems emphasizing the interests of other stakeholders to varying degrees. *See, e.g.,* generally Mark J. Roe, *Political Preconditions to Separating Ownership from Control*, 53 STAN. L. REV. 539 (2000); Douglas M. Branson, *The Very Uncertain Prospect of “Global” Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321 (2001); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829 (2000). Others, however, have argued that there is “no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.” Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439.

²⁸³ This is not, of course, to suggest that Sony has not done perfectly well for its equity owners. For Sony's financials, see Sony 20-F, *supra* note 268.

²⁸⁴ DEL. CODE ANN. tit. 8, § 102(a)(3) (2005), *available at* Lexis.

²⁸⁵ Of the six companies, the charters of four of them (Disney, Time Warner, Viacom, and News Corporation) state that the company's purpose is simply to engage in “any lawful act or activity.” *See* Restated Certificate of Incorporation of The Walt Disney Company, art. III, Annex C to the Proxy Statement/Prospectus in Form S-4, filed Sept. 30, 1999 (333-88105); Restated Certificate of Incorporation of AOL Time Warner Inc., art. III, Exhibit 3.1 to Form 8-K, filed Jan. 11, 2001; Amended and Restated Certificate of Incorporation of New Viacom Corp., art. III, Exhibit 3.1 to Form Viacom 10-K, *supra* note 266; Amended and Restated Certificate of Incorporation of News Corporation, Inc., art. II, Exhibit 3.1 to Form 8-K, filed Nov. 12, 2004. Two of the six (General Electric and Sony) endeavor to be more specific, but – as one might predict – the forms of activity described are extremely broad and far-reaching. *See* Certificate of Incorporation of General Electric Company, art. 2, Exhibit 3 to Form 8-K, filed May 1, 2000; Articles of Incorporation of Sony Corporation, art. 4, Exhibit 1.1 to Sony 20-F, *supra* note 268.

that the “success of our businesses is highly dependent on maintenance of intellectual property rights in the entertainment products and services we create,” and that the “[i]mposition by foreign countries of trade restrictions or motion picture or television content requirements or quotas” poses a competitive risk, increasing regulatory costs and “restrict[ing] our ability to offer products and services that are profitable.”²⁸⁶ In essence, the MPAA’s constituents desire an intellectual property system imbuing their products with the maximum value attainable (proportionate to the strength of the rights granted by the legal regime), and an international trade system expanding to the maximum scope possible the market in which their products can move unfettered.

The tension between these two positions has not been lost on observers of the U.S. entertainment industry. Canadian scholar Rosemary Coombe, for example, has observed the strain between advocating liberalism in the trade regime, while at the same time calling for a form of protectionism in the intellectual property regime.²⁸⁷ Indeed, for decades intellectual property restrictions were not tied to the trade liberalizing program of the GATT system precisely due to the “conceptual problem” that intellectual property laws could themselves “be categorized as non-tariff barriers to trade.”²⁸⁸ Only in the 1990s, when the GATT became subsumed in the WTO system, would the United States “force nations that sought favorable trade in other areas to sign the Agreement on Trade Related Aspects of Intellectual Property (TRIPs), a set of global minimal standards for copyright, patent, trade secret, trademark, semiconductor, and geographic marker regulations.”²⁸⁹

The tie between trade liberalism and intellectual property protectionism is certainly not their intellectual compatibility; it is simply the advancement of corporate interests in the West – and particularly the United States – where intellectual property has become increasingly economically important over time.²⁹⁰ And as one might expect, the combined lobbying efforts of News

²⁸⁶ Disney 10-K, *supra* note 267, at 22, 24.

²⁸⁷ Rosemary J. Coombe, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 STANFORD L. REV. 1357, 1363 (1996), available at JSTOR.

²⁸⁸ Sunny Handa, *A Review of Canada’s International Copyright Obligations*, 42 MCGILL L.J. 961, 974 (1997), available at Lexis. Handa observes, for example, that under a national treatment regime, weak copyright laws could function to minimize outflows from a country weak in publishing (domestic authors would be hurt too, but royalty outflows would be diminished) just as strong copyright laws could “keep wealth in the country” where there is a strong publishing industry. *Id.* at 974.

²⁸⁹ Siva Vaidhyanathan, *Remote Control: The Rise of Electronic Cultural Policy*, 597 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 127 (2005), available at Lexis.

²⁹⁰ See, e.g., Coombe, *supra* note 287, at 13-63-64; Handa, *supra* note 288, at 974-76.

Corporation, Viacom, Time Warner, Disney, General Electric, and Sony have proven enormously effective in advancing these interests. Jack Valenti, who became President of the MPAA in 1966 and remained in the position for almost forty years before leaving in 2004, “established himself as perhaps the most prominent and effective lobbyist in Washington” and, during that time, came to be the man who Lawrence Lessig would describe as “the nation’s foremost extremist when it comes to the nature and scope of ‘creative property.’”²⁹¹ This effort does not, however, mean that Valenti fell down on the job with respect to trade advocacy. During this same period, Valenti came to be recognized as the “most formidable trade lobbyist” in the United States,²⁹² describing the MPAA’s products as “the jewel in America’s trade crown.”²⁹³ As an MPAA “anti-piracy” statement put it, “trade agreements ... ensure the free flow and protection of intellectual property.”²⁹⁴ In terms of maximizing the value of their products and expanding the market for them, protectionist intellectual property law and liberalist international trade law are of a piece.²⁹⁵

In the intellectual property context Lessig has strongly criticized the MPAA’s pursuit of its “naked self-interest,”²⁹⁶ and his perspective was evidently shared by Justice Breyer, who all but said as much in a strongly worded dissent to the Supreme Court majority’s 2003 decision in *Eldred v. Ashcroft*.²⁹⁷ Lessig, who argued the case for Eric Eldred challenging the Copyright Term Extension Act based on the Constitution’s “limited times” language and the First Amendment, would later recall his surprise at the standing-room-only crowd on hand the first day, as well as that when he sat down for oral arguments, he “saw Jack Valenti sitting in the special section ordinarily reserved for family of the Justices.”²⁹⁸ Ultimately the Court upheld the Act, determining that Congress’ ability to extend copyrights was effectively unlimited.²⁹⁹ Breyer, however, desiring more exacting scrutiny than the majority had brought to bear, argued in dissent that a

²⁹¹ LESSIG, *supra* note 19, at 117-18. Lessig essentially devotes a chapter of his book *Free Culture* to refuting the claim advanced by Valenti that “[c]reative property owners must be accorded the same rights and protections resident in all other property owners in the nation,” notwithstanding the constitutional requirement that grants of intellectual property rights be for a “limited time.” *See id.* at 117, 119 (quoting Valenti, internal quotation marks omitted, emphasis removed).

²⁹² Cable, *supra* note 19, at 235.

²⁹³ Richardson, *supra* note 17 (quoting Valenti, internal quotation marks omitted).

²⁹⁴ Motion Picture Association of America (MPAA), *Anti-Piracy*, on file with author.

²⁹⁵ *Cf.* Richardson, *supra* note 17 (expressing support for the inclusion of strong intellectual property rights into free trade agreements).

²⁹⁶ LESSIG, *supra* note 19, at 255.

²⁹⁷ 537 U.S. 186 (2003). Lessig himself argued the case for Eric Eldred, who challenged the law.

²⁹⁸ LESSIG, *supra* note 19, at 238.

²⁹⁹ *See id.* at 239-43.

statute extending copyrights “involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression – in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture.”³⁰⁰ Breyer also pointed to legislative history suggesting that the true aim of the law was “the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports.”³⁰¹ “It is easy to understand,” Breyer concluded, “how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.”³⁰²

The MPAA has not only advocated stronger intellectual property rights, but has even opposed changes to the intellectual property registration system that would have had no direct impact on their rights over their own intellectual property. The “Eldred Act,” proposed by Lessig in a *New York Times* op-ed, would have freed up unused intellectual property for creative use by others by requiring that, 50 years following its creation, the copyright owner pay a nominal fee and register the work in order to get the protection of the full copyright term. The logic was to eliminate copyright protection “where it is doing nothing except blocking access and the spread of knowledge,” while preserving it “for as long as Congress allows for those works where its worth is at least \$1” to the copyright holder.³⁰³ Once the bill was drafted, however, by California’s Zoe Lofgren, the “lobbyists began to intervene.” Notably, “Jack Valenti and the MPAA general counsel came to the congresswoman’s office to give the view of the MPAA,” communicating “that the MPAA would opposed the Eldred Act,” even though they appeared to have no substantive reason for doing so.³⁰⁴ Ultimately, Lessig concluded of this effort – quite plausibly – that the “effort to block the Eldred Act is an effort to assure that nothing more passes into the public domain. It is another step to assure that the public domain will never compete, that there will be no use of content that is not commercially controlled, and that there will be no commercial use of content that doesn’t require *their* permission first.”³⁰⁵

³⁰⁰ *Eldred*, at 244 (Breyer dissenting).

³⁰¹ *Id.* at 262.

³⁰² *Id.*, at 266.

³⁰³ LESSIG, *supra* note 19, at 248-49.

³⁰⁴ *Id.*, at 253-54 (recounting the MPAA’s rationale for opposing the Eldred Act, including that it “would harm poor copyright owners – apparently those who could not afford the \$1 fee”).

³⁰⁵ *Id.*, at 255.

This attempt not just “to protect what is theirs,” but also “to assure that all there is is what is theirs,”³⁰⁶ highlights another aspect of Hollywood’s business model flowing from the fundamental nature of media products. Such products constitute a quintessential example of what Cass Sunstein and Edna Ullmann-Margalit call “solidarity goods” – that is, products that “have more value to the extent that other people are enjoying them; they reflect something like a communal impulse.”³⁰⁷ A film, for example, derives at least part of its value to any given consumer from “the range of benefits coming from the fact that other people are also enjoying or buying it,” including the “social benefits that come after the show has been watched.” Companies in the business “are well aware of this fact; they know that the number of viewers and users will increase, sometimes exponentially, once popularity is known to exceed a certain threshold.”³⁰⁸ Disney, for example, recognizes in its annual report the business risks posed by “competition ... from alternative providers of the products and services we offer and from other forms of entertainment,” as well as that Disney’s “success depends substantially on consumer tastes and preferences that change in often unpredictable ways. The success of our businesses depends on our ability to consistently create and distribute filmed entertainment” and other products “that meet the changing preferences of the broader consumer market.”³⁰⁹ To the extent they constitute “solidarity goods,” it is not surprising that Hollywood would have a strong incentive to narrow the supply of competing intellectual property-based entertainment by opposing initiatives like the Eldred Act. Not only might competing intellectual property potentially divert sales, but it also might diminish the intrinsic appeal of Hollywood’s products to the extent that it steers cultural preferences in another direction. As one scholar put it, “[m]ediated cultural competition is very much about gaining preference for your media product as social glue, which produces a hue of solidarity around it.”³¹⁰ This endeavor to restrict the supply of competing

³⁰⁶ *Id.* (emphasis removed).

³⁰⁷ Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity in Consumption 2* (University of Chicago Law Sch. John M. Olin Law & Econ. Working Paper No. 98, 2000), available at http://papers.ssrn.com/paper.taf?abstract_id=224618.

³⁰⁸ *Id.* at 3, 16.

³⁰⁹ Disney 10-K, *supra* note 267, at 21, 23.

³¹⁰ See Guy Pessach, *Copyright Law As a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright’s Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1083-87 (2003), available at Lexis (discussing the application of Sunstein’s and Ullmann-Margalit’s “solidarity good” concept to media products); cf. Vaidhyanathan, *supra* note 289, at 125 (arguing that the “academic ‘cultural imperialism thesis’ is in severe need of revision,” and that “if there is a dominant form of cultural imperialism, it concerns the pipelines, not the products – the formats of distribution and the terms of access and use”).

intellectual property clearly goes hand in hand with advocacy for a protectionist intellectual property regime and a liberalist trade regime.

That Hollywood stands to profit through restrictive intellectual property rules, liberal international trade rules, and the constriction of supply of competing intellectual property is straightforward enough. Again, the aim in broader terms is to maximize the value of their products and the scope of the market in which they can move unfettered. But what about the substance of those products? What type of subject matter and production maximizes return for shareholders?

Cultural theorists like Appiah and Bhabha certainly make an important point when they emphasize the inevitable hybridity of all national cultures – the permeability of their boundaries, and the inevitability, even desirability, of cultural “contamination.” Hollywood production, however, defies categorization in such terms, because Hollywood’s aim is precisely to avoid cultural specificity. It neither contaminates nor is contaminated – if by that we mean fruitful contacts among diverse cultures – because it is all of us and none of us at the same time. Within a protectionist intellectual property regime and a liberalist trade regime, Hollywood seeks to maximize the appeal of its products through a universality intended not to correspond with any national or cultural reality. As A.O. Scott, a film critic for *The New York Times*, has observed, “Hollywood studios, as they try to protect their dominant position in the global entertainment market, are ever more heavily invested in fantasy, in conjuring counterfeit worlds rather than engaging the one that exists.”³¹¹ As his colleague Lynn Hirschberg would similarly observe, “corporate finances dictate that they cast the widest net possible,” meaning a cultural universality that – ironically, in light of the complaints of other nations that they are overrun by “American” popular culture – in fact does not reflect America at all. “Now most big studio films aren’t interested in America,” Hirschberg writes, “preferring to depict an invented, imagined world, or one filled with easily recognizable plot devices.”³¹² As a studio executive preferring to remain unnamed told Hirschberg, American films “no longer reflect our culture,” having become “gross, distorted exaggerations.”³¹³ Ironically, the “arrival of globalization is not complicating the

³¹¹ A.O. Scott, *What is a Foreign Movie Now?*, N.Y. TIMES MAG., Nov. 14, 2004, at 78, 81.

³¹² Hirschberg, *supra* note 5, at 90-91. This may be further reflected in the increasing number of animated films – “many of them about cute talking animals.” Jeffrey Katzenberg, DreamWorks’ chief executive, related to *The Wall Street Journal* a time when “he was in a movie theater and sat through back-to-back trailers for several near-identical” animated films. “I didn’t realize how similar they were all going to be,” he said. See Marr, *supra* note 7, at B14.

³¹³ Hirschberg, *supra* note 5, at 91 (internal quotation marks omitted).

American stories being told; it is simplifying them.... [N]ow, instead of being known for our sense of conversation or style, we are known for our blood and gore.”³¹⁴ Oliver Goodenough expresses a similar insight when he observes Hollywood’s “devotion to pushing the hot-buttons of human gratification” – “high-violence, high-sex, high-materialist product,” or what he calls “the salt, fat and sugar of the human psyche.” As Goodenough adds, “[p]ut these in the theatre, on the tube, or over the radio, and people around the world will consume them like salty french fries.”³¹⁵

C. Edwin Baker sets out a compelling economic explanation for Hollywood’s relentless push toward universality. Building on the typology of Eli Noam, who suggests (for analytical purposes) that media content can be categorized as “*D*” for domestic, “*U*” for universal, and “*F*” for foreign, Baker (following Noam) assumes that a given national population will tend to value *D* highly, *U* somewhat, and *F* not so much. One country’s *F* will of course be another’s *D*, but the crucial observation is that both value *U* somewhat. In order to maximize profit, “a producer should include each element until its cost becomes greater than the revenue its inclusion allows the producer to extract from potential audiences,” which predicts that “media products made for domestic audiences will contain mostly *D*, some *U*, and little if any *F*.” Under a regime of free trade, a producer might be inclined to exploit export opportunities by increasing *F*, but this would only pay in those markets where *F* happens to be *D*, and the greater amount of *F* would come at the cost of diminishing the product’s value in the home market. As a consequence, “for a producer seeking to export its creations, generally the dominant strategy is to increase *U* and sacrifice some *D*.”³¹⁶

The greater universality that Baker’s and Noam’s analysis predicts accords well with the reality that critics like Scott and Hirschberg have observed in American film. Hirschberg, for example, has observed – again, ironically – that the drive for “universal appeal” has led to shooting films abroad in part so that “films are set in a movie world with no distinct sense of place,” as well as to a generation of “international stars” (mainly men, she observes) “from other English-language-speaking countries, like Ireland (Colin Farrell), England (Jude Law, Clive Owen), Scotland (Ewan McGregor) or Australia (Russell Crowe).”³¹⁷

But of course these dynamics are in no sense specific to U.S. media production. Over recent years, for example, India’s raucous “Bollywood” film

³¹⁴ *Id.* at 94.

³¹⁵ Goodenough, *supra* note 8, at 226.

³¹⁶ BAKER, *supra* note 53, at 227-28.

³¹⁷ Hirschberg, *supra* note 5, at 94.

industry has enjoyed greater global popularity, particularly – though not exclusively – with the Indian diaspora. And of course those profiting from this business would love to see it expand further, which raises the question, how best to do that? The first thing to note is that Bollywood’s success outside India to date has resulted at least in part from a concerted effort to achieve “the validation of the west.” As Rahul Jacob, writing for *The Financial Times*, put it, “the formula ... that Bollywood films now follow is intended to appeal to people like me, India’s diaspora in places like the US and the UK.”³¹⁸ Accordingly, Bollywood star Shah Rukh Khan has suggested that “[w]hat Indian cinema needs is to wear the garb of western cinema. We have to make shorter films, introduce more special effects and raise the production standards to make our movies more appealing to an international audience.”³¹⁹ Observe that the perceived formula for success is not to condition the West to understand Indian cinema or to expect the audience to encounter it on its own terms, but to universalize it – to conform the art to the requirements of a global audience. Indeed, filmmakers from other countries who have made inroads in the West have quite consciously made similar universalizing moves. Chinese director Chang Yimou, whose 2004 film “Hero” (starring Zhang Ziyi) did quite well in the United States, “said he kept western audiences in mind as he was shooting. ‘I tried to get across themes that would be understood by a western audience.’”³²⁰ Again, the secret to export success, in China just as in the United States, is to alter the film, not to expect much of the audience. The economic forces that Baker and Noam identify – detectable in other parts of the world striving for a global audience as well – suggest that what is truly “American” about Hollywood is not the content it purveys so much as its size and capacity to exploit a global market. As Baker puts it, “[m]aybe the often criticized shallowness of American cultural products is less intrinsic to American creativity or tastes ... than to the commercial realities of producing these products for export.”³²¹

One aspect of Hollywood’s dominance that is actually quite specific to America, however, is the sheer size of the home market, which helps explain the push for bigger, more expensive films, as well as their global dominance. The growth of DVD sales revenues over recent years – sometimes far exceeding what a film makes at the box office – has placed enormous power in the hands of a small number of retail chains that together account for a huge percentage of sales

³¹⁸ Rahul Jacob, ... *or just home-grown melodrama?*, FIN. TIMES, Aug. 28-29, 2004, at W7.

³¹⁹ Sumathi Bala, *Bollywood dreams going global ...*, FIN. TIMES, Aug. 28-29, 2004, at W6 (quoting Khan, internal quotation marks omitted).

³²⁰ Ien Cheng, *Hero’s success sweeps the US*, FIN. TIMES, Sept. 13, 2004, at 12.

³²¹ BAKER, *supra* note 53, at 228.

in the United States. Jon Gertner reports that “a handful of big chains have assumed a near-cartel on retail DVD sales,” with Best Buy, Target, Costco, Sam’s Club, Circuit City, and Blockbuster accounting together for about 42 percent of DVD sales in the United States. But each of these pales beside Wal-Mart, which evidently wields such extraordinary buying power that even Hollywood executives are terrified of them. Gertner learned an apparent “axiom of the DVD business ... that no one discusses Wal-Mart’s influence or its negotiating tactics,” though according to one analyst Wal-Mart “alone controls about 22 percent of the overall DVD market in the United States and up to 40 percent on any one hit title.” As a consequence of these market dynamics, studio heads listen closely to what the retailers have to say, and the upshot is that “limited shelf space ... has made it increasingly unappealing for studios to acquire smaller projects for distribution,” such as independent and foreign films.³²² This drive for expensive productions and ability to recoup costs through domestic sales, however, clearly works to Hollywood’s advantage in the international market, where it has the consequence of rendering it increasingly difficult for others to compete.³²³

Interestingly, however, even though financial realities push the big Hollywood cinemas to think grand and global, it’s these same studios that can afford so-called “specialty divisions” that do aim to produce authentically American films, notwithstanding the diminished global appeal. Hirschberg points to the example of “Sideways,” starring “four relative unknowns,” which, after having been rejected by Universal, was produced by Searchlight – a division of Fox that “largely concentrates on reaching a small North American audience.” Films like this (with “no international stars and no action”), and the divisions that make them, are clearly not where the money is. “A mediocre film released in thousands of theaters will usually be more successful than a small

³²² Jon Gertner, *Box Office in a Box*, N.Y. TIMES MAG., Nov. 14, 2004, at 104, 108-9. This is of course not to say that studio heads have no appetite for independent films. In fact, “big studios send some of their brightest people to [the Sundance Film Festival] to shop for films and future projects, potential stars and possible franchises.” As Manohla Dargis has pointed out, “Hollywood’s incursion into the independent film realm has not only radically affected festivals like Sundance and turned them into a growth market, it has also changed the stakes for everyone involved. Modesty, after all, isn’t much of a virtue when you’re releasing a film with a multimillion-dollar ad campaign on thousands of screens.” Manohla Dargis, *Gold Rush Mentality at a Hustlin’ Sundance*, N.Y. TIMES, Jan. 26, 2007, available at <http://www.nytimes.com/2007/01/26/movies/26sund.html?adxnnl=1&adxnnlx=1169855026-npBuDGMgQxsCUPhtzmN11Q> (accessed Jan. 26, 2007).

³²³ See *infra* text accompanying notes 326-327. It should, however, be noted that reliance on DVD sales can create its own risks. In 2005 DreamWorks had to restate earnings estimates multiple times due to miscalculation of “Shrek 2” DVD sales, leading to an informal Securities and Exchange Commission inquiry. See Marr, *supra* note 7, at B1.

movie, without stars, that requires clever marketing.”³²⁴ That they are made at all should perhaps be considered, from the “culture” maven’s perspective, a point in Hollywood’s favor and an indication of the devotion to the craft that some within these mega-companies bring to their work. But consider another question: If worldwide sales of Hollywood “event” films are what it takes, in a globally liberalized marketplace, to free up small divisions of enormous film companies to produce authentically American films on occasion, then what pays for authentic local cultural production in the rest of the world?

At this point, the examination of Hollywood’s business model and its consequences brings us back to UNESCO’s Culture Convention – what it represents, and what it might accomplish. Awkward as the drafting may be, the Culture Convention is perhaps best read as an assertion of the legitimacy of the very types of governmental structures that, in the absence of any capable market actor or mechanism, could fill that void. It is, in essence, an assertion of the capacity to register preferences about cultural production other than through a globalized marketplace that disfavors the small and local. It is easy to criticize this from the American perspective, though of course as described above, the United States simply does not face this dilemma, and in fact profits enormously from maintenance of the *status quo*. While often tarred as “paternalistic,” as Baker points out, “this complaint, not intervention, is what is really paternalistic. Paternalism lies not in subsidized government structural intervention but in refusing to treat the decision about subsidies and intervention as a matter of democratic choice.”³²⁵

Baker has compellingly argued that such legal measures should be permitted to the extent that liberalized trade exacerbates market failures,³²⁶ emphasizing (among other things) that the size of its home market gives the United States an enormous advantage on the international playing field. Countries importing U.S. cultural products, for example, cannot look to “anti-dumping” rules (which generally penalize countries exporting goods below cost) because once media products have been created, there is little added cost to producing additional copies for export. The size of Hollywood’s home market permits it to recoup

³²⁴ Hirshberg, *supra* note 5, at 90, 92. “Sideways” involves a “wine-tasting road trip” in Santa Barbara by Miles, “a would-be novelist,” and Jack, “his old college buddy and washed-up actor,” before Jack’s wedding. The film won awards for “best adapted screenplay” at the Academy Awards and the Writers Guild Awards, as well as Golden Globes for “Best Picture” (comedy/musical) and “Best Screenplay.” See Fox Searchlight, *Sideways*, available at <http://www2.foxsearchlight.com/sideways> (accessed Oct. 3, 2006).

³²⁵ BAKER, *supra* note 53, at 121.

³²⁶ *Id.* at 222.

production costs through domestic sales, as well as to create more expensive products beyond the reach of producers elsewhere (who lack the home market to support their creation), and then to sell those products abroad at lower prices – which still brings in a nice return due to the low cost of subsequent copies.³²⁷

The MPAA, of course, simply sidesteps these issues, emphasizing that “in the e-commerce world” channel scarcity is no longer a problem, and arguing on this basis that protectionist measures like quotas are not justified.³²⁸ But the hypocrisy of the predominant U.S. position on trade in cultural products – not to mention the U.S. no-vote on UNESCO’s Culture Convention – stands out perhaps most starkly on the rare occasion that the United States itself actually feels culturally threatened by the trade regime (or can benefit rhetorically by posturing as if it did). For example, when a WTO dispute resolution panel ruled for Antigua and Barbuda in 2004, finding that “the United States policy prohibiting online gambling violates international trade law,” incensed congressional leaders did not hesitate to play the culture card. According to *The New York Times*, “several members of Congress said they would rather have an international trade war or withdraw from future rounds of the World Trade Organization than have American social policy dictated from abroad.” As Bob Goodlatte, a Republican Representative from Virginia, intoned, “[i]t cannot be allowed to stand that another nation can impose its values on the U.S. and make it a trade issue.” Sir Ronald Sanders, the foreign affairs representative of Antigua and Barbuda, for his part observed that the United States “says it wants open competition,” but “it only wants free trade when it suits the U.S.”³²⁹

³²⁷ *Id.* at 226-27; see also John H. Barton, *The International Video Industry: Principles For Vertical Agreements and Integration*, 22 CARDOZO ARTS & ENT. L.J. 67, 85 (2004), available at Lexis (“In free trade, information-based firms that are dominant in larger home markets have a competitive advantage over firms in smaller markets and thus tend to dominate in international trade. This is because firms in nations with larger markets are likely to spend more on content in the individual production in order to meet domestic competition, and are also likely to be able to recover a significant portion of those costs in the home market. Thus, they can export a better (or at least better funded) product at a lower price, and the nation is likely to export more content than it imports.”).

³²⁸ Richardson, *supra* note 17.

³²⁹ Matt Richtel, *U.S. Online Gambling Policy Violates Law, W.T.O. Rules*, N.Y. TIMES (online), Mar. 26, 2004, available at <http://www.nytimes.com/2004/03/26/technology/26gamble.html?ex=1395723600&en=c8c1b6ed92e479ef&ei=5007&partner=USERLAND> (accessed Sept. 6, 2006). Ultimately the WTO’s Appellate Body agreed that the U.S. actions at issue restricted trade in services contrary to U.S. GATS commitments, but found that the ban on Internet gambling was justified under the exception for the protection of “public morals.” See Joost Pauwelyn, *WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation*, ASIL INSIGHT,

If the regulation of on-line gambling is infused with social and cultural significance for the United States to the point that intrusions by the trade regime leave members of Congress ready to leave the WTO altogether, then is it really so surprising that concerns about national cinema – far more culturally significant and economically consequential, by any sensible measure – could lead other countries to decline to liberalize their media markets?

C. Hard Power, Soft Power, and Enabling Rhetoric

While Hollywood's movers and shakers are enormously powerful themselves, it must be recognized that their business strategy depends critically on the actions of individuals and institutions that are – at least formally – not under their control. Domestic laws come from Congress.³³⁰ And foreign commitments come from the Executive, as refracted through the Senate, due to the latter's power to approve treaties.³³¹ These constitutional principles themselves give rise to additional questions: Why might the U.S. government work so hard to advance Hollywood's (or rather its shareholders') interests? Setting aside the unsavory thought that our government's attention can simply be bought, and recognizing that elected officials will of course be happy to hear Hollywood report that media industries bring in substantial export revenues and employ many people,³³² the question nevertheless remains: How might the U.S. government's own goals be advanced through the global dominance of Hollywood?

There is an element of raw power politics in the U.S. pursuit of dominance in cultural products trade. Political scientists Robert Keohane and Joseph Nye, Jr. have drawn a useful distinction between "hard" power – that is, "the ability to get others to do what they otherwise would not do through threats or rewards" – and "soft" power – that is, "the ability to get desired outcomes because others want what you want." Getting what one wants "through attraction rather than coercion" is the stuff of "soft" power, and this "can rest on the appeal of one's ideas or culture." Keohane and Nye observe that the achievement of soft power

Apr. 12, 2005, available at <http://www.asil.org/insights/2005/04/insights050412.html> (accessed Jan. 25, 2007).

³³⁰ "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

³³¹ The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*, art. II, § 2.

³³² See text accompanying note 17.

can result in a country “not need[ing] to expend as many costly traditional economic or military resources.”³³³

In their exploration of expressions of such power, Keohane and Nye observe that “soft power is strongly affected by the cultural content of movies and television programs,” and that because economies of scale aid such production in the United States, the “dominant American market share in films and television programs in world markets is therefore likely to continue.”³³⁴ The strategic value of ensuring that global media remain primarily in the business of piping content basically amenable to American values and viewpoints is obvious. Monroe Price’s notion of a “market for loyalties” essentially emphasizes this strategic value. Price identifies a global “competition for influence,” and contends that “the argument for free trade is a central element of masking or shaping a particular entrant into this market for loyalties on a global basis.”³³⁵ In this light, the U.S. approach to trade negotiations affecting cultural products might be viewed as the employment of hard power (diplomatic pressure coupled with the carrot of U.S. market access) in order to facilitate the achievement of soft power (cultural products broadly amenable to American values).

The endeavor to make the world safe for American ideas is itself, however, facilitated and enabled by rhetoric that aims to give trade liberalism a patina of scientific inevitability, notwithstanding its relatively recent vintage and political contingency. Political scientist John Ruggie, in a well-known article published in *International Organization* in 1982, described the post-World War II order as the “embedded liberalism compromise.” Rejecting both the extreme “economic nationalism” of the 1930s and the extreme “liberalism” of the prewar gold standard and free trade, embedded liberalism – built upon the Bretton Woods institutions (the International Monetary Fund and the World Bank) and the GATT regime – represented a middle road that was at once “multilateral in character” and “predicated upon domestic interventionism.”³³⁶ With respect to the trading system, “principles of multilateralism and tariff reductions were affirmed, but so were safeguards, exemptions, exceptions, and restrictions – all designed to protect the balance of payments and a variety of domestic social

³³³ Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, 77 FOREIGN AFF. 81, 86 (1998), available at Hein Online.

³³⁴ *Id.* at 87-88.

³³⁵ Panel Discussion, *International Trade in Media Products Commentary*, 27 BROOKLYN J. INT’L L. 1003, 1022 (2002), available at Lexis (Monroe Price participating in panel discussion).

³³⁶ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 393 (1982), available at JSTOR.

policies.”³³⁷ Liberalism was, quite literally, to be “embedded” within the larger goal of domestic stability. The history is important because we might observe of the debate over cultural products what Ruggie observes more broadly of the entire postwar global economic order: “[I]f we compare changes in the monetary and trade regimes against some ideal of orthodox liberalism, then we are bound to be disappointed if not shocked by recent trends. But,” he continues, “we are also bound to be misled. For orthodox liberalism has not governed international economic relations at any time during the postwar period.”³³⁸

The United States has expended enormous effort to make things appear otherwise. Recall, for example, as argued above, that the Culture Convention is very likely aimed at legitimating the refusal to liberalize audiovisual services under the GATS negotiations, notwithstanding the general commitment to continue negotiating toward further liberalization. It is worth pausing to consider, however, the origin of the perhaps counterintuitive notion that “services” can be “traded” in the first place. William Drake and Kalypso Nicolaidis have exhaustively chronicled the origin of the normative shift toward conceptualizing services as tradeable, and the history will strike many as surprisingly recent. Unlike goods, with respect to which the modern argument for gains through trade dates back at least to the early 19th century,³³⁹ as late as 1972 virtually no one would have thought of a service as something that could be “traded.” That year, however, “a group of experts” meeting “under the auspices of the Organization for Economic Cooperation and Development (OECD) ...

³³⁷ *Id.* at 396. Indeed Amartya Sen reminds us that economics in the West “has had two rather different origins, both related to politics, ... concerned respectively with ‘ethics’, on the one hand, and with what may be called ‘engineering’, on the other.” For Aristotle, economics – subject to “the master art” of politics – was a means to be employed in pursuit of “the good of man.” AMARTYA SEN, ON ETHICS AND ECONOMICS 2-3 (1987) (Blackwell 1996) (internal quotation marks omitted). Further observing the “self-consciously ‘non-ethical’ character of modern economics and the historical evolution of modern economics largely as an offshoot of ethics,” Sen further reminds us that Adam Smith himself was a Professor of Moral Philosophy at Glasgow. *Id.* at 2.

³³⁸ Ruggie, *International Regimes, Transactions, and Change*, *supra* note 336, at 405.

³³⁹ See RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS 5-10 (1996). The British economist David Ricardo, in *The Principles of Political Economy and Taxation* (1817), set out the “first ‘scientific’ demonstration that international trade is mutually beneficial.” Ricardo’s “law of comparative advantage” holds that countries do best by specializing in goods for which their costs of production are comparatively low, relative to other goods. Regardless of the fact that “a nation may have an absolute advantage over others in the production of every good, specialization in those goods with the lowest comparative costs, while leaving the production of other commodities to other countries, enables all countries to gain more from exchange” and thereby to enjoy consumption opportunities beyond their production capacities. This notion of comparative advantage “remains the linchpin of liberal trade theory.” ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (1987), *excerpted in* BHALA, *supra*, at 9.

coined the phrase ‘trade in services.’” This was the beginning of what Drake and Nicolaidis describe as “a revolution in social ontology” that “redefined how governments thought about the nature of services, their movement across borders, their roles in society, and the objectives and principles according to which they should be governed.”³⁴⁰ The new terminology was “embraced quickly in the United States,” with a large enough market to have “nurtured some of the world’s largest services firms” eager to dismantle barriers to market entry abroad. And the rhetorical benefits of this shift were enormous:

For American-based [trans-national corporations], the “trade” category had a dual appeal. Internally, it rolled together a new political coalition of companies from diverse industries by underscoring their common problems and justifying their individual demands. Externally, it gave them each a potent discursive weapon with which to advance these demands by redefining industry-specific policies as “protectionism,” a charge that was less easily ignored by foreign governments than were ad hoc appeals for regulatory flexibility.³⁴¹

Even by the 1980s those pushing the idea that services should be considered tradeable consisted principally of American government officials and business people, as opposed to “independent observers” or scholars. The U.S. Chamber of Commerce, the U.S. Council for International Business, the Conference Board, and other business organizations were instrumental in advocating the idea “on the conference circuit, in public and private sector meetings, and in a handful of publications,” and as a consequence “classical liberal thinking in the American mode shaped the agendas of those who were aware of the issues.”³⁴² Meanwhile, the United States government pursued the negotiating strategy of pushing to get services included in bilateral trade deals “to gain quick entry for American-based [companies] in key markets, set a standard for services initiatives, and pressure other GATT members into negotiations.”³⁴³ As discussed above, the Europeans

³⁴⁰ William J. Drake & Kalypso Nicolaidis, *Ideas, Interests, and Institutionalization: “Trade in Services” and the Uruguay Round*, 46 INT’L ORG. 37, 38 (1992), available at JSTOR.

³⁴¹ *Id.* at 46.

³⁴² *Id.* at 49-50.

³⁴³ *Id.* at 57. I have written elsewhere about the efficacy of this U.S. trade negotiation strategy. See Bruner, *supra* note 75, at 38-52. Cf. generally Christopher M. Bruner & Rawi Abdelal, *To Judge Leviathan: Sovereign Credit Ratings, National Law, and the World Economy*, 25 J. PUB. POL’Y 191 (2005) (discussing the efficacy of gatekeeper status vis-à-vis the U.S. capital market as a means of enforcing U.S. values and market practices globally); ABDELAL, *supra* note 39 (exploring the emergence of the norm favoring capital liberalization as a collision of America’s preference for “ad hoc” globalization versus Europe’s desire for “managed” globalization); Drake & Nicolaidis,

(spearheaded by the French) ultimately were able to resist audiovisual services liberalization under the GATS by declining to make commitments in that sector, but the very fact that by the 1990s services were broadly spoken of as tradeable constituted a huge rhetorical victory for the U.S. government and industry. As Drake and Nicolaidis observe, “the predominantly Anglo-American analysts who first posed the issues established the terms of discourse to which other members later had to respond.” And by linking services liberalization to the concept of trade, they were able as a practical matter to reverse the burden of persuasion; in “defining services transactions as ‘trade’” they “established normative presumptions that ‘free’ trade was the yardstick for good policy against which regulations, redefined as nontariff barriers ..., should be measured and justified only exceptionally.”³⁴⁴

Those who have ultimately come to recognize an interest in opposing services liberalization in cultural sectors, though initially caught on their heels, have in the Culture Convention endeavored to reset the default presumptions about the relative wisdom of liberalism versus regulation in this area. As Ruggie would observe close to the time of the WTO’s creation, the trade regime created in the wake of World War II “was intended to achieve and maintain a sustainable balance between the internal and external policy objectives of governments It was not designed to restructure domestic institutional arrangements. Yet, domestic restructuring is what the trade policy agenda increasingly has come to be about.”³⁴⁵ The Culture Convention, which, it should be recalled, passed 148-2 (warts and all), in broader terms builds on this recognition and rejects the normative premise that liberalization of media products is inevitable or even desirable. It is an attempt to place back on the United States the burden to demonstrate why liberalization in this area is appropriate and/or desirable, and by all indication, the United States is failing in that effort.

In the area of cultural products, however, the United States has deployed not only trade rhetoric, but also human rights-based arguments aimed at painting cultural protectionist measures as a violation of speech and related rights –

supra note 340, at 41 (contrasting “the largely American partisans of comprehensive liberalization” with the “more European-style managed liberalism”).

³⁴⁴ Drake & Nicolaidis, *supra* note 340, at 40; *see also* John Gerard Ruggie, *At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy*, 24 MILLENNIUM 507, 514-15 (1994) (observing that “because the concept of services has no well-established place in economic theory, its definition tends to be *ad hoc* and arbitrary,” and there is consequently “no reason to expect that contested definitions will yield to consensus simply because a GATS has been reached”).

³⁴⁵ Ruggie, *At Home Abroad, Abroad at Home, supra* note 344, at 516.

notably the right to receive information of one's choosing. The U.S. Ambassador to UNESCO Louise Oliver has, as described above, attacked the Culture Convention not only as potentially destabilizing to the global trade system, but as potentially opening the door to speech-related human rights abuses. Emphasizing the United States' own diversity and openness to new ideas, Oliver and others suggest that the Culture Convention will do precisely the opposite, leading to stasis and homogeneity within national cultures through government control of access to ideas.³⁴⁶ Likewise Appiah implicitly makes a human rights-based attack on the Culture Convention when he suggests that its "principle of equal dignity of and respect for all cultures" is contradictory in that "all cultures" would also include "those of the K.K.K. and the Taliban."³⁴⁷

Such "contradictions" are more apparent – and for those with commercial or diplomatic incentives to oppose the Culture Convention, convenient – than real. As an interpretive matter, the notion that the Culture Convention somehow endorses the racist and ethnocentric lunacy of the K.K.K. and the Taliban is plainly incorrect. The first listed objective of the Culture Convention is "to protect and promote the diversity of cultural expressions," and others include encouraging "dialogue among cultures" and fostering "interculturality in order to develop cultural interaction in the spirit of building bridges among peoples."³⁴⁸ The principle selectively quoted by Appiah, then, reads in full: "The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples."³⁴⁹ In other words, to accord with the objective, one's conduct would have to reflect recognition of the equal dignity of all. It is precisely the likes of the Taliban and the K.K.K. the conduct of which would accord neither with such objective nor with such principle. Taliban-like and K.K.K.-like views and conduct are rather clearly *condemned* by this principle of the Culture Convention (read in full), not respected or permitted by it.³⁵⁰ And just like U.S. officials speaking on the Culture Convention, Appiah omits to mention another "principle" – the first listed in the instrument, actually – which states that "[n]o one may invoke the provisions of this Convention in order to infringe human rights and fundamental

³⁴⁶ See *supra* text accompanying notes 34-36, 46-47, 206, 235.

³⁴⁷ Appiah, *supra* note 255, at 37.

³⁴⁸ Culture Convention, *supra* note 27, art. 1(a), (c), (d).

³⁴⁹ *Id.*, art. 2:3.

³⁵⁰ Any pluralist cultural policy will ultimately require a "non-interference" principle of this sort to delineate the outer boundaries of acceptable social conduct. In essence, "no group conscious policy can be supported if it conflicts with the realisation of social justice for other groups." OWEN-VANDERSLUIS, *supra* note 54, at 123-24.

freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.” Both “freedom of expression” and “the ability of individuals to choose cultural expressions” are provided as explicit examples, and the principle is stated without exception or qualification.³⁵¹ In an explanatory document, UNESCO cites this principle as ensuring that “the risk of cultural relativism, which in the name of diversity would recognize cultural practices that infringe the fundamental principles of human rights, has been eliminated.”³⁵²

Indeed, blurry as the operative definitions may be, it is difficult to imagine such a document having the practical effect on governments’ human rights compliance that I have argued it will have on their approach to trade negotiations. A commentary published in *The Washington Times* by a past fellow of the Competitive Enterprise Institute, a policy think tank describing itself as “dedicated to advancing the principles of free enterprise and limited government,”³⁵³ includes the following paragraph:

The day of the UNESCO decision, word came that the theocracy running Iran ordered tight restrictions on what movies can be shown in that country’s theaters. The ‘distribution and screening of foreign films which promote secular, feminist, liberal or nihilist ideas’ is officially forbidden. Like the UNESCO treaty, Iran’s ban is a none-too-subtle shot at Hollywood.³⁵⁴

While the author does not go so far as to state that the one caused the other, the implication is clear. But are we actually to believe that Iran’s government feels newly empowered to censor the information available to its citizens from abroad in a way or to a degree that it did not previously and would not have otherwise, but for this document? The author does not go this far because to do so would be ludicrous; the reality is that Iran was Iran both on the Wednesday before the Culture Convention’s adoption and on the Friday afterward. Indeed, should the likes of Iran try to justify censorship by reference to the Culture Convention, they would immediately run into human rights commitments (via Article 2:1 of the

³⁵¹ Culture Convention, *supra* note 27, art. 2:1.

³⁵² *Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, at 7, available at http://portal.unesco.org/culture/en/file_download.php/f5941da8a7fdc57bba15886d6fa41199tenkeys_en.pdf (accessed Jan. 25, 2007).

³⁵³ See *About CEI*, available at <http://www.cei.org/pages/about.htm> (accessed Oct. 5, 2006).

³⁵⁴ Neil Hrab, *Internet in U.N. hands?*, WASH. TIMES, Nov. 8, 2005, at A17, available at Lexis.

Culture Convention) that they have already made in other documents.³⁵⁵ Whatever ambiguity Article 20 of the Culture Convention may engender with respect to its status vis-à-vis trade agreements, there is no such ambiguity with respect to human rights. The latter trumps the Culture Convention by its own terms.

And what does the body of human rights law itself have to say about speech and cultural diversity? In essence it endeavors to balance them – a reality hardly militating toward comprehensively defaulting to the market on cultural matters. The Universal Declaration on Human Rights (not a treaty, but a proclamation of the UN General Assembly) says both that all have the right “to seek, receive and impart information and ideas through any media and regardless of frontiers,” and that all have the right “freely to participate in the cultural life of the community.”³⁵⁶ The International Covenant on Civil and Political Rights says that “peoples have the right of self-determination” including the right to “freely pursue their economic, social and cultural development,” but also that all have the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”³⁵⁷ The International Covenant on Economic, Social and Cultural Rights likewise says that “peoples have the right of self-determination” including the right to “freely pursue their economic, social and cultural development,” but also requires parties to take steps “necessary for the conservation, the development and the diffusion of science and culture.”³⁵⁸

These important human rights documents recognize that the expression of preferences about culture and values take place both at the level of consumers acting individually in markets and at the level of citizens acting collectively as a polity, and as others have suggested, government intervention may be necessary

³⁵⁵ For example, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were signed by Iran on April 4, 1968 and ratified on June 24, 1975, in each case without declaration or reservation. See Office of the United Nations High Commissioner for Human Rights [hereinafter UNHCHR], *Ratifications and Reservations: International Covenant on Civil and Political Rights*, updated Sept. 19, 2006, available at <http://www.ohchr.org/english/countries/ratification/4.htm> (accessed Oct. 5, 2006); UNHCHR, *Ratifications and Reservations: International Covenant on Economic, Social and Cultural Rights*, updated Sept. 19, 2006, available at <http://www.ohchr.org/english/countries/ratification/3.htm> (accessed Oct. 5, 2006). Speech-related human rights specified in these documents are discussed *infra*.

³⁵⁶ UDHR, *supra* note 119, arts. 19, 27.

³⁵⁷ International Covenant on Civil and Political Rights [hereinafter ICCPR], March 23, 1976, arts. 1:1, 19:2, available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (accessed Aug. 30, 2006).

³⁵⁸ ICESCR, *supra* note 126, arts. 1:1, 15:2.

to enhance overall speech opportunities due to media market failures. Baker, for example, has argued that a significant problem with measuring what audiences want solely by reference to what they will pay in a market for cultural products is that this simply ignores larger social “externalities” – including the formation of values and beliefs – which are particularly potent in the realm of media. This is in large part what media regulation endeavors to address, and such intangible externalities are virtually impossible to measure in dollar terms.³⁵⁹ Baker relays the observation of George Gerbner “that the age of commercial television is the first time in human history that children learn about themselves and the world primarily by listening to corporations with something to sell rather than to people with something to tell.”³⁶⁰ In light of the potential for over-commodification of communications through the market, Baker asks “why not merely allow people to choose” to what degree communications should be commodified?³⁶¹ The MPAA, of course, has traditionally dismissed non-market modes of expression of preferences. Valenti, for example, “argued that Europeans prefer American programming, claiming that Europeans ‘like, admire, and patronize what we offer them,’” and characterized EU audiovisual policy as pure commercial protectionism, dismissing the possibility that such policies themselves constitute an expression of a cultural preference.³⁶² Indeed, people might rationally choose to curtail the influence of media market actors precisely because they recognize the media’s capacity to distort their own preferences.³⁶³

While it is undoubtedly the case that one’s view on the role of media in society is intimately bound up with one’s view of democracy and the proper bounds of governmental power,³⁶⁴ it is important not to lose sight of the fact that the legal regime most directly addressing such issues is the corpus of human

³⁵⁹ BAKER, *supra* note 53, at 42-43.

³⁶⁰ *Id.* at 65.

³⁶¹ *Id.* at 63-67.

³⁶² See Middleton, *supra* note 18, at 614 (quoting Valenti).

³⁶³ See, e.g., Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1417-18 (2004), available at Lexis (“[C]ommercial media enterprises successfully use various programming and marketing techniques to develop tastes in the kinds of fare that they intend to produce, and consumer desires developed in this way will naturally agitate for more of the same.”); BAKER, *supra* note 53, at 72-74 (observing the range of settings in which the expression of preferences is not left to the market, such as voting and citizenship).

³⁶⁴ See, e.g., Neil Weinstock Netanel, *The Commercial Mass Media’s Continuing Fourth Estate Role*, in THE COMMODIFICATION OF INFORMATION 317, 317-18 (N. Elkin-Koren & Neil Weinstock Netanel, eds., 2002); BAKER, *supra* note 53, at 125-216.

rights law, described above, to which virtually all (at least pretend to) adhere,³⁶⁵ and the primacy of which is clearly established in the Culture Convention. No credible participant in the discussion is actually claiming that outright censorship – a governmental effort to keep foreign ideas out – is desirable or legally permissible.³⁶⁶ The Culture Convention affirms the balance to be struck – an approach resonating not only with the instrument’s principal sponsors, Canada and France, ever fearful of U.S. media domination,³⁶⁷ but also with developing countries seeking to avoid the twin dangers of excessive government control and excessive market control. As Robert Martin has observed of mass media development in Africa, for example, there is “a subtle and difficult balance to be struck.” While state domination of the media remains a problem in many developing countries, there is likewise “a real danger that newspapers and other publications may be free from state control only to be swallowed up by international interests” – especially in broadcasting, for which production costs “are such that many African networks have already allowed themselves to become dumping grounds for old, and often inferior, western programmes.”³⁶⁸ Ironically, it was precisely this form of balance that UNESCO’s “MacBride report” – over which the United States left UNESCO – reflected,³⁶⁹ and which the United States continues to impede today.

³⁶⁵ Cf. BAKER, *supra* note 53, at 270 (arguing that human rights law should be used “to identify impermissible national burdens or restraints on imported media products” in a manner analogous to the “use of the First Amendment to forbid objectionable restrictions on communications while allowing governmental structural regulation of the communications industries”); *but see* Barton, *supra* note 327, at 98, 103-104 (arguing that human rights laws on speech limit the ability of national governments to impose media access restrictions, but that the WTO is the correct forum for hashing out the intersection of trade and culture, and that a side agreement to the GATS might provide for “a limited share of reserved local content channels”).

³⁶⁶ See, e.g., Goodenough, *supra* note 8, at 211, 235-36 (distinguishing between “strong” protectionism with an exclusionary aim and “weak” protectionism aimed at preserving local cultural production, and ultimately finding weak protectionism “far preferable”); BAKER, *supra* note 53, at 267-68 (endorsing Goodenough’s distinction).

³⁶⁷ This of course is not to say that elites – even in liberal Western democracies like France – might not endeavor to use cultural concerns to their domestic political advantage, *see, e.g.*, Riding, *American culture: A French appreciation*, *supra* note 51, but rather to point out that this is neither enabled nor endorsed by the Culture Convention.

³⁶⁸ Robert Martin, *Building Independent Mass Media in Africa*, 30 J. MOD. AFR. STUD. 331, 335 (1992), available at JSTOR; *see also* Dima Dabbous-Sensenig, *From defending “cultural exception” to promoting “Cultural Diversity”*: *European cultural policy and the Arab World*, 14 QUADERNS DEL CAC 33, 35-36, 40, 42 (2002), available at <http://www.audiovisualcat.net/publicationsing/Q14arab.pdf> (accessed Aug. 28, 2006) (citing “public service broadcasting” of North America and Europe as a useful model of non-market, non-governmental media encouraging cultural diversity).

³⁶⁹ Martin, *supra* note 368, at 335-36.

VII. From Cannes to Hollywood

In a series of essays published in *The New England Journal of Medicine* between 1971 and 1973, physician Lewis Thomas – like UNESCO – analogized cultural diversity to biodiversity, celebrating the nascent technological globalization that was beginning to bring distant peoples into contact with one another, with a previously dreamt of immediacy. In considering what this capacity for global communication meant for us as individuals, societies, and humanity, Thomas mused that the “human brain is the most public organ on the face of the earth, open to everything, sending out messages to everything” – and that as a consequence of this permeability, both acting upon the world and acted upon by it, the “whole dear notion of one’s Self – marvelous old free-willed, free-enterprising, autonomous, independent, isolated island of a Self – is a myth.” And as for individuals, Thomas thought, so for cultures:

Maybe the thoughts we generate today and flick around from mind to mind, like the jokes that turn up simultaneously at dinner parties in Hong Kong and Boston, or the sudden changes in the way we wear our hair, or all the popular love songs, are the primitive precursors of more complicated, polymerized structures that will come later, analogous to the prokaryotic cells that drifted through shallow pools in the early days of biological evolution.³⁷⁰

Perhaps – only time will tell. As Thomas went on to observe, “we’ve been at it for only the briefest time in evolutionary terms, a few thousand years out of billions, and during most of this time the scattered aggregates of human thought have been located patchily around the earth.” The then-current “structures of art and science” reflected the growing exchanges across cultures, and this process could be expected to proceed over time, “by simply passing the bits around from mind to mind, until something like natural selection makes the final selection, all on grounds of fitness.”³⁷¹

In the meantime, however, observe the implicit requirements of such fruitful exchanges, analogized by Thomas to the benefits of biodiversity: first, diversity, and second, contact. Both are essential, or the benefits of cultural contact are lost utterly. Thomas’ perspective as of the early 1970s was essentially identical to that of UNESCO’s founders in the 1940s. Just like UNESCO’s constitution, Thomas assumed that cultural diversity could be taken for granted, but that

³⁷⁰ LEWIS THOMAS, *THE LIVES OF A CELL* 166-68 (1974) (Bantam 1988) (collection of essays originally published in *The New England Journal of Medicine*).

³⁷¹ *Id.* at 168.

contact could not;³⁷² global communications essentially remained nascent. But as of late 2005, when the Culture Convention was adopted, could the same be said? At least in the view of the 148 national delegations that voted to approve the Culture Convention, the reality had radically altered. In an ever-shrinking global media landscape, in which American content grows ever more dominant, it would appear that the situation has reversed: Contact can be taken for granted (if only one-way), but cultural diversity cannot. The end goal – the fruitful encounter of diverse cultures – remains the same, but the steps needed to get there have changed considerably. France, Canada, and many other countries around the world fear that in the absence of some capacity to facilitate local cultural production, the market will select a single global winner by very different criteria of “fitness” than we might favor upon reflection. Domestic politics, embedding cultural production in a larger set of values and preferences than the market can accommodate – a sort of “embedded cultural liberalism,” as it were – will be the policy context in which the intersection of culture and trade will be determined. Or at least so says the Culture Convention.

The United States’ denial of this reality, this assertion of sovereign prerogative, coupled with the smokescreen of patently self-serving rhetoric, rings increasingly hollow. People know special interest capture when they see it – especially before the backdrop of such resounding global consensus. The United States may, to be sure, get what it wants moving forward; there is already evidence to suggest that the Culture Convention has not altered America’s negotiating position in any fundamental way, at least in bilateral negotiations.³⁷³ But it will not be easy, and if it comes, it will not come for free. As the WTO Appellate Body itself observed,

³⁷² See *supra* text accompanying note 112.

³⁷³ One observer characterized the Culture Convention as “‘a safety valve at best,’ suggesting that it might be of use to countries such as France, Canada, and Korea, but perhaps not to smaller countries engaged in bilateral negotiations with the US.” See ICTSD, *supra* note 110. While its screen quota was widely applauded, however, particularly by France and Canada, around the time of the Culture Convention’s signing, little time would pass before South Korea would agree to cut the quota in half as a concession to gain U.S. market access through a bilateral trade agreement. See Barbara Demick, *U.S., South Korea in a Cinema War*, L.A. TIMES, Oct. 31, 2005, at C1, available at Lexis; Darcy Paquet, *Koreans Cut Pic Quotas*, VARIETY, Jan. 30, 2006 – Feb. 5, 2006, at 19, available at Lexis. As of early 2007, local films were enjoying significant successes in East Asia’s booming film markets – including not only China and Japan, but also South Korea – though domestic protectionist measures remained important policy levers and the Culture Convention was clearly viewed as an important buffer against American competition in the future. See Geoffrey A. Fowler & Juying Qin, *Asian-Produced Movies Reel In Viewers*, WALL ST. J., Jan. 11, 2007, at B7; *China ratifies UNESCO convention on protecting cultural diversity*, XINHUA GEN. NEWS SERVICE, Dec. 29, 2006, available at Lexis.

The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.³⁷⁴

In evaluating the potential for trade in cultural products in these terms, the cost of liberalization is felt to be very, very high for countries like France, Canada, and many others. And because the United States refuses to recognize this cost – in fact, portraying Hollywood’s bigger, shinier products as beneficial – it acknowledges neither the need to put correspondingly attractive benefits on the table, nor that, ultimately, such market access may well not be for sale at any price.

Until the United States recognizes the costs of liberalization in cultural products for the rest of the world, the distance between Cannes and Hollywood will remain very great indeed.

³⁷⁴ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra* note 60, pt. F.