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THE LIFE, DEATH, AND REBIRTH OF THE “CULTURAL EXCEPTION” IN THE MULTILATERAL TRADING SYSTEM: AN EVOLUTIONARY ANALYSIS OF CULTURAL PROTECTION AND INTERVENTION IN THE FACE OF AMERICAN POP CULTURE’S HEGEMONY

INTRODUCTION

International relations-globalization literature is replete with bleak forecasts regarding the fate of states’ cultural identity in the context of the hegemonic ideology of the neoliberal trading system.¹ Self-interest, domestic pressure, bias, ignorance, and uncertainty have all compelled states to respond to extant global trade climates by creating unique public policy instruments to justify deviations from the standard GATT/WTO legal framework² and to withstand complete liberalization³ in certain sectors of the global economy. For example, negotiations in the audiovisual sector have historically been plagued by problems of ill-definition, misperception, and intransigence.⁴ These problems are co-

1. Neoliberalism is a political-economic school of thought that encourages deregulation, privatization, and free trade. Often associated with the free activity of capitalist economies unconstrained by the government or civil society, neoliberalism is built upon neo-classical price theory. For an unflattering account of neoliberalism, see Susan George, *A Short History of Neoliberalism*, at <http://www.globalpolicy.org/globaliz/econ/histneol.htm> (last visited Apr. 13, 2004).

2. The overarching goal of the GATT/WTO legal framework is to liberalize trade in pursuit of greater global welfare. This is to be achieved by strict adherence to the norm of nondiscrimination through such principles as “most-favored-nation treatment,” and “national treatment.” The principle of most-favored-nation treatment, found in article I of the initial General Agreement on Tariffs and Trade (GATT), requires World Trade Organization (WTO) member states to treat the goods and services of all other member states similarly. The principle of “National Treatment” in article III of the GATT requires WTO member states to treat national goods and services and foreign goods and services in the state’s domestic market alike. The GATT provided the basic legal framework of the multilateral trading system from Jan. 1, 1948, until Jan. 1, 1995, when the WTO entered into force and the 1947 GATT text was updated to become “GATT 1994.” See *infra* note 13.

3. Complete liberalization reflects a world in which the global markets reign uninhibited by tariffs, quotas, and informal trade barriers. In theory, consumer sovereignty is maximized by access to the best products at the best price. See ADAM SMITH, *THE WEALTH OF NATIONS* 342, 346, 348–49, 424, 444–45 (1776).

4. Victoria de Grazia, *Mass Culture and Sovereignty: The American Challenge to European Cinemas, 1920–1960*, 61 J. MOD. HIST. 53–87 (1989); DAVID ELLWOOD & ROB KROES, *HOLLYWOOD IN EUROPE, EXPERIENCES OF CULTURAL HEGEMONY* (1994); RICHARD KUISEL, *SEDUCING THE FRENCH: THE DILEMMA OF AMERICANIZATION* (1993); RICHARD PELLIS, *NOT LIKE US: HOW EUROPEANS HAVE LOVED, HATED, AND TRANSFORMED AMERICAN CULTURE SINCE WORLD WAR II*

determined by the dominance of American Popular Culture⁵ and the complementary evolution of the “cultural exception” doctrine as a policy response designed to neutralize this dominance. The cultural exception doctrine resulted in a long-standing international public relations war alternatively boxed in the rhetoric of “Americanization”⁶ and “anti-Americanism”.⁷ While its halcyon days were as recent as the last decade, the exigencies of the “new economy”⁸ and its accompanying technology, coupled with globalization’s hallmarks of consolidation, integration, and harmonization,⁹ have led one interested party to boldly proclaim “the cultural exception is dead.”¹⁰

This Note proceeds by examining the confluence of multilateral trade policy, cultural identity, and the vitriol of the “Americanization” and “anti-Americanism” rhetoric through an assessment of the genesis, evolution, and current vitality of the “cultural exception” doctrine as applied to the audiovisual sector. Part I defines the cultural exception doctrine, pinpoints its origins and modern sources in the international trade architecture, and introduces the divide that exists between believers and non-believers. Part II evaluates the legal, economic, and social justifications traditionally offered in its support, emphasizing the problems of ill-definition and misperception. Part III examines several key developments that have impacted the audiovisual sector since the conclusion of the Uruguay Round of Multilateral Trade Negotiations, with a determinative outlook as

(1997).

5. See World Trade Organization, Council for Trade in Services, *Audiovisual Services*, S/C/W/40(98-2437), June 15, 1998; OECD, *Content as a New Growth Industry*, DSTI/ICCP/IE(96)6/FINAL, May 22, 1998; OECD, *Policy and Regulatory Issues for Network-Based Content Services*, DSTI/ICCP/IE(96)9/REV1 (and CORR1), Aug. 4, 1997; European Commission, *Panorama of EU Industry 1997*; European Audiovisual Observatory, *Statistical Yearbook 1997*, Strasbourg.

6. Victoria de Grazia, *Americanization and Europeanization*, EUR. STUD. NEWS. (Council for European Studies), June 2001; Elizabeth Franck, *Americanization of Messier: Vivendi Boss Loses Billions*, NEW YORK OBSERVER, Mar. 11, 2002, at A1.

7. See L’ANTIAMÉRICANISME=ANTI-AMERICAN AT HOME AND ABROAD: ACTES DU COLLOQUE DES 26 ET 27 MARS 1999 (Sylvie Mathé, ed., 2000); Darrin McMahon, *Echoes of a Recent Past: Contemporary French Anti-Americanism in Historical and Cultural Perspective*, COLUM. INT’L AFF. ONLINE, available at <http://www.ciaonet.org/wps/mcd01/> (last visited Apr. 13, 2004).

8. For a discussion of the relationship between culture and the “new economy,” see HARVEY B. FEIGENBAUM, *GLOBALIZATION AND CULTURAL DIPLOMACY* 32 (2001).

9. Joseph M. Grieco & G. John Ikenberry, *Economic Globalization and its Discontents*, available at http://www.duke.edu/~pfeaver/grieco_reading.chapter6.htm (last visited Apr. 9, 2004) (defining globalization as “the fastest growing integration since World War II of the national economies of most of the advanced-industrialized countries of the world, and an increasing number of developing nations, to the degree that we may be witnessing the emergence and operation of a single worldwide economy . . . Globalization is, however, not only about economic integration . . . it also includes an increase in cross-border political, social, cultural and technological exchanges”).

10. See Franck, *supra* note 6; see also Meara Cavanaugh, *Messier: Threat to French Culture?*, CNN.COM (Apr. 17, 2002), <http://www.cnn.com/2002/BUSINESS/04/17/messier/index.html> (on file with the Washington University Global Studies Law Review).

to whether the doctrine is alive and well or on its last leg. The Note concludes with a speculative exploration of the doctrine’s future.

I. DEFINITION, POSSIBLE ORIGINS, AND MODERN SOURCES

The idea of state protection of cultural identity has existed for many years, arguably reaching as far back as the origins of state sovereignty.¹¹ However, the modern doctrine of the cultural exception¹² did not begin to take shape until the establishment of the multilateral trading system.¹³ Yet, the problems of bias, political self-interest, misperception, and intransigence that have historically plagued trade in the audiovisual sector are the very same problems that make selecting a working definition of the doctrine a difficult task. Once all the showmanship and spurious theories are teased out of the process, we are left with a raw marrow that recognizes the sensitive nature of the audiovisual sector and the desire to exempt this sector from standard GATT/WTO legal obligations.¹⁴

Though not specifically articulated as such, advocates of the cultural exception would suggest that one definition of the doctrine in the multilateral trading system can be found in article IV, part II of the 1947 GATT.¹⁵ The “Special Provisions Relating to Cinematograph Films”¹⁶

11. Danielle S. Petito, *Sovereignty and Globalization: Fallacies, Truth, and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139 (2001).

12. This is also known as “cultural exclusion” and “cultural specificity.” For distinctions between the three, see Denise Prévost, *The Relationship Between Trade and Cultural Identity: The Question of Linkage*, Prepared for the Referatendagen in Maastricht (Feb. 10–12, 1999), <http://www.rechten.unimaas.nl/ozic/referatendagen%201999/prevost.pdf> (last visited Apr. 15, 2004).

13. Since the end of World War II, the ninth round of multilateral trade negotiations has begun. The first eight rounds took place under the framework of a progressively strengthening legal regime, known as the GATT. The eighth round of multilateral trade negotiations (Uruguay Round) culminated in the institutionalization of the regime in a body of binding legal norms to be enforced by the WTO.

14. The “most-favored-nation treatment” and the “national treatment” principles of nondiscrimination are relaxed under this scenario. Compare with UNESCO, Division of Creativity, Cultural Industries, and Copyright Sector for Culture, *Culture, Trade, and Globalization: Questions and Answers*, available at <http://www.unesco.org/culture/industries/trade/index.shtml> (last visited Apr. 14, 2004).

15. GATT, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188. See generally, Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 286 (1997).

16. Article IV reads:

If any contracting party establishes or maintains internal quantitative restrictions relating to exposed cinematographic films, such regulations shall conform to the following requirements: (a) Screen quotas may require the exhibition of cinematographic films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specific period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theater per year or the equivalent thereof.

responded to Hollywood's pursuit of the European film market during the interwar years¹⁷ and the subsequent inundation of this market with American films in the wake of World War II.¹⁸ Prior to the 1947 Agreement the majority of films shown in Western Europe were American-made. Fearing the impact this onslaught would have on European cultural identity and values, several countries imposed quotas on the number of American movies shown in their countries.¹⁹ While these measures were ultimately short-lived, they were undoubtedly the forerunners of the screen quota institutionalized in article IV of the GATT. The decision of the GATT's contracting parties to limit the application of a cultural exception to this single industry likely reflected both a generalized perpetuation of the pre-war Americanization fears²⁰ and a recognition of the media's unique power to persuade.²¹

More devout adherents of the cultural exception have pointed to two other GATT provisions for support of the doctrine's early roots in the multilateral trading system: article XIX and article XX(f).²² Article XIX provides for an "emergency" derogation from standard nondiscrimination obligations when the competitive forces of the marketplace threaten to overwhelm a domestic industry.²³ Thus, the cultural exception doctrine is allowed if competition is so fierce that the audiovisual sector's very survival is in jeopardy.²⁴ Article XX(f),²⁵ one of a limited set of general exceptions delineated in the GATT,²⁶ is a rather open-ended provision that permits states to derogate from nondiscrimination obligations in order to protect "national cultural treasures."²⁷ Although some cultural exception

See GATT, *supra* note 15, art. IV.

17. See generally JOHN TRUMBOUR, *SELLING HOLLYWOOD TO THE WORLD: U.S. AND EUROPEAN STRUGGLES FOR MASTERY OF THE GLOBAL FILM INDUSTRY, 1920-1950* (2002).

18. *Id.*

19. Europe responded with both numerical quotas (based on absolute number) and screen quotas (based on percentage of screen time) even though article IV of the GATT permits screen quotas only. See generally JENS ULFF-MØLLER, *HOLLYWOOD'S FILM WARS WITH FRANCE: FILM TRADE DIPLOMACY AND THE EMERGENCE OF THE FRENCH FILM QUOTA POLICY* (2001); KUISEL, *supra* note 4.

20. See JACOB PALUDAN, JØRGEN STEIN (1966).

21. Michael Braun and Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?*, 22 *DENV. J. INT'L L. & POL'Y* 155, 182 (1993).

22. Compare Cahn & Schimmel, *supra* note 15, at 284, with Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 *MICH. J. INT'L L.* 1, 31 (2000).

23. This provision is sometimes known as the "escape clause." See GATT, *supra* note 15, art. XIX.

24. Cahn & Schimmel, *supra* note 15, at 285.

25. GATT, *supra* note 15, art. XX(f).

26. In addition to the "national cultural treasures" exception, article XX permits the contracting parties to make "general exceptions" for protection of natural resources, public health, and public morality. See GATT, *supra* note 15, art. XX(a)-(j).

27. GATT, *supra* note 15, art. XX(f).

enthusiasts have suggested that all copywritten audiovisual material would satisfy this condition,²⁸ a more reasoned analysis would suggest the intent of this provision was to protect objects of “high culture” typically found in the museums of the world.²⁹ To conclude otherwise leads to such absurd results as Bruce Springsteen’s *Born in the USA* and Federico Fellini’s *La Dolce Vita* falling within the scope of article XX protection.³⁰

In 1988, advocates of the doctrine scored a major victory when Canadian negotiators introduced³¹ the “cultural exclusion” doctrine³² in articles 2005 and 2012 of the Canada-US Free Trade Agreement.³³ Five years later, the idea of excluding certain cultural industries was readopted in the North American Free Trade Agreement,³⁴ when the same CFTA provisions were incorporated by reference in Annex 2106 of NAFTA.³⁵ Even a cursory examination of these provisions leaves little doubt that the drafters specifically intended several industries within the audiovisual sector to fall within the shadow of cultural protection.³⁶ However, the

28. Cahn & Schimmel, *supra* note 15, at 284.

29. A contextual analysis of article XX(f)—“measures . . . imposed for the protection of national treasures of artistic, historic or archaeological value”—leaves little doubt of the contracting parties’ intent. *But see* Harry Hillman Chartrand, *International Cultural Affairs: A 14 Country Survey*, 22 J. ARTS MGMT., LAW & SOC’Y 2 (1992) (“In principle, this provision could be extended to the cultural industries to provide protection of cultural identity.”)

30. Ironically, some promoters of the cultural exception have suggested that the cumulative effect of the U.S. “reverse clause” (appended to the Florence Agreement) and its subsequent Nairobi Protocol was to create a cultural exception even before this notion was developed. One may also reference the reserve mechanisms found in the United States’ adherence to The Florence Agreement. The Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials (1950); Annex C-1 of the Nairobi Protocol (1976); and UNESCO, *supra* note 14, at Question 19. However, these soft-law instruments, adopted under the auspices of UNESCO, lack the binding force of the rules and obligations contained within the GATT/WTO legal framework. For a general discussion of the role soft-law instruments play in international law, see Chris Inglese, *Soft Law?*, POLISH YEARBOOK OF INT’L L. 20 (1993).

31. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3–4 (1990) (characterizing institutions as the “rules of the game”). To “institutionalize” means to alter the rules of the game. *Id.*

32. Prevost, *supra* note 12.

33. Can.-U.S. Free Trade Agreement, Jan. 2, 1988, H.R. Doc. No. 216, 100th Cong. (1988), reprinted in 27 I.L.M. 281 (1988) [hereinafter CFTA].

34. North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

35. Cahn & Schimmel, *supra* note 15, at 308.

36. Section 1, article 2005 of the CFTA is quite explicit: “Cultural industries are exempt from the provisions of this Agreement.” CFTA, *supra* note 33, art. 2005. Article 2012 defines cultural industries as:

an enterprise engaged in . . . a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine-readable form, but not including the sole activity of printing or typesetting any of the foregoing, b) the production, distribution, sale or exhibition of film or video recordings, c) the production, distribution, sale or exhibition of audio or video music recordings, d) the publication, distribution, or sale of music in print or

extent to which these provisions would take precedence over conflicting provisions within the WTO framework was clarified by a de facto rejection of the cultural exception doctrine by a panel of the Dispute Settlement Body.³⁷

While true believers point to the conclusion of the Uruguay Round as further evidence of the cultural exception in the international trade architecture, non-believers point to the very same event as evidence of its death knell.³⁸ In the final days of the GATS negotiations,³⁹ the audiovisual sector was still on the negotiating table, being considered in conjunction with civil aircraft, financial services, and maritime transportation.⁴⁰ As EU and US trade representatives reached an impasse, it appeared that years of negotiations were unraveling. The solution, euphemistically hailed as the “Agreement to Disagree,”⁴¹ pulled the audiovisual services sector into the GATS framework, but allowed the EU to maintain the market access and national treatment exclusions⁴² necessary to preserve its audiovisual policy.⁴³

machine readable form, or e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

CFTA, *supra* note 33, art. 2012.

37. Paul, *supra* note 22, at 42–52. The panel’s decision (later affirmed by the Appellate Body of the W.T.O.) regarding the GATT-legality of a Canadian excise tax on split-run periodicals will be addressed in more detail in Part III. *See infra* notes 117–31 and accompanying text.

38. *See* Luc Veron, *Hollywood and Europe: A Case of Trade in Cultural Industries, the 1993 GATT Dispute*, COLUM. INT’L AFF. ONLINE, <http://www.ciaonet.org/wps/ue/vel> (last visited Apr. 13, 2004); Lisa L. Garrett, *Commerce Versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C. J. INT’L L. & COM. REG. 553, 554–56 (1994).

39. General Agreement on Trade in Services, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, 33 I.L.M. 44 (1994) [hereinafter GATS]. GATS is the services analog to the GATT. Several years younger and much less developed, GATS applies the same nondiscrimination principles as the GATT. For a more detailed definition, see UNESCO, *supra* note 12, at Question 13.

40. Veron, *supra* note 38.

41. THE HOLLYWOOD REPORTER, Dec. 17, 1993, at 3; *see also* *Agreed to Disagree: GATT Goes Forward by Dropping TV and Film Issues*, COMM. DAILY, Dec. 15, 1993, at 2.

42. The WTO has been concerned about the global misperception regarding market access and national treatment commitments of GATS. Specifically, a recent report by the World Development Movement caused concern. The WTO responded to the criticisms on its website, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/oolist_e.htm (last visited Apr. 13, 2004). *See also* Given, *infra* note 121.

43. The 1989 “Television without Frontiers” Directive, implementing the Council of Europe’s European Convention on Transfrontier Television and amended in 1997, remains the centerpiece of the European Union’s audiovisual policy. It has the effect of limiting the number of American films that can be shown on European television and in European movie theaters by mandating that a majority (fifty-one percent) of broadcast time be reserved for films of European origin. France upped the minimum to 60 percent. *See* Directive 97/36/EC of the European Parliament and of the Council of June 30, 1997, amending Council Directive 89/552/EEC; Ramezzana, *infra* note 54. *See also* Joongi Kim, *The Cultural Exception under the International Trade Regime*, COALITION FOR CULTURAL

Unfortunately, this solution does little to inform us of the doctrine's fate in the multilateral trading system. Non-believers argue that no explicit cultural exception can be found in the text of the Final Act of the Uruguay Round and that the consequent inclusion of the audiovisual services sector within the GATS framework is both a clear indication of its obsolete status and a positive affirmation of its tenuous legal origins. However, the question still remains as to why audiovisual goods were not included in the "Agreement to Disagree." Moreover, just days after the Round's conclusion, French Prime Minister Edouard Balladur claimed that, "the cultural identity of Europe (had been) protected."⁴⁴ This single episode and the disparate responses it spawned encapsulates the problems of ill-definition, misperception, and intransigence that have plagued the audiovisual sector. These problems, both the products and handmaidens of the doctrine, continue to fuel the justifications traditionally offered in its support.

II. MISGUIDED JUSTIFICATIONS

The preceding section suggests that although the cultural exception doctrine has a resolute following, its tenuous legal origins and its ambivalent modern sources within the multilateral trading system render its current status murky at best. Adding to the debate are several legal, economic, and social justifications offered in the cultural exception doctrine's support. This section will evaluate these justifications and demonstrate the degree to which each is misguided.

Though no GATT/WTO provision speaks directly of a cultural exception, current supporters of the doctrine have presumed its conformity with pre-existing law. They rely upon ancient notions of sovereignty and the traditional property canon of exclusion.⁴⁵ Such reliance is fundamentally flawed and outdated.⁴⁶ Significant cessions of state power to organizations such as the WTO in pursuit of freer trade and enhanced global welfare have opened states' domestic systems of property rights to

DIVERSITY IN MOVING IMAGES, http://www.screenquota.org/menupage/newsPage_disp.asp?num=46&gotopage=1 (last visited Apr. 13, 2004).

44. See Veron, *supra* note 38.

45. Kevin V. Mulcahy, *Cultural Imperialism and Cultural Sovereignty: U.S.-Canadian Cultural Relations*, 31 J. ARTS MGMT., LAW, & SOC'Y 265 (2002); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STANFORD J. INT'L L. 347 (2001); RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971).

46. See generally NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* (1999); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447 (1993).

outside influences and have resulted in dramatic re-allocations of jurisdiction.⁴⁷ To suggest that the cultural exception conforms to pre-existing law is to turn a blind eye to more than fifty years of evolution and institutionalization within the multilateral trading system.⁴⁸ This is not to say that globalization and the emergence of supranational entities resulted in an across-the-board desertion of the sovereignty principle, but it has certainly been modified. Member states continue to pursue tenaciously their own domestic agendas under the proviso that they not deviate from standard GATT/WTO nondiscrimination obligations.⁴⁹

This was the understanding of the GATT contracting parties in 1947 when they completed the first round of trade negotiations. Inherent in this initial cession of individual and sovereign powers was a belief that “certain public policy objectives took . . . precedence . . . over the freer trade goals.”⁵⁰ These public policy objectives, representing exceptions to the norm of progressive liberalization, were spelled out in article XX of the GATT.⁵¹ In addition to the “national cultural treasures” exception previously addressed, general exceptions exist for protection of natural resources, public health, and public morality.⁵² However, no cultural exception exists for the protection of cultural identity. Had the contracting parties intended to place an explicit exception in the text of the GATT, article XX would have been the logical place.

As addressed above, the cultural exception supporters have also exploited the screen quota immortalized in article IV and the article XIX emergency derogation provisions as legal justifications for a broad and enduring cultural exception within the multilateral trading system.⁵³ These specific provisions are applied quite broadly, imaginatively, and, consequently, misguidedly.

Any economic justifications offered in support of the doctrine are equally misguided,⁵⁴ as they frequently run afoul of basic logic and

47. Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”*, 96 AM. J. INT’L L. 77.

48. See North, *supra* note 31. In the wake of World War II, the nations of the world met in Bretton Woods, New Hampshire, with the aim of designing institutions that would prevent another world war by eliminating the economic causes of war. To this end, three neoliberal institutions were created: the International Monetary Fund (IMF), the World Bank, and the International Trade Organization (ITO). Although the ITO died prematurely, its provisional agreement, the GATT, lived on.

49. Debra P. Steger, *The “Trade and . . .” Conundrum—A Commentary*, 96 AM. J. INT’L L. 135 (2002).

50. *Id.* at 143.

51. GATT, *supra* note 15, art. XX.

52. See *supra* note 26.

53. See *supra* notes 15–16 and accompanying text.

54. Paolo Ramezzana, Professor of Economics at the University of Virginia, characterizes the

rationality.⁵⁵ At the heart of this confusion is a simple classification problem. Advocates of the cultural exception doctrine are ensconced in the misperception that audiovisual products⁵⁶ are not private goods, but rather hybrids that defy standard economic classification⁵⁷ because "they reflect . . . cultural identities."⁵⁸ Audiovisual products, like many products, generate significant externalities⁵⁹ that "have cultural reverberations."⁶⁰ However, such products are commodities subject to excludability and rivalry constraints, the points of access to which "are controlled by the familiar institutions of private property."⁶¹

Nonetheless, the persistent drumbeat of the cultural exception apologists has led many to the mistaken belief that Americanization is exhausting the limited resources of the audiovisual sector⁶² and swallowing up states' cultural identities.⁶³ However, this belief is both illogical and erroneous. First, it effectively correlates one state's success at selling tangible goods in the audiovisual sector to a direct and proportionate erosion of another state's intangible cultural identity. But this fallacy rests upon a more fundamental flaw: the erroneous assumption that a state's cultural identity is an exhaustible resource.⁶⁴ Cultural

problem this way: "Although these calls for the protection of a country's culture from the consequences of potential market failures may have some merit, the arguments used to support them are often based more on a European intellectual tradition of suspicion towards American culture rather than on sound and impartial logic." Paolo Ramezzana, *Globalization and Cultural Diversity: The Economics of the 'Cultural Exception'*, Working Paper (2002) (copy on file with author).

55. I equate logic and rationality with efficiency, cost-benefit analysis, and the law of comparative advantage, all of which are fundamental tenets of neoliberal trade theory. It is generally agreed that free trade is good for global welfare. *But see* Noam Chomsky, *Free Trade and Free Markets: Pretense and Practice*, THE CULTURES OF GLOBALIZATION 356–70 (1989).

56. The word "products" is used as an umbrella term for both goods and services. Adding to the confusion in this area is a long-standing debate as to whether cultural products are goods or services. However, this debate should not be used as some form of misdirection to obscure the fact that cultural products are commodities that should be subject to the discipline of the free market.

57. While audiovisual products may resemble public goods, they must closely resemble private goods. C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1377 (2000).

58. Paul, *supra* note 22, at 37.

59. Baker, *supra* note 57, at 1391.

60. Paul, *supra* note 22, at 41.

61. Stanley R. Carpenter, *Sustainability and Common-Pool Resources: Alternatives to Tragedy*, 3 J. OF SOC. FOR TECH. AND PHIL. 4 (1998).

62. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243–48 (1968).

63. *See* Karen Elizabeth Rinaman, *Trade and Culture*, Working Paper, TED ANALYSIS CASES, at <http://gurukul.ucc.american.edu/ted/projects/tedcross/xcult11.htm> (last visited Apr. 13, 2004).

64. *See* Anthony J. Liehm, *The Cultural Exception: Why?*, KINEMA (Fall 1996); *We Are Not An Average Nation: An Exclusive Talk With Jacques Chirac*, TIME, Dec. 11, 1995, at 59; UNESCO, *World Culture Report 2000: Cultural Diversity, Conflict, and Plurality*, available at <http://www.unesco.org/bpi/WCR2000> (last visited Apr. 9, 2004).

exception proponents would have us believe that the production and/or consumption of a single unit of American audiovisual product in world markets adversely impacts another state's cultural identity. This approach views audiovisual products not as private goods, but as common pool resources: shared and exhaustible.⁶⁵ More specifically, this approach views the propensity or taste for audiovisual products as a shared resource, liable to tap out at any moment. Proponents of this theory believe that an unsuspecting Frenchman's preferences and consumptive habits will disappear after listening to Bruce Springsteen's *Born in the USA*, somehow depleting his "Frenchness" reserve.

Even if this micro-level analysis is unpersuasive, the same specious reasoning is evident at the macro-level. At either level of analysis the suggestion is the same: the production and/or consumption of American popular culture results in a net loss of French identity. Proponents of the cultural exception have suggested that even where our hypothetical Frenchman's cultural identity is unaffected by the patriotic crooning of "The Boss,"⁶⁶ the distribution and consumption of *Born in the USA* throughout France creates enormous externalities⁶⁷ that ripple through French culture and produce the net effect of a diminished cultural identity on a larger scale.

Extending this fallacious line of reasoning to its conclusion exposes yet another flawed economic presumption of the cultural exception doctrine: trade in audiovisual products is a zero-sum game.⁶⁸ According to this theory, France's loss is America's gain; by extension, where there is a loss of French identity, there is a proportionate gain for Americanization. Fortunately for global welfare, trade is a positive-sum game. More efficient markets lead to greater consumer welfare by offering more products at a lower price. There will be both "winners" and "losers" from altering trade policy, but the efficiency gains of greater liberalization can be redistributed to compensate the "losers."⁶⁹ However, paternalistic

65. These two central characteristics of common pool resources distinguish them from other types of goods. When many people share an exhaustible resource, such as clean air, and there is no ability to exclude, the resource is prone to the "tragedy of the commons." See Hardin, *supra* note 62.

66. "The Boss" is the self-proclaimed nickname of Bruce Springsteen. His nickname has been affectionately perpetuated by his fans.

67. While trade in audiovisual products undoubtedly creates both positive and negative externalities, they are nearly impossible to measure. Baker, *supra* note 57, at 1392-95. To suggest that one creates greater positive externalities or fewer negative externalities than the other is nothing more than an exercise in blind bravado. *Id.*

68. For an opinion of why trade is not a zero-sum game but rather a positive-sum game, see Paul Krugman, *Competitiveness: A Dangerous Obsession*, 73 FOREIGN AFF. 2, 28-44 (1994). Cf. Clyde Prestowitz et al., *The Fight Over Competitiveness: A Zero-Sum Debate?*, 73 FOREIGN AFF. 4, 186-203 (1994).

69. This is standard neoclassical economics, where normative concerns for equity and fairness do

cultural exception policies interfere with this process by restricting choice, damaging consumer sovereignty,⁷⁰ and creating a deadweight loss in the audiovisual markets.⁷¹

Advocates of this sort of intervention generally feel that there is a social benefit that is not captured by the standard free market cost-benefit analysis, which justifies limiting consumer choice and distorting incentives.⁷² They would argue that erecting trade barriers, such as 'Television Without Frontiers,' increases domestic production in the audiovisual markets, thereby creating a social benefit that outweighs the costs of intervention. This approach rests on the presumption that domestic market imperfections are best healed through changes in trade policy.⁷³ However, barriers to trade cloaked in the language of the cultural exception fail to directly address the source of the problem: domestic underproduction. Domestic market failures are best addressed through direct subsidization of producers in the audiovisual sector.⁷⁴ Several countries, including the United States, have domestic support mechanisms in place.⁷⁵ While such grants and subsidies lead to greater levels of domestic production,⁷⁶ they should not be perceived as a remedy to sector-specific trade deficits.⁷⁷ Such measures risk creating social welfare losses in complementary markets⁷⁸ with knock-on effects that are impossible to

not enter the picture.

70. See Ramezzana, *supra* note 54 (an expansion of American productions is not necessarily welfare reducing). *Id.*

71. A deadweight loss is a loss of efficiency in an economy due to market interventions that distort the incentive of either consumers or producers. Such interventions can further damage the markets for complements of the initial good. See PAUL KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* (1997).

72. *Id.* at 226–27.

73. *Id.* at 228.

74. *Id.*

75. See Susanne Nikoltchev & Francisco Javier Cabrera Blázquez, *National Film Production Aid: Legislative Characteristics and Trends*, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, Issue 2001-4, at http://www.obs.coe.int/oea_publ/iiris_plus/focus4_2001.pdf (last visited Apr. 13, 2004). In the film industry, the British Film Institute (BFI) is a support mechanism for the UK, the Centre national de la cinématographie (CNC) is a support mechanism for France, the Filmförderungsanstalt (FFA) is a support mechanism for Germany, and the National Endowment for the Arts is a support mechanism for the United States. *Id.*

76. See Phillip H. Gordon, *Liberte! Fraternite! Anxiety!*, FIN. TIMES, Jan. 2002, at 19–20 (“... while subsidies for French cinema ensure that more French films are made, they do not make them more widely watched or exported”).

77. See The Federal Reserve Bank of St. Louis, *available at* <http://research.stlouisfed.org/publications/review/99/09/9909mp.pdf> (last visited Apr. 13, 2004) (“a country runs a trade deficit with another country when its exports are less than its imports ... the rest of the world is shipping to the home country more goods and services than the home country is shipping to the rest of the world”).

78. See The Environmental Economics Glossary, at <http://www.damagevaluation.com/surveyopen.htm>.

ascertain at the point of intervention. Second, such interventions do not take place in a vacuum. Directing valuable resources to one sector of the economy necessarily draws resources away from other sectors.⁷⁹

Lurking just beneath the surface of the flawed economic justifications advanced in support of the doctrine is an omnipresent social justification: a fear of homogenization.⁸⁰ Implicit in this justification is a manufactured exigency to respond to the world's constantly changing parameters. Fear of this uncertain future drives policymakers to precipitate action, while homogenization conveniently morphs into Americanization. In sum, protectionist measures cloaked in the language of the cultural exception uniformly contain a subjective, affective element, which is informed by anti-Americanism.⁸¹

The fear of homogeneity, or becoming American, may indeed be an old fear dressed in new clothing.⁸² Today, the prevailing fear is of globalization and its effects. These fears share common bonds: the belief that some type of policy response is required to contain the dynamic and complex parameters of an ever-changing world, that these changing parameters are known and reducible, that, through such a policy response, change can be slowed or reversed, and that the best way to achieve this is through measures that promote resistance to change and instead celebrate cultural heterogeneity.⁸³

79. This final point cynically, though realistically, highlights the brutal essence of the democratic process. Judge Richard Posner explains that when the cultural exception veil is peeled back, the economic justifications offered in its support are revealed as nothing more than protectionist measures orchestrated at the behest of connected and well-organized special interest entities who trust that the average consumer will either be too ignorant or too acquiescent to care about an audiovisual product that costs slightly more than the world price. Others have suggested that the democratic process is nothing more than institutionalized rent seeking. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1998); KRUGMAN & OBSTFELD, *supra* note 71, at 229–30; J. PATRICK GUNNING, *UNDERSTANDING DEMOCRACY: AN INTRODUCTION TO PUBLIC CHOICE* (2002).

80. See Petito, *supra* note 11.

81. Michael D. Bordo et al., *Is Globalization Today Really Different than Globalization a Hundred Years Ago?*, 7195 NAT'L BUR. ECON. RES. 1 (1999); Gordon, *supra* note 76; Richard Pells, *Resistance and Transformation: Europe's Response to American Mass Culture*, *TRADING CULTURE: GATT, EUROPEAN CULTURAL POLICIES AND THE TRANSATLANTIC MARKET* (1996); Petito, *supra* note 11, at 1143.

82. In the 1920s and 1930s, Europeans feared the coming of the consumer society. In the immediate post-war years, they feared the Marshall Plan's cultural component and the "Coca-Colonization" it allegedly encouraged. See REINHOLD WAGLEITNER, *COCA-COLONIZATION AND THE COLD WAR: THE CULTURAL MISSION OF THE UNITED STATES IN AUSTRIA AFTER THE SECOND WORLD WAR* (1994); Pells, *supra* note 4.

83. To soften the biased nature of such measures, policymakers have taken to couching cultural exceptionalism in the rhetoric of cultural pluralism. Yet, the inherent contradiction between self-promotion and pluralism cannot be ignored. See Jean Tardif, *The Hidden Dimensions of Globalization: What is at Stake Geoculturally*, available at <http://www.globalpolicy.org/socecon/tnes/2002/mediaculture.htm> (last visited Apr. 16, 2004). See also UNESCO, *Universal Declaration on Cultural Diversity*, Adopted by the 31st Session of the General Conference of UNESCO, Paris, Nov. 2, 2001, at

In truth, the policy responses made in the audiovisual sector are only partially constrained by the democratic process.⁸⁴ The impact that ignorance of, or lack of familiarity with, the benefits of free trade has on the decision-making process is modest at best. Something more must constrain these policymakers. While some have tongue-in-cheek suggested that this something is indeed a European-wide strain of neurosis,⁸⁵ I suggest that policy choices, such as the cultural exception, when made in the face of uncertainty, are susceptible to cognitive bias and illusion.⁸⁶ These biases and illusions in turn feed, and are fed by, anti-American sentiment.

Cognitive bias and illusion "arise from our difficulties in quantifying and dealing with uncertainty,"⁸⁷ "affect people of all levels of expertise and field,"⁸⁸ and "lead to departures from rational thinking."⁸⁹ In addition to the generalized anxiety created by the advent of globalization, with respect to the audiovisual sector, bias and illusion have been incubated by slanted media coverage.⁹⁰ Policy measures, such as the cultural exception, which are orchestrated by politicians in response to this coverage, unjustly target American popular culture. As a result, policy responses constrained by cognitive bias act as a negation of uncertainty, constitute an overestimation of the American popular culture's threat to cultural identity, and represent a subjective reliance on intuition rather than on hard data.⁹¹ When policymakers speak of "managing" or "humanizing" globalization,⁹² they are not dealing with concrete issues.

While there is no dispute that the United States has enjoyed the fruits of globalization in the audiovisual sector, it is unclear that such success translates to any substantive homogenization and a respective diminution of cultural identity. Homogenization (or its irrational, hate-inspired morphological twin, Americanization⁹³), like the legal and economic

http://www.inst.at/kulturen/unesco/declaration_english.htm (last visited Apr. 13, 2004).

84. See generally POSNER, *supra* note 79.

85. See Veron, *supra* note 38.

86. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124-31 (1974). See also Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453-58 (1981); Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, *SCIENTIFIC AMERICAN* 136-42 (1982).

87. Neville Nicholls, *Cognitive Illusions, Heuristics, and Climate Prediction*, 80 *BULLETIN OF THE AM. METEOROLOGICAL SOC'Y* 1385-98 (1999).

88. *Id.* at 1386.

89. *Id.*

90. McMahon, *supra* note 7.

91. Paul Slovic, *Perception of Risk*, 236 *SCIENCE* 280-85 (1987).

92. See Gordon, *supra* note 76.

93. THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 233 (1999).

justifications offered above, rests on faulty presumptions. The theory of homogenization can only be sustained if you first accept that cultural transmission is a one-way street.⁹⁴ The fear is premised upon the mistaken belief that America actively transmits its popular culture to the rest of the world, while all other states stand by idly, receiving, but not daring to transmit culture themselves. Second, the theory paternalistically presumes that the citizens of the world are solely depositories of culture, never transforming cultural stimuli.⁹⁵ Both presumptions are patently false, as they push the rest of the world to the sidelines of globalization. However, the nations of the world and their citizenry are not standing on the sidelines of globalization. They are participants in the process and creators of content, uniquely selecting, modifying, and incorporating cultural stimuli to fit their own schematic visions.⁹⁶

III. SIGNS OF LIFE AND DEATH SINCE URUGUAY

The preceding section suggests that the legal, economic, and social justifications sustaining the cultural exception doctrine rest upon shaky theoretical grounds and are thus somewhat misguided. Whether grounded in reality or not, the doctrine's fate is far from sealed. While it is clear that the "trade and culture" linkage has taken a backseat to other more pressing issues on the global trade agenda, the events of recent years paint a confusing picture of the doctrine's vitality.⁹⁷ This section thoroughly examines several key developments that have impacted the audiovisual sector since the conclusion of the Uruguay Round in order to make an ultimate determination as to whether the cultural exception doctrine is alive and well.

A. *Canada's De-listing of Country Music Television*

Fresh off their success in retaining the cultural exclusion in NAFTA⁹⁸ and perhaps building on the momentum generated by the "Agreement to Disagree,"⁹⁹ cultural exception apologists in Canada decided to push the envelope in early 1994.¹⁰⁰ In a move that resembled President Lázaro

94. See Pells, *supra* note 81.

95. *Id.*

96. *Id.*

97. Many scholars have suggested that we may be experiencing a state of "globalization fatigue," implying that members of the US and EU political establishment have grown tired of the pace of trade liberalization in the wake of the rapid succession of the NAFTA and WTO agreements.

98. See *supra* notes 31–37 and accompanying text.

99. See *supra* note 41.

100. Canada has fiercely defended its cultural industries from US domination for decades. See

Cardenas' nationalization of foreign oil reserves in the late 1930s, the Canadian government's regulatory broadcasting department, the Canadian Radio-Television and Telecommunications Commission (CRTC),¹⁰¹ de-listed the US-owned Country Music Channel from Canadian cable,¹⁰² ending a successful ten-year run.¹⁰³ Taking advantage of the void, the CRTC created the New Country Network (NCN), owned by a Canadian cable programmer.¹⁰⁴ The United States Trade Representative (USTR), Mickey Kantor, responded¹⁰⁵ to the de-listing by threatening to invoke section 301 of the 1974 US Trade Act.¹⁰⁶ After months of posturing, a full-blown trade war¹⁰⁷ with our immediate neighbor and largest trade

Paul, *supra* note 22, citing John Herd Thompson, *Canada's Quest for Cultural Sovereignty: Protection, Promotion, and Popular Culture*, NORTH AMERICA WITHOUT BORDERS? INTEGRATING CANADA, THE UNITED STATES, AND MEXICO 269-83 (1992). See also Oliver R. Goodenough, *Defending the Imaginary to the Death: Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203 (1998); J. Michael Robinson, *The Information Revolution, Culture and Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 147 (1998).

101. Canadian Radio-Television and Telecommunications Commission Act, R.S.C., ch. C-22 (1985). See also 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 (Jan. 1991) at 1, available at 1991 WL 329550.

102. CRTC Decision 94-284, 128 C. Gaz. pt. I, at 3047-48 (1994); CRTC Public Notices 1994-60, 61-1, 128 C. Gaz. pt. I, at 3035-39 (1994). See also Andrew M. Carlson, Note, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585 (1997); Amy E. Lehmann, Note, *The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity*, 23 SYRACUSE J. INT'L L. & COM. 187 (1997); 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 (1995).

103. See Karen Elizabeth Rinaman, *Country Music Television and Cultural Protectionism*, Working Paper, MANDALA PROJECTS, TRADE AND ENVIRONMENT DATABASE; see also Lorraine Woellert, *Foreign Backlash Grows vs. US Culture*, WASH. TIMES, Feb. 4, 1996, at A1.

104. CRTC Public Notices 1994-60, 61-1, 128 C. Gaz. pt. I, at 3036 (1994).

105. The US Trade Representative is a cabinet-level position that "acts as the principal trade advisor, negotiator, and spokesperson for the President on trade and related investment matters . . . 'USTR' refers both to the agency and to the agency head, the US Trade Representative." USTR's Role, available at <http://www.ustr.gov/about-ustr/ustrrole.shtml>. Michael Kantor was the United States Trade Representative during President Bill Clinton's first term. See Office of U.S. Trade Representative, *U.S. Response to Recent Canadian Trade-Related Decisions*, U.S. DEP'T ST. DISPATCH 21 (1995).

106. Section 301(a) enables the USTR to retaliate when another state has breached a trade agreement with the United States, and section 301(b) enables the USTR to retaliate when another state's actions "burden or restrict United States commerce." Trade Act of 1974, 19 U.S.C. §§ 2411-2420 (1994); Carlson, *supra* note 102.

107. A trade war is "a category of intense international conflict where states interact, bargain, and retaliate primarily over economic objectives directly related to the traded goods or service sectors of their economies, and where the means used are restrictions on the free flow of goods and services." JOHN CONYBEARE, *TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY* 3 (1987).

partner¹⁰⁸ was ultimately avoided by a simple mechanism of the free market.¹⁰⁹ CMT negotiated a deal to purchase twenty percent of NCN from its parent company. The deal, finalized on March 7, 1996,¹¹⁰ involved an initial allotment for a twenty percent stake of NCN (with the understanding that when Canada revised upward its foreign ownership ceiling, CMT would buy an additional thirteen point three percent).¹¹¹ Although Canada was forced to relent partially in the face of a trade war, if there ever was a “golden era” of the cultural exception, this was it.

B. Canada's Attack on Sports Illustrated

Meanwhile, a separate cultural dispute between Canada and the United States had been developing for some time.¹¹² Customs' tariffs prohibiting the importation of so-called “split-run”¹¹³ magazines into Canada had been on the legislative books for years.¹¹⁴ However, the situation exploded when US-based Time Warner began to circumvent these restrictions by electronically beaming the content of its Sports Illustrated magazine to printing facilities across the border.¹¹⁵ Clearly upsetting the Canadian cultural establishment, the Canadian Parliament, justifying its move on the

108. Given the economic mutual dependence of Canada and the United States and their strong geopolitical ties, a trade war would have been irrational. *When Neighbors Embrace*, ECONOMIST, July 5, 1997, at 21–23. For current statistics on the level of trade between the two countries and Mexico, see the North American International Trade Corridor Partnership (NAITCP), available at <http://www.naitcp2004.com/welcome.htm> (last visited Apr. 28, 2004).

109. Mickey Kantor's earlier posturing, through repeated threats of retaliatory sanctions, certainly “greased the wheels” of the free market and created significant background leverage. Michael Burgi, *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. See also *Retaliation is Threatened Over Canada's Limitations on the Broadcasting of U.S. Radio and TV Programs*, N. AM. FREE TRADE & INVEST. REP., Feb. 15, 1996, available at 1996 WL 10175250.

110. See Carlson, *supra* note 102, citing *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) 11, at 421 (Mar. 13, 1996).

111. See Carlson, *supra* note 102, citing *Direction to the CRTC (Ineligibility of Non-Canadians)* SOR/96-192, 130 C. Gaz. pt. II, at 1296, 1299 (1996); *Canada Eases Foreign Ownership Limits on Broadcasting, Cable TV Holding Firms*, 13 INT'L TRADE REP. (BNA) 16, 646 (Apr. 17, 1996); Rinaman, *supra* note 103.

112. See generally Ian Slotin, *Free Speech and the Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination*, 111 YALE L.J. 2289, 2293 (2002); Paul, *supra* note 22; Goodenough, *supra* note 100.

113. A split-run magazine is “a foreign-owned magazine that prints a second edition of a magazine issue in Canada in order to qualify for treatment as Canadian.” Media Awareness Network, at http://www.media-awareness.ca/english/resources/legislation/canadian_law/federal/excise_tax_act.cfm (last visited Apr. 15, 2004).

114. Tariff Code 9958, as amended, ch. 49, § 114, 1987 S.C. 1407, 1452, 3308-10.

115. See Slotin, *supra* note 112, citing 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, 674 (1995).

grounds of cultural survival,¹¹⁶ passed a prohibitive excise tax (eighty percent) on all advertising revenue generated from split-run magazines sales across the country.¹¹⁷ Taking a different route, the United States opted to advance its cause before the WTO's newly formed Dispute Settlement Body (DSB).¹¹⁸ Because the recently enacted excise tax did not apply to domestic magazines,¹¹⁹ the United States argued that the tax clearly violated the national treatment principle of GATT article III.¹²⁰ Attempting to exploit shortcomings in the embryonic GATS,¹²¹ Canada countered that GATT article III was not applicable because the principal focus of the controversy was over advertising services rather than split-run goods.¹²² In essence, Canada suggested that GATS was the relevant framework for analysis and that it had made no such national treatment commitments with respect to advertising services under that framework.¹²³ In a blow to cultural exception proponents, a panel of the DSB ruled in favor of the United States, reasoning that split-run and ordinary magazines were essentially similar products for the purposes of national treatment.¹²⁴ Some have suggested that the effect of this decision was the "implicit rejection of Canada's claim that cultural goods cannot be subject to GATT national treatment requirements."¹²⁵ While the Appellate Body later softened the panel's ruling, it still held that the excise tax was a manifest

116. Slotin, *supra* note 112, citing Peter Lichtenbaum & Selma Lussenburg, *Canadian Law*, 31 INT'L LAW. 477 (1997).

117. An Act To Amend the Excise Tax Act and the Income Tax Act, ch. 46, § 36, 1995 S.C. at 5.

118. Instead of pursuing Section 301 bilateral sanctions in the CMT dispute, the United States turned to one of the multilateral institutions to which it was a party. The United States could have either pursued action under the NAFTA's Dispute Settlement Mechanism (DSM), or the WTO's Dispute Settlement Body (DSB). The United States wisely chose the later option due to the cultural exclusion provision of NAFTA. Paul, *supra* note 22, at n.191.

119. Slotin, *supra* note 112, citing Peter Lichtenbaum & Selma Lussenburg, *Canadian Law*, 31 INT'L L. 477 (1997).

120. Paul, *supra* note 22, citing the WTO Dispute Panel Report on Canada—Certain Measures Concerning Periodicals, WT/DS 31/R (Mar. 14, 1997) [hereinafter Panel Report].

121. GATS is a young instrument that has not yet matured into a set of binding commitments on the member states with regard to its cultural sectors. A few countries, notably the United States, Brazil, Switzerland, and Japan, have made proposals for more progressive commitments in sectors touching cultural industries. However, given the manner in which GATS divides the trade in services into non-binding "general obligations" and binding "specific commitments", member states have been able to evade locking themselves into progressive liberalization in the cultural sectors. Jock Given, *Culture, Trade, Terror and the World Trade Organization*, METRO 133, 214–23 (2002).

122. Panel Report, *supra* note 120, at 3.33.

123. *Id.*

124. *Id.* at 5.25.

125. Paul, *supra* note 22, at 48.

violation of GATT article III,¹²⁶ thus constituting a dramatic setback to cultural exception proponents around the world.

C. Challenging Australia's 1995 Content Standard

In a similar philosophical vein to the Television without Frontiers Directive, Australia's regulatory telecommunications industry implemented a minimum content standard,¹²⁷ requiring that fifty-five percent of all programming between 6 a.m. and midnight be Australian-produced broadcasts.¹²⁸ The Australian Broadcasting Authority (ABA) indicated that the "object of the standard [was] to promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to programs produced under Australian creative control."¹²⁹ Although the standard has been modified twice,¹³⁰ both changes have merely fleshed out the initial standard and lend greater clarity and specificity to the terms "Australian creative control" and "Australian programming."¹³¹

In *Project Blue Skies Inc. v. Australian Broadcasting Authority*,¹³² the Australian High Court upheld a lower court's ruling that the 1995 Content Standard violated the terms of a bilateral trade agreement between New Zealand and Australia.¹³³ In that case, a group of New Zealand television producers scored a minor victory for opponents of the cultural exception, by arguing that their programs be included (as Australian) within the scope of the domestic content limitation.¹³⁴ This ruling prompted the subsequent

126. *Id.*, citing WTO Appellate Body Report, Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R (adopted June 30, 1997) [hereinafter Appellate Report].

127. See Franco Papandrea, *Cultural Regulation of Australian Television Programs*, BUREAU OF TRANSPORT AND COMMUNICATIONS ECONOMICS (1977).

128. The Broadcasting Services Australian Content Standard was determined under paragraph 122(1)(a) of the Broadcasting Services Act (1992), which was issued by the Australian Broadcasting Authority on Dec. 15, 1995. See ABA, Review of Australian Content Standard (July 1998), at http://www.aba.gov.au/abanews/news_releases/1998/68nr98.htm (last visited Apr. 15, 2004).

129. *Id.* at 1. See also Angela J. Campbell, *Lessons From Oz: Quantitative Guidelines for Children's Educational Television*, 20 HASTINGS COMM. & ENT. L.J. 119, 135 (1997).

130. First, by Broadcasting Services Australian Content Standard Variation 1999 (No. 1), and then again by Broadcasting Services Australian Content Standard Variation 2002 (No. 1).

131. See ABA, Content Regulation, available at <http://www.aba.gov.au/tv/content> (Apr. 15, 2004).

132. *Project Blue Skies, Inc. v. Australian Broadcasting Authority*, 194 CLR 355 (1998).

133. Australia-New Zealand: Closer Economic Relations-Trade Agreement, reprinted in 22 I.L.M. 945 (1983).

134. Franco Papandrea, *Trans Tasman Blues: Australian Content on Television*, 1998 COMMUNICATIONS RESEARCH FORUM, available at <http://www.dca.gov.au/cif/papers98/papandrea.doc> (last visited Apr. 15, 2004).

amendments to the Australian Content Standard to avoid similar problems in the future.

D. EU Media Programs and Domestic Schemes

As the logical extension to the Television without Frontiers Directive, the Media II program¹³⁵ supplemented domestic subsidies in the audiovisual sector at the institutional level. Taking effect in January of 1996, Media II succeeded an earlier support structure, Media I.¹³⁶ It pumped some 310 million Euro, in the form of additional grants and subsidies, into the audiovisual sector during a time when tensions were running high.¹³⁷ Though not a grand sum,¹³⁸ it served to bolster domestic subsidies in the audiovisual sector and further fan the oppositional flames of the cultural exception.

France is the primary force that has driven the EU's policies of cultural protectionism.¹³⁹ While the Television without Frontiers Directive mandates a majority (fifty-one percent) of broadcast time be reserved for European films “where practicable” and “by appropriate means,”¹⁴⁰ France has imposed an even more stringent minimum European content requirement of sixty percent (forty percent of which must be French).¹⁴¹ The limitations apply at all hours of the day, thereby thwarting foreign access to the “lucrative prime time market.”¹⁴² Additionally, France

135. Media II is the product of two European Council decisions. See Council Decision 95/564/EC (Media II) (1995 O.J. (L321) 33, 38, available at http://europa.eu.int/comm/aupolicy/legis/legis_en.htm (last visited Apr. 15, 2004) (implementing a training program for professionals in the European audiovisual program industry); Council Decision 95/563/EC (Media II—Development and Distribution), 1995 O.J. (L321) 25, 32, available at http://europa.eu.int/comm/aupolicy/legis/legis_en.htm (last visited Apr. 15, 2004) (implementing a program encouraging the development and distribution of European audiovisual works).

136. Today, Media II has been replaced by Media Plus. Council Decision 2000/821/EC, 2000 O.J. (L 336) 82. See also <http://europa.eu.int/comm/avpolicy/intro/intro.en.htm> (last visited Apr. 16, 2004).

137. Harvey B. Feigenbaum, *Public Policy and the Private Sector in Audiovisual Industries*, 49 UCLA L. REV. 1767 (2002), citing *EU Ministers Agree on Funding for MEDIA Plus*, HOLLYWOOD REP., Nov. 27, 2000, at 5.

138. Minister of Culture Suvi Lindén, Opening Speech at the Forum on Audiovisual Policy, Helsinki, Finland, Sept. 9–10, 1999, available at <http://www.minedu.fi/eupresidency/eng/index.html> (last visited Apr. 15, 2004) (suggesting that the audiovisual sector was still grossly under-funded).

139. Laurence G. C. Kaplan, *The European Community's 'Television without Frontiers' Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255 (1994).

140. Parliament & Council Directive 97/36/EC, 1997 O.J. (L 202) 60, 70, available at http://europa.eu.int/comm/aupolicy/regul/twf/newint_en.htm (last visited Apr. 15, 2004) (amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities).

141. See Ramezzana, *supra* note 54.

142. See USTR 2002 Report on EU service sectors, available at <http://www.ustr.gov/reports/nte/2002/europeanunion.PDF> (last visited Apr. 15, 2004) [hereinafter USTR Report].

maintains a restrictive radio broadcast quota, which requires all pop music stations to meet a forty percent domestic content requirement.¹⁴³ In Germany, the government sponsored Youth Protection Authority is empowered to index any film it deems “unsuitable for minors.”¹⁴⁴ Costs of re-editing to meet the standards can be “prohibitively expensive.”¹⁴⁵ Italy has followed France’s lead by increasing the minimum content requirement¹⁴⁶ to fifty-one percent, and excluding all prime time talk shows from counting toward the requirement.¹⁴⁷ In Spain, a slightly less stringent film quota system has been enacted, whereby movie houses are required to show “one day of EU-produced film for every three days of non-EU-produced film.”¹⁴⁸

E. France’s Messier Affair

In one of the more recent indications of mass consolidation within the audiovisual sector, on December 6, 2000, 96.6 percent of the shareholders voted¹⁴⁹ in favor of a merger between Vivendi SA, the French telecommunication powerhouse, and Seagram Company, the Canadian drinks conglomerate and parent of Universal Pictures.¹⁵⁰ Jean-Marie Messier, chairman of Vivendi SA, masterminded the merger that created Vivendi Universal.¹⁵¹ Less than a year later, the same man who engaged Vivendi Universal from a small water utility company to the world’s second largest media player was caught off-balance, declaring, “The

143. *Id.* See also Judith Beth Prowda, *US Dominance in the “Marketplace of Culture” and the French “Cultural Exception,”* 29 N.Y.U. J. INT’L L. AND POL. 193, 206 (Fall 1996–Winter 1997), citing Alan Riding, *Where Is the Glory That Was France?*, N.Y. TIMES, Jan. 14, 1996, at B1; Carlson, *supra* note 102.

144. See USTR Report, *supra* note 142, at 127; Margaret Moore, *Sex and Violence: European Censorship of American Films*, 11 ENT. & SPORTS LAW. 1 (1994), citing Motion Picture Export Association of American International Censorship Documents (revised Apr. 1990).

145. See USTR Report, *supra* note 142, at 128.

146. Regulators of content requirements often have a difficult time determining a product’s origin because some films have a director from one country, actors from another, and are co-produced in yet another country. See FEIGENBAUM, *supra* note 8.

147. See USTR Report, *supra* note 142, at 128; Jon Filipek, ‘Culture Quotas’: *The Trade Controversy Over the EC’s Broadcasting Directive*, 28 STAN. J. INT’L L. 323, 334 (1992).

148. See USTR Report, *supra* note 142, at 128.

149. See Vivendi Universal’s Press Release Archive, http://www.vivendiuniversal.com/vu/en/press_2004 (last visited Apr. 16, 2004).

150. See Gregg Kilday, *Parlez-vous Universal?*, at <http://archive.salon.com/business/feature/2000/06/22/vivendi> (last visited Apr. 16, 2004) (noting that Universal Pictures is the “home of such enduring Americana as Frankenstein, . . . Jaws, and E.T.”).

151. See *Timeline: The Rise and Fall of Jean-Marie Messier*, THE GUARDIAN (July 1, 2002), <http://media.guardian.co.uk/broadcast/story/0,7493,747403,00.html> (on file with the Washington University Global Studies Law Review).

French cultural exception is dead.”¹⁵² This comment was particularly alarming to cultural exception subscribers because Vivendi Universal is also the parent company of Canal-Plus, the French television channel and production house responsible for financing one-third of all French productions.¹⁵³ The French government was quick to distance itself from the statement, with Catherine Tasca, French Culture Minister,¹⁵⁴ quoted as saying, “This is a proposal by a businessman who is developing his group on the other side of the Atlantic [and] definitely not the policy of this government.”¹⁵⁵ Though Messier later tried to soften his statement by stressing the fresh rubric of cultural diversity,¹⁵⁶ the statement must be viewed as a serious indication of the current temperature of the battle over the cultural exception, as should the swift response of the French cultural elite.¹⁵⁷ By July, Messier was ousted, partially pushed by an advisor to French President Jacques Chirac.¹⁵⁸

F. European Commission Attacks the Cultural Exception

Citing concerns about the impact it may have on non-French advertising agencies, the European Commission took action against a French law prohibiting certain retail groups from advertising on television.¹⁵⁹ In early May 2002, the Commission asked the French government for a justification of the law.¹⁶⁰ The government of France argued that the prohibition is necessary to protect the local press, couching their argument in terms of the cultural exception.¹⁶¹ The goal of EU single market legislation is the harmonization of domestic laws, including those laws applying to the services sectors.¹⁶² Yet, as the European Union continues this process of internal market harmonization, any “exceptions”

152. See Franck, *supra* note 6; Cavanaugh, *supra* note 10.

153. Alan Riding, *Remark by Vivendi Chief Unnerves French Film Industry*, N.Y. TIMES, Dec. 24, 2001, at E1.

154. Comparatively, the United States does not have a Ministry of Culture.

155. See Gordon, *supra* note 76.

156. See *supra* note 83 and accompanying text; Riding, *supra* note 153.

157. See Bruce Crumley, *The Old Guard's Revenge*, TIME EUROPE (July 15, 2002), available at <http://www.time.com/time/europe/magazine/article/0,13005,901020715-300626,00.html> (last visited Apr. 16, 2004).

158. *Id.* See also *Timeline*, *supra* note 151.

159. Francesco Guerrera, “*Brussels Moves on Advertising Rules in France*” (May 9, 2002), FIN. TIMES, available at 2002 WL 20298945.

160. *Id.*

161. *Id.*

162. *Id.* A European Commission official remarked, “the single market relies on the freedom to provide services anywhere in the union.” *Id.*

that impact others outside the union will be harder to justify.¹⁶³ Presumably, the accession of thirteen new members will merely accentuate this problem.¹⁶⁴

G. Survival of the High Cultural Exception at Doha

There really is no fight over the cultural exception as it applies to “high” culture.¹⁶⁵ One author has characterized the results of the November 2001 WTO Ministerial Summit as permitting the “survival of the ‘cultural exception’ in the Doha agenda.” The battleground for the debate is over popular culture because “this is where the money is truly at stake on both sides.”¹⁶⁶ Nonetheless, the survival of the cultural exception in any form, regardless of its application, could be perceived as an omen that opponents have begun to lose their grip.

H. 9/11

1. The Global Response to 9/11

On September 11, 2001, terrorists crashed airplanes into the twin towers of the World Trade Center, grossly damaged the Pentagon, and crashed United flight No. 93 near Shanksville, Pennsylvania.¹⁶⁷ While a large majority of the world condemned the action, which was masterminded by the al Qaeda organization¹⁶⁸ and resulted in the swift passage of UN Security Council Resolutions 1368, 1373, and 1377,¹⁶⁹ there has since been a muted but slow-building chorus that America “deserved it.”¹⁷⁰ While no one suggests that proponents of the cultural

163. Heather Field, *EU Enlargement, Popular Culture and Cultural Policy: Transition and Change*, FOCUS, circular no. 13, (Feb. 2002).

164. Editorial, *France's Europe*, FINANCIAL TIMES (Jan. 22, 2002), available at 2002 WL 3304034.

165. Slotin, *supra* note 112, at n.5.

166. Slotin, *supra* note 112, citing Goodenough, *supra* note 100.

167. Serge Schmemmann, *U.S. Attacked: President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2001, at A1.

168. The attacks received near-universal condemnation. See G.A. Res. 9959, U.N. GAOR, 56th Sess., 46th mtg., U.N. Doc. GA/9959 (2001). The al Qaeda organization is an “international terrorist network” with “autonomous underground cells” in some sixty countries, including the United States. It “seeks to purge Muslim countries of what it sees as the profane influence of the West and replace their governments with a fundamentalist Islamic regime.” *Terrorism: Questions and Answers*, THE COUNCIL ON FOREIGN RELATIONS, available at <http://www.cfrterrorism.org/groups/alqaeda.html> (last visited Apr. 16, 2004).

169. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001); and S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413th mtg., U.N. Doc. S/RES/1377 (2001).

170. See Thomas L. Friedman, *Yes, but What?*, N.Y. TIMES, Oct. 5, 2001, at A27; *Dateline: Why*

exception partook in the terrorist attacks, there has been evidence that for quite some time radical anti-West rhetoric is bleeding into mainstream anti-Americanism.¹⁷¹ In this sense, it was a mistake to refer to the cultural exclusion as the most virulent strain of the cultural exception.¹⁷² This may be true of defensive measures taken within the context of the international trade regime, but the paradigm gets turned on its head when we speak of an all-out offensive cultural war or cultural execution. Increased incidence of a cultural *jihad* against America makes traditional anti-Americanism cloaked in the language of the cultural exception much more palatable. As the bar reaches the extreme end of the spectrum, proponents of the softer cultural exception may enjoy a victory by default.

2. French Intransigence with Respect to Iraq

While the majority of the international community initially supported the Bush administration's "War on Terror,"¹⁷³ military action in Iraq did not come without considerable domestic and international resistance, largely due to the U.S. administration's failure to convince the international mainstream media and policymakers of the link between the al Qaeda network and the Iraqi regime.¹⁷⁴ Notwithstanding this failure, the

They Hate US (NBC television broadcast, Dec. 7, 2001); Karl Weinberg, *Anti-War or Anti-American*, Jan. 30, 2003, available at <http://www.american.daily.com/item/476> (last visited Apr. 16, 2004).

171. See Benjamin R. Barber, *Jihad vs. McWorld*, ATLANTIC MONTHLY, Mar. 1992, at 53–65; Jonah Goldberg, *The Specter of McDonalds: An Object of Bottomless Hatred*, NATIONAL REVIEW (June 5, 2000), <http://www.nationalreview.com/05june00/goldberg0605.html> (last visited Apr. 16, 2004); Stephen Zunes, *The US as Global Outcast: Growing Anti-Americanism*, FOREIGN POLICY IN FOCUS (July 2001), available at <http://www.fpir.org/commentary/2001/0107outcast.html> (last visited Apr. 16, 2004); Martin Kettle, *US Bashing: It's All the Rage in Europe*, WASH. POST, Jan. 7, 2001, at B4; and Stephen Erlanger, *In Europe, Some Say the Attacks Stemmed from American Feelings*, N.Y. TIMES, Sept. 22, 2001, at B12.

172. See *supra* note 32.

173. In the days following 9/11, over 130 countries and numerous governmental and non-governmental organizations pledged various forms of support to the United States in its campaign against the al Qaeda network. See *Foreign Support of the U.S. War on Terrorism*, Report for Congress, available at <http://fpc.state.gov/documents/organization/6207.pdf> (last visited Apr. 16, 2004).

174. Brian Ross, *Weak Link*, Feb. 5, 2002, at http://www.abcnews.go.com/sections/wnt/DailyNews/ansar030205_Krekar.html (last visited Apr. 16, 2004); John Diamond, *Connection Sought between Iraq, Al Qaeda*, July 29, 2002, available at http://www.usatoday.com/news/world/2002-07-28-iraq-al-qaeda_x.htm (last visited Apr. 16, 2004); Paul Reynolds, *Analysis: Iraq and Al Qaeda*, Oct. 28, 2002, available at <http://news.bbc.co.uk/2/hi/americas/2284123.stm> (last visited Apr. 16, 2004); *The Main Event*, Mar. 17, 2002, available at http://www.mapleleafweb.com/education/spotlight/issue_12 (last visited Apr. 16, 2004) (Canadian Prime Minister Jean Chretien stated "at this time . . . there is no link between Al Qaeda and Iraq that I know of."). *Id.* However, the Bush administration may have convinced the American populace that such a link existed in the build-up to the war. See Linda Feldman, *The Impact of Bush Linking 9/11 and Iraq*, Mar. 14, 2003, available at http://www.aaiusa.org/news/must_read03_14a_03.htm (last visited Apr. 16, 2004).

ubiquitous cat-and-mouse tactics of the Iraqi regime were sufficient to persuade the international community to support the draft resolution on Iraq submitted by the United States, United Kingdom, and Spain on February 24, 2003.¹⁷⁵ After several weeks of passive resistance by Iraqi President Saddam Hussein to weapons inspections mandated by UN Security Council Resolution 1441,¹⁷⁶ French President Jacques Chirac vowed to veto any further Security Council resolution that would make war with Iraq inevitable.¹⁷⁷ More than a simple desire to occupy the “high moral ground,”¹⁷⁸ Chirac’s stance symbolizes the international community’s negative reaction to the unilateralist posturing of the Bush administration.¹⁷⁹ Such posturing encourages proponents of the cultural exception to deviate from the binding legal norms of the multilateral trading system and risk “going it alone”¹⁸⁰ in the face of American hegemony.

175. U.S. Dept. of State, *Draft Resolution on Iraq Offered by U.S., U.K. Spain (Submitted to U.N. Security Council, Feb. 24, 2003)*, available at <http://usinfo.state.gov/topical/pol/arms/0302241.html> (last visited Apr. 13, 2004). Ironically, the President’s decision to amass US troops near the Iraqi border spawned a degree of cooperation with inspectors on the part of the Iraqi regime that may have convinced the international community that war was unnecessary.

176. See S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002). This followed ten resolutions issued over the course of eleven years of Iraqi obstructionism. See also S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/661 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990); S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/RES/686 (1991); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/688 (1991); S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991); S.C. Res. 707, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/707 (1991); S.C. Res. 715, U.N. SCOR, 46th Sess., 3012th mtg., U.N. Doc. S/RES/715 (1991); S.C. Res. 986, U.N. SCOR, 50th Sess., 3519th mtg., U.N. Doc. S/RES/986 (1995); S.C. Res. 1284, U.N. SCOR, 54th Sess., 4084th mtg., U.N. Doc. S/RES/1284 (1994); S.C. Res. 1382, U.N. SCOR, 56th Sess., 4431st mtg., U.N. Doc. S/RES/1382 (2001).

177. During a live television interview, Chirac stated, “My position is that whatever the circumstances, France will vote no.” Elaine Sciolino, *France to Veto Resolution on Iraq War, Chirac Says*, N.Y. TIMES, Mar. 10, 2003, at A10.

178. Robert Graham, *No One Dares Put a Price on the Cost of Breaking So Sharply with the US over a Major Issue*, FIN. TIMES, Mar. 12, 2003, at A11.

179. A series of unilateralist moves taken by the Bush administration have contributed to this negative reaction: the decision to withdraw from the 1972 ABM Treaty, the rejection of the International Criminal Court, the withdrawal from the Kyoto Global Warming Treaty, the unwillingness to sign the treaty banning the use of land mines, and Bush’s Doctrine of Preemption. Ivo H. Daalder & James M. Lindsay, *Unilateralism is Alive and Well in Washington*, INT’L HERALD TRIBUNE, Dec. 21, 2001, at 4; Michael J. Kelly, *The Bush Foreign Policy 2001–2003: Unilateralist Theory in a Multilateral World, and the Opportunity for Change Offered by Iraq*, 2 WASH. U. GLOBAL STUD. L. REV. 221 (2003); Graham, *supra* note 183; Robert F. Drinan, *Bush’s Unilateralism Aggravates World’s Problem’s*, NCR ONLINE, available at http://www.finalarticles.com/cf_dls/m1141/10_39/96738447/p1/article.jhtml (last visited Apr. 16, 2004); Kyle Lohmeier, *The Joys of Unilateralism*, THE HOUSTON REVIEW, July 29, 2001, available at <http://www.houstonreview.com/articles/lohmeier/KL20010729.html> (last visited Apr. 16, 2004).

180. Jeffrey Donovan, *Powell Says Washington Will Go It Alone if Necessary*, RFE, available at <http://www.rferl.org/nca/features/2002/02/06022002090755.asp> (last visited Apr. 16, 2004).

IV. THE FUTURE OF THE CULTURAL EXCEPTION

Today, the deployment of the cultural exception doctrine seems to be code for the dual desire to slow the pace of globalization while evaluating some of its unintended consequences. Domestic subsidies and recognition of the importance of cultural diversity are the order of the day, and the place where proponents and opponents of the cultural exception are most likely to find common ground.¹⁸¹ In truth, however, these accommodations amount to little more than an extension of the "Agreement to Disagree."¹⁸² The intense debate that nearly derailed seven years of trade negotiations has largely been shifted to the back burner.¹⁸³ Yet, as the Bush administration continues to struggle with the impossible task of balancing unilateralism and internationalism, the potential for reheating the debate remains.¹⁸⁴ Persistent unilateralism, even that which apparently falls outside the confines of the international trade architecture, may potentially undermine universalization of public international legal norms fostered by the trade architecture.¹⁸⁵ Just as Chirac obstinately refused to bend to

181. Jack Valenti, president of the Motion Picture Association of America, Hollywood's primary lobbying arm, recently confirmed as much. Alan Riding, *Filmmakers Seek Protection from US Dominance*, N.Y. TIMES, Feb. 5, 2003, at E3; but see Pierre Suavé and Karsten Steinfatt, *Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?*, paper presented to Achieving Better Regulation of Services Conference, June 26–27, 2000, available at <http://www.pc.gov.au/research/confproc/abros/paper13.pdf> (last visited Apr. 16, 2004) ("unless something is done in the coming years . . . the existing tension between trade in culture will increase rather than decrease . . .").

182. In fact, the United States, in the preliminary stages of the Doha Round, has requested a "standstill" in the audiovisual sector. This had the effect of freezing the current state of affairs. *Id.* This, coupled with the fact that the round's agreed-upon agenda focused on developing countries, suggests that both proponents and opponents of the cultural exception may prefer this murky middle ground for the time being.

183. For instance, GATS remains a largely undefined instrument that is only as legitimate as the binding "specific commitments" that the member states are willing to take. See *supra* note 121; Dr. Des Freedman, *Trade Versus Culture: An Evaluation of the Impact of Current GATS Negotiations on Audio-visual Industries*, 2002, available at <http://www.isanet.org/noarchive/freedman.html> (last visited Apr. 16, 2004).

184. Secretary of State Colin L. Powell embodies this struggle. In remarks made at a business event in China, just a month after 9/11, Powell stated that "nobody's calling us unilateral anymore . . . that's kind of gone away for the time being . . . we're so multilateral it keeps me up twenty-four hours a day checking on everybody . . . nobody accuses us of that anymore . . . they can see that America is prepared to be a leader in this new campaign against a threat that is against all of civilization." Secretary of State Colin L. Powell, Address to Regional Business Leaders in Shanghai (Oct. 18, 2001), at http://www.usembassy.it/file2001_10/alia/a1102232.htm (last visited Apr. 16, 2004). See also US Wheat Associates, *September 11 and the Aftermath: Implications for Trade*, Presented to ABITRIGO, Nov. 2001, available at <http://www.uswheat.org/marketnews.nsf/0/562b2682535327e385256b0600540f08?OpenDocument> (last visited Apr. 16, 2004); Suave, *supra* note 181.

185. For a discussion on the role that the GATT/WTO framework plays in fostering public international law norms, see Brian F. Fitzgerald, *Trade-Based Constitutionalisms: The Framework for*

another UN Iraqi resolution, the nations of the world may opt to bring the cultural exception doctrine back to the forefront and apply its core principles to issue areas well beyond the scope of the audiovisual sector of the international trade regime.¹⁸⁶ As the United States continues to jeopardize universality norms, exceptions to universality advanced by other nations become more plausible.

That said, globalization cannot be stopped. The sovereign citizen consumers of the world are unlikely to stand on the sidelines while their elected representatives throw up smokescreens and take stock of the so-called damage. Instead, they will continue to participate in shaping globalization's process and content by actively selecting and modifying cultural messages from around the globe.¹⁸⁷ A monolithic American popular culture will not pervade the world, but instead several cultural hybrids,¹⁸⁸ affected but not overwhelmed by American popular culture, will be the likely result. Elements of American popular culture exported via the audiovisual sector will be transfigured to fit within an individual's unique cultural schema comprised of his or her own pre-existing tastes and preferences.¹⁸⁹ One must also remember that consumers drive technology. Recent advances in the areas of broadcast satellites and digital compression have greatly muted the impact of content requirements and other trade policy instruments, partially nullifying the debate over the cultural exception.¹⁹⁰ Moreover, the sale of Canal-Plus to an American production house further indicates that globalization will bring continued consolidation in an industry where America is already the dominant force.¹⁹¹ One can only speculate as to the impact that the sale of the production house responsible for financing one-third of all French productions will have on the future of the cultural exception.

Finally, the European Union faces a formidable road ahead with the competing goals of harmonization and enlargement.¹⁹² While Europe

Universalizing Substantive International Law, 5 U. OF MIAMI Y.B. INT'L L. 111 (1996-1997).

186. Recently, Chirac hosted a gathering of cultural representatives from thirty-five countries for the promotion of a global cultural instrument under the auspices of UNESCO. Chirac hoped to completely extract culture from the GATT/WTO context. Riding, *supra* note 181, at E1.

187. See Pells, *supra* note 81.

188. The idea of "cultural hybridization" is essential to the theory of "creolization." See Petito, *supra* note 11, at 1158; R.J. HOLTON, GLOBALIZATION AND THE NATION STATE 108 (1998).

189. See Pells, *supra* note 81.

190. See FEIGENBAUM, *supra* note 8.

191. At the time of this writing, the American conglomerate GE, was very much in the running for the bid to purchase Vivendi Universal's entertainment assets, including the international assets of its pay TV arm Canal Plus. Peter T. Larsen, *Three in the Frame for VUE Assets*, FIN. TIMES, Aug. 19, 2003, at 24.

192. Kevin M. McDonald, *Would You Like Your Television With or Without Borders and With or Without Culture—A New Approach to Media Regulation in the European Union*, 22 FORDHAM INT'L

(through its cultural mouthpiece: France) fears cultural homogeneity, the European Union seeks harmonization and uniformity of laws and regulations among its member states. As the Treaty of Nice paves the way for enlargement, exceptions will necessarily be made for the commitments of new European Union member states. The delicate balance of protecting national identities while promoting some nebulous brand of "European culture"¹⁹³ will make the cultural exception all the more difficult to articulate. Finally, consumer sovereignty, technological change, and perhaps another dominant voice within the European Union¹⁹⁴ will prove too powerful to keep in check. The collective hand of EU negotiators will be forced to make further concessions and jumpstart GATS negotiations in the audiovisual sector, perhaps extracting valuable concessions from the United States in other sectors.¹⁹⁵ However, if the "trade and culture" linkage is not squarely addressed soon, the European Union may find itself in a position whereby its concessions in the audiovisual sector are of little value at the negotiating table.

*Frederick Scott Galt**

L.J. 1991 (1999).

193. *Id.*

194. Dr. Des Freedman suggests that this may be the United Kingdom. Freedman, *supra* note 183 (stating "one country with a mature audio-visual market and strong export interests that one would expect to see actively engaged in 'offensive' negotiations is the UK."). *Id.*

195. *Id.*

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