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The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports

Andrew M. Carlson

The United States is the dominant producer and exporter of entertainment and popular culture throughout the world.¹ The largest² and arguably most important trading partner of the United States, in entertainment as well as other goods and services, is Canada. Like many other countries, Canada is fearful that American culture and entertainment will displace its own national culture and weaken its entertainment industries. In response to this fear, Canada has implemented subsidies, discriminatory taxes and tax deductions, and quotas against American cultural imports. Canada has also excluded entertainment goods and services from its responsibilities under the North American Free Trade Agreement (NAFTA), the central trade agreement binding it and the United States.³ Furthermore, Canada, aligned with many other countries, has excluded cul-

1. Canadian Ambassador to the United States Raymond Chrétien recently asserted that the contents of more than 64% of television programs, 60% of books, 90% of records, and 94% of films present in Canada originated abroad, almost entirely in the United States. *Canadian Ambassador Defends Curbs on Imports of U.S. Magazines, TV Shows*, 12 Int'l Trade Rep. (BNA) No. 4, at 178 (Jan. 25, 1995). See generally David Rieff, *The Culture That Conquered the Earth: Why Conformist Consumerism is America's Greatest Export*, WASH. POST, Jan. 2, 1994, at C1.

2. Donald S. Macdonald, *The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law*, 20 CAN.-U.S.L.J. 253 (1994). In 1989, "\$200 billion worth of goods and services flowed between the two nations [Canada and the United States]. In that same year, shipments from the U.S. to Canada accounted for more than 20% of the value of all U.S. exports of merchandise and nearly equalled total U.S. exports to the European Community." Stephen R. Konigsberg, Note, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281, 283 (1994), citing U.S.-Canada Free Trade Agreement Biennial Report, available in 1991 WL 329550, at *1 (Jan. 1991).

3. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

tural industries from the agreements under the administration of the World Trade Organization (WTO),⁴ the principal international multilateral trade organization.

Although the United States and Canada are firm allies and generally maintain a cordial trade relationship, these cultural exemptions threaten to undermine trade cooperation between the two countries. The tensions between open trade and cultural protectionism that affect both countries were recently illustrated by a dispute arising from the Canadian government's refusal to allow Country Music Television (CMT), an American country music-video channel, to continue to operate in Canada.

Part I of this Note summarizes the historical and legal background of this dispute. Part II details the chronology of the CMT dispute itself. Part III analyzes the claims made by both the United States and Canada, uses those claims to illustrate the problems inherent in the system of existing agreements with regard to cultural trade, and examines arguments both for and against limiting cultural trade, with a view towards developing policies to balance the needs of all countries. This Note concludes that as cultural trade tensions continue to grow in importance, the lessons that can be learned from the CMT dispute can be applied to the benefit of both the United States and its trading partners.

I. BACKGROUND

A. THE CANADA-UNITED STATES RELATIONSHIP

The United States and Canada are intimately linked by ties of history, geography, and trade. Both are former colonies of England and are wealthy, industrialized nations with abundant natural resources. Canada and the United States share the longest unprotected national border in the world,⁵ and more than 80 percent of the Canadian population lives within 100 kilometers of that border.⁶ This population distribution makes

4. General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the World Trade Organization, December 15, 1993, 33 I.L.M. 13 (1994). The 1994 Uruguay Round of trade agreements culminated in the creation of the WTO. The WTO's charter incorporates its predecessor, the General Agreement on Trade and Tariffs (GATT), as well as other major agreements made during the Uruguay Round.

5. U.S.-Canada Free Trade Agreement Biennial Report, available in 1991 WL 329550, at *1 (Jan. 1991).

6. John Herd Thompson, *Canada's Quest for Cultural Sovereignty: Protection, Promotion, and Popular Culture*, in NORTH AMERICA WITHOUT BORDERS? 269, 271 (Stephen J. Randall et al. eds., 1992).

the vast majority of Canadian consumers easily accessible to American exporters, whether of products or of cultural services such as television broadcasts. As a result, Canada is uniquely susceptible to American cultural exports.

For some time, there has been a movement in Canada to identify and nurture Canadian culture.⁷ This movement is derived from policies, common to most governments, that attempt to foster national pride, sovereignty, and cultural achievement. For example, the Massey Report,⁸ written in 1949, strongly urged the creation of a Canadian Council for the Arts, because

. . . it is desirable that the Canadian people should know as much as possible about their country, its history and traditions; and about their national life and common achievements . . . [and] it is in the national interest to give encouragement to institutions which express national feeling, promote common understanding and add to the variety and richness of Canadian life.⁹

Throughout the 1950s and 1960s, American cultural industries such as film, television, and popular music experienced dramatic growth. There was a corresponding rise in the export of American entertainment and culture.¹⁰ During those decades, the Canadian government made its first attempts to nurture its domestic culture and entertainment industries by protecting them from American competition.¹¹ These efforts culminated in the Broadcasting Act of 1968,¹² and the creation of a Federal agency, the Canadian Radio-Television and Telecommunications Commission (CRTC).¹³ The CRTC issues broadcast licenses and oversees Canada's centralized communi-

7. See generally *id.*

8. The Massey Report was the product of the Royal Commission on National Development in the Arts, Letters, and Sciences, chaired by the Right Honourable Vincent Massey, Chancellor of the University of Toronto. Konigsberg, *supra* note 2, at 290. The creation of this commission was the first major postwar step taken by the Canadian government to create a framework linking the desire to preserve Canadian culture to a strong governmental policy. *Id.*

9. *Id.*, citing ROYAL COMMISSION ON NATIONAL DEVELOPMENT IN THE ARTS, LETTERS, AND SCIENCES (1949-1951) (Can.), at xi-xii.

10. *Id.* at 291.

11. See *id.* for a detailed overview and history of the U.S.-Canada cultural trade relationship.

12. Broadcasting Act, R.S.C., ch. B-11 (1985) (Can.).

13. Canadian Radio-Television and Telecommunications Commission Act, R.S.C., ch. C-22 (1985) (Can.). The CRTC was originally named the Canadian Radio-Television Commission, but was soon renamed the Canadian Radio-Television and Telecommunications Commission. Konigsberg, *supra* note 2, at 292 n.78.

cations network, the Canadian Broadcasting Corporation (CBC).¹⁴

B. CANADIAN PROTECTIONIST MEASURES

Among the tools the CRTC has used to protect Canada from the perceived onslaught of American culture are subsidies and tax measures. For example, until 1987, any investment in a Canadian-produced film was 100 percent tax-deductible.¹⁵ Another tax measure, known as Bill C-58,¹⁶ denies advertising cost deductions for Canadian businesses that attempt to reach their domestic market by advertising in non-Canadian media. Total Canadian direct and indirect federal arts subsidies in 1989-1990 were estimated to be Canadian \$2.93 billion.¹⁷

Perhaps the two most important policies the CRTC has implemented to protect Canada from American entertainment are its restrictions on foreign ownership and on broadcast content. Until recently, broadcast entities such as television and radio stations and cable television providers doing business in Canada had to be at least 80 percent Canadian owned.¹⁸ Canadian television and radio broadcasters are subject to "Canadian content" restrictions: 60 percent of all programming and 50 percent of all prime time programming must be of Canadian origin.¹⁹

Canada's protectionist stance toward cultural imports manifests itself in the key trade agreements to which Canada is a signatory, NAFTA and the WTO agreements. Although NAFTA generally discourages the use of quotas and other trade restrictions, it contains an exemption for cultural industries. Annex 2106 of NAFTA provides that "any measure adopted or

14. "Subject to this Act, . . . the Commission shall regulate and supervise all aspects of the Canadian broadcasting system." Broadcasting Act, *supra* note 12, § 15.

15. This measure, called the 100% Capital Cost Allowance, is discussed in STEVEN GLOBERMAN, *CULTURAL REGULATION IN CANADA* 12-14 (1983). In 1987, the deductible amount was reduced to 30%. Susan Walker, *Sinking Arts Groups Send SOS to New Government*, *TORONTO STAR*, Oct. 23, 1993, at L15 available in 1993 WL 7284952.

16. Income Tax Act, R.S.C., ch.1, § 19 (1985, 5th Supp.) (Can.). This restriction was the subject of a Section 301 action initiated in 1978. See *infra* notes 139-41 and accompanying text.

17. Walker, *supra* note 15, at L15.

18. Canadian Radio-Television and Telecommunications Commission: An FM Policy for the Nineties, Pub. Notice 1990-111, C. Gaz. pt. I, at 455 (Can.) (1990). The current limit, enacted in April 1996, is 67%. See *infra* note 77 and accompanying text.

19. Television Broadcasting Regulations, SOR/87-49, C. Gaz. pt. II, at 339 (Can.) (1987).

maintained with respect to cultural industries, . . . and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada-United States Free Trade Agreement" (FTA).²⁰ FTA Art. 2012's definition of "cultural industries" includes the publication, distribution, or sale of books, magazines, periodicals, newspapers, films, video recordings, audio or video music recordings, and sheet music, as well as all radio, television, cable, and satellite broadcasting services.²¹ Article 2005 states that "[c]ultural industries are exempt from the provisions of the [FTA]" (and by incorporation, NAFTA).²² NAFTA thus allows Canada to construct trade barriers to cultural services and products.²³

The original GATT included an exception for screen quotas imposed on movie theaters,²⁴ but otherwise did not mention cultural products. There has been much debate over whether and how cultural products were covered under GATT,²⁵ most of which was resolved in 1994 with the creation and adoption of the Uruguay Round WTO/GATT agreements, which included the General Agreement on Trade in Services (GATS)²⁶ and the Trade-Related Aspects of Intellectual Property Agreement

20. NAFTA, *supra* note 3, Annex 2106.

21. Canada-U.S. Free Trade Agreement, Dec. 22-23, 1987 and Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281, art. 2012 (1988) [hereinafter FTA].

22. *Id.* art. 2005.

23. Konigsberg, *supra* note 2, at 299.

24. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. IV.

25. See, e.g., Laurence G.C. Kaplan, Comment, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 307-44 (1994); Timothy M. Lupinacci, Note, *The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?*, 24 VAND. J. TRANSNAT'L L. 113, 131-42, (1991); Michael Braun & Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?*, 22 DENV. J. INT'L L. & POL'Y 155, 178-91 (1993); Jon Filipek, "Culture Quotas": *The Trade Controversy Over the European Community's Broadcasting Directive*, 28 STAN. J. INT'L L. 323, 345-62 (1992); Hale E. Hedley, *Canadian Cultural Policy and the NAFTA: Problems Facing the U.S. Copyright Industries*, 28 GEO. WASH. J. INT'L L. & ECON. 655, 682-83 (1995); Clint N. Smith, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT'L TAX & BUS. L. 97 (1993).

26. General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 44 (1994) [hereinafter GATS].

(TRIPS).²⁷ Although GATS and TRIPS arguably cover certain sectors of the group of industries generally agreed to be "cultural," the WTO has no general provision concerning cultural products as a whole. Reasoning that anything not expressly prohibited is allowed, many WTO members consider themselves legally free to apply quotas and other trade restrictions to protect their domestic cultural industries. For example, just a week after the Uruguay Round ended, the French Senate approved a new requirement that French radio stations devote 40% of air time to French music, and Spain's Parliament passed a new law requiring one-fourth to one-third of all movies shown in Spanish theaters be of European origin.²⁸

C. AMERICAN RESPONSES TO CULTURAL PROTECTIONISM

The U.S. government's primary tool in combating foreign measures that exclude U.S. exports of entertainment and culture is contained in the 1974 Trade Act.²⁹ Section 301 of that Act³⁰ contains two main provisions: 301(a), which allows the Office of the U.S. Trade Representative (USTR) to take retaliatory action if a trading partner breaks a trade agreement with the United States; and 301(b), which does not require the breach of a trade agreement, but instead allows the USTR to take retaliatory action if the trading partner's actions are "unreasonable" or "discriminatory" and also "burden or restrict United States commerce."³¹ Section 301 thus vests extremely broad discretion in the USTR. Section 301 claims are generally initiated by American citizens who make a complaint to the USTR, which then investigates the complaint and decides what action to take.³² The United States can use Section 301 measures either indepen-

27. Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS].

28. Roger Cohen, *France and Spain Impose Quotas*, N.Y. TIMES, Dec. 22, 1993, at C15.

29. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1994).

30. Section 301, 19 U.S.C. §§ 2411-20 (1994).

31. *Id.* §§ 2411(a)(1), 2411(b)(1). There are two other types of Section 301 action: "Special 301" and "Super 301." *Id.* §§ 2242, 2420. Special 301 is used when foreign countries deny American companies the market protection associated with intellectual property rights, and Super 301 is designed to force the Executive Branch to self-initiate Section 301 actions against "priority" nations. Because these provisions are applicable only within certain circumstances that do not concern disputes over cultural industries, they are not within the scope of this Note.

32. *Id.* §§ 2412-20.

dently or in conjunction with remedies available under international trade agreements.

A second U.S. response to a perceived trade problem is through NAFTA. A Canadian measure could either be directed explicitly at limiting cultural imports into Canada, or could have the effect of restricting cultural trade, although enacted for a purpose that is putatively unrelated to culture. For example, a Canadian statute that banned, ostensibly for environmental reasons, the sale of magazines without recycled, non-glossy covers has a goal that is unrelated to cultural trade. Because nearly all American magazines have glossy covers, this measure would effectively prohibit the import into Canada of American magazines. In this case, if the Canadian measure breached some *other* aspect of NAFTA, the United States could combat the measure through NAFTA.³³ The United States would effectively be fighting to continue its cultural exports through the machinery of NAFTA, even though cultural industries are expressly excluded from NAFTA (through the FTA).

If the Canadian measure had been designed specifically to discriminate against American cultural imports, as allowed under the NAFTA/FTA cultural exemption, the United States could retaliate via Article 2005(2) of the FTA: "Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement."³⁴ These measures are not otherwise limited, and thus a Section 301 action that was of "equivalent commercial effect" against Canadian cultural industries seems to be implicitly allowed by the FTA.

Third, the United States may pursue a remedy for a trade grievance under the WTO agreements. There are several GATT provisions that allow a member to withdraw concessions or otherwise respond to a trade problem.³⁵ GATT Article XXIII provides that if the United States (or any other member of GATT) considers that the benefits it derives from being a member of the WTO are being "nullified or impaired" by another member's actions, whether or not those actions actually violate the agreement, it may take steps to retaliate.³⁶ Any dispute

33. NAFTA, *supra* note 3, ch. 20.

34. FTA, *supra* note 21, art. 2005(2).

35. Two examples are Article XI, which provides remedies for "dumping," and Article XIX, which provides for emergency actions to prevent serious injury to domestic producers. GATT arts. XI and XIX.

36. *Id.* art. XXIII:1(a)-(c).

that arises under Article XXIII is settled through the formalized dispute procedure codified in the Dispute Settlement Understanding (DSU).³⁷ Action via Article XXIII and the DSU is similar to action via Section 301, in that the United States could respond to a Canadian protectionist measure through GATT even if the measure did not violate any specific agreement between the two countries. However, unlike section 301 actions, responses through the WTO may be somewhat lengthy and time-consuming, in spite of the improvements made by adopting the DSU.³⁸ Section 301 procedures, because they are unilateral, can be relatively quick.

A fourth remedy for redressing international trade wrongs is simply a lawsuit, in either country involved. Depending on the laws of the country in which the suit is brought, an American person, corporation, or the U.S. government may make a claim for a tort (such as damages arising from unfair trade practices) or breach of contract (such as an implied contract of good-faith dealing) against a foreign entity or government. The availability and success of this remedy vary widely, depending on the circumstances of the case.

Finally, multinational companies do not have to take formal action at all—they can just conduct their business so as to achieve their ends without governmental assistance or interference. This type of action can range from purchasing decisions and other ordinary business activity to boycotts and public relations campaigns that are calculated to have a retributive effect on an international competitor.

II. THE CHRONOLOGY OF THE COUNTRY MUSIC TELEVISION DISPUTE

The CMT dispute began in February 1994, when the CRTC began holding hearings to allot an undetermined number of ad-

37. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 112 (1994) [hereinafter DSU].

38. The sum of the maximum times allotted for each of the several stages of a DSU action is approximately 31 months. See generally JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 341-44 (3d ed. 1995). By contrast, the maximum time allowable between initiation and implementation of a Section 301 action is under 14 months. Section 301, 19 U.S.C. §§ 2412(a)(2), 2414(a)(2)(B) (1994).

ditions to Canadian cable broadcasting service.³⁹ CMT was one of forty-eight applicants, many of which had already been broadcasting in various parts of Canada.⁴⁰ CMT began operations in Canada in 1984, and in 1994 it had 464 system affiliates and approximately 1.9 million subscribers there.⁴¹ At the hearings, Canadian broadcasters alleged that CMT would directly compete against their proposed channels⁴² and did not adequately feature Canadian country musicians.⁴³ A total of seven broadcasters⁴⁴ applied to operate country music channels, and it seemed clear that the CRTC would decide that there was only enough room on Canadian cable for one channel in a country music format.⁴⁵

On June 6, 1994, the CRTC announced its decision: CMT was dropped from Canadian cable and the CRTC instead decided to license a similar, brand-new channel (New Country Network, or NCN) offered by Canadian programmer MH Radio/

39. Barbara Wickens, *Special Pleadings: The CRTC Screens Proposals for Television's New Frontier*, MACLEAN'S, Feb. 21, 1994, at 64.

40. *Id.*

41. Janet Stilson, *Canadian Commission Forces Systems to Drop CMT*, MULTICHANNEL NEWS, June 20, 1994, at 12.

42. *Country Music Television Inc. v. CRTC et al.* [1994] 178 N.R. 386, 389.

43. Spence Bozak, president of Canada's Country Music Channel, one of CMT's competitors, testified at the CRTC hearings that there was a big difference between Canadian and American country music, and that "[a]ll the artists we talked to said, 'We just want our music exposed to Canadians.'" Wickens, *supra* note 39, at 66.

44. The seven included five Canadian applicants plus CMT and The Nashville Network (TNN), which was also already established in Canada. *Id.* Until recently, CMT was a joint venture between Nashville-based country-music industry giant Gaylord Entertainment (owner of the Grand Ole Opry, Opryland Convention Center, and Acuff-Rose Music Publishing) and Group W Satellite Communications (GWSC), a division of Westinghouse (owner of the CBS television network and manufacturer of everything from refrigerators to nuclear power plants). See GAYLORD ENTERTAINMENT COMPANY, INC., 1995 ANNUAL REPORT 40 (1996); WESTINGHOUSE, INC., 1995 ANNUAL REPORT 21 (1996). TNN, owned wholly (at the time) by Gaylord, differs from CMT in that CMT broadcasts almost entirely country-music videos, whereas TNN broadcasts "country-lifestyle" programming, such as line-dancing, fishing, and motor sports shows. GAYLORD ENTERTAINMENT, *supra* at 13-15, 40. In early February 1997, Westinghouse announced that it was buying TNN and CMT from Gaylord for \$1.55 billion in Westinghouse stock. Geraldine Fabrikant, *Westinghouse to Buy Country Music Units*, N.Y. TIMES, Feb. 11, 1997, at C5.

45. Even though there were proposals for 48 different channels, ranging from a pay-per-view hockey channel to all-animation channels, most cable carriers in Canada had only the capacity to carry six additional channels. Wickens, *supra* note 39, at 64. This made it unlikely that more than one channel in any given format would be allowed. Eventually, a total of seven new channels were allowed. Joanne Ingrassia, *Canada Limits TV Investors*, ELECTRONIC MEDIA, Jan. 23, 1995, at 159.

Rawlco.⁴⁶ Even though Canadian regulations stated a preference for mostly Canadian programming and suggested that foreign services would face cancellation if similar programming could be provided by a Canadian company, CMT said it was "disturbed" by what it called a "perplexing" CRTC decision.⁴⁷ CMT was the only American channel that was forced to stop broadcasting in Canada as a result of the CRTC's decision.⁴⁸

On July 4, CMT applied for leave to appeal in Canada's Federal Court of Appeal.⁴⁹ It intended to fight the Commission's decision on the grounds that the CRTC denied CMT an opportunity to be heard on a matter directly affecting CMT's interests when it denied CMT's request to participate in public hearings, and failed to consider all of the relevant information in making its decision.⁵⁰

On August 26, Canada's Federal Court of Appeal granted CMT leave to appeal the CRTC's decision.⁵¹ If the court agreed that CMT was denied its "natural justice," CMT could present its case before the CRTC again.⁵² The appeal hearing was held on November 22, 1994, and on December 20, the court dismissed

46. CRTC Decision 94-284, 128 C. Gaz. pt. I, at 3047-48 (Can.) (1994); CRTC Public Notices 1994-60, 61-1, 128 C. Gaz. pt. I, at 3035-39 (Can.) (1994). Because CMT would, in the CRTC's view, directly compete against NCN, the CRTC placed CMT on a list of discretionary cable television services until the end of 1994, at which time it would be removed from the list of services that were eligible for broadcast at all. CRTC Decision 94-284, *supra*. At the same time, NCN was placed on the newly expanded list of basic cable television services. CRTC Public Notice 1994-60, *supra* at 3036.

47. *International Cable*, WARREN'S CABLE REG. MONITOR, June 20, 1994, available in 1994 WL 8368290.

48. Stilson, *supra* note 41, at 12. In past CRTC actions, U.S. channels had been allowed to continue broadcasting even when Canadian competitors debuted, apparently because they were not challenged. James Careless, *CMT Fights Being Booted off Canadian Cable*, MULTICHANNEL NEWS, July 11, 1994, at 14. For example, CNN remained in Canada after CBC Newsworld was licensed, as did Arts & Entertainment Network (A&E) when Canadian-owned Bravo was launched. *Id.* Because TNN, CMT's sister channel, was apparently not directly competitive with NCN or any other Canadian basic cable service, its Canadian broadcasting status remained unchallenged.

49. Careless, *supra* note 48, at 14.

50. *Id.*

51. *Music Notes*, BILLBOARD, Sept. 8, 1994.

52. *Id.* "Natural justice" is roughly analogous to procedural due process in American constitutional and administrative law. Compare DONNA SOBLE KAUFMAN, BROADCASTING LAW IN CANADA: FAIRNESS IN THE ADMINISTRATIVE PROCESS 7, (1987) (describing natural justice), with *Goldberg v. Kelly*, 397 U.S. 254 (1970) (applying procedural due process in an administrative setting).

CMT's appeal.⁵³ The court held that since its entry into the Canadian market in 1984, CMT had been on notice that it could become ineligible to broadcast if a similar Canadian service became competitive with it.⁵⁴ The court held further that since CMT had been given a reasonable opportunity to state its case to the CRTC, natural justice had not been denied.⁵⁵ On December 29, 1994, the Supreme Court of Canada denied CMT's application to appeal the Appellate Court's ruling.⁵⁶

A few days earlier, on December 23, CMT had filed a petition with the USTR alleging that the CRTC's action violated NAFTA by limiting market access to service providers, confiscating investments, and generally discriminating against U.S. firms.⁵⁷ CMT argued that if the unfair practices were not remedied, the United States could take retaliatory action, including restrictions on imports of goods and services from Canada.⁵⁸

CMT's petition also asked the USTR to initiate a Section 301 action.⁵⁹ At the same time, CMT instituted a boycott of all Canadian country music artists on all of its broadcast outlets.⁶⁰ For the purposes of this boycott, CMT defined "Canadian" country musicians as any who did not have contracts with American record companies, thus allowing itself to continue to play videos by already popular country musicians who were from Canada.⁶¹

During the same period, other disputes based on cultural exports from the United States to Canada had flared up, including a new tax on American magazines sold in Canada.⁶² On December 22, 1994, the USTR released a dispatch responding to Canada's actions.⁶³ In it, U.S. Trade Representative Mickey Kantor stated that the U.S. government was "examining all of

53. *Country Music Television Inc. v. CRTC* [1994] 178 N.R. 386, 387; *CMT Protests Eviction from Canada*, ELECTRONIC MEDIA, Jan. 2, 1995, at 50.

54. *Country Music Television Inc. v. CRTC* [1994] 178 N.R. 386, 391.

55. *Id.* at 390.

56. *Id.* at 400.

57. *CMT Fights Back Against CRTC: Petitions U.S. Trade Rep.*, CABLEFAX, Dec. 23, 1994, available in 1994 WL 11049381. It is unclear exactly which NAFTA provisions CMT thought Canada's actions had violated. See *infra* notes 100-15 and accompanying text.

58. *CMT Fights Back*, *supra* note 57.

59. *CMT Protests Eviction*, *supra* note 53.

60. Etan Vlessing, *Now, Ousted CMT Gives Canadian Vids the Boot*, HOLLYWOOD REP., Jan. 12, 1995.

61. *Id.*

62. *New Canadian Tax Initiative Targets 'Split-Run' Magazines; USTR Concerned*, 12 Int'l Trade Rep. (BNA) No.1, at 15 (Jan. 4, 1995).

63. Office of U.S. Trade Representative, *U.S. Response to Recent Canadian Trade-Related Decisions*, U.S. DEP'T ST. DISPATCH 21 (1995).

its options, including retaliation options, to appropriately respond to these unacceptable developments." This was a strongly worded hint that the United States would institute punitive measures (most likely a Section 301 action) aimed at Canadian entertainment industry companies operating in the United States.⁶⁴ Soon after, Kantor indicated that his office was initiating the Section 301 trade investigation and invited public comments on how the CRTC policy had harmed U.S. interests.⁶⁵

In response, U.S. entertainment conglomerate and CMT co-owner Westinghouse, along with several other American cable broadcasters, urged the federal government to impose annual penalties of \$750 million against Canada in retaliation for discriminating against CMT.⁶⁶ Kantor set a June 21 deadline for resolution of the dispute, threatening to compile a "hit list" of Canadian entertainment companies that would suffer retaliation.⁶⁷ Observers suggested that a "bona fide trade war" was erupting between the United States and Canada.⁶⁸

The impending "trade war" was averted on June 22, 1995, when CMT and NCN agreed to form a joint venture to run a single Canadian country music network.⁶⁹ CMT would own twenty percent of the new network (the maximum foreign ownership allowed under Canadian law),⁷⁰ which was to be called "CMT: Country Music Television (Canada)."⁷¹ The remaining eighty percent would be held by MH Radio/Rawlco, the original owners of NCN.⁷² However, if the Canadian restrictions that kept foreign ownership of broadcasters below twenty percent

64. *Id.*

65. *USTR Initiates Section 301 Probe of Canada TV Communications Practices*, 12 Int'l Trade Rep. (BNA) No. 6, at 267 (Feb. 8, 1995).

66. *U.S. Entertainment Firms Call for Retaliation Against Canada*, 12 Int'l Trade Rep. (BNA) No. 11, at 504 (Mar. 15, 1995). One of the firms urging retaliation was The Weather Channel (TWC). A few months earlier, TWC's Canadian counterpart, Météomédia/Weather Now, had requested that TWC become ineligible to broadcast in Canada, just as CMT had. CRTC Public Notice 1994-125, 128 C. Gaz. pt. I (Can.) (1994).

67. Michael Bürgi, *Sabers Rattle in Row over Country Music; Canada's Ban on U.S. Cable Channel Leads to Threats from Washington*, ADWEEK, May 29, 1995, at 12.

68. *Id.*; see also *U.S., Canada out of Tune over CMT*, BROADCASTING & CABLE, June 5, 1995, at 27; *Music Compromise*, MACLEAN'S, July 1, 1995, at 60; Justin Martin, *Truce Declared in the Canadian Country Music War*, FORTUNE, Aug. 21, 1995, at 126.

69. *Tentative Accord Reached On Dispute With Canada Over Revoking CMT's License*, 12 Int'l Trade Rep. (BNA) No. 26, at 1088 (June 28, 1995).

70. See *supra* note 18 and accompanying text.

71. *Tentative Accord Reached*, *supra* note 69.

72. *Id.*

were eased to allow thirty-three percent foreign control, NCN would sell an additional thirteen percent stake to CMT.⁷³

Nevertheless, in January 1996, there was still friction between the Canadian owners and CMT, which claimed that it was being prohibited from participating in the management of the channel.⁷⁴ CMT again asked Mickey Kantor for help, claiming that its Canadian partners had exhibited bad faith, and requesting that Kantor find the Canadian ownership restrictions unreasonable and take retaliatory measures.⁷⁵ As February 6, 1996, (the statutory deadline for the original Section 301 action) approached, Kantor hinted that if a settlement was not soon reached, the retaliatory measures would go into effect.⁷⁶ However, on February 6, Kantor declined to announce retaliatory action, noting that negotiations between the parties seemed to be on track.⁷⁷ Finally, on March 7, CMT announced that it had reached an agreement with its Canadian partners.⁷⁸ On April 11, the Canadian government announced the relaxation of its foreign ownership rules, permitting foreign business entities to purchase up to one-third of the voting shares of a Canadian holding company in the television, radio, and cable television industries.⁷⁹

Finally, on August 8, 1996, after more than two years of turmoil, acting U.S. Trade Representative Charlene Barshefsky⁸⁰

73. *Music Compromise*, *supra* note 68, at 60. The loosening of the foreign investment provision, *see infra* note 79 and accompanying text, was presumably already being negotiated at that time.

74. Michael Bürgi, *CMT Seeks Canada Links*, *MEDIAWEEK*, Jan. 15, 1996, at 5.

75. *Id.*; Rich Brown, *Group W Dispute with Canada Heats up*, *BROADCASTING & CABLE*, Jan. 15, 1996, at 130.

76. *Retaliation is Threatened Over Canada's Limitations on the Broadcasting of U.S. Radio and TV Programs*, *N. AM. FREE TRADE & INVESTMENT REP.*, Feb. 15, 1996, available in 1996 WL 10175250.

77. *USTR Says Canada Broadcast Policies Discriminate; CMT Talks Continue*, 13 *Int'l Trade Rep. (BNA)* No. 7, at 244 (Feb. 14, 1996).

78. *CMT Makes Canada Connection*, *MEDIAWEEK*, Mar. 11, 1996, at 3; *Country Music TV Dispute Resolved; U.S., Canadian Firms Finalize Deal*, 13 *Int'l Trade Rep. (BNA)* No. 11, at 421 (Mar. 13, 1996).

79. *Direction to the CRTC (Ineligibility of Non-Canadians) SOR/96-192*, 130 *C. Gaz.* pt. II, at 1296 (1996 (Can.)) (1996); *Canada Eases Foreign Ownership Limits on Broadcasting, Cable TV Holding Firms*, 13 *Int'l Trade Rep. (BNA)* No. 16, at 646 (Apr. 17, 1996).

80. Mickey Kantor became U.S. Secretary of Commerce on April 13, 1996, and his assistant, Charlene Barshefsky, became acting USTR immediately thereafter. Paul Blustein, *Clinton Expected to Name Barshefsky to Trade Post*, *WASH. POST*, Nov. 14, 1996, at E1. Barshefsky was confirmed as USTR by the Senate on March 5, 1997. Paul Blustein, *Barshefsky Confirmed by Senate; Vote on Trade Official Spurs Angry Debate*, *WASH. POST*, Mar. 6, 1997, at E2.

announced that CMT and its Canadian partners had received final regulatory approval to begin broadcasting in Canada and had been issued a broadcast license good until 2000.⁸¹ However, she warned that the United States would closely monitor Canada's actions regarding cultural industries, and the U.S. administration would "not tolerate discrimination against any U.S. industry."⁸²

III. ANALYSIS

A. RESPONSES TO CANADA'S EXCLUSION OF CMT

As outlined above, there were five avenues through which the United States and CMT could have responded to the CRTC's decision: the GATT/WTO system, NAFTA/FTA, Section 301, a lawsuit in Canadian court, and an independent private action. Because an intensive inquiry into Canadian administrative law would be outside the scope of this Note, it will be assumed that the CRTC's hearing and the Canadian legal decisions on appeal were procedurally and legally correct.

An examination of the CMT dispute under GATT, NAFTA, and Section 301 is the first step in an investigation of cultural trade exclusion policy in general. Responses involving two of these were threatened but not used: CMT alleged that the decision violated NAFTA, and the USTR threatened Section 301 action. Redress under the WTO/GATT system was neither used nor even mentioned by any party to the dispute. These three means of redress will be discussed in ascending order of their possible effectiveness.

1. GATT/WTO

At no point in the dispute did either CMT or the United States attempt to argue that the CRTC's action violated any GATT/WTO agreement. It would not have been surprising if the United States had made this argument, though, because it and other countries have been engaged in an ongoing debate over the status of cultural industries under the GATT/WTO system.⁸³

The first issue in the debate over whether the CRTC's denial of CMT's license is actionable under a WTO agreement is

81. Gary G. Yerkey, *U.S. Country Network to Begin Broadcasting in Canada This Fall, Ending Long Trade Dispute*, 13 Int'l Trade Rep. (BNA) No. 33, at 1304 (Aug. 14, 1996).

82. *Id.*

83. See generally *supra* note 25.

whether cable television broadcasting is considered to be a good or a service. If cable television is a good, then it is covered by GATT and the United States could respond to the CRTC's action by instituting a non-violation "nullification or impairment" proceeding under the Dispute Settlement Understanding.⁸⁴ Although this course of action has its uncertainties,⁸⁵ it does provide a dispute resolution system that is procedurally predictable and that, whatever the outcome, is likely to be adhered to by all concerned.

If cable television broadcasting is a service, it is covered under GATS, which contains a more limited non-violation nullification and impairment provision.⁸⁶ In prior disputes over cultural regulations (primarily with the EC), the United States has attempted to claim that television programming and broadcasting are goods and, as such, are governed by GATT. For example, when the EC passed its "Television without Frontiers" directive in 1989, the U.S. House of Representatives unanimously renounced the directive, calling it "GATT-illegal" and requesting the USTR to take action against the EC through GATT (and Section 301) on the basis that television programming constituted a good, not a service.⁸⁷

However, since the conclusion of the Uruguay Round, it can no longer be plausibly argued that cable television broadcasting is anything but a service. The simplest and most persuasive evidence of this is that the general list of services covered by GATS includes "Radio and television transmission services," which cer-

84. See *supra* note 37 and accompanying text.

85. Two large groups of problems with the GATT/WTO dispute settlement system have been identified: those that arise from the general structure and historical background of the GATT and those that arise from changes made during the Uruguay Round. The first group of problems include: (1) disuse, (2) delays in the establishment of panels, (3) delays in appointing specific panel members, (4) delays in the completion of panel reports, (5) uncertain quality and neutrality of panelists and panel reports, (6) blocked panel reports, and (7) non-implementation of panel reports. JACKSON, *supra* note 38, at 344-45, summarizing William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 81-89 (1987). All of these problems continue to persist even after the adoption of the 1994 Uruguay Round improvements, and have been complemented by the problems particular to those improvements, such as major powers' possible non-compliance with adverse decisions and uncertainty about the effect and role of the new Appellate Body. JACKSON, *supra* note 38, at 345.

86. See *infra* notes 93-94 and accompanying text.

87. Lupinacci, *supra* note 25, at 128-29, 134, and n.103, citing 135 *CONG. REC.* H7330 (daily ed. Oct. 23, 1989) (statement of Rep. Frenzel); see also Filipek, *supra* note 25, at 355-57; Smith, *supra* note 25, at 123-27.

tainly describes cable television broadcasting.⁸⁸ Furthermore, there is strong precedent in Canadian,⁸⁹ U.S.,⁹⁰ and international law⁹¹ that cable broadcasting is a service.⁹² Thus, the WTO agreement governing the CMT dispute is GATS, not GATT.

GATS, although similar in structure to GATT, has some major differences. While GATT is founded on both the principles of Most-Favored-Nation (MFN)⁹³ and national treatment,⁹⁴ GATS has a MFN requirement but no general national treatment requirement. In other words, although the CRTC's actions distinguish between Canadian and foreign broadcasters, they are GATS-legal because they do not distinguish between U.S. broadcasters and other foreign broadcasters. However, GATS does contain a *limited* national treatment requirement. Part III of GATS, titled Specific Commitments, requires national treatment for measures that have been specified in each member's

88. BERNARD HOEKMAN, WORLD BANK, TENTATIVE FIRST STEPS: AN ASSESSMENT OF THE URUGUAY ROUND AGREEMENT ON SERVICES 37-38 (1994).

89. See, e.g., Attorney General of Canada v. Lount Corp. [1985] 2 F.C. 185, 197 (Can.) (holding that "television service, provided for the guests [of a hotel] is akin to the provision of heating, water, linens, furniture, towels and soap, and elevator service.") (emphasis added).

90. See, e.g., Leathers v. Medlock, 499 U.S. 439, 442, (1991) ("[plaintiff] brought this class action . . . to challenge the extension of the sales tax to cable television services") (emphasis added); Cable Communications Policy Act of 1984, 47 U.S.C. § 522(7) (1994) (defining a "cable system" as "a facility . . . that is designed to provide cable service . . . to multiple subscribers within a community. . .") (emphasis added).

91. Sacchi, 1974 E.C.R. 409, 427 (E.C.J.), 14 Common Mkt. Rep. (CCH) 177, 201-02 (1974) (holding that "a television signal must, by reason of its nature, be regarded as a provision of services It follows that the transmission of television signals . . . comes, as such, within the rules . . . relating to services").

92. This conclusion, although accurate in the case of CMT, does not necessarily apply to all sectors of all cultural industries. For example, magazines and compact discs are clearly goods, not services. Television programming, as distinguished from television broadcasting, may also be a good. Thus, although GATS governs the CMT dispute, GATT or TRIPS may govern future disputes about films, magazines, records, and television, depending on the exact issues of each case. Notwithstanding this, most of the controversy over cultural protection has been, so far, over the means of distribution. Content and investment quotas have mostly been used by importing countries to control the means of dissemination of entertainment, not to control the importation of the physical media on which the entertainment is carried. Thus, it is useful to assume the commodity in question is a service, rather than a product, when examining cultural trade policy in general.

93. GATT art. I.

94. *Id.* art. III.

Schedule.⁹⁵ Canada has not put its broadcast regulations in its Schedule,⁹⁶ so national treatment is not required in regard to its broadcast regulations under any WTO agreements. Even if national treatment were required, non-violation “nullification and impairment” dispute resolution through the Dispute Settlement Understanding is available under GATS only for those services that are listed in each party’s Schedule.⁹⁷ Thus, the United States can make no claim that the CRTC’s decision was GATS-illegal, and there is no means by which it can make an “equitable” claim that although the CRTC’s decision was GATS-legal, it still impaired benefits they might have reasonably expected under GATS.

The futility of a United States response to the CMT dispute through WTO/GATT agreements is augmented by several other disadvantages that might be present even if there were a way for the United States to bring this dispute before the WTO. WTO Dispute Settlement proceedings can be lengthy and bureaucratically complex.⁹⁸ Furthermore, presenting this dispute in front of the whole WTO might cause other countries and trade organizations, particularly the EC, to get involved. The United States and the EC have a long and contentious history of dealing with cultural trade issues,⁹⁹ and it is unlikely that the EC involvement would do anything except ensure that the WTO proceedings would become longer, more complex, and less predictable. In sum, the CRTC’s exclusion of CMT is “legal” within the GATT/WTO system, and even if it were not, the GATT/WTO system would not be the most effective forum in which to settle this particular bilateral dispute between the United States and Canada.

2. NAFTA

In its December 23, 1994 petition to the USTR, CMT alleged that the CRTC’s decision violated NAFTA.¹⁰⁰ Although CMT never identified exactly which provisions of NAFTA it had in mind, it alleged that Canada had “unfairly discriminate[d]

95. GATS art. XVI:1.

96. GATT SECRETARIAT, 28 URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, (1994).

97. GATS art. XXIII.

98. See *supra* note 85.

99. See *supra* note 87 and accompanying text; see generally Kaplan, *supra* note 25.

100. See *CMT Fights Back*, *supra* note 57 and accompanying text (discussing CMT’s intention to file a petition).

against U.S. firms¹⁰¹ by violating NAFTA “provisions that deal with market access for service providers and confiscation of investments.”¹⁰²

Whatever CMT’s arguments may have been, the CRTC’s exclusion of CMT was indisputably within Canada’s prerogatives under NAFTA. As discussed above,¹⁰³ NAFTA Annex 2106 incorporates the cultural industries exemption of FTA Article 2005(1).¹⁰⁴ Cable television broadcasting clearly fits within the exemption’s definition of cultural industries, which includes “all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network service.”¹⁰⁵

There are several ways to interpret CMT’s allegations that Canada “violated” NAFTA. The first is that CMT was merely focusing on different aspects of the agreement. Chapters 11, 12, and 13 all seem relevant at first glance.¹⁰⁶ Chapter 11 requires national treatment and MFN for investors from each party,¹⁰⁷ Chapter 12 requires national treatment and MFN for service providers from each party,¹⁰⁸ and Chapter 13 requires access to telecommunications for all parties.¹⁰⁹ Cable television is excluded, however, from the scope of Chapter 13.¹¹⁰ In spite of these possibly applicable chapters, the cultural exemption applies “[n]otwithstanding any other provision of [NAFTA].”¹¹¹

The second possibility is that CMT was attempting to wage a public relations war. Perhaps CMT believed it would be able to present its case in a more sympathetic light if it seemed that Canada had acted unfairly.

Whatever CMT’s motivation, its claim that the denial of its license “discriminate[d] against U.S. firms”¹¹² may have been accurate, but the denial did not constitute a violation of NAFTA or the FTA. Likewise, the CRTC’s actions did not violate any NAFTA “provisions that deal with market access for service providers and the confiscation of investments” as CMT had

101. Rich Brown, *CMT Appeals Ruling*, BROADCASTING & CABLE, Jan. 2, 1995, at 22.

102. *Id.*

103. See *supra* notes 20-23 and accompanying text.

104. FTA, *supra* note 21, art. 2005.

105. NAFTA, *supra* note 3, art. 2107(e).

106. *Id.* chs. 11, 12, and 13.

107. *Id.* ch. 11.

108. *Id.* ch. 12.

109. *Id.* ch. 13.

110. *Id.* art. 1302 ¶ 1.

111. NAFTA, *supra* note 3, art. 2106.

112. Brown, *supra* note 101.

claimed.¹¹³ However, CMT's threat that the United States could "retaliate by restricting imports of Canadian goods and services" is accurate.¹¹⁴

FTA Article 2005(2) allows a Party to take measures of "equivalent commercial effect in response to actions that would have been inconsistent with [FTA, and by extension, NAFTA] but for [the cultural industries exemption]."¹¹⁵ Thus, the United States could retaliate in any number of ways to the CRTC's decision, as long as the retaliations added up to an "equivalent commercial effect." The United States did threaten to retaliate in exactly this way, through Section 301 of the 1974 Trade Act.

3. Section 301

Section 301 of the 1974 Trade Act has been a very controversial tool of U.S. trade policy.¹¹⁶ The principal critique of Section 301 is that its unilateral nature is contradictory to the multilateral goals and structures of the GATT/WTO.¹¹⁷ The Section 301 proceedings that occurred in the course of the CMT dispute illustrate a different problem with Section 301: it is such a powerful tool that it may be easily abused. This abuse may occur in several forms. Section 301 is so open-ended that it allows extremely incommensurate retaliation, and its procedures allow it to be abused by individual American companies.

113. *CMT Fights Back*, *supra* note 57.

114. *CMT to Appeal Against Canadian Ban*, MUSIC & COPYRIGHT, Jan. 18, 1995, at 15, available in 1995 WL 9764210.

115. FTA, *supra* note 21, art. 2005(2).

116. "Of all the U.S. international trade statutes, perhaps none elicits greater international condemnation than Section 301. . . . [It has] brought forth . . . a 'fusillade of censure' from foreign trade policy officials. One Canadian official, for example, characterized Section 301 as a 'threat to the central viability of the multilateral trade system.'" Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 301 (1990) (citations omitted). For a variety of critiques and defenses of Section 301, see generally JAGDISH BHAGWATI ET AL., AGGRESSIVE UNILATERALISM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

117. See, e.g., Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM, *supra* note 116, at 33-38 (describing Section 301 as GATT-illegal); Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 before the WTO*, 17 U. PA. J. INT'L ECON. L. 233 (1996) (concluding that the WTO should attempt to circumscribe the scope of Section 301, because its use is contrary to the goals of the WTO/GATT). A separate critique of Section 301 is that it violates the principles of extraterritorial jurisdiction that are codified in the Restatement (Third) of Foreign Relations Law. Chris Shore, Note, *The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Actions Taken Under Section 301 of the Trade Act of 1974*, 23 LAW & POL'Y INT'L BUS. 725 (1992).

Furthermore, its design and immense power make it an inappropriate tool (especially when considered in conjunction with its open-ended nature) for the delicate work of dealing with barriers to cultural trade.

On December 23, 1994, CMT filed a petition asking the USTR to initiate a Section 301 action.¹¹⁸ This gave the USTR forty-five days to decide whether to initiate a Section 301 investigation.¹¹⁹ On February 6, well within the time limit, the USTR announced it was initiating the action.¹²⁰ The USTR then had a twelve-month time limit to decide whether it would use a Section 301 action to respond to the CRTC's actions.¹²¹

Section 301(a) provides for mandatory retaliation if a U.S. international agreement has been violated. In contrast, Section 301(b) allows discretionary action in situations where an agreement has not been technically violated.¹²² As shown above, the action violated neither GATS (or any other GATT/WTO agreement) nor NAFTA/FTA. The retaliation provision contained in FTA Article 2005(2)¹²³ is an implicit acknowledgment that discretionary Section 301 actions are a possible response to a cultural restriction.

Discretionary Section 301 actions are available only if the act, policy, or practice is "unreasonable or discriminatory and burdens or restricts United States commerce."¹²⁴ Mickey Kantor's description of the USTR's approach to the dispute shows that the action contemplated was discretionary Section 301 action: "if the issue is not resolved expeditiously, USTR proposes to determine that the CRTC practice is unreasonable and constitutes a burden and restriction on U.S. commerce."¹²⁵

In addition to determining whether retaliation is appropriate by this standard, the USTR also must decide what type and amount of retaliation is appropriate. Under Section 301, the USTR is authorized to suspend any obligations it has under any trade agreements,¹²⁶ and may impose any sort of fee, duty, or

118. *USTR Initiates Section 301 Probe*, *supra* note 65, at 267.

119. Section 301, § 2412(a)(2).

120. *USTR Initiates Section 301 Probe*, *supra* note 65, at 267.

121. Section 301, § 2414(a)(2)(B). Although the USTR may provide public hearings in regard to impending Section 301 actions within this 12-month period, it did not do so in this case because such a hearing was not requested by CMT. *Id.* § 2412(a)(4)(A).

122. *See supra* note 31 and accompanying text.

123. *See supra* note 34 and accompanying text.

124. Section 301 § 2411(b)(1).

125. *USTR Initiates Section 301 Probe*, *supra* note 65, at 267.

126. Section 301, § 2411(c)(1)(A).

restriction it determines to be appropriate.¹²⁷ The FTA's retaliation provision, Article 2005(2), establishes a standard of "equivalent commercial effect."¹²⁸ This constrains the economic consequences of the retaliatory effect, but does not limit the industry or sector to which the retaliation is to be applied. Section 301 makes explicit this open-endedness: the USTR may respond without regard to whether the response targets the same economic sector that was originally involved.¹²⁹

One answer to the question of how much retaliation is permitted was provided on March 15, 1995, when a group of U.S.-based cable companies suggested to the USTR that the appropriate level of retaliation should exceed \$750 million annually.¹³⁰ These companies did not specify how they had reached this figure. CMT had just under two million viewers in Canada as of Jan. 1, 1995, when it was forced to terminate service.¹³¹ Its annual "cash flow" from Canadian operations was \$1.2 million.¹³² CMT owner Westinghouse said that the financial impact of the CRTC's decision was "insignificant."¹³³ Retaliation of \$750 million seems incommensurate with an "insignificant" \$1.2 million.¹³⁴

As Kantor's June 21, 1995 deadline approached, there was speculation over which Canadian companies or industries would be targeted.¹³⁵ The list of companies expected to face trade sanctions included Telelobe, an international telecommunica-

127. *Id.* § 2411(c)(1)(B).

128. FTA, *supra* note 21, art. 2005(2).

129. Section 301 § 2411(c)(3)(B).

130. *U.S. Entertainment Firms Call for Retaliation*, *supra* note 66, at 504.

131. Stilson, *supra* note 41, at 12.

132. *Gaylord Entertainment: Going Global with Country Music*, MUSIC & COPYRIGHT, May 10, 1995, at 12, available in 1995 WL 9764658.

133. Rich Brown, *Canada Cans Country Music Television*, BROADCASTING & CABLE, June 20, 1994, at 22.

Lloyd Werner of CMT parent company Group W Satellite Communications says the financial impact of CMT's removal from the Canadian market will be insignificant to GWSC because its current [as of mid-1994] distribution of 1.9 million cable subscribers in Canada just barely covers the cost of marketing the service in the country. But GWSC had long-term growth plans for CMT in Canada that showed the channel turning a small profit at about 4 million subscribers.

Id.

134. Maury Lane, director of government affairs for Westinghouse, offered an assessment of the retaliation which is entirely different in scale, but which presents the same inequity: "[t]he CMT issue was worth perhaps \$100 million But this move by Kantor could cost (the Canadian entertainment industry) multi-billions of dollars." Peter Morton, *U.S. Draws up Canadian Culture "Hit List"*, FIN. POST (Toronto), Feb. 4, 1995, at 3.

135. *U.S., Canada Out of Tune*, *supra* note 68, at 27.

tions company, Cineplex Odeon, a movie theater chain, and MuchMusic, a music video channel.¹³⁶ Since the Section 301 action was averted at the last minute by the joint-venture agreement, it is unclear how sanctions would be applied to these companies. However, one example will show the inequality of treatment that could easily have resulted: if MuchMusic was excluded from expansion into the U.S. just as CMT was excluded from Canada, MuchMusic would suffer far more. MuchMusic is a much smaller service than CMT¹³⁷ and is owned by a much smaller corporate parent.¹³⁸

Perhaps the most important question facing the USTR was how the sanctions were going to be implemented. Typically, the response under Section 301¹³⁹ is in the form of trade sanctions, such as imposing a tariff or quota on a product or service.¹⁴⁰ In this case, the USTR apparently intended to target specific companies. Although trade limitations frequently have a dramatic

136. *Id.*

137. At the end of 1994, MuchMusic had a total viewership of 6.3 million (5.8 million in Canada and 500,000 in the U.S.), Lisa Kassenaar, *While MTV is Off Conquering Europe, Canada's Own MuchMusic is Tackling the U.S. Music Video Network on Its Home Turf*, FIN. POST (Toronto), Oct. 8, 1994, at S9, whereas CMT's international broadcasts reached more than 25 million viewers in 22 countries. *Gaylord Entertainment, supra* note 132, at 12.

138. MuchMusic is run by CHUM Ltd., with total 1996 sales of Canadian \$239 million and a 1996 profit of Canadian \$10.25 million. CHUM LIMITED 1996 ANNUAL REPORT 2 (1996). On the other hand, CMT owners Gaylord Entertainment had total revenues of about \$688 million and \$63 million profit in 1994, *Gaylord Entertainment Income Rises to \$63.06 Million in '94*, J. REC.(Okl. City), Feb. 17, 1995, and Westinghouse had roughly \$9 billion in revenue for 1995, and its broadcasting division, GWSC, had \$303 million in revenue and \$9 million in profit just for the month of November 1995. *Westinghouse Announces Fourth Quarter Results*, PR NEWswire, Feb. 8, 1996, available in Westlaw, Allnewsplus File.

139. More frequently than not, the initiation of Section 301 investigations, and the mere threat of sanctions, is the impetus that causes the other government to capitulate. See, e.g., Determinations Under Section 304 of the Trade Act of 1974, 55 Fed. Reg. 4294 (USTR 1990) (describing resolution of EC "Oil-seeds" dispute after USTR initiated Section 301 investigation, (which was confirmed by a GATT panel report) but before sanctions were actually implemented). Only seven of forty-eight mandatory Section 301 actions initiated between 1974 and 1992 actually resulted in sanctions being imposed. Alan O. Sykes, *Constructive Unilateral Threats in International Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992). As a result, exactly how sanctions will be implemented is a question that rarely emerges.

140. See, e.g., Determination to Impose Increased Duties on Certain Products of the European Community, 53 Fed. Reg. 53115 (USTR 1988) (describing the imposition of increased customs duties in the EC "Beef Hormone" case). For more information on the Beef Hormone case, see Michele Carter, Note, *Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormone Controversy*, 6 MINN. J. GLOBAL TRADE 625 (1997).

impact on specific companies, it is unusual to first identify which individual companies to attack, and then figure out how to do so within the framework of trade regulations. The method apparently contemplated by the USTR seems more likely to anger a trading partner than to reach a compromise that works to the benefit of both countries.

A second approach would be to adopt a non-trade measure, such as a tax or an administrative procedure or regulation. A prior Section 301 action, which also involved Canadian television broadcasting, provides an example.¹⁴¹ In that case, Canada denied tax deductions to Canadian businesses for television advertisements on U.S. border stations received in Canada.¹⁴² The United States responded not by punishing specific companies, but by enacting tax legislation that mirrored the Canadian legislation.¹⁴³ This less aggressive non-trade response does not seem to be a viable way to resolve or even respond to the CMT dispute. In the past, cable television in the U.S. has been subjected to significant government regulation, but with recent developments, culminating in the passage of the Telecommunications Act of 1996,¹⁴⁴ it is now subject to much less regulation. In contrast, cable television in Canada has been entirely under the regulatory control of the CRTC since that organization's inception. Although U.S. courts have in the past had some success in mandating that cable television providers carry some types of content (such as local channels), it is unlikely that the U.S. government could legally prohibit all cable providers from broadcasting a particular channel.¹⁴⁵ As a result, there seem to be no non-trade measures available for the United States to pursue.

The final option is to apply sanctions in cultural or entertainment sectors outside cable television broadcasting.¹⁴⁶ The USTR, in considering sanctions against film industry com-

141. Presidential Determination Under Section 301 of the Trade Act of 1974: Memorandum for the USTR, 45 Fed. Reg. 51173 (1980).

142. *Id.*

143. *Id.*

144. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

145. Even if the U.S. government was in the regulatory mood to try such a prohibition (which it certainly is not now), the prohibition would probably constitute a prior restraint on speech and thus be nearly per se unconstitutional. See *Near v. Minnesota*, 283 U.S. 697 (1931).

146. Sanctions in these sectors could be GATS-illegal, and sanctions in industries outside of the general cultural industry exception could also be NAFTA-illegal. For example, Canadian telecommunications company Telelobe was rumored to be the subject of possible sanctions in the CMT dispute. Unilateral changes in international telecommunications regulations,

panies such as Cineplex Odeon, was entertaining this option. One problem with applying these cross-sector sanctions is the possibility of arbitrary, abusive application: the U.S. government could very easily be used to serve the goals of one or a few particular American multinational companies. Assume it was Home Box Office (HBO) instead of CMT that had objected to the administration of Canadian cable television. HBO's parent company, Time/Warner, could request as a remedy that compact discs released by non-American owned record companies should be subjected to a prohibitively high tariff. Because Time/Warner is the only major American-owned record label, this would effectively give Time/Warner a monopoly on the entire U.S. record market.

Admittedly, this hypothetical example is somewhat implausible. However, it is useful because it illustrates another problem inherent in Section 301 action. The right to retaliate against the "unfair" actions of their competitors places U.S. firms in a powerful position, since they can afford to disrupt or harass their foreign competitors at little cost to themselves.¹⁴⁷ There is simply nothing for an American company to lose in bringing claims, no matter how unjustified. Furthermore,

. . . because the U.S. administrative agencies that carry out these actions on the behalf of U.S.-based firms . . . face no penalty when they file unjustified actions or false "unfair" trade claims, [the abuse of Section 301] create[s] severe repercussions for Canadian exporters to the United States. [Section 301 action has been] found not only to have complicated Canada-U.S. relations, but to be one of the leading causes of trade disruption with other major U.S. trading partners, in particular Japan.¹⁴⁸

The CMT dispute illustrates that Section 301 is, paradoxically, such a powerful tool that it barely works. The theoretical flexibility and seemingly unlimited size of sanctions that it offers are complicated by a number of problems in actual use. Only one type of sanction (cross-sector) was available, and there is no check preventing American companies from asking for incommensurate and arbitrary sanctions against their competitors.

Of course, by one standard Section 301 worked perfectly in this case. CMT eventually obtained 33 percent of what it wanted, a Canadian broadcast outlet. However, the fact that

which would need to be made to affect Teleglobe, would likely violate the GATS Annex on Telecommunications.

147. ANDREW D. M. ANDERSON, *SEEKING COMMON GROUND: CANADA-U.S. TRADE DISPUTE SETTLEMENT POLICIES IN THE NINETIES* 251 (Thomas D. Willett ed., 1995).

148. *Id.*

the threat of Section 301 action can scare governments into negotiation does not illustrate that Section 301 is a truly useful tool. Instead, it only illustrates the unpredictable effect of trade policy conducted by brute force rather than by diplomacy.

This unpredictability is especially inappropriate when dealing with such a potentially politically sensitive area as cultural trade. The aggressive response by CMT and the U.S. government may even have galvanized more Canadian support for limiting cultural trade than American support for increased cultural exports.¹⁴⁹ Canada's cultural trade policy is deeply rooted and strongly felt, even though U.S. policy does not recognize this. In fact, cultural trade policy is an increasingly crucial element of international trade, one that the United States should perhaps approach from a less contentious and simplistic viewpoint.

B. CANADIAN CULTURAL TRADE POLICY: DISCRIMINATORY PROTECTIONISM OR THE DEFENSE OF NATIONAL IDENTITY?

A U.S. Department of State Dispatch released soon after Canada's denial of CMT's license is typical of the American response to Canadian cultural protectionism:

The CRTC's decision . . . amounts to nothing less than a confiscation of CMT's business and will reflect negatively on Canada as a safe place to invest. . . . These developments [are] concrete evidence of an increasing and disturbing trend in Canada toward the implementation of policies that are intended to protect Canadian industry by discriminating against legitimate U.S. . . . interests.¹⁵⁰

Around the same time, Canadian ambassador to the United States Raymond Chrétien made a series of statements which exemplify Canada's defense of the CRTC decision:

[F]or Canada, trade in cultural goods and services is not just like any other trade. . . . There was a strong commitment within the Canadian government to ensure that our cultural industries are allowed to progress and develop . . . the ability to maintain viable, home-grown cultural industries that tell us about ourselves, is key to our sense of

149. Greg Quill, *Country Music TV Deal Capitulation—It's All About Unfinished NAFTA Business*, TORONTO STAR, June 23, 1995, at D12, available in 1995 WL 6001410; Jamie Portman, *Tuning Out the Twang from U.S. Station*, MONTREAL GAZETTE, Feb. 22, 1995, at B3, available in 1995 WL 6941095; Susan Kastner, *Dagnabit. Looks Like We've Ruffled Those Old Yankee Feathers Again*, TORONTO STAR, Nov. 6, 1994, at E2, available in 1994 WL 7948424.

150. U.S. Response to Recent Canadian Trade-Related Decisions, *supra* note 63.

national identity . . . [this commitment] is one thing that Canadian government policy has consistently recognized.¹⁵¹

These two quotes sound the main themes that reverberate throughout discussions of cultural trade policy.

One of several rationales that have been used to defend policies against limits on cultural trade is freedom of speech.¹⁵² Limiting cultural trade, it is argued, inhibits the interplay of information between countries and obstructs the development of a diversity of viewpoints.¹⁵³ Although this argument is probably true in the abstract, it has to be taken to extremes to actually be applicable to Canada-United States trade policy. No one could suggest that there is not already a healthy exchange of ideas between the United States and Canada. Canada's policies have neither the purpose nor the effect of making Canada into another North Korea, isolated from the rest of the world by a communications barrier. Instead, they are designed to maintain limited protection for distinctly Canadian speakers (meaning film-makers, musicians, and other members of the entertainment industries) who might otherwise be effectively prohibited from expressing themselves at all. Similarly, although U.S. free-speech jurisprudence primarily emphasizes the need for the government to not restrict speech, it does leave room for balancing that need against other important governmental interests.¹⁵⁴ In the case of international broadcasting, the interests of the marketplace of ideas must be balanced against access to

151. *Canadian Ambassador Defends Curbs on Imports of U.S. Magazines*, *supra* note 1, at 178-79.

152. Robin L. Van Harpen, Note, *Mamas, Don't Let Your Babies Grow Up to be Cowboys: Reconciling Trade and Cultural Independence*, 4 MINN. J. GLOBAL TRADE 165, 188 (1995).

153. *Id.* at 188-90. Cf. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (suggesting that the rationale of the First Amendment is to allow a marketplace of ideas, in which the "best test of truth is the power of the thought to get itself accepted in the competition of the market"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether by the Government itself or a private licensee").

154. [The] tradition [of free-speech jurisprudence] teaches that the First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court, in different contexts, has consistently held that the Government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

the marketplace itself. Although Canada has had basically the same policies in place since 1968, U.S. entertainment still remains dominant. If the policies had not been in place, there is a real possibility that Canadian freedom of expression within Canada would have been diminished.

A second way to analyze Canada's governmental broadcasting policy is to compare it to the U.S. experience with broadcast regulation. For much of its history,¹⁵⁵ the Federal Communications Commission (FCC) has attempted to maximize the diversity and quality of programming, and keep in check the monopolistic tendencies of entertainment and media companies, by giving preference to locally owned broadcasters.¹⁵⁶ The CRTC likewise pursues the dual objectives of creating diverse and high quality programming,¹⁵⁷ and restraining the profit-maximizing behavior of large companies operating in Canada.¹⁵⁸

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996). *But see* Buckley v. Valeo, 424 U.S. 1 (1976) (holding limits on an individual's expenditures in running for elected office to be unconstitutional restraints on speech, and holding that the government's attempt to "enhance" the speech of weaker parties by suppressing the speech of stronger parties is incorrect First Amendment jurisprudence). *Buckley v. Valeo* has been severely criticized. *See, e.g.,* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 464 (1996) (calling Buckley's rejection of enhancement theory "one of the most castigated passages in modern First Amendment case law"); Cass R. Sunstein, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 94-101 (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1423-25 (1986). Time, place and manner restrictions on speech, although appropriate only when the restrictions are content-neutral, also illustrate this balancing. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

155. There have been many recent changes in the FCC's jurisdiction, culminating in the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). However, the FCC and CRTC still have fundamentally comparable missions and roles in their respective governments.

156. *See generally* STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 437-38, 441 (3d ed. 1992).

157. The current Broadcasting Act states that the broadcasting policy of Canada is to "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view. . . ." Broadcasting Act of 1991, ch. 11, § 3(d)(ii), 1991 S.C. 117 (Can.). The Act also requires that "the programming . . . should be of high standard. . ." *Id.* § 3(g).

158. ROBERT E. BABE, *CANADIAN TELEVISION BROADCASTING STRUCTURE, PERFORMANCE, AND REGULATION* 33 (1979). Profit-maximizing, in this context, is not intended to mean the ordinary attempt to earn reasonable profits that is the incentive for private broadcast activity. Instead, it is intended to mean

It could be argued that the above parallels between the FCC and the CRTC show that CMT should have been allowed to continue broadcasting, on the rationale that the FCC has historically done an inconsistent at best job of administering broadcasting,¹⁵⁹ and so the CRTC is probably equally inept.¹⁶⁰ This syllogism fails to take into account the two-step process used by the FCC in broadcast licensing: it first must decide if the applicant meets the minimal statutory qualifications, and then it uses discretionary factors to decide between equally qualified applicants.¹⁶¹ The FCC has generally had the most trouble at the second step.¹⁶² On the other hand, the CRTC's denial of CMT's continued broadcasting was at the first step: CMT failed to meet basic Canadian statutory requirements of Canadian ownership, control, and content.¹⁶³

The actions of media mogul Rupert Murdoch illustrate the importance and simplicity of these threshold requirements. One of the FCC's statutory thresholds prohibits the ownership of a broadcasting company in the United States by an alien or alien-affiliated foreign corporation.¹⁶⁴ In order to buy U.S. broadcast-

profit-seeking behavior that is excessive to the point of harming the public interest. "[I]t can be deduced that television broadcasters earning very high rates of return in broadcasting are not providing the public service contemplated by the Broadcasting Act; the opposite is true." *Id.*; see also Broadcasting Act § 3.

159. FCC comparative licensing hearings have been described as "unpredictable, excessively discretionary, complex and baffling, deficiently consonant with the rule of law, and producing results that seem inconsistent from case to case." Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39 (1971).

160. Like the FCC (and probably every other administrative agency anywhere), the CRTC has been subjected to severe criticism. See generally HERSCHEL HARDIN, *CLOSED CIRCUITS* (1985) (chronicling the CRTC from its creation in 1968 through the early 1980s). However, the CRTC's overall success (or lack thereof) in implementation of its goals does not mean that in any particular licensing denial (such as CMT's) it has acted incompetently.

161. BREYER & STEWART, *supra* note 156, at 437-38.

162. *Id.* at 439-48.

163. Broadcasting Act of 1991, ch. 11, §§ 3(a), (f), 1991 S.C. 117 (Can.). The CRTC's decision regarding CMT can thus be seen as analogous to the FCC's decision, in *United States v. Storer Broadcasting Co.*, to deny a station's license because it did not meet the minimum guidelines for eligibility. 351 U.S. 192 (1956).

164. 47 U.S.C. § 310(b) (1994):

(b) Grant or holding by alien or representative, foreign corporation, etc.

No broadcast . . . license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien of which more than one-fifth of the capital stock is owned of record or

ing network Metromedia, the Australian-born Murdoch became a U.S. citizen.¹⁶⁵ If the United States' broadcasting policy limits foreign ownership, it seems strange that American companies should find Canada's similar requirements unfair.

Furthermore, the CRTC has to consider an additional goal with which the FCC is not concerned. In addition to preventing profit-maximizing behavior by individual companies,¹⁶⁶ the CRTC must also protect Canada from what it perceives to be an even more threatening monopoly: the American entertainment industry. Just as American broadcasting policy historically has preferred local ownership and control, Canada's cultural trade policy can be seen as an attempt to prefer local (Canadian) broadcasters over a larger, external conglomerate.

It has been strongly argued that the FCC's strategy of emphasizing local broadcasting may have been implemented in such a way as to actually inhibit programming diversity.¹⁶⁷ If so, then one might assume that Canada's strategy of emphasizing local (i.e., Canadian) broadcasters would have a similar paradoxical effect. However, a strategy and its implementation are not the same. The fact that the FCC's emphasis of local (market-by-market) ownership of broadcast media may not have worked does not necessarily mean that an emphasis on local (Canadian) ownership will not work. The reasons why the FCC's emphasis on local ownership (concern with the limited broadcast spectrum, and on the distribution sector rather than the transmission sector of the industry)¹⁶⁸ may have created results opposite of those desired simply do not exist when "local"

voted by aliens or their representatives . . . or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives . . . or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such a license.

Id.

165. William H. Meyers, *Murdoch's Global Power Play*, N.Y. TIMES, June 12, 1988, at 19.

166. See *BABE*, *supra* note 158, at 33.

167. See, e.g., Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1482 (1996).

168. See *id.* at 1428-29. The creation and packaging of marketable goods and services is the transmission sector, and the delivery of that content to consumers is the distribution sector. This distinction is applicable in regulated industries ranging from natural gas to entertainment.

means Canadian, and when technological advances continually widen the broadcasting spectrum.

Perhaps the chief American argument against cultural protectionism is that it is nothing more than disguised economic protectionism. Michael Jay Solomon, President of Warner Brothers International Television Distribution, has stated "[t]he cultural argument is bullshit . . . [a]ll people in television care about is ratings and profit."¹⁶⁹ This argument (although usually not so crassly expressed) is based on the premise, acknowledged by all, that cultural industries are big business. For example, Ian Morrison, spokesperson for the Friends of Canadian Broadcasting, estimates that the benefit to private Canadian television broadcasters and networks from federal protectionist policies is around Canadian \$200 million.¹⁷⁰

However, just because cultural industries are big business does not mean that they are just like any other industry. In a general sense, the objective of free trade is economic efficiency. The best example of how free trade achieves this objective is the "Law of Comparative Advantage."¹⁷¹ The Law of Comparative Advantage only works, however, if one assumes that goods and labor can be quantified into consistent monetary units. To begin with, services of all types are more difficult than goods to quantify this way.¹⁷² The fundamental flaw in this economic analysis, though, is that it assumes that economic decisions are made

169. Ken Auletta, *TV's New Gold Rush*, NEW YORKER, Dec. 13, 1993, at 88.

170. Van Harpen, *supra* note 152, at 174. Another example of this economic impact, from the EC, is French Communications Minister Alain Carignon's estimate that free trade in cultural industries would jeopardize 50,000 jobs and 50 billion French Francs (\$8.5 billion) in revenue for television and film alone. *Id.* at 177.

171. The Law of Comparative Advantage posits that countries will, and should, export products in which they have production advantages relative to their trading partners, and import products in which they have production disadvantages. CHARLES P. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 17-34 (5th ed. 1973). Since Canada is, by any standard, disadvantaged relative to the U.S. in the production of entertainment, the Law of Comparative Advantage suggests that it should just give up.

172. [Q]uality is the only yardstick by which to measure the value of a service, and quality depends on the manner in which each particular service act is performed. [T]here may be no such thing as a standard of service, let alone a standard unit of service, which constitutes a uniform valuation basis for each particular service activity. If that is so, . . . due to the fact that both output and price vary from one service act to another, there is no sound basis to calculate the productivity of any given service activity.

Jacques Nusbaumer, *Some Implications of Becoming a Services Economy*, in *COMMUNICATION REGULATION AND INTERNATIONAL BUSINESS* 23, 27 (Juan F. Rada & G. Russell Pipe eds., 1984).

rationally. The value of a television program cannot be determined by identifying the cost of production or the price at which the viewing of the show is sold to the end viewer. In the entertainment industry, more than in perhaps any other, production and consumption decisions are made irrationally.¹⁷³ Aesthetic sensibilities, hype, and escapism are far more likely to influence television viewing sensibilities than reasoned choices made on the intrinsic "worth" of the program.¹⁷⁴ The law of comparative advantage does not make sense in a choice between an American television broadcast, such as CMT, and a Canadian one, such as MuchMusic, because the products simply can not be logically compared.¹⁷⁵ In sum, although limits on cultural trade have a large economic impact, it is overly simplistic to argue that the broad economic argument behind maximizing free trade applies to cultural trade.

Another group of arguments in favor of removing cultural trade restrictions between the United States and Canada is based on a less sweeping economic analysis, asking how the Canadian entertainment industry would be affected if restrictions were no longer in effect. For example, it has been argued that imported American entertainment supports the Canadian local

173. "[There is in the entertainment business] a creative process in which artistic vision is subjective and unpredictable. The clash between 'art' and 'commerce' is a constant theme . . . for the artistic value of any entertainment property or talent is mostly subjective." DONALD E. BIEDERMAN ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 265 (3d ed. 1996). Because the value of entertainment property is so *subjective*, there is no *objective* way to comprehensively measure the entire societal value of a television program, song, or film. It is not hard to think of examples of entertainment that have had a societal impact far beyond their value at the cash register, such as the music of Bob Dylan or the broadcast of the Apollo 11 lunar landing.

174. Ordinarily, a necessary service is highly valued to the consumer and can be highly profitable to the producer. However, public television and arts funding programs, well established in both Canada and the U.S., exist because in many situations no producer will find it profitable to provide what the consumer needs. See, e.g., 47 U.S.C. § 396(a) (1994) (stating that the purposes for the establishment of the Corporation for Public Broadcasting include ". . . to encourage the development of programming that involves creative risks and that addresses the needs of unserved audiences and underserved audiences").

175. The argument that the two programs could be compared by airing them simultaneously in the same market and comparing their ratings does not work, because there is no logical rationale that can be used to explain why a viewer would prefer one over the other. If the value of entertainment lay only in its apparent economic value as measured by ratings, there would be no reason for protecting entertainment or culture under the First Amendment. Canada and the United States both recognized long ago that expression, including entertainment, has an intangible value that is worth protecting even when it offers no economic benefit.

entertainment industry, because the low cost of American entertainment products, such as films and television shows, allows broadcasters to stay in business, giving local producers a means with which to disseminate their more expensive product.¹⁷⁶ A similar argument is that the reduction of protection will lead local producers to specialize, which is economically more productive and efficient.¹⁷⁷

However, both of these arguments have major flaws. From an economic standpoint, the idea of using cheap imported entertainment to, in effect, subsidize more expensive domestic entertainment only makes sense if there *are* content quotas—if there are not, any rational broadcaster will soon find it even cheaper to use only the imported entertainment.¹⁷⁸ A related problem is that because increased specialization brings with it diminished flexibility and market power, a Canadian community of specialist producers will find that it is unable to assert itself in the international marketplace the way the more unified and integrated American film and record industries do. The ultimate result of increased specialization will be diminished competition in the North American and world marketplaces.

Maintaining competition in the entertainment industry is especially important for three reasons: the industry has an inherent trend towards monopolization; the ongoing revolution in communication technology will be most easily exploited by large companies; and most importantly, these industries are of unparalleled importance in the culture of individual nations, and of the world.

American entertainment industries have a long history of monopolistic behavior.¹⁷⁹ This historical trend is reinforced by

176. Van Harpen, *supra* note 152, at 183-84.

177. *Id.* at 184-85.

178. The imbalance of programming costs, and entertainment production generally, between the United States and Canada is partially due to the fact that the United States is currently the largest audience in the world in which nearly the entire population shares a common language. Canada has one-tenth the population of the United States and a bilingual audience, and there are many major language groups within the EC. Because U.S.-based entertainment companies can recover the large fixed production costs of making television programming and films, and other entertainment in their domestic market, they are able to sell their entertainment at variable-cost prices that non-U.S. producers cannot match.

179. *See, e.g.*, Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (invalidating a film cartel's attempt to condition the distribution of film projectors upon an agreement to exclusively show the company's films); NBC v. United States, 319 U.S. 190 (1943) (upholding FCC regulations designed to prevent market-dominating practices by radio networks); United

current market reality. The production and distribution of entertainment exhibit economies of scale,¹⁸⁰ and thus the entertainment industry can be thought of as a "natural monopoly".¹⁸¹ Finally, from the Canadian perspective, although the American entertainment industry consists of eight or ten large but fiercely competitive companies, these companies all produce the same product (non-Canadian entertainment). It seems logical that the Canadian government would intervene when confronted with a market saturated with an undesired product.

The ongoing technological revolution in entertainment and communications has been used as an argument against culturally protective policies such as Canada's. In this view, communication advances allow producers to circumvent protectionist barriers, and if the barriers are futile, why have them at all?¹⁸² Like the free speech argument, this only makes sense if one assumes that total protectionism is the desired goal. Cultural trade barriers like Canada's, even though semi-permeable, still

States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (prohibiting a movie studio's attempt to condition access to its copyrighted films only upon "block-booking" of its films in local theater); United States v. Loew's, Inc., 371 U.S. 38 (1962) (reaching the same result).

180. Only a few companies can "amass sufficient capital to acquire, organize, deliver, and promote the constant stream of new programming needed to satisfy an easily bored public." Chen, *supra* note 167, at 1489.

181. [Natural monopolies exist] when there is a relation between the size of the market and the size of the most efficient firm in that market such that one firm of efficient size can produce all the market can absorb at a remunerative price and can continually expand its capacity at less cost than that of a new firm entering the business.

BREYER & STEWART, *supra* note 156, at 236. The entertainment industry (broadly encompassing film, music, television, and publishing) fits this description. In each sector, there are seven or fewer monolithic firms that are vertically integrated from the production of the content through at least most of the distribution chain, and in film and music, the costs of starting a new company to compete with the "majors" has effectively prohibited the creation of any competitors in at least twenty years. Although three new television networks have been started in the last 10 years, none of them represent the entry of a new start-up competitor—they instead exemplify the trend that has dominated the entertainment industry for years: increased integration and mergers. See BIEDERMAN, *supra* note 173, at 3-5, 527, 556-57, 602-03, 627-28. The net effect of this increased integration is that there are perhaps a dozen really big firms that control the entertainment industry, and that operate on such a large and diversified scope that no new firm could possibly hope to compete with them. "Local distribution of power, gas, water, telephone, and perhaps CATV [cable television] service still tend to be considered natural monopolies." BREYER & STEWART, *supra* note 156, at 236 (emphasis added).

182. See generally Van Harpen, *supra* note 152, at 181 (describing the impact of changing technology on cultural industries).

achieve their purpose: to provide a limited degree of protection, enough to shelter Canada's own cultural industries.¹⁸³

In fact, the limited protection offered by Canada's cultural trade policy is even more important in light of the quasi-monopolistic nature of the American entertainment industry and current advances in communications and other technology. New distribution systems, whether they be satellite communications or cable internet systems, require massive investments to implement.¹⁸⁴ Thus, the larger a company is, the better situated it is to take advantage of technological advances. At this late date, there can be no doubt that those who are able to take advantage of these advances will control the future of entertainment and communications.¹⁸⁵ It should come as no surprise, then, to companies engaged in international cultural trade that Canada has made it a national priority to try to save itself a lane on the information superhighway by shielding its entertainment industry from domination.

Thus, even if Canadian cultural industries are currently maintaining their tenuous position, technological change makes it important for the CRTC to keep a vigilant watch toward the future. Whoever controls the communications and entertainment networks of the future will control the terms of speech, exerting an ever-widening influence.¹⁸⁶ This is ultimately the danger about which the Canadian government is concerned: they want to protect their cultural industries because they see them as inextricably linked to their culture and its future.¹⁸⁷

183. See, e.g., Bill Brownstein, *Canadians in Cultural Denial; World Loves Our Performers but the Federal Government is What Helps them Flourish*, OTTAWA CITIZEN, Feb. 6, 1996, at C7.

184. At the 1994 launch of its Full Service Network (an experimental interactive television service) in Orlando, Time Warner announced that it had committed \$5 billion to upgrade its cable systems over the next five years to allow movie-viewing, shopping, games, and telephone services via a "souped-up cable box and television set". Eben Shapiro, *Time Warner Cites Role of Movies, Ads in Interactive Project*, WALL ST. J., Dec. 15, 1994, at B8.

185. See Chen, *supra* note 167, at 1490-91.

186. *Id.*

187. [Canadian] *Broadcast Strategy recognizes that the tide of technological change cannot be stopped nor will simple reliance on barriers suffice. 'Even if Canadians wanted to, we could never build walls high enough to stop a flood that is coming from the sky alone.' 'But many Canadians have also recognized that something very precious—our heritage, our cultural identity, our sense of ourselves as a national community would be lost if their enhanced choice of programming does not include the creation of new programs by Canadians.'*

A surprisingly common response to this argument is that there is no such thing as Canadian culture.¹⁸⁸ The obvious ethnocentrism manifested in non-Canadians passing judgment on the worth or very existence of Canadian culture eliminates this argument from having to be taken seriously.¹⁸⁹ A slightly more plausible argument asks why Canada has chosen to protect its culture by regulating television, instead of something more traditionally "cultural," like literature. The simple answer is that television can have enormous force on society. Great numbers of people watch television¹⁹⁰ for great periods of time,¹⁹¹ and one

Jake V. Th. Knoppers, *A Perspective From Canada*, in COMMUNICATION REGULATION AND INTERNATIONAL BUSINESS 93, 100-01 (Juan F. Rada & G. Russell Pipe eds., 1984) (emphasis and quotation marks in original).

188. Jay Berman, CEO of the Recording Industry Association of America (the lobbying organization for the six major record labels), did not help his cause when he told the following joke on a Canadian radio show: "What's the difference between yogurt and Canada? Yogurt has an active culture." Ben Wildavsky, *Culture Clashes*, 28 NAT'L J. 648 (1996); see also Nina Munk, *Culture Cops*, FORBES, Mar. 27, 1995, at 42, 43 (asserting that Canadian efforts to protect Canadian culture are mere economic protectionism, on the basis that "it's hard to pinpoint anything distinctly Canadian").

189. There are . . . those on the American side of the border who can find no distinguishable Canadian cultural artifact that is definitively unique in relation to those produced in the rest of Northern America. It must be even more difficult for technocrats, industrialists, and policy-laden bureaucrats on both sides of the invisible border to recognize what is real to those who maintain a national consciousness and identity, who identify themselves as Canadian in terms of their collective existence as a nation, and, individually, through the cultural industries. Perhaps the differences between the two societies could be seen more readily if Canadian products were as available south of the border as American products are north of it.

Laurence S. Seidenberg, *Canadian Cultural Identity and Copyright Law: The Signal-Piracy Imbroglia After the Free Trade Agreement*, in BORDERLANDS: ESSAYS IN CANADIAN-AMERICAN RELATIONS 263, 282 (Robert Lecker ed., 1991). Similarly, Raymond A.J. Chrétien, Canadian ambassador to the United States, has asked:

Would you accept as a country to have 90 percent of everything shown on your television screens coming from another country? . . . Would you accept half the penetration that we accept in Canada of foreign cultural products in our country? If the situation was reversed, I think there would be a huge outcry.

Wildavsky, *supra* note 188, at 650.

190. In 1990, more than 7 million Canadians (roughly one-quarter of Canada's population) subscribed to cable television. CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, CRTC YEAR IN REVIEW 1990-1991, 71 (1991). In the U.S., 62.1 million households subscribed to cable television in 1996. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC Order No. 96-496 (1996) (on file with the Minnesota Journal of Global Trade).

191. In 1990, each Canadian 2 years old or older viewed an average of 23.3 hours of television weekly. CRTC YEAR IN REVIEW, *supra* note 190, at 18.

only has to consider events such as the 1960 Nixon-Kennedy debate and the coverage of Operation Desert Storm to realize television's dramatic impact.¹⁹² Because broadcasting and communications have traditionally been areas of regulation, and because of this enormous impact, television is a natural means for the implementation of cultural protection.

CMT contends that "[c]ountry music videos reflect the best elements of American culture No political messages, no gratuitous sex or violence, just good music."¹⁹³ In other words, CMT asks "Why, of all the programming that comes into Canada from the U.S., ban us?" The answer is that the value of any individual program or cultural service lies in the eye of the consumer. Of course CMT thinks their programming is the best. The real question is what programming does Canada think is best, and the CRTC answered that it was not CMT.

C. BALANCING CULTURE AND COMMERCE

The CMT dispute demonstrates the problems that both governments and international agreements have with cultural trade policy. The WTO system, which has yet to explicitly address the problem, offers no guidance as to how to arrive at a resolution. NAFTA's asymmetrical cultural exemption is not a solution, but is instead an ongoing sore spot in Canada-U.S. relations. Section 301, the United States' primary tool in attempting to resolve the dispute, also poses problems. It can too easily be applied so as to serve every interest except a mutually satisfactory resolution, and its brute force is just as likely to irritate trade partners as it is to lend to an amicable compromise.

192. The power of television in Canadian political and cultural life is powerfully illustrated in the story of Canada's adoption of a Bill of Rights. Throughout the 1970s, Canadian television broadcast many American police dramas in which officers read Miranda rights to the criminals they apprehended. Despite the entirely different constitutional and political system of Canada at that time, many Canadians grew to believe that they had "the right to remain silent, the right to counsel," and all the other protections existing under the U.S. Constitution. When Canada re-adopted its Constitution in the process of cutting governmental ties with the U.K., it added an American-style Bill of Rights. This was, at least in part, because so many Canadians had already assumed that they had such rights. GEORGE H. QUESTER, *THE INTERNATIONAL POLITICS OF TELEVISION* 109-10 (1990); see also Kaplan, *supra* note 25, at 257-59 (explaining the theory of 'la télévision toute-puissante'—the all powerful television).

193. This was said by GWSC's Lloyd Werner about CMT's expansion into Europe, but it applies equally to their expansion into Canada. Jack Hurst, *On the Road Again: Nashville Artists Find New Nations to Conquer*, CHI. TRIB., July 26, 1996, § 5 (Tempo), at 1.

The dispute also illustrates Canada's commitment to a sensible cultural policy, uncomfortable as that policy and commitment may be to the United States. What can be done to try to balance the interests of both Canada and the United States?

One option would be to adopt, at the WTO level, an agreement providing for some degree of cultural protection. The number of nations asserting their rights to protect their domestic culture industries is rising, as is their determination to do so vigorously.¹⁹⁴ At the same time, the U.S. entertainment industry is increasingly looking abroad for growth.¹⁹⁵ A well-crafted multilateral agreement could allow both sides to compromise. Canada, the EC, and others could offer the United States certain sectors or types of culture or entertainment in which there would be open trade in exchange for United States accession to the agreement.

There is precedent in the WTO system for such a compromise. The WTO provides exclusions for industries such as defense¹⁹⁶ and government procurement.¹⁹⁷ Furthermore, it already provides an exclusion somewhat linked to a country's culture, the public morals exception of GATT Article XX(a).¹⁹⁸ All of these exceptions allow a country to determine what is in its own best interest in issues that it feels are central to its identity and sovereignty. If Canada, the EC, and others strongly feel that the importation of American cultural products endangers their national identities, or even sovereignty, that concern should be treated just as these other central concerns have been.

194. BIEDERMAN ET AL., *supra* note 173, at 6.

195. For example:

CMT Latin America took flight in 1995, making CMT International's satellite signals available to more than 90% of the television households in the world. The next step is to build the base of households that are actually receiving CMT We are very enthusiastic about country music's reception around the world and CMT International's potential for growth. . . . [W]e believe the international market is large enough that the investment we make today will be paid back in the years to come. We remain committed to CMT International and its goal of taking country music—America's music—to the world. We believe this is in the best interest of the Company and its shareholders for the long term.

GAYLORD ENTERTAINMENT COMPANY, INC., *supra* note 47, at 15.

196. GATT art. XXI.

197. Agreement on Government Procurement, *Marrakesh Agreement Establishing the World Trade Organization*, Dec. 15, 1993, Annex 4, reproduced as amended in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 438 (1995).

198. GATT art. XX(a).

A second solution is just to scale back the level of disagreement through voluntary corporate behavior. Some Canadian broadcast networks have grown, thanks to the CRTC's policies, large enough to be competitive in the international marketplace.¹⁹⁹ MuchMusic, one of the leaders of Canadian broadcasting's nascent export movement, attributes its growth and success to its concern for local content.²⁰⁰ In Argentina, MuchMusic began operations with 80% Canadian content and 20% local content, and then worked with the local broadcaster to reach a goal of 50% Canadian, 50% local broadcasting.²⁰¹ Many Canadian broadcasters believe that this sensitivity to local cultural concerns, instilled by surviving in the shadow of the United States, has made Canadian television exporting more flexible and thus more profitable.²⁰²

This approach may not work in all situations, but it is one that the United States entertainment industry may find it profitable to try. Perhaps if CMT had played more Canadian country artists in the first place, there would have been no complaints at the CRTC hearing.

CONCLUSION

The compromise ultimately reached between CMT and its Canadian co-venturers was a resolution that both sides could live with. However, it came with dramatic cost to CMT, consumers, and the Canadian country-music artists who were boycotted. Furthermore, the dispute caused the once relatively dormant issue of cultural trade protection to surface, unnecessarily creating international tension and illustrating the problems, for both the United States and Canada, that are inherent in the current system of agreements and laws dealing with cultural trade protection. Canada and the United States should seek to use the lessons learned from the CMT dispute to develop a compromise to this ongoing trouble spot in their relations.

199. Tony Atherton, *TV Nation; World Tunes in Canada's Television Set*, OTTAWA CITIZEN, June 30, 1995, at B1. In 1994, Canada exported Canadian \$300 million of television programming. *Id.* This made it a distant second in the world to the United States. *Id.* In 1993, U.S. exports of all visual media (movies, television, and home video) totaled approximately \$18 billion. David J. Fox, *Entertainment Industry Gets Clinton's Free Trade Pledge*, L.A. TIMES, Oct. 15, 1993, at D5.

200. Atherton, *supra* note 199, at B1.

201. *Id.* MuchMusic has also had similar success in Finland and Mexico. *Id.*

202. *Id.*

Although Canada is particularly susceptible to American cultural exports, most of the United States' other trading partners face the same issue: how to balance the desire to protect their own entertainment and cultural sovereignty with the desire to minimize barriers to trade to benefit their citizens and the global entertainment industry. Ever-quickenning technological change, increasing centralization of ownership, and the drive of the entertainment industry to expand across the globe will increasingly cause this issue to be important in international political and economic relations. Thus, there are lessons from this dispute for all governments concerned about their economies and cultures.

