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13 Towards multilateral rules on trade and culture: protective regulation or efficient protection?

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13.1 Introduction

While many ‘trade and ...’ problems have only recently achieved notoriety in policy circles (Trachtman 1998), conflicts between trade and cultural values go back to the 1920s, when a number of European countries introduced quotas in order to protect their fledgling film industry from a sudden influx of films from the United States. Despite its long-standing nature, the ‘trade and culture’ quandary is by no means resolved. On the contrary, against a global backdrop characterised by the increased commoditisation and homogenisation of mass-consumption cultural products, countries around the world have expressed an increasing desire to protect their national identity, values and beliefs through a range of policies on culture. Not surprisingly, given the high tradability of many cultural products (goods and services), the last few years have witnessed escalating friction between trading nations over the place of such products in international law. Such frictions have brought to the fore the shortcomings of the existing institutional framework in properly balancing trade and cultural objectives.

Unless something is done in the coming years to more resolutely address such shortcomings, chances are, particularly in the context of the World Trade

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Organization's (WTO) environment of significantly heightened judicial activism, that the existing tension between trade and culture will increase rather than decrease (Bernier 2000 and Carmody 1999). To date, attempts to resolve that tension have centred on proposals designed chiefly to shield cultural goods and services from the application of international trade disciplines, whether through cultural exceptions, exemptions, reservations or other similar legal devices (Bernier 1998). Such an approach is unlikely to prove sustainable as a long-term policy option. For one, as the rising number of cases recently submitted to WTO dispute resolution attest, cultural products are already largely subject to WTO disciplines governing trade and investment in goods, services and trade-related intellectual property matters. From a juridical standpoint, any purported cultural 'exception' or blanket immunity from international trade law, a notion still much in vogue in large segments of some countries' cultural industries, is mere chimera.¹ Second, ongoing technological developments and the proliferation and convergence in media platforms that they allow are blurring already murky boundaries between goods, services and IPR-related issues in the cultural field. Recent WTO panel and, especially, Appellate Body decisions, most notably those relating to periodicals² and bananas,³ reinforce the above point.

The question of whether WTO disciplines should apply to cultural products is a moot point. However, a far more relevant question is to determine the kinds of disciplines and the delicate blend of adjudication and legislation that is most likely to strike an acceptable balance between the competing objectives of cultural diversity and market openness.

This paper focuses on two dimensions of the trade and culture debate.

¹ However, it bears noting that except for Articles IV and XX(f) of GATT, there is no direct invocation of domestic cultural policy issues anywhere in WTO law. Article IV (Special Provisions Relating to Cinematograph Films) allows member countries to maintain 'screen quotas' and specifies a number of requirements to which quotas must conform. In essence, Article IV seeks to limit the application of screen quotas to 'films of national origin' in order to ensure the consistency of these measures with the most favoured nation principle established in Article I. Article XX(f), on the other hand, allows member countries to adopt or enforce measures 'imposed for the protection of national treasures of artistic, historic or archaeological value,' subject to the requirements set forth in the article's *chapeau* [preface].

² See Appellate Body Report: Canada — Certain Measures Concerning Periodicals, WT/DS31/AB/R (30 June 1997); and Panel Report: Canada — Certain Measures Concerning Periodicals, WT/DS31/R (14 March 1997).

³ See Appellate Body Report: European Communities — Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R (25 September 1997); and Panel Reports: European Communities — Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador (WT/DS27/R/ECU), Guatemala (WT/DS27/R/GTM), Honduras (WT/DS27/R/HND), Mexico (WT/DS27/R/MEX) and the United States (WT/DS27/R/USA).

First, it asks whether the insights of economic theory can be deployed in such a manner as to challenge the normative assumption that the benefits of freeing up trade in cultural goods and services are just as compelling as for any other category of products. Simply put, can economics help advocates of cultural diversity reclaim the dominant public policy discourse, and restore some degree of equivalence between this discourse and the political (and negotiating) reality of the trade-culture interface? Arguing that, over and above their commercial, commoditised features, cultural products play a central role in shaping domestic democratic discourse, the analysis put forward in the paper lends support to the claim that the special features of markets in cultural goods and services can cause markets to fail to provide consumers with appropriate production and distribution of cultural products. Such features include:

- the nature of competition in products with substantial public goods aspects;
- economies of scale in the production and distribution of cultural goods and services;
- the impact of externalities on the pricing of cultural products; and
- collective action problems.

The broad tendency for markets in cultural goods and services to fail to yield welfare-maximising outcomes justifies recourse to corrective governmental interventions that may, among other things, take the form of subsidies and local content rules. Analysis of the economic problems free trade creates for potentially highly valued local cultural products, combined with the scope for implementing policies of ‘efficient protection’ (Sykes 2000) that minimise adverse effects on trade and investment, suggest that cultural trade policies existing in much of the world’s democracies, and the commensurate regulatory precaution shown to date by a great majority of WTO Members, are broadly sensible from both a political and economic point of view. That said, the paper argues that care should be taken in designing trade- and investment-restricting policies with a view to ensuring that foreign cultural content is allowed to play a useful contributive role in shaping domestic cultural dialogue.

Second, drawing on the insights offered by the law and economics literature on the issue of rules versus standards, the paper assesses whether the multilateral trading system’s current predominant reliance on adjudication in matters of trade and culture is a sustainable proposition in light of the growing incidence of commercial conflict arising from this policy interface. The analysis suggests that WTO Members may need to contemplate a shift from standards to rules, and to lay the foundations for a comprehensive body of multilateral disciplines governing trade, investment and IPR-matters in the area of cultural industries, aimed at reconciling the twin pursuit of market openness and cultural diversity.

13.2 Trade and culture: a closer look at the underlying economics

The United States has long sought to see the cross-border exchange of cultural goods and services governed by free trade principles. Its determination to codify this position in international trade law almost derailed the concluding phase of the Uruguay Round. Despite intense diplomatic and commercial efforts, the US view ultimately failed to carry the day. For example, to date, only a distinct minority (18) of the WTO's 136-strong membership has agreed to schedule bound liberalisation commitments in audiovisual services under the General Agreement on Trade in Services (GATS). This suggests that most countries deem it preferable, as a matter of trade policy, to refrain from taking on legally binding GATS obligations in order to pursue their cultural policies.⁴

Although the United States stands virtually alone among major trading nations in its negotiating stance on trade in cultural products, it is remarkable how the American position is widely seen, particularly among large segments of the country's economics and legal professions concerned with matters of trade, as winning all the theoretical arguments, especially rational economic arguments. Cloaked in freedom of expression arguments that command powerful intuitive and symbolic appeal, the mainstream view regards free trade in cultural products as justified as a matter of principle, and not simply as a manifestation of mercantile self-interest. The dichotomy between the political (and negotiating) reality of trade and culture, which reveals a clear majority preference for regulatory autonomy on the part of WTO Members, and the (largely unchallenged) dominant, pro-free trade, economic discourse directed to the interface, is striking.

The broad outlines of the competing paradigms in the trade and culture debate can be described succinctly. Widely accepted premises (and two centuries of practice) justify the general claim that free trade benefits people of all countries. Despite its complex distributional consequences, both over time and between and within countries and categories of workers, free trade is, by and large, widely understood as being good for consumers, as well as for a society's more productive workers and its most efficient firms. This premise underlies the WTO system and most of the world's attempts to progressively liberalise trade and investment regimes in recent decades.

⁴ These countries are: Central African Republic, Dominican Republic, El Salvador, Gambia, Hong Kong, India, Israel, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Nicaragua, Panama, Singapore, Thailand, and the United States. Of the group, only two WTO Members, the Central African Republic and the United States, undertook market access and national treatment commitments in all six sub-categories of audiovisual services covered by the GATS (WTO 1998, p. 7).

The United States contends that such a premise applies straightforwardly to cultural products, especially films and television programs, but also to magazines, books, musical recordings and advertising, which collectively rank atop the country's sources of export earnings. Under this view, nothing economically special about these products is seen as justifying a repudiation of free trade premises. Deviations from free trade are seen as particularly harmful for consumers in countries imposing import restrictions, as they deprive them of the cultural products that they want as sovereign individuals.

An alternative view affirms the 'specialness' of culture as a federating force in pluralistic democracies (Baker 2000). Such a view draws attention to the fact that, over and above their commercial dimension, cultural products are importantly vehicles of social communication that promote a wider sense of belonging and cultural identity. Cultural patrimony can thus be seen as a crucial component of the identity and self-understanding of a nation. Accordingly, countries should have the right to protect and promote their own culture internally (box 13.1).

The dominant view, particularly in American trade policy circles, is to label this perspective of culture as 'paternalistic' and 'protectionist'. Even when accepting that cultural trade policy involves difficult choices between the free trade premise of letting people have products they want and the value of preserving local culture, commentators typically disparage the latter claim. They are prone indeed to argue that protectionists invoke culture as a smoke screen for purely self-interested policies designed primarily to benefit politically powerful domestic commercial interests.

There are admittedly few reasons to believe that public officials should be any more immune from the politics of capture in matters of cultural trade policy than with respect to any other sensitive policy interface. And there is assuredly some truth to the assertion that paternalism and elitism, together with industrial policy activism and socially wasteful rent-seeking, typically lurk in the second-best world in which cultural trade policy is formulated. That said, proponents of cultural diversity and of rules aimed at providing some immunity to governmental measures taken in support of domestic cultural content (most of whom have not to date emanated from trade policy circles) have generally done a poor job of questioning the soundness of the economic arguments aligned in support of the free trade premise on trade and culture.

Box 13.1 Clashing over the meaning of culture

The trade and culture debate tends to oppose two starkly differing views of culture. Free trade proponents often take what Baker (2000) has described as an ‘artefact’ or ‘commodity’ conception of culture, viewing it as content-oriented and backward-looking. Cultural integrity is seen as involving an essentially static preservation of this historical content from the perturbing effects of new (and especially) foreign ideas and influences. Free trade obviously threatens this preservation function. Its advocates focus on the political economy of who benefits from, and who pays for, preservation, often with the implicit suggestion that certain elites benefit while the broader public, who are denied the imported cultural products they desire, pay. Proponents of free trade in cultural products bemoan the parochialism in content deriving from protectionist policies and posit that free trade would allow domestic cultural industries to reveal their true value to the world and induce them to supply more popular, and hence more desirable, products. The latter suggestion assumes that the true value of culture lies in the universal appeal of its content rather than in its appeal to local audiences.

This conception of culture can be contrasted to one where participants, rather than content, occupy centre-stage — the primary audience being other members of the community. Rather than preserving backward-looking patrimony, the relevant goal of such a ‘culture as dialogue’ approach is essentially to ensure ‘shelf space’ and provide resources to members of a cultural community so as to foster dialogue on domestically salient issues (Schwanen 1998, Bernier 2000). Members’ speech to each other will often be contextually specific, even if universal meaning can sometimes be found in particular cultural output. So that even if free trade enabled a nation to export more cultural material, if it also caused the nation’s cultural industry to change its content to compete better in international markets but to speak less directly to domestic audiences, free trade could impoverish the domestic cultural dialogue.

The policy implications of this latter view of culture differ markedly from those suggested by the ‘commoditised’ view depicted above. If the overriding policy goal is to maintain or create a dynamic local cultural discourse, this cannot be done without preserving (or indeed creating) local cultural industries. Such a goal could justify direct subsidies as well as indirect means of support — for example, screen or broadcast quotas or content rules aimed at guaranteeing space for domestic producers and products, as well as some discriminatory burdens on imports. However, since the value of culture lies to an important degree in its ability to inform democratic choices, like censorship, any categorical exclusion of imports will tend to stunt discourse and is thus unacceptable. Outside cultural content and influences cannot be excluded since they usefully contribute to domestic dialogues on national identity and help shape a country’s social and political aspirations. Rising calls to embrace the broader notion of cultural diversity, and growing disaffection with the inward-looking and exclusionist logic of cultural exceptions, can be more readily understood in this context, as the recent shift in the international policy debate involves more than semantic subtleties (Bernier and Sauvé 1999).

As it happens, a credible case can be made to support the claim that the special features of markets in cultural goods and services can cause markets to fail to provide consumers with appropriate production and distribution of cultural products. Such features include the nature of competition in products with substantial public goods aspects; economies of scale in the production and distribution of cultural goods and services; the impact of externalities on the pricing of cultural products; as well as collective action problems. Because each of these problems arises in the context of international trade, there are strong grounds to believe that free trade in cultural goods and services is unlikely to yield efficient or welfare-maximising outcomes.

Thus, the challenge for policymakers becomes one of devising a hierarchy of domestic support measures able to remedy market failures at source. In doing so, the remedies should, wherever possible, minimise any adverse effects on trade and investment. The aim is to preserve the considerable benefits — the most important of which is the promotion of a better understanding among peoples — that accrue from the cross-border exchange of cultural goods and services. Stated simply, the challenge is to ensure that legitimate regulatory interventions represent, in the light of their likely high incidence on foreign products, ‘efficient’ forms of trade and investment protection.

Cultural products as public goods

Cultural products, and intellectual property more generally, share an important public good characteristic — their use is substantially non-rivalrous.⁵ This arises from the low cost (which is close to zero in the case of broadcast media) of providing them to additional users. Non-rivalrous use has both explanatory and policy relevance for international trade. For starters, media firms sell their products at markedly different prices from country to country.⁶ For most private goods sold in competitive markets, a substantially lower price for foreign sales strongly suggests ‘dumping’, that is, selling at below cost. Non-rivalrous use, however, means that the exported product is not sold at below cost because there are no significant additional costs beyond those already incurred by producing it for the domestic market.

⁵ Non-rivalry means that the consumption of a good or service by one person does not reduce the amount available for consumption by others (eg defence).

⁶ Shao (1995, p. 121), for example, quotes a mid-1980s survey conducted by the magazine *Variety* which found that prices for feature-length US films for television ranged from US\$90–US\$150 in Bermuda to US\$30 000–US\$40 000 in France. Similarly, the average cinema ticket price in the United States in 1993 was around US\$7, while it was US\$3.50 in Mexico.

This public good aspect of media products explains the readily observed dominance of the United States in international trade in films and television programming. Indeed, if the price to a consumer is the same, the customer will typically prefer the product that costs more to produce, that is, uses better inputs. Consumers seldom get this choice, for it is rare that goods that cost a lot to produce — the average cost of a Hollywood film was US\$52.7 million in 1998, as opposed to an average of less than US\$2 million in most countries with small film industries (Footer and Graber 2000) — sell for the same price as cheaply produced goods. The tradeoff for most private goods is typically between higher quality and lower price. Not so for media products, for as long as copy costs are minimal, the production budget for a single item will depend not on the amount one individual will pay, but on the number of paying customers to whom the firm can sell the single product (or its cheap copies). Putting aside international trade, a larger production budget should be available for media products primarily targeted at bigger and wealthier markets. Such a situation has long favoured large production budgets for American producers.

Enter international trade. If distributors sell domestic and imported media products at the same price, consumers in all countries are likely to prefer the products with the higher budget. More often than not, that will be an American product. Admittedly, most audiences will have a preference for domestic content — that is, content spoken in their own language and which addresses their own cultural and social predicaments. Predictably (if much to the ire of film distributors in Continental Europe who bemoan the closed nature of the US market),⁷ Americans will logically consume primarily home-made media products. For countries with smaller audiences over which to spread costs, the US advantage of higher budgets and the local advantage of domestic content should push in opposite directions, leading to some balance between imports and domestic products. Generally, the proportion of domestic products should increase, the larger and richer the domestic audience is and the more distinct its domestic culture and language are compared to those of exporting countries. Still, as the large bilateral imbalances reported for audiovisual trade between the United States and most OECD countries attest, the larger production budgets and the big and wealthy domestic audiences give American media products a significant edge in export markets.

Note how the greater ability of American media producers to tap export markets, based once more on the natural advantages flowing from the larger budgets afforded to them by the superior size and wealth of the domestic market, affects matters of

⁷ European films accounted for 3 per cent of box-office receipts in the United States in 1998, a year during which US films accounted for 63.5 per cent of box office receipts in Europe (Courrier de la Planète 2000, pp. 52–3).

content. It does so by tilting production away from products with predominantly domestic cultural content towards products with greater universal appeal. Although art critics typically praise the former types of cultural products, free trade may actually discourage their production. Seen this way, the oft-criticised ‘shallowness’ of American cinema or television production, with its predominant reliance on action, violence, sex and special effects, may owe less to domestic tastes or the lesser innate talent or imagination of American producers than to the industry’s significantly greater dependence on export markets. Hence, the predictive assertion that American media products will feature greater doses of products with ‘universal’ appeal than will cultural products emanating from countries relying less on export revenues. In the process, American exports will usually take market share from and reduce demand for an importing country’s domestic cultural products, while also crowding out American products with lesser export appeal.

Because producers of cultural goods and services are unable to price discriminate adequately, many cultural products will not be commercially valuable even though their creation and distribution would be a valuable use of social resources.⁸ This market failure is generally more common for cultural products with comparatively smaller audiences. In both domestic and foreign markets, media products with culturally-specific content fail even when strongly valued by local audiences and even though they would exist in greater quantities if free trade were subject to appropriate restrictions. In such circumstances, free trade may well hurt consumers.⁹

Economies of scale

The concept of ‘economies of scale’ refers to the tendency for unit costs to be lower with larger output. Economic theory holds that scale economies provide countries with a twofold incentive: first, to shift resources towards the production of a restricted number of goods (with a view to increasing output and reducing unit costs); and second, to engage in international trade, which creates an integrated market larger than any one country’s market (Krugman and Obstfeld 1997). When scale economies are present, the incentive for countries to specialise and to engage in international trade translates not only into a greater variety of products available for consumers but also lower prices.

⁸ Selling at high prices would cause the loss of too many customers to be profitable, while selling at a low price would not produce enough revenue per customer.

⁹ Free trade policies afford large budget productions greater capacity to price discriminate domestic productions with a smaller-audience. This inability of valued, yet small scale, domestic production to price discrimination and recoup production costs over various market segments (movie theatres, video-cassettes, television, cable, book spin-offs) may cause them to fail.

The fact that so many cultural industries, including film, television, music, and publishing, are characterised by economies of scale presents policymakers with the difficult challenge of balancing cultural and trade values. While free trade resulting from economies of scale will usually lead to efficiency gains in the form of greater variety and lower prices, in the case of cultural products characterised by scale economies policymakers cannot simply formulate and implement rules that promote free trade. As discussed above, economies of scale provide countries with the twofold incentive to trade and to specialise in the production of a limited range of goods. For some countries, specialisation might entail the loss of a cultural industry that is strongly valued by society. Policymakers might therefore wish to formulate ‘efficient’ forms of protection that limit the degree to which specialisation, in the context of cultural goods characterised by scale economies, occurs.

So far, our discussion has focused on internal scale economies, that is, those occurring at the level of the individual firm. However, not all scale economies apply at this level. Often, the concentration of production in one or a few locations may reduce an entire industry’s costs, making a cluster of firms more efficient than any single firm in isolation. In this case, we speak of external economies of scale.

Economic models of external scale economies and international trade assign an important role to history and accident in determining the pattern of international trade. Specifically, three sources of external economies are usually cited in the literature (Krugman and Obstfeld 1997):

- the ability of a cluster of small firms to support specialised suppliers;
- the creation of a pooled market for skilled labour around the cluster of firms; and
- knowledge spillovers.

Due to the pivotal role played by history and accident in generating and shaping each of the sources underlying external scale economies, it is not uncommon to find situations in which a country starting with a large industry retains its advantage in the production of a particular good even if another country could potentially produce the same good more efficiently.¹⁰ Again, this possibility might warrant the implementation of ‘efficient’ forms of protection aimed at containing or reversing certain patterns of trade that pose a threat to domestic cultural industries.

¹⁰ See Donaldson (1996) for a useful overview of the events that resulted in today’s trade pattern in audiovisuals.

Externalities

Markets achieve efficient outcomes when products are sold at their real cost. Improper pricing can occur for various reasons, including dumping — selling a product in the importing country below its cost of production in the exporting country, usually as a result of subsidy or subsidy-like practices directed at the exporting firm. Improper pricing can also occur when products create large negative or positive externalities — that is, costs or benefits to people other than their owner or purchaser. A product's real cost is the sum of the cost to producers as well as the cost imposed on third parties. Because negative externalities are costs not borne by either producer or purchaser, producers of goods with negative externalities can sell them at below their real cost.

Much as they are difficult to identify and measure, cultural products generate significant externalities, both positive and negative. By affecting readers' or viewers' behaviour, behaviour that in turn affects other people (why else would the advertising industry exist?), the cultural product has positive or negative value for people other than its buyer or seller. The existence of such externalities, however, does not *per se* justify measures that discriminate against foreign cultural products. For this to be the case, the externalities of imports would need to differ in a predictable (and negative) enough manner from those of domestic products that the imports would compete with or replace. Whether such differences exist will largely be context- or country-specific, and attempts at evaluating them will inevitably prove contentious.

The comparative success of imports that results from their larger production expenditures has in itself no *prima facie* relation to positive or negative externalities. Rather, it is the predictable differences in content flowing from the public good and economies of scale characteristics noted earlier that are likely to be most relevant for an externality analysis. Foreign cultural goods and services characteristically supply new and different perspectives. This can support greater cross-cultural understanding and bring with it notions of equality, liberty, democracy, the politics of race or gender, and other potentially 'foreign' ideas.¹¹ On the whole, therefore, measures aimed at fostering cultural diversity are likely to generate potentially significant positive externalities, to which public policy (including trade and investment policy) needs to be sensitive.

¹¹ These transformative properties can be especially important for individuals or groups oppressed or marginalised by a dominant local culture. It is hardly surprising that authoritarian regimes are deeply suspicious of free trade in cultural products and prone to varied forms of cultural censorship. The couching (and strong political appeal) of the trade-culture debate in freedom of speech terms is more readily understood in this light.

The introduction of transformative content through cross-border trade and investment may not always involve positive externalities. Imports may also have more negative consequences (for instance in the case of violent media) and indeed displace and crowd out local cultural products that have more positive aspects. For most importing countries, the dominant position of the US audiovisual industry means that foreign cultural products — and the greater degree of ‘universal’ content they typically feature — will often displace (rather than supplement) local products with high levels of domestic-specific content. The loss of domestic content because of displacement or marginalisation of local cultural products can generate potentially significant negative externalities, particularly from a ‘culture-as-domestic-dialogue’ perspective.

The quality and availability of news media, for instance, whether in print or broadcast form, performs vital democratic functions in any society, helping shape the development, awareness and richness of national identities. All these functions supply important positive externalities and can significantly improve the well-being of a community beyond the immediate consumers of such services. For such positive effects to be felt, domestic content and cultural specificity is typically crucial. In addition to using the local language, domestic-oriented cultural products typically reflect, interpret or render critical judgement on the predominant views found within the country from which they emanate. As Baker (2000) usefully observes:

To the extent that a country’s own media products better provide (or provide in ways not duplicated by imports) domestic content that people need directly for their political process to function or, more generally, for their cultural discourses of identity, meaning and value, domestic media can have tremendous positive externalities not supplied by the imports that threaten to replace the local content.

What policy implications can one adduce from the preceding discussion? For one, as with the case of market failures stemming from the public good dimension of cultural products and the presence of significant economies of scale in production and distribution, an externality analysis suggests that unrestrained trade in cultural goods and services may well reduce consumer welfare in the importing country. This result may obtain to the extent that the improper pricing of cultural products prevents audiences from getting what they most likely want — domestic content.

This market failure once again points to the desirability of corrective governmental intervention. The more imports of cultural products are seen to threaten or marginalise a country’s capacity to sustain a healthy dialogue on salient domestic issues, the greater the justification for enacting measures that impose ‘efficient’ burdens on imports or foreign investments. Accordingly, while shying away from any categorical exclusion of foreign cultural content that, in virtually all circumstances (including those giving rise to negative externalities) nourishes

democratic debates, countries should think twice (and typically do) before negotiating away their prerogative to impose some restrictions on trade and investment in cultural products. Rather, they should seek to codify international rules governing possible conflicts over trade and culture and agree (subject to dispute settlement disciplines) on an explicit hierarchy of admissible and least burdensome means of supporting domestic cultural industries under WTO law. Given the political sensitivities and the might of the industrial interests involved, doing so would assuredly represent a delicate balancing act. Indeed, because of its fluid nature, a concept like cultural diversity could very easily become the favourite veil used by certain groups to disguise protective measures. In turn, requiring the international trading system to indulge clearly protectionist policies on the grounds that they aim to promote domestic culture would dilute the considerable economic advantages derived from the WTO and the pursuit of free trade ideals.¹²

Collective action problems

In addition to the three sources of market failure depicted above, collective action problems might also warrant the formulation and implementation of policies aimed at protecting or promoting domestic culture. In his classic study on the interaction between groups and public goods, Olson (1965) showed that rational, self-interested individuals will not act to achieve their common or group interests, unless there is coercion or some other special device to make individuals act in their common interest. The reason for the inadequate level of collective activity can be traced back to what Olson refers to as ‘the essential’ function of a group or organisation, namely to provide ‘an inseparable, generalised benefit,’(p. 15) or public good. In most cases, there is a gap between the interest of a group to provide a public good and the individual interests of the members of the group.¹³

To illustrate how the inadequate level of collective activity operates in the specific context of cultural goods and services, suppose individuals in a community view

¹² This latter concern arguably informed much of the cautious reasoning displayed by first instance panellists and by Appellate Body Members in the recent dispute over magazines.

¹³ Olson draws a useful analogy between this gap and the gap between firms and industry in a competitive market: ‘[t]he firms in a perfectly competitive industry, for example, have a common interest in a higher price for the industry’s product. Since a uniform price must prevail in such a market, a firm cannot expect a higher price for itself unless all of the other firms in the industry also have this higher price. But a firm in a competitive market also has an interest in selling as much as it can, until the cost of producing another unit exceeds the price of that unit. In this there is no common interest; each firm’s interest is directly opposed to that of every other firm, for the more other firms sell, the lower the price and income for any given firm. In short, while all firms have a common interest in a higher price, they have antagonistic interests where output is concerned.’ (Olson 1965, p. 9).

domestic films as an essential manifestation of their culture. Accordingly, all individuals in this community would benefit significantly from an increase in the production of domestic films. One possible way to achieve such an increase would be if all individuals chose to view domestic films rather than films produced in other countries. From the perspective of the single individual, however, seeing only domestic films is unlikely to influence the capacity of the domestic film industry to increase its output. In fact, unless all individuals in a community decide not to see foreign films, a single individual's decision in this regard will have a negligible effect on the local film industry. In addition, for a single individual, the decision to limit his or her choice to domestic films might entail high costs, especially if he or she derives benefit from seeing foreign films as well. Meanwhile, any potential cultural benefits derived from the individual's 'sacrifice' would be available to all members of the community. In light of this collective action problem, government intervention, for example in the form of screen quotas for domestically produced films, might once again provide an avenue for a society to satisfy its preference for cultural diversity.

Preliminary conclusions

The preceding discussion suggests that economic theory cannot predict that free trade in cultural products will be better at giving audiences what they want than would a set of policies imposing some restrictive effect on imports. Indeed, when viewed from a 'culture as dialogue' perspective, economic theory suggests compelling reasons to expect free trade to be inefficient compared to an optimal system of trade restraints from the perspective of *both* American and importing country audiences. The most obvious policy response would be to subsidise those categories of cultural products most likely to be economically justified, but which will not survive in a free market environment. The US response to such policies has been to portray them as violations of free trade principles, even as it has failed to make concrete proposals on whether or how to curtail the use of trade- and investment-distorting subsidies in services trade. It has also tended to call for any such subsidies to be applied on a national treatment basis, even as the economic justification for subsidies (as is evidenced by the dominant market share of US media products in the vast majority of foreign markets) applies uniquely to local media products disadvantaged by the free trade regime.

In addressing the market failures identified above, a large number of countries have also enacted content quotas, typically requiring theatres, television networks, radio stations and publications to show or broadcast a certain percentage of domestically produced films, television programs, or music recordings or to feature local 'stories' or news events. Much disparaged by trade economists (and indeed condemned by WTO law in goods trade), such rules have nonetheless proven beneficial in some

instances as they marginally reduce the reach of imports without barring any particular import,¹⁴ even while giving rise to wasteful rent-seeking activity that may, in some instances, raise questions of distributional fairness, produce content of questionable quality and cultural specificity, and encourage anticompetitive conduct on the part of protected ‘infants’.¹⁵

By allowing imports to help make a theatre or radio station profitable, such rules can be regarded as a form of indirect subsidy to local content. While directly aiding local media products, properly designed quotas still allow importing firms to determine what combination of universal appeal and more culturally-specific imports will capture the largest remaining surplus. US dominance in large segments of cultural trade, particularly audiovisual trade, is such that a ‘remaining’ surplus will be quite large in most countries.¹⁶

¹⁴ Broadcast quotas for French language music in France, for instance, have had a clearly beneficial effect on sales of domestically produced music, which increased from 42 per cent of total sales in 1994, the year the quota policy was implemented, to 55 per cent in 1999, a rise of some 31 per cent. During the same period, investment in France by the largest recording companies expanded five-fold, from FFr 100 million in 1994 to FFr 500 million last year. What is more, by boosting the album sales of established artists, the policy allowed production companies to invest more in younger artists, to which content quotas also applied (Rony 2000, pp. 49–50).

¹⁵ Such instances call for greater competition policy activism, and a reconsideration of the antitrust immunity afforded in some countries to domestic cultural industries. A progressive relaxation of investment restrictions, even while maintaining — or indeed perhaps enacting — various local content requirements could also help foster greater competition in domestic cultural industries. The resolution of a number of commercial disputes between Canada and the United States relating to cultural matters (eg over broadcast rights for country music and, most recently, over magazines), typically featured such a combination of investment regime liberalisation and local content rules.

¹⁶ Canada, whose ‘protectionist’ cultural policies are constantly decried by US industry and documented in the Office of the US Trade Representative’s annual inventory of foreign trade barriers, vividly illustrates this point. In 1999, foreign (overwhelmingly American) content accounted for 45 per cent of book sales; 83 per cent of English-language consumer magazines on newsstands and 65 per cent of magazine circulation revenue; 79 per cent of the retail sales of tapes, CDs, concerts, merchandise and sheet music; 60 per cent of English-language television programming; and 97 per cent of screen time in Canadian cinemas. Similar, if slightly less spectacular, results obtain elsewhere, as the share of film receipts garnered by US industry stood in 1996 at 70 per cent in Europe, 83 per cent in Latin America and 50 per cent in Japan (Wernick 2000, pp. 52–3).

Box 13.2 Domestic support measures used in cultural industries

- *Subsidies*, involving the provision of grants and loans for the production of cultural works, most notably audiovisual products. For example, Eurimages, an initiative by the Council of Europe, provides subsidies for the co-production of European audiovisual works. The Media II program of the European Communities, while excluding the support of production, focuses on training for professionals, the development of attractive projects and the transnational distribution of audiovisual programs and films. National programs providing subsidies to the domestic film industry exist in France, Germany, the United Kingdom, Canada, the United States and Switzerland. Canada also subsidises its publishing industry through grants, marketing assistance, interest-free loans and postal subsidies.
- *Domestic content rules*, especially measures regulating radio and television broadcasting content. For example, the European Communities, the Council of Europe, Australia, Canada, and France use domestic broadcast content to control access to their television broadcast and film markets.
- *Market access restrictions*, in particular measures that control access to film markets, including screen quotas for cinemas (as in France, Mexico, South Korea and Spain); rebates on box office taxes for cinemas that show national films (Italy); prohibitions of dubbing of foreign films (Mexico); dubbing licences (eg in Spain, film distributors can only receive a dubbing licence for foreign films when they contract to distribute a certain number of national films).
- *Regulatory/licensing restrictions*, especially measures that control access to radio or television broadcasting through regulatory or licensing restrictions. Canada relies on this type of measure.
- *Tax measures*. France, for example, uses taxes on box office revenues, on receipts of broadcasters and on videocassettes to support local film production. Switzerland has been debating plans to introduce a tax on films that simultaneously are exhibited on more than 50 screens within the country.
- *Foreign investment and ownership* covers measures restricting foreign investment and ownership, including divestiture policies, for example, in the broadcasting industry and news media in Australia, Canada, the United Kingdom and the United States.
- *Border measures*, which may include tariffs or quantitative restrictions, as was the case in India, which used to restrict the import of film titles to 100 per year.
- *Film co-production agreements*. An example is the Council of Europe that has established a convention on plurilateral film co-production.

Source: Adapted from Footer and Graber (2000).

As a policy matter, screen and time quotas are preferable (and can indeed be viewed as a more ‘efficient form’ of protection) to quotas governing the *number* of imported cultural products. The latter will tend to favour imports of universal appeal ‘blockbuster’ products that are likely to prove more damaging to local industry (and domestic cultural dialogue) than would imports of smaller-audience products.

The foregoing analysis of the economic problems free trade creates for potentially more valued local cultural products, combined with the scope for implementing policies of ‘efficient protection’ that minimise adverse effects on trade and investment, suggests that the cultural trade policies that exist in much of the world’s democracies, and the commensurate regulatory precaution shown to date by a great majority of WTO Members, are broadly sensible from both a political and economic point of view.

The very real possibility that markets for cultural goods and services may fail to maximise consumer welfare under conditions of free trade suggests that policymakers should not set jurisdictional rules only with a view to enhancing market access conditions. They should also consider other factors related to the overlap between trade and cultural values.

A quick survey of the main types of cultural policies and instruments currently in place in different jurisdictions is indicative of the central role played by the various sources of market failures identified in this paper. Box 13.2 provides an illustrative list of the most commonly found support measures directed at domestic cultural industries. Debates over the WTO-compatibility of such measures and the possible need to codify an explicit hierarchy of permissible (ie non-actionable) and prohibited practices are likely to loom large in discussions aimed at developing international disciplines governing the trade and culture interface.

13.3 Legislation or adjudication? A law and economics perspective on how to manage a fractious policy interface

If, as is reasonably certain, the trade and culture interface will by its very nature generate commercial tension, an important question is how best to manage the policy interface. In considering these matters of governance and institutional choice, the law and economics literature provides useful tools of analysis.

In this literature, one essential distinction between rules and standards lies in the extent to which efforts to give content to the law are undertaken *before* or *after* the conduct regulated by the law takes place (Kaplow 1992, p. 560). A law is more

rule-like ‘the greater the extent to which it provides advance guidance’ (Kaplow 2000, p. 509). In contrast, a law is more standard-like to the extent that it establishes less specific guidance in advance of the conduct regulated by the law. From a rules and standards perspective, more specific law in the form of a rule is not always better law. Under certain circumstances, it might be more efficient to have only general guidance in the form of a standard prior to the occurrence of the regulated conduct, and delegate the task of giving content to the law *ex post* to a panel or tribunal. To identify the particular circumstances under which it might be more appropriate to have less specific law (ie standards) as opposed to more specific law (ie rules) in advance, the literature on rules and standards identifies several cost-benefit parameters.

- Costs of formulation: given that rules embody a higher degree of legal precision *ex ante*, they also entail higher costs in terms of formulation than standards. Such costs result from drafting, negotiation, and use of general administrative resources and will be directly related to the variability of the conduct that the rule or standard seeks to regulate. If the conduct in question has a large number of variants, it will be more costly to formulate a rule than a standard, for rules in this case will require those responsible for formulation to identify and define all possible variants of the relevant conduct and then decide on the scope and coverage of the law.
- Public choice costs: some commentators have observed that rule-making, particularly in the international trade context, is likely to be subjected to intense domestic scrutiny, while the application of a standard by a dispute resolution process is likely to be subjected to less scrutiny. According to this perspective, then, rules would entail higher costs than standards in public choice terms. It remains to be seen how the coming of age of internet-based policy advocacy by non-governmental organisations will affect the public choice costs and benefits of rules and standards.
- Primary and secondary predicability: rules are generally associated with a higher degree of primary predicability. For States as well as private parties, the interpretation of rules will usually entail lower costs than the interpretation of standards. Precisely because rules embody more information *ex ante*, individuals or States will not need to invest resources in assessing whether their behaviour conforms to the requirements of the law. Rules will be less expensive than standards in terms of secondary predicability as well, because rules usually allow parties, after the relevant conduct has taken place, to predict the outcome of dispute resolution and by implication, to resolve a dispute in a less costly manner.
- Legitimacy: since rules often involve *ex ante* specification through a treaty negotiated by elected government officials, rules are likely to reflect the

preferences of citizens to a greater extent than standards, which often involve *ex post* specification by panels or tribunals. Especially at the international level, the process whereby a panel or tribunal gives content to the law *ex post* is likely to be perceived as removed from citizens' preferences, particularly due to the lack of representativeness embodied in an international panel's composition.

Before using the insights provided by the rules and standards literature in addressing the question of which institution should manage the interface between trade and cultural values, we need to make explicit the institutional dimension of rules and standards. Rules often involve *ex ante* specification through treaties or political agreements, while standards often involve *ex post* specification by panels or tribunals.¹⁷ While this distinction might not always hold in practice (courts may be able to formulate rules pursuant to statutory or constitutional authority), the international trading system provides an example of a sphere where, generally speaking, the source of rules is likely to be a treaty or political agreement, whereas standards will be applied by a panel or tribunal. Viewed from this perspective, and disregarding the relative nature of the institutional dimension of rules and standards, the choice between rules and standards implies a decision about allocation of jurisdiction between dispute resolution bodies on the one hand, and legislatures on the other.

The law and economics literature on rules and standards assigns a central role to the 'frequency' of the conduct regulated by the law: all other things being equal, rules (or legislation) tend to be preferable when the frequency of the conduct to be regulated is high, while standards (or adjudication) are more efficient when the relevant conduct is relatively rare (Kaplow 2000, p. 510). The reasons can be traced back to the cost and benefit parameters outlined above. Rules have higher formulation costs (including public choice formulation costs) that are only borne once. On the other hand, the benefits of rules in terms of primary and secondary predictability and perceived legitimacy will arise often if the conduct required or proscribed by the law is frequent and rarely if it is not.¹⁸

Applying this insight to the domain of trade and culture suggests that as the frequency of 'trade and culture' conflicts increases, the net benefits of giving

¹⁷ This distinction is drawn from Trachtman (1999, p. 353).

¹⁸ To illustrate this point, consider the case of a law regulating the release into the water supply of hazardous substances. For dry cleaning and automotive fluids, it would be best to specify permitted disposal techniques in advance, as many small establishments would be unlikely to be able to determine the effect on their own and, even if they could, the costs of each obtaining information on the matter would be great. Redundant costs would also be incurred in inevitable enforcement proceedings. But for rare substances, it may not be worthwhile to specify the range of permitted and prohibited disposal techniques in advance, because most scenarios involving potentially hazardous action may never arise. The example is drawn from Kaplow (2000, p. 511).

content to the law *ex ante* through legislation will exceed the net benefits of giving content to the law *ex post* through adjudication. While this result is relatively simple to understand from a conceptual perspective, it might prove difficult to apply it to particular factual settings, especially because of problems associated with measuring the incidence of ‘trade and culture’ conflicts¹⁹ in order to arrive at a meaningful indicator of ‘frequency.’ For example, one relatively straightforward way to measure the frequency of ‘trade and culture’ conflicts would be to look at the number of adjudications in the domain of trade and culture. However, measuring frequency in this manner might be misleading, for as Kaplow (2000, p. 511) pointed out, ‘the frequency of activity may be great even if reported adjudications in a field are few’.

A more promising route for gauging the frequency of ‘trade and culture’ conflicts in specific context consists of probing the specific parameters that are likely to impact frequency itself. In addition to providing an estimate of the likely incidence of ‘trade and culture’ conflicts in a particular context, this approach would facilitate the important task of predicting changes in frequency without having to delve repeatedly into the maze of regulations of one or more jurisdictions. The following represents a tentative list of parameters affecting the frequency of trade and culture conflicts.

- *Market Failures.* Governmental measures aimed at correcting the various types of market failures that arise in the production and distribution of cultural goods and services are likely to lead to commercial tensions to the extent that such measures will often involve recourse to trade- and investment-restricting policies. Generally, the higher the scope for scale economies or the greater the presence of negative externalities affecting domestic cultural industries, the higher the probable frequency of ‘trade and culture’ conflicts.
- *Cultural proximity.* The extent to which foreign cultural products will penetrate a market and exert an effect on domestic culture will partly depend on the degree of cultural proximity between trading partners.²⁰ The concept of ‘cultural proximity’ encapsulates factors such as language, values, beliefs, institutions, and behavioural patterns. Differences in language, for example, will often act as a natural barrier to imports of cultural products, in particular audiovisual products and published materials. So will differences in values, beliefs and behavioural patterns. Such natural barriers will decrease the appeal of imported cultural products and obviate the need to implement additional policies aimed at

¹⁹ In line with this paper’s characterisation of the ‘trade and culture’ problem, a ‘trade and culture’ conflict arises in the presence of a regulation having at least a purported cultural goal that also collaterally restricts trade or investment.

²⁰ For a discussion of a ‘cultural discount’ parameter, see Hoskins, Finn and McFadyen (1997, p. 68).

reducing their availability in the domestic market. Thus, the higher the degree of cultural proximity between jurisdictions, the higher the frequency of ‘trade and culture’ conflicts between them.²¹

- *Trade liberalisation.* The reduction of tariffs and quotas since the inception of the General Agreement on Tariffs and Trade (GATT) in 1947 has been accompanied by a rise in conflicts between trade values and cultural values. This trend can be expected to intensify, especially in light of the firm foundation for future liberalisation opportunities laid by the Uruguay Round negotiations. For example, the ongoing round of talks on services trade and investment liberalisation conducted under the aegis of the GATS and which forms part of the Uruguay Round’s built-in agenda, will likely result in pressures for additional liberalising disciplines that might require policymakers to strike a new balance between trade and cultural values. Generally, then, the increase of trade law (understood here in terms of substantive issue coverage) as well as in the number and quality of scheduled market access and national treatment commitments, could result in a higher frequency of trade and culture conflicts as WTO Members prosecute potential de-liberalising changes in policy through multilateral dispute settlement.
- *Technology.* Recent years have witnessed the rapid transformation of the information and communications technology environment.²² Digital transmission technology drastically expands the capacities to deliver data by many different networks, including terrestrial, cable and satellite. At the same time, the internet is providing a new platform for multimedia services where the traditional systems for the delivery of text, voice, sound and images are merged. Such technological developments are either rendering obsolescent an increasing number of policies aimed at stemming the inflow of cultural products into domestic markets or forcing governments to rethink entirely the role of cultural policies in this new environment. As policymakers seek to respond to the challenges posed by the new information and communications technology environment through the formulation and implementation of new and untested cultural policies, and as the borders between various segments of cultural industries further erode, the frequency of ‘trade and culture’ conflicts is likely to increase.

The parameters discussed above may be applied to particular factual contexts, thus shedding light on the frequency of ‘trade and culture’ conflicts and consequently, on the type of institution — legislative versus adjudicative — to be assigned the task of

²¹ The fractious Canada-US relation in cultural matters offers a case in point.

²² For a more detailed account of the technological impact of globalisation on cultural goods and services, see Footer and Graber (2000).

balancing trade and cultural values. A detailed discussion of where in the WTO institutional structure power over the conflict between trade and cultural values should be exercised is beyond the scope of this paper. Suffice to say that, from a normative standpoint, it is debatable whether the current indeterminacy of WTO law with respect to trade and cultural matters, and the implicit deferral to dispute resolution that it entails (which is itself a reflection of the preference of WTO Members to eschew the difficult bargaining and inevitable ‘concessions’ that a legislated approach would necessitate), is sustainable or indeed desirable. This is especially so at a time when the very legitimacy, both political and juridical, of the WTO is being questioned against the backdrop of domestic anxieties and civil society activism arising from globalisation.

From a positive standpoint, the above analysis suggests that the trade and culture interface can be expected to generate a relatively high incidence of commercial tension, in part because governmental interventions made in response to market failures will often exert restricting effects on imported cultural goods and services given their high tradability. Such a conclusion suggests that future negotiations on cultural goods and services in the WTO could well be characterised by a shift from standards to rules, and that such a shift might be warranted on both efficiency and legitimacy grounds.

In terms of the horizontal allocation of jurisdiction within the WTO institutional structure, such a conclusion implies that the net benefits associated with more specific legislation governing cross-border trade and investment in cultural goods and services are likely to outweigh the political risks and de-legitimising outcomes that primary reliance on the multilateral trading system’s fledgling adjudication mechanism might entail (see, for example, Braun and Parker 1993). In short, the time may be near when members of the international community have to contemplate more seriously the scope for, and the content of, a WTO-anchored set of disciplines aimed at striking an acceptable balance between the potentially competing logics of trade and investment liberalisation on the one hand, and of cultural diversity on the other.

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GATS negotiations on audiovisual commitments

The paper by Pierre Sauvé mentioned that only 18 countries had scheduled commitments for audiovisual services in the Uruguay Agreement. But the countries that have signed the agreement include the United States and India, between them the largest producers of movies, as well as Japan, Mexico and Hong Kong. The only large producer of movies that has not signed the agreement is Brazil, though it could well join in the future. English and Spanish are represented in the agreement and Portuguese may soon be introduced if Brazil becomes a signatory. In a sense, the European Community is already present on the list of signatories in terms of language. The language links may encourage countries like the United Kingdom, Portugal and Spain to join.

Culture and entertainment

Culture is not entertainment. It is relatively easy to draw a line between culture and entertainment. It is uncertain what will be the culture of the early 21st century — people will only know this in 50 years time when they look at the works that have survived and acknowledge their worth. The lesson of history is that few people have been able to recognise the masters of their time in terms of culture.

Economic features

The paper mentioned the economic features of audiovisuals — public goods, scale economies, externalities and collective action.

But movies are not public goods in a theatre. Individuals pay for a seat.

There are no scale economies in terms of production. Indeed, the US major companies are producing fewer films than are the three French majors (the high number of French films is also related to the subsidies received by French filmmakers). It is the actors rather than the directors that are the integral part of movie production today, and it is difficult to talk about scale economies in terms of actors. Pierre Sauvé is correct in saying that there are scale economies in distribution. But in most European countries, American firms do not own the distribution network. Rather, it is owned jointly by the American and European firm, so the European firms are part of the story.

Even if scale economies were large, the development of new technology such as the Internet means that there are no longer barriers to entry in distribution. If there is one country in the world that should not put up barriers to the internet, it is France — the internet enables French movies to reach French-speaking people in Oklahoma, New South Wales or Africa at very low cost. As technology progresses, the US distribution system is losing the advantage of size, and this creates a good opportunity to compete in the market.

It is possible that there are externalities associated with audiovisuals, but are these positive or negative and what instruments could be used to manage these externalities? It is too complex to handle and it is doubtful whether there are any externalities at all.

One point that is more important than public goods, scale economies or externalities is product differentiation. The paper talks about one unique industry, but Hollywood and the production of cultural films are clearly different industries. The maker of a cultural film does not dream of 10, 15 or 20 million viewers during the six months following the film's release, but, rather, dreams of having 10 or 20 million viewers over the next 50 years. The filmmaker knows they are making a different film that may not attract a large audience.

Because of product differentiation, the Europeans are becoming exporters of audiovisual works such as game shows and sitcoms, not just movies. It is not yet a two-way trade, but there is trade in differentiated products.

The last 40 years suggests that protection has Americanised the French quicker than free trade. Protection attracts resources into areas in which others have a comparative advantage, and this is the last thing you should want to do when you are proud of your culture.

General discussion

The discussion on the papers presented in chapters 12 and 13 focused on:

- defining culture;
- the economics of protecting culture;
- patronage as a domestic policy to protect culture;
- subsidies to protect culture;
- the review of the Australian Broadcasting Services Act; and
- developing a Reference Paper on audiovisual services.

Defining culture

It was noted that the Australian regulatory system did differentiate between cultural and industrial material. There was a sliding scale, whereby to qualify as Australian content, material had to meet certain cultural criteria about such things as the creative principles involved. Co-production activity attracted different levels of points. Finally, there was a range of audiovisual production in Australia that did not receive, nor seek, subsidies or regulatory protection of any sort. This last area of Australian production was growing in a significant way. So there were already practical ways of differentiating industrial from cultural activity.

The economics of protecting culture

It was noted that there had been a study of the costs and benefits of Australian content in television that had taken externalities into account, and found that the costs were commensurate with the benefits (Papandrea 1997).

It was suggested that Pierre Sauvé's economic case for protecting culture ignored two significant factors.

First, monopolistic competition with endogenous product differentiation would typically lead to excessive product variety, rather than too little product variety. And with monopolistic competition, the costs of measures such as quotas would be especially high.

Second, and more importantly, intellectual property rights already dealt with many of the market failures identified with cultural works. In general, intellectual property protection was sensible, but if the system had an element of precedence, that again would lead to excessive product variety.

If the cultural goods were non-rivalrous in consumption, then duplication of those goods as a result of quotas would amount to pure waste. If, in addition to being non-rivalrous, there were externalities associated with incorrect production of the good, then the combination of the pure productive waste from duplication and the externalities associated with producing the wrong goods would make the costs of remedies very high relative to the problems being addressed.

It was noted that both papers failed to address the fact that through copyright laws, virtually every country with the exception of New Zealand restricted the parallel importation of copyrighted goods. These restrictions were a significant source of indirect subsidy to the parties that controlled the goods. With monopolistic competition, these restrictions induced allocative and technical efficiency losses.

Patronage as a domestic policy to protect culture

A participant advocated domestic patronage as a means of protecting culture, suggesting the relevant market failure was potential myopia in private tastes. The present value of Van Gogh's paintings was huge, yet nobody would have lent Van Gogh money in his own lifetime. Indian classical music would not have survived either without patronage.

If there was a case for patronage, how was it best implemented? Patrick Messerlin thought the British way of funding culture was interesting, whereby money from the National Lottery was used to subsidise cultural activities. An alternative option to fund domestic film production would be by taxing moviegoers. Boards, like film festival boards, could decide which filmmakers had 'potential' and should therefore receive subsidies. Patrick Messerlin reiterated that he did not believe democratic governments could handle the support of culture, and referred to the successes of the British non-government patronage system involving competition between patrons.

Subsidies to protect culture

Patrick Messerlin noted that although quantitative restrictions had a positive impact on the music industry currently, this was unlikely to continue. Eventually, subsidies would be captured and unsuccessful artists would remain in the industry just to receive subsidies.

Patrick Messerlin also suggested that French subsidies were of concern, not because of the GATS or criticisms from the United States, but because some people thought

that this was the only way to create French moviemakers. He was concerned about subsidies for cultural impact reasons, not for trade negotiation reasons.

Review of the Australian Broadcasting Act

The cultural objectives of broadcasting regulation were a major part of the terms of reference for the Productivity Commission's inquiry into the Broadcasting Services Act and Australian broadcasting policy (PC 2000). The pursuit of cultural objectives was alleged to have a pervasive effect on broadcasting policy. This was evident through a series of quid pro quos relating to restrictions on entry into television and radio, and to the obligations placed on broadcasters to incur extra costs in adhering to a quota system for local programming (despite the fact that the costs of Australian productions involved was minute compared with the value of rents obtained from the restrictions on entry into the industry).

The Productivity Commission's report looked at the effects of barriers to entry and the cultural policy issues associated with content quotas. The barriers to entry into broadcasting had created monopolistic conditions within audiovisual markets, with the perverse effect of actually reducing the demand for local culturally significant programming. Producers of audiovisual material claimed that the small number of potential buyers for their product meant that they were being constantly squeezed on prices and were increasingly forced to reduce production values. This, in turn, reduced the attractiveness of the products they were able to make relative to competing imports. So there was a perverse relationship, rather than the quid pro quo claimed in Australian policy.

The Productivity Commission also looked at the issue of quotas and came to similar conclusions as Pierre Sauv . The rapid changes in technology and the diversification of platforms for the dissemination of audiovisual material were likely to have profound effects on the industry and the ability of past measures to be successful in achieving cultural policy objectives. The report recommended there be a review of policy measures for this purpose by 2004.

Reference Paper on audiovisual services

One participant doubted whether there were sufficient countries in support of a Reference Paper on audiovisuals. Of the 19 Members that had made WTO commitments, some were major film producers. But only two countries had made full commitments — the United States and the Central African Republic. Most major film producers had not made anything close to full commitments on audiovisual services.

Australia had taken cultural objectives into account, and so had not made commitments on audiovisual services and had taken out most favoured nation (MFN) exemptions for bilateral co-production agreements. The MFN exemptions were subject to a theoretical ten-year sunset rule that expired in 2005. But there was little support to remove these exemptions and the process of negotiating them away was likely to be slow. It was also observed that the GATS did not currently have disciplines on either subsidies or domestic regulation. It would be a long time before there was sufficient momentum to create a Reference Paper on audiovisual services addressing these issues.

Pierre Sauvé supported this pessimistic view on both subsidies and the MFN derogation, noting the recent signals from Geneva and the repeated failures of the multilateral community to tackle subsidy issues.

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