

CULTURE, SOVEREIGNTY, AND HOLLYWOOD: UNESCO AND THE FUTURE OF TRADE IN CULTURAL PRODUCTS

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I.	FROM HOLLYWOOD TO CANNES	352
II.	CULTURE AND NATIONAL IDENTITY: IMAGINED AND RE-IMAGINED	360
	A. <i>The Elusive Concept of Culture</i>	361
	B. <i>Knowing Culture Backward and Forward</i>	364
III.	THE "CULTURE EXCEPTION" AND AGREEING TO DISAGREE	366
	A. <i>General Agreement on Tariffs and Trade</i>	366
	B. <i>Free Trade in North America</i>	368
	C. <i>The European Union: Unity and Diversity</i>	370
	D. <i>General Agreement on Trade in Services</i>	374
	E. <i>Bilateral Trade with the United States</i>	376
IV.	UNESCO AND CULTURAL DIVERSITY	378
	A. <i>Culture as Organism</i>	381
	B. <i>The United States' Love-Hate Relationship with UNESCO</i>	382
V.	THE CULTURE CONVENTION	383
	A. <i>Canada</i>	384
	B. <i>France and the European Union</i>	390
	C. <i>Drafting and Negotiations</i>	394
	D. <i>The Final Text and Reactions</i>	400
VI.	MARKETS AND POLITICS: THE FUTURE OF INTERNATIONAL TRADE IN CULTURAL PRODUCTS ..	405
	A. <i>Hybridity and Choice</i>	408
	B. <i>Media Markets and the Hollywood Model</i>	411

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C. <i>Hard Power, Soft Power, and Enabling Rhetoric</i>	424
VII. FROM CANNES TO HOLLYWOOD	434

If they could read their stuff, they'd stop writing.
Will Rogers, on Hollywood

I. FROM HOLLYWOOD TO CANNES

Perhaps nowhere are the forces, tensions, and contrasts of cultural globalization more evident than the Cannes Film Festival. Held annually since 1946 in the French Riviera resort town of Cannes, the festival has grown from a modest showcase of cinematic art to a “highly mediatised” event attracting thousands of journalists and corporate interests.¹ Though founded through the efforts of the Association Française d’Action Artistique (French Association for Artistic Action), and sponsored by France’s Ministère des Affaires Etrangères (Ministry of Foreign Affairs), Ministère de l’Education Nationale (Ministry of National Education), and Centre Nationale de la Cinématographie (National Cinema Center), the Cannes Film Festival today styles itself as “an annual tribune for international film, where all styles, schools and genres have their place.”²

Of course this includes not only auteur cinema,³ but big-budget, star-studded, special effects-laden Hollywood productions. And there’s the rub. As *New York Times* film critics Manohla Dargis and A.O. Scott have observed, each year brings “the same complaints: from purists who accuse the Cannes Film Festival of selling out its tradition of artistic prestige for the glamour and lucre of Hollywood, and from the more commercially minded scenesters who wonder why Cannes lavishes so much attention on esoteric, difficult films bound for an

1. Cannes Film Festival - Provence-Alpes-Cote d’Azur, <http://provencealpescotedazur.wetpaint.com/page/Cannes+Film+Festival> (last visited Jan. 18, 2008) [hereinafter Cannes Film Festival].

2. *Id.*

3. “Auteur” is used in film theory to describe a director “whose personal influence and artistic control over his or her films are so great that he or she may be regarded as their author.” “Auteur theory” likewise is “a critical theory . . . based on a belief that a film-maker may be considered as the creator of a body of art, with individual styles, themes, and techniques identifiable throughout their work.” OXFORD ENGLISH DICTIONARY ONLINE EDITION, <http://dictionary.oed.com> (last visited Jan. 18, 2008).

ever-shrinking audience of cognoscenti.”⁴ Cannes’ organizers, making lemonade of the lemons in hand, write that “the Festival has become famed for the balance it has established between artistic quality of films and commercial impact.”⁵ But not all share that view. Lynn Hirschberg, also of the *New York Times*, wrote of the 2004 festival that it “epitomized the extraordinary global reach of American films—sometimes to the point of absurdity.”⁶

While other countries’ entries appeared reflective and probing, taking “globalism as a chance to reveal their national psyches and circumstances through film,” America offered up “Shrek 2”—a computer-animated sequel from DreamWorks depicting the ongoing adventures of a green ogre, his princess bride, and a donkey.⁷ In this contrast, Hirschberg detected an unsettling feature of the image of America projected to the world by Hollywood. Perhaps ironically, in an effort to maximize the global audience and give films the best chance of resonating across cultures and selling across borders, big Hollywood film companies had moved away from stories exploring American life and culture, gravitating rather—by the pull of “corporate finances”—toward lowest-common-denominator themes scrubbed of cultural specificity. The resulting films feature not nuanced dialogue but action and special effects, and certainly not America, but “an invented, imagined world, or one filled with easily recognizable plot devices.”⁸ Evidently it works. As of November 2004, “Shrek 2” was the third-highest grossing film ever.⁹ But of course this is not the only

4. Manohla Dargis & A.O. Scott, *At the Cannes Film Festival, Brows Range From High to Middling*, N.Y. TIMES, May 17, 2006, at E1, available at <http://www.iht.com/articles/2006/05/17/arts/web.0517cannes.php>.

5. Cannes Film Festival, *supra* note 1.

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

7. *Id.* at 90. Of course 2004 was also the year that Michael Moore’s “Fahrenheit 9/11” won Cannes’ highest award. *Id.* However, it was widely speculated that the award had more to do with politics than art. See, e.g., David Gritten, *Cannes Jury Told to Vote for the Film, Not Politics*, DAILY TELEGRAPH (London), May 12, 2005, at 9.

8. Hirschberg, *supra* note 6, at 90-91.

9. *Id.* DreamWorks’ reliance on Shrek may, however, have proven excessive. In 2005 the company had to restate earnings estimates due to miscalculation of “Shrek 2” DVD sales (leading to an informal inquiry by the Securities and Exchange Commission), and by early 2007 the studio risked

way to maximize revenues. Oliver Goodenough has identified another means of expanding the global audience in Hollywood's "devotion to pushing the hot-buttons of human gratification, . . . pour[ing] out high-violence, high-sex, high-materialist product"—what he aptly terms "the salt, fat and sugar of the human psyche"—which, like McDonald's fries, readily appeal to the human animal the world over.¹⁰

The French, the Canadians, and many others around the world find themselves of two minds when it comes to Hollywood production. As consumers, they are all too ready to buy what Hollywood sells, and Hollywood's domination of international film markets reflects this. Whereas one percent of films shown in the United States are foreign, 85% of ticket sales globally are for Hollywood productions,¹¹ which grossed \$9.2 billion in 2004 alone—an 80% increase over the prior decade.¹² Hollywood's trade and lobbying group, the Motion Picture Association of America (MPAA), and its "international counterpart," the Motion Picture Association (MPA), have trumpeted Hollywood's global dominance, observing that "U.S. films are shown in more than 150 countries worldwide" and that the "U.S. film industry provides the majority of home entertainment products seen in millions of homes throughout the world."¹³

In this light, it is surprising neither that film companies in other countries have found it difficult to survive, continually

"looking like a one-trick pony whose only trick is the popular 'Shrek' franchise." Plans to remedy this included doubling the production schedule from one year to two in order to produce better products, though the company did anticipate at least two more Shrek films, which would bring the total to five. According to a DreamWorks executive, while sequels are more expensive (due to the "higher costs involved in luring back the talent"), they involve less risk and tend to do better overall. Merissa Marr, *DreamWorks Reboots for Life Beyond 'Shrek'*, WALL ST. J., Jan. 23, 2007, at B1.

10. 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, 226 (1998).

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

12. Alison James, *Gaul Wall Won't Stall H'wood Anytime Soon*, VARIETY, Oct. 31–Nov. 6, 2005, at 8.

13. Motion Picture Association of America (MPAA), About Us, <http://www.mpa.org/AboutUs.asp> (last visited Jan. 18, 2008) [hereinafter MPAA, About Us].

losing domestic market share to their larger and better endowed American competitors, nor that their governments have stepped in, endeavoring to support local efforts through various regulatory measures. The impact of American popular culture has been especially great in Canada, where 75% of the population is estimated to live within 100 miles of the U.S. border¹⁴ and where Canadian films accounted for only 2.7% of cinema ticket sales in 2003.¹⁵ The Canadian government, in response to the omnipresence of American media, has instituted a raft of legal mechanisms aimed at protecting and promoting domestic producers of cultural goods and services, including subsidies, tax incentives, and quotas requiring that specified amounts of “Canadian content” be shown in Canadian cinemas and broadcast by Canadian television and radio stations.¹⁶

Hollywood, of course, loathes such policies. The MPA was in fact established in 1945 in part “to respond to the rising tide of protectionism resulting in barriers aimed at restricting the importation of American films.”¹⁷ And the MPAA has emphasized that what they term “the content industries” (e.g. film, television, home video, publishing, and software) “are America’s most successful exporters,” producing higher international revenues than any other industry and “creat[ing] jobs in the United States at three times the rate of the rest of the economy.”¹⁸ In 2001 the U.S. audiovisual industry made over \$530 billion (over five percent of gross domestic product) and exported \$90 billion worth of its products to other countries.¹⁹ The MPAA’s long-time (former) leader, Jack Valenti, who

14. See National Geographic Society, Canada, http://www3.nationalgeographic.com/places/countries/country_canada.html (last visited Jan. 18, 2008).

15. See James, *supra* note 12, at 8.

16. See generally Goodenough, *supra* note 10 (discussing the differences between U.S. and Canadian culture as well as the various legal mechanisms each country has developed in response).

17. MPAA, About Us, *supra* note 13.

18. *Impediments to Digital Trade: Hearing Before the Subcomm. on Commerce, Trade & Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 17 (2001) (statement of Bonnie J.K. Richardson, Vice President, Trade & Federal Affairs, MPAA) [hereinafter Richardson].

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

would be recognized by the mid-1990s as the “most formidable trade lobbyist” in the United States,²⁰ liked to describe these industries as “the jewel in America’s trade crown.”²¹

Given the demonstrated export value of these “content industries” and their magnitude relative to the overall U.S. economy, U.S. trade negotiators have enthusiastically responded to the MPAA’s call, pushing hard over the course of recent decades for the maximum degree of audiovisual trade liberalization attainable—wherever they can get it. The differences between the perspectives of Americans and others, however, could not be more stark. So far as the MPAA and U.S. government officials are concerned, films, television shows, and the like are simply entertainment commodities. The reason they sell well abroad, according to this view, is because discerning global consumers voting with their money deem American products superior.²² And as such, there is no reason they should not be governed by the multilateral trade regime. Viewed through this lens, any attempt to “protect” domestic cultural products²³ from international competition would appear suspect—not only as inefficient “protectionism” (used pe-

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

21. Richardson, *supra* note 18, at 17 (quotations omitted).

22. See, e.g., Middleton, *supra* note 19, at 614 (“Jack Valenti, the former president of the [MPAA] has argued that Europeans prefer American programming, claiming that Europeans ‘like, admire, and patronize what we offer them.’”).

23. Drawing a clear, categorical distinction between “goods” and “services” has presented a vexing problem in the trade realm. *The Economist* has, perhaps glibly, defined “services” as “[p]roducts of economic activity that you can’t drop on your foot.” *Economist.com*, Economics A-Z, <http://www.economist.com/research/Economics/alphabetic.cfm?term=services> (last visited Jan. 18, 2008). The WTO Appellate Body has stated that a given product might contain attributes both of goods and of services, and that the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services might both apply to a given product. See Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, at 17, 19 (June 30, 1997).

poratively), but also by reference to widely accepted human rights-based principles of free speech and access to ideas.²⁴

Meanwhile, the prevailing view in many other countries is that these products should be conceptualized not as commodities like any other, but as a special category of products significantly impacting cultural development and national identity. As the authors of an influential Canadian government-sponsored report posed the issue in 1999, “[d]o we define ourselves simply as the producers and consumers of tradeable [sic] goods and services? Or are we prepared to . . . reaffirm the importance of cultural diversity and the ability of each country to ensure that its own stories and experiences are available both to its own citizens and to the rest of the world?”²⁵

Against this backdrop, an extraordinary legal instrument purporting to govern the pursuit of “cultural diversity” has been negotiated—and overwhelmingly approved—in an unlikely forum. By a vote of 148 to 2 (with 4 abstentions), the “Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (the “Culture Convention”) was adopted on October 20, 2005 by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO).²⁶ The document is not a “statement” or “declaration” or “recommendation.” It is a treaty, and by its terms becomes binding international law for the countries that ratify it.²⁷ The United States, which (along with Israel) voted

24. See, e.g., Krista Boryskavich & Aaron Bowler, *Hollywood North: Tax Incentives and the Film Industry in Canada*, 2 ASPER REV. INT’L BUS. & TRADE L. 25, 26 (2002); *U.S. Ambassador to UNESCO Louise Oliver Speaks With Foreign Journalists*, STATES NEWS SERV., Nov. 8, 2005 [hereinafter *U.S. Ambassador*]; Richardson, *supra* note 18, at 20-21.

25. *Time for New Strategies?*, in CULTURAL INDUSTRIES SECTORAL ADVISORY GROUP ON INT’L TRADE (SAGIT), NEW STRATEGIES FOR CULTURE AND TRADE: CANADIAN CULTURE IN A GLOBAL WORLD, sec. 2 (1999), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/can_culture.aspx?lang=en [hereinafter SAGIT REPORT]; see also *infra* Parts III.B and V.A (discussing the SAGIT Report in further detail).

26. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, UNESCO Doc. No. CLT-2005/Convention Diversite-Cult. Rev., available at unesdoc.unesco.org/images/0014/001429/142919e.pdf [hereinafter Culture Convention].

27. By its terms, the Convention enters into force three months after thirty countries have ratified it. *Id.* art. 29. The thirtieth ratification having occurred on December 18, 2006, the Culture Convention took effect March 18, 2007. UNESCO, Convention on the Protection and Promotion of the

against the Culture Convention,²⁸ obviously will not ratify it and as such will not be bound by its terms.²⁹ However, this does not mean that the United States will not be affected by it. Not only does the Convention “reaffirm [the] sovereign right to formulate and implement . . . cultural policies and to adopt measures to protect and promote the diversity of cultural expressions,” but it also takes aim at other international instruments that might impede the exercise of such rights,³⁰ widely understood to mean international trade agreements.³¹ Given that virtually all members of the World Trade Organization (WTO) are also UNESCO members, this presents real cause for U.S. concern.³²

As a legal instrument, the Convention is by any measure a muddle. As U.S. officials have lamented, the Culture Convention offers no definitions for “culture” and “cultural identity,” key concepts upon which the operative terms and central rights and obligations of the document are constructed.³³ As a consequence, the scope of the document’s application is difficult to predict.³⁴ In addition to its conceptual indeterminacy, the article on the Convention’s relationship to other international legal instruments is confusing and apparently contradic-

Diversity of Cultural Expressions, http://portal.unesco.org/la/convention_p.asp?order=alpha&language=E&KO=31038 (last visited Jan. 18, 2008).

28. Alan Riding, *U.S. Backs Hollywood at UNESCO: It Votes Against Plan to Fight Globalization on the Cultural Level*, INT’L HERALD TRIB. (Paris), Oct. 22, 2005, at 5. The four abstaining countries were Australia, Honduras, Liberia, and Nicaragua. *Id.*

29. *See* Vienna Convention on the Law of Treaties arts. 11, 30(4)(b), 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. While the United States would not normally be bound in the absence of ratification, Culture Convention rules nevertheless could become binding upon non-parties through recognition as “customary rule[s] of international law.” *Id.* art. 38.

30. Culture Convention, *supra* note 26, arts. 5, 20.

31. *See infra* Part V for discussion of this potential clash.

32. *See* Tania Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55 INT’L & COMP. L.Q. 635, 635 (2006).

33. Culture Convention, *supra* note 26, art. 4.

34. *U.S. Ambassador*, *supra* note 24; *see also* Voon, *supra* note 32, at 636; Rachael Craufurd Smith, *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?*, 1 INT’L J. COMM. 24, 26 (2007).

tory.³⁵ Thus the Convention's relation to existing international legal obligations is far from obvious.

The diplomatic meaning of the Convention, however, is considerably clearer. As one commentator has observed, whereas France may have been seen as the "lunatic fringe" in the 1990s for its strenuous opposition to bringing cultural products within the scope of WTO negotiations, the Culture Convention's resounding approval—including by the United Kingdom and other close U.S. allies—"shows that international opinion has swung into line with them since."³⁶ As this Article will argue, it is in large part by reference to the dynamics of diplomacy, domestic politics, and ongoing negotiation—and not so much as a legal instrument taking its place amidst existing international legal obligations—that we can best make sense of this otherwise opaque and apparently contradictory document.

This Article aims to identify the Culture Convention's true legal and diplomatic significance. Following a brief look at theoretical and practical conceptions of "culture," the Article examines the treatment of cultural products in the WTO system, the North American Free Trade Agreement, the nascent Free Trade Area of the Americas, the European Union, and recent bilateral trade agreements involving the United States. The Article then traces the history of UNESCO and its efforts to preserve cultural diversity, a history that includes the United States' cool relationship with this United Nations (UN) body. I then examine the origins, negotiation, and drafting of the Culture Convention, paying particular attention to the efforts of Canada, France, and the European Union to ensure its adoption.

The Article concludes that the Culture Convention will likely have little (if any) legal effect on existing trade obligations, but that it will have a significant diplomatic impact on future negotiations toward greater audiovisual liberalization under the WTO system—a major trade policy goal of the United States. The efficacy of the Culture Convention as a means of resisting audiovisual trade liberalization will ultimately depend on the perceived normative legitimacy of the broader argument for shielding cultural diversity through do-

35. See Culture Convention, *supra* note 26, art. 20.

36. See James, *supra* note 12, at 8.

mestic protectionist measures. The final sections of the Article address the trade and culture debate in these broader terms. Based on an examination of the media market, Hollywood's prevailing business model, and the construction of trade rhetoric and deployment of human rights arguments by U.S. trade negotiators and corporate interests, I argue that the burden remains squarely on the United States to demonstrate that the liberalization of trade in cultural products is in fact necessary or desirable.

Though easily dismissed as anti-Americanism,³⁷ the concerns that motivated the adoption of the Culture Convention are better described as non-Americanism—but of a very specific sort. As described *infra*, U.S. policymakers and corporate interests strain to frame the debate about culture and trade by reference to established universal norms and obligations, notably human rights principles, and would-be universal norms and obligations, notably trade principles, in order to obfuscate the fact that this is really about future negotiations regarding potential further liberalization. The true subject matter of the Convention is a terrain that remains politically and diplomatically contestable. And the evil feared, it turns out, is not really America at all; Hollywood represents a quintessentially global business model, if one that could only have taken root in the United States.³⁸

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

II. CULTURE AND NATIONAL IDENTITY: IMAGINED AND RE-IMAGINED

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

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

38. See *infra* Part VI.B (discussing the global nature of the Hollywood business model).

A. *The Elusive Concept of Culture*

In his seminal work on nationalism, Benedict Anderson argues that whatever else nations might be, they are fundamentally “imagined” communities. They are imagined, he observes, in the literal sense that “members of even the smallest nation will never know most of their fellow-members.” Furthermore, they are imagined in the minds of their constituents to be “limited”: They are assumed to have “finite, if elastic, boundaries, beyond which lie other nations”; to be “sovereign” in the post-Enlightenment sense in that they “dream of being free, and, if under God, directly so”; and to be a “community” in that “regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.”³⁹ According to Anderson, these essentially imaginary parameters of association lie at the core of one’s sense of national identity.

Homi Bhabha, building on Anderson’s work, emphasizes the “ambivalence of modern society” that lies at its heart, an equivocal posture resulting in part from the “conceptual indeterminacy” of national identity itself. To the degree that language and art endeavor to represent the national culture, they also construct and alter it. The critical perspective that Bhabha terms “nation as narration” endeavors to shine a bright light on national cultural boundaries precisely to reveal the fluidity and indeterminacy that emerge in all efforts to articulate what the nation actually is. As Bhabha puts it, cultural boundaries are “Janus-faced[,] and the problem of outside/inside must always itself be a process of hybridity, incorporating new ‘people’ in relation to the body politic, generating other sites of meaning and, inevitably, in the political process, producing unmanned sites of political antagonism and unpredictable forces for political representation.”⁴⁰

Though no diplomat or trade negotiator in the U.S. government would likely put it in such esoteric terms, the basic idea—the fundamental fluidity, hybridity, and indeterminacy of any national culture—does a lot of rhetorical work to ad-

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

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

vance the U.S. position on trade in cultural products. Ambassador Louise Oliver, for example, has emphasized that the “United States, the most culturally diverse country in the world, is a vigorous proponent of cultural diversity.”⁴¹ In explaining the United States’ no-vote on the Culture Convention, she argued that the “United States has achieved the vibrant cultural diversity that so enriches our society by our commitment to freedom and our openness to others, and by maintaining the utmost respect for the free flow of ideas, words, goods and services.”⁴² Put differently, if cultural diversity is hybridity, then the most direct and comprehensive means of achieving cultural diversity is the dismantling of border impediments to “the free flow of ideas, words, goods and services.”⁴³ A crucial assumption, of course, is that the desired diversity would continue to exist in a wholly liberalized market, an assumption examined *infra*.⁴⁴ But for the moment, observe the ease with which trade, human rights, and cultural terminology flow together in this formulation, implicitly aligning with the angels Hollywood’s economic interest in unfettered markets.

So what does UNESCO—presumably the UN’s authority on the matter—think “culture” means? Helpfully, UNESCO has assembled a list of “Questions and Answers” on the intersection of trade and culture, though “culture” itself remains undefined. The omission is unsurprising, given that a principal assertion of the cultural studies literature is the de facto impossibility of defining culture in any clear and comprehensive way. UNESCO does offer a narrative description of “cultural industries,” though these, like virtually all definitions involving culture, are defined circularly.⁴⁵ The indeterminacy of

41. Ambassador Louise V. Oliver, Permanent Delegate of the U.S., Statement to 172nd UNESCO Executive Board (Sept. 20, 2005), *available at* <http://www.state.gov/p/io/rls/rm/53915.htm> [hereinafter Oliver Statement 1].

42. Ambassador Louise V. Oliver, Permanent Delegate of the U.S., Statement to 33rd UNESCO General Conference, Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), *available at* <http://geneva.usmission.gov/Press2005/2010Oliver.htm> [hereinafter Oliver Statement 2].

43. *Id.*

44. *See infra* Part VI.

45. “Cultural industries” are defined as “those industries that combine the creation, production and commercialization of contents which are intan-

culture and related concepts would appear to work strongly in favor of the American view: The United States need not define them because its impulse is deregulatory. If in fact regulating cultural industries requires defining culture, UNESCO would appear to be in big trouble.

In any event, while UNESCO may have a hard time saying precisely what makes certain industries, goods, and services cultural in the pertinent sense, it has less trouble quantifying the economic impact of the industries identified as examples. UNESCO observes that cross-border movements of such products have grown substantially over recent decades, with “annual world trade of printed matter, literature, music, visual arts, cinema, photography, radio, television, games and sporting goods surg[ing] from US\$95.340 to \$387.927 millions” between 1980 and 1998.⁴⁶ The “global reach of the North American film industry” is likewise noted, with Hollywood reportedly bringing in half of its revenues overseas—up from thirty percent in 1980.⁴⁷

As it happens, the focus on economic impact suggests—if inadvertently—a potential clarification of what we actually mean when we talk about culture in the context of trade. Oliver Goodenough has distinguished between “high” culture, by which he refers to “opera, ballet, classical music,” and the like, and “popular” culture “such as entertainment film and television, pop music, popular fiction, popular journalism, ‘soft’ news, and commercial architecture.” Though neither comprehensive nor strictly categorical, Goodenough’s distinction does permit a refinement of the debate. As he observes, “the fight here is seldom over ‘high’ culture,” which the United States, like many other nations, routinely subsidizes. What is really at

gible and cultural in nature.” UNESCO, Culture, Trade and Globalisation: Questions and Answers, no. 1, http://www.unesco.org/culture/industries/trade/html_eng/question.shtml (last visited Jan. 18, 2008) [hereinafter UNESCO, Questions and Answers]. “Cultural goods” are described as “those consumer goods [that] convey ideas, symbols, and ways of life” (though a list of examples is provided, including books, magazines, multimedia, software, records, films, videos, audiovisual programs, crafts, and fashion). *Id.* no. 2. “Cultural services” are, predictably, services that aim at “satisfying cultural interests or needs.” *Id.*

46. *Id.* no. 3.

47. *Id.* no. 4.

stake is control over the flow of, and capacity to profit from, popular culture.⁴⁸

Viewed in this light, a precise definition of culture would appear to be less crucial. The legal and normative legitimacy of national governments undertaking to identify and protect such industries is addressed *infra*,⁴⁹ but for the moment it will suffice to observe that what is required is less a comprehensive concept of culture than a pragmatic delineation of industries, the broad-stroke cultural impacts—and profit potential—which are substantial enough both to lead well-heeled producers to look abroad for new markets and to lead cultural ministries and trade negotiators to think twice before allowing them in.

B. *Knowing Culture Backward and Forward*

Before turning to the degree of recognition currently accorded cultural products under existing trade regimes, an additional refinement of the culture concept will further clarify what is truly at stake in the debate about trade and culture. C. Edwin Baker has observed that free trade advocates generally employ a “‘museum,’ ‘commodity,’ or ‘artifact’ conception of culture” which implicitly characterizes claims regarding cultural values as “relatively static, largely *backward*-looking, and very much *content*-oriented.” If this is what culture means, then protectionist policies are vulnerable to the charge that they represent an effort by the powerful—who may benefit from prevailing conceptions of national culture—to keep out the winds of “liberating change” from abroad.⁵⁰

In contrast to these assertions of free trade advocates, however, cultural protectionism is typically underwritten by a

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

49. See *infra* Part VI (discussing national protection of cultural industries).

50. C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 249-50 (2002).

conception of culture as “a living practice” very much rooted in the present. The cultural past is of course relevant, but only as a conceptual context for “discourses of identity and value” in the present and future. The cultural protectionist, then, aims not to protect any specific cultural content, but rather “to assure an adequate context for participation in cultural, social, and democratic dialogue and to provide resources needed for dialogic participation by all members of the cultural community.”⁵¹

Thus it seems that pro-trade and protectionist voices in the trade and culture debate essentially speak past one another. Because the actions of protectionists tend to be the principal subject of debate, though, one could fairly describe this state of affairs as an obfuscation by pro-traders of what is actually going on and what is actually at stake. Deriving substantial rhetorical benefit from the ultimate indeterminacy of culture, pro-traders emphasize the resulting inability to define precisely what protectionists would have us regulate, looking past the fact that there is actually a relatively discrete set of *popular*-cultural industries toward which cultural protectionists direct their strongest claims. And deriving political benefit from the characterization of cultural protectionists as power-hungry mind-controllers endeavoring to keep foreign influences out in order to perfect a static, self-serving conception of national culture, pro-traders likewise ignore the fact that cultural protectionist arguments tend to be forward-looking and discourse-oriented, aiming at the creation of speech opportunities where market forces might otherwise have precluded them.⁵²

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

52. It has been observed that the identification of autonomy and meaningful choice with unfettered market exchange is deeply embedded in the psychology of welfare economics. See, e.g., OWEN-VANDERSLUIIS, *supra* note 51, at 40-49. This is not, however, inconsistent with the claim that the rhetoric of liberalism has been consciously deployed in a strategic manner, as this Article will argue.

III. THE “CULTURE EXCEPTION” AND AGREEING TO DISAGREE

The Culture Convention did not spring into being, fully formed, in a vacuum. In fact, literally hundreds of trade agreements—bilateral, regional, and multilateral—have been negotiated over recent decades,⁵³ and their treatment of cultural products differs as greatly as the historical circumstances, national interests, and relative negotiating leverage of the parties that have entered into them.

This Part of the Article provides a general overview of the pre-existing relationship between culture and trade established through various trade regimes, emphasizing the concerns that Canada and France—the Culture Convention’s principal proponents—have long expressed regarding audiovisual liberalization in both regional and multilateral fora.

A. *General Agreement on Tariffs and Trade*

The General Agreement on Tariffs and Trade (GATT), originally signed in 1947 and incorporated into the WTO agreements, forms the historical and conceptual core of the world trading system.⁵⁴ The most important undertakings that a country makes pursuant to the GATT are so-called “most-favoured-nation [MFN] treatment” and “national treatment” under articles I and III, respectively. MFN treatment requires generally that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁵⁵

53. In addition to the WTO agreements themselves, the WTO indicates that the GATT received notification of 124 regional trade agreements (including bilateral agreements) between 1948 and 1994 and that the WTO, since its creation in 1995, has received notification of over 240 more. World Trade Organization (WTO), *Regional Trade Agreements: Facts and Figures*, http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Jan. 18, 2008). For lists of these agreements, see WTO, *Regional Trade Agreements*, http://www.wto.org/english/tratop_e/region_e/a_z_e.xls (last visited Jan. 18, 2008).

54. See *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *Legal Instruments—The Results of the Uruguay Round, 1867 U.N.T.S. 187*, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

55. *Id.* art. I(1).

In other words, the best treatment extended to any has to be extended to all. National treatment means that “products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject . . . to internal taxes or other internal charges of any kind in excess of those applied . . . to like domestic products.”⁵⁶ In other words, do unto others as you do unto yourself. Terms such as “like products” obviously leave ample room to litigate,⁵⁷ but the basic commitments are conceptually straightforward.

Since its inception in 1947, the GATT has included provisions that ostensibly give national governments some room to maneuver when it comes to cultural goods. Article IV, for example, explicitly permits “screen quotas” favoring domestic films.⁵⁸ This provision reflects the fact that the film industry in Europe, decimated by World War II, had just witnessed the post-war release of years of pent-up Hollywood supply—literally thousands of American films—that had not been previously released in Europe due to the war.⁵⁹ Article XX also includes broadly worded language creating a general exception for measures “necessary to protect public morals” and those “imposed for the protection of national treasures of artistic, historic or archaeological value.”⁶⁰

It would be quite a stretch, however, to characterize such provisions as creating a culture exception from the GATT regime.⁶¹ The more explicit of these two provisions applies specifically to “commercial exhibition” of films, suggesting that this exception should not even reach, for instance, televised

56. *Id.* art. III(2).

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

58. GATT 1994, *supra* note 54, art. IV(a).

59. *See* Hernan Galperin, *Cultural Industries in the Age of Free-Trade Agreements*, 24 CAN. J. COMM. 49, 68 (1999).

60. GATT 1994, *supra* note 54, art. XX(a), (f). The GATT also includes a general safety-valve provision permitting the suspension of obligations under certain circumstances where imports “cause or threaten serious injury to domestic producers . . . of like or directly competitive products.” *Id.* art. XIX(a).

61. *Cf.* Voon, *supra* note 32, at 646, 648-49.

films, let alone made-for-television programming.⁶² And the more general exception for protecting “national treasures of artistic, historic or archaeological value” would not appear to embrace the category of popular culture very comfortably.⁶³ Actual culture exceptions would appear in trade agreements only later and in regional settings.

B. *Free Trade in North America*

Something approaching a true culture exception appears in the North American Free Trade Agreement (NAFTA) as between Canada and both the United States and Mexico (but interestingly, not between the United States and Mexico⁶⁴). The practical utility of the exception for Canada is substantially undercut, however, by an accompanying provision of the agreement.

In the pre-existing Canada-U.S. Free Trade Agreement (CUSFTA), negotiated under the pro-market administrations of Ronald Reagan and Brian Mulroney, a broadly worded culture exception was coupled with a provision permitting retaliation for its use.⁶⁵ Article 2005 of CUSFTA provides generally that “[c]ultural industries are exempt from the provisions of this Agreement,” but that either party could nevertheless “take measures of equivalent commercial effect in response to [such] actions.”⁶⁶ The practical upshot is that an exception intended to comfort the Canadian cultural sector was effec-

62. See Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 287-89 (1997); see also Galt, *supra* note 37, at 912.

63. See Galt, *supra* note 37, at 913. This general exception has, however, been read aggressively by some to embrace “copyrightable goods.” See Cahn & Schimmel, *supra* note 62, at 284-85.

64. Galperin suggests that Mexico’s relative lack of concern regarding U.S. cultural products results from “a combination of relatively strong domestic industries, the limited appeal of American products in some sectors due to cultural distance factors, and the neoliberal orientation of its communication policies.” Galperin, *supra* note 59, at 62.

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

66. Canada-U.S. Free Trade Agreement, Can-U.S., art. 2005, Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281 (1988), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf> [hereinafter CUSFTA]; see also *id.* art. 2012 (defining “cultural industry”).

tively blunted by a mechanism ensuring that cultural products would be treated like others.⁶⁷

NAFTA goes no further than CUSFTA did; it simply incorporates by reference the aforementioned provisions of the bilateral agreement. NAFTA article 2106 and the accompanying annex provide generally that cultural industries, as between Canada and each of the United States and Mexico, are to be governed by the applicable provisions of CUSFTA—including the retaliation provision.⁶⁸ While Canada has argued that the United States' capacity to retaliate under NAFTA should be limited to Canadian measures that would violate CUSFTA, which did not extend to audiovisual services and intellectual property rights, U.S. officials have argued in return that the retaliation provision was intended to serve as a deterrent to the culture exception's use and have not shied away from threatening retaliation in the audiovisual sector.⁶⁹ Indeed, it has been observed that the capacity to retaliate in the cultural products context under NAFTA is even more substantial than in other areas, since retaliation is normally available only following a dispute settlement process.⁷⁰ Moreover, it is widely agreed that retaliatory action need not be limited to the cultural industries,⁷¹ meaning that the United States could impose a de facto tax-and-transfer within Canada to the detriment of whatever industry the United States decided to hit

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

68. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2106, annex 2106, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. For additional background on Canada's cultural policies and the range of international agreements affecting Canada's cultural products, see Media Awareness Network (MAN), Canadian Content Rules (Cancon), http://www.media-awareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm (last visited Jan. 19, 2008); MAN, Canada's Cultural Policies, http://www.media-awareness.ca/english/issues/cultural_policies/canada_cultural_policies.cfm (last visited Jan. 19, 2008); MAN, International Agreements and Canadian Identity, http://www.media-awareness.ca/english/issues/cultural_policies/international_agreements.cfm (last visited Jan. 19, 2008); MAN, Media and Canadian Cultural Policies Chronology, http://www.media-awareness.ca/english/issues/cultural_policies/cultural_policy_chronology.cfm (last visited Jan. 19, 2008).

69. See W. A. DYMOND & MICHAEL M. HART, ABUNDANT PARADOX: THE TRADE AND CULTURE DEBATE 5-6 (2001), available at <http://www.carleton.ca/ctpl/pdf/papers/culture.pdf>; Cahn & Schimmel, *supra* note 62, at 308-10.

70. DYMOND & HART, *supra* note 69, at 5.

71. See Cahn & Schimmel, *supra* note 62, at 310.

(e.g., steel or finance)—presumably chosen to maximize the detriment to Canadian interests overall.⁷²

More recently, Canada has continued to advocate substantial latitude for domestic cultural policies in a broader regional forum. The Free Trade Area of the Americas (FTAA), which would create a free trade area embracing the 34 democratic countries of the Western Hemisphere (thus excluding Cuba), has been under negotiation since 1994 and has foundered on a number of contentious trade and related issues.⁷³ Among other things, Canada has insisted that language on cultural products be included in the FTAA's preamble, and has further advocated a comprehensive culture exception.⁷⁴ Both of these appear bracketed in the current FTAA draft.⁷⁵

C. *The European Union: Unity and Diversity*

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

Article 151 of the Treaty Establishing the European Community provides that the Community "shall contribute to the flowering of the cultures of the Member States, while respect-

72. See, e.g., OWEN-VANDERSLUIS, *supra* note 51, at 142 (observing that the retaliation against Canada threatened by the United States in connection with a dispute over trade in periodicals would have applied "across-the-board . . . , including key sectors such as steel and finance," an approach "meant to create divisions within Canadian society" and bring internal pressure to bear upon the Canadian government).

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

74. See Foreign Affairs and International Trade Canada, Cultural Diversity in the FTAA—Canada's Position, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ftaa-zlea/C-PandP.aspx> (last visited Jan. 19, 2008) (explaining Canada's commitment in the FTAA negotiations to maintaining maximum flexibility to pursue cultural policy objectives and drawing attention to multilateral efforts to promote the importance of preserving cultural diversity); Foreign Affairs and International Trade Canada, Canada's Proposal for a Cultural Exemption, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ftaa-zlea/culture.aspx> (last visited Jan. 19, 2008).

75. Free Trade Area of the Americas Draft Agreement, ch. I, ch. XXII art. 7, Nov. 21, 2003, http://www.ftaa-alca.org/FTAADraft03/Index_e.asp (last visited Jan. 19, 2008).

ing their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”⁷⁶ This is generally referred to as the principle of “unity in diversity.”⁷⁷ Articulating wherein that unity resides, however—or more precisely, saying what it means to be European—has proven difficult. Article 49 of the Treaty on European Union provides that any European country can apply to join the Union,⁷⁸ but “European” is never defined, and some have contended that the European Union (EU) “needs a stronger identity to be viable.”⁷⁹ The theme of unity in diversity is also emphasized in the Charter of Fundamental Rights of the European Union, the preamble of which notes the “common values” of Europe—including “human dignity, freedom, equality and solidarity,” as well as “principles of democracy and the rule of law”—and characterizes the EU as “contribut[ing] to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.”⁸⁰ The Charter affirms “the right to freedom of expression,” including the freedom “to receive and impart information and ideas without interference by public authority and regardless of frontiers,” while at the same time affirming that the EU “shall respect cultural, religious and linguistic diversity.”⁸¹

The project of European integration has long been marked by the struggle to forge a coherent European identity, and one of the means through which policymakers have endeavored to achieve this end is a continental audiovisual policy embodied in the Television Without Frontiers Directive.⁸² Ac-

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

77. EurActiv.com, European Values and Identity, <http://www.euractiv.com/en/future-eu/european-values-identity/article-154441> (last visited Jan. 18, 2008).

78. Consolidated Version of the Treaty on European Union art. 49, Dec. 24, 2002, 2002 O.J. (C 325) 5.

79. EurActiv.com, *supra* note 77.

80. Charter of Fundamental Rights of the European Union pmbll., Dec. 7, 2000, 2000 O.J. (C 364) 8.

81. *Id.* arts. 11(1), 22.

82. See 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, 1989

ording to a discussion document released prior to the promulgation of the Directive, both unity and diversity could be achieved through a common liberalized audiovisual policy precisely because such an approach would help identify a “common European heritage” as broadcasters competed for pan-European audience share.⁸³ In practice, however, the liberalization of European audiovisual markets has not resulted in the coalescence of a truly European media landscape. As one scholar put it, “the idea that the free flow of cultural products would bring to the fore the ‘common European identity,’ thus creating a pan-European audience, has proven overly simplistic.”⁸⁴

Indeed, recent surveys suggest that Europeans still tend to think of themselves in predominantly national terms.⁸⁵ Ironically, the liberalization of audiovisual policy may have made things worse by reinforcing the dominance of those Member States with the strongest media industries—France, Germany, and the United Kingdom.⁸⁶ Although some, like former European Commission President Jacques Delors, urge that Europe-

O.J. (L 298); Council Directive 97/36/EC, 1997 O.J. (L 202) (amending Council Directive 89/552/EEC), *available at* <http://europa.eu/scadplus/leg/en/lvb/l24101.htm> [hereinafter Amended TWF Directive]. Efforts to update and modernize the Television Without Frontiers Directive continue. *See* European Commission, Audiovisual and Media Policies, Legislative Proposal for an Audiovisual Media Services Directive: Towards a Modern Framework for Audiovisual Content, http://ec.europa.eu/avpolicy/reg/twtf/modernisation/proposal_2005/index_en.htm (last visited Jan. 19, 2008).

83. Galperin, *supra* note 59, at 55 (quotations omitted).

84. *Id.* at 56-57.

85. One study found that just 47% of respondents considered themselves citizens both of their country and Europe, and that 92% felt greater attachment to their home countries. EurActiv.com, *supra* note 77.

86. Middleton, *supra* note 19, at 625. Similarly, Owen-Vandersluis observes that the liberalism at the heart of the common market project substantially narrows the scope of cultural diversity compatible with it; there is a level of comfort in “giving primacy to the community *and* espousing diversity precisely because it views liberal values as the only natural basis for that community.” OWEN-VANDERSLUIS, *supra* note 51, at 171-72. Owen-Vandersluis presciently anticipates greater tension, however, as expansion of the European Union introduces a degree a cultural diversity that increasingly confounds attempts to specify the content of the much-heralded European identity. *Id.*

ans “proceed further in this quest for a European identity,”⁸⁷ it has remained difficult—particularly in light of enlargement concerns—to say what European identity might amount to, beyond that it is not American.⁸⁸ While a truly European polity has not yet emerged, one observer has suggested that a “factor that could help” forge such a polity was “growing anxiety among Europeans about US hegemony.”⁸⁹

Nevertheless the EU, spearheaded by France, has strongly defended the capacity of individual member states to pursue cultural policies at the global level. As described *infra*,⁹⁰ the EU steadfastly refused to make liberalization commitments on audiovisual services within the WTO framework,⁹¹ and the EU Parliament has more recently expressed continued support for the European Commission’s approach to the Doha round of WTO negotiations, making “no offers of liberalisation . . . in the health, education and audiovisual sectors” and affirming

87. Jacques Delors, *Europe’s Self-Doubting Also Proves to be Asset*, SUNDAY PATRIOT-NEWS (Harrisburg), Sept. 17, 2000, at B15.

88. See Sarah Lyall, *Under One Flag: For Young Europeans, Identity Questions*, INT’L HERALD TRIB. (Paris), Mar. 5, 2004, at 1. On the failed constitutional referenda in France and the Netherlands and their relationship to national politics, particularly with respect to concerns regarding the voting structure in an expanded EU, see generally RICHARD E. BALDWIN, CTR. FOR EUR. POL’Y STUD., CEPS POLICY BRIEF NO. 104, TRAIL TO FAILURE: HISTORY OF THE CONSTITUTIONAL TREATY’S REJECTION AND IMPLICATIONS FOR THE FUTURE (2006), available at http://shop.ceps.be/BookDetail.php?item_id=1332; see also EurActiv.com, Merkel: EU Needs a Rethink, <http://www.euractiv.com/en/future-eu/merkel-eu-needs-rethink/article-155193> (last visited Jan. 15, 2008) (German Chancellor Angela Merkel arguing that “[w]e need the constitutional treaty,” and that including a “catalogue of European fundamental values” would help to clarify a European identity) (quotations omitted). Like the treaties it would replace, the proposed constitution is open to “European” countries (undefined), and includes the “unity in diversity” principle. See Treaty Establishing a Constitution for Europe arts. I-58, III-280, 2004 OJ (C 310) 1.

89. Raphael Minder, *Elections Fought on Europe-Wide Themes Have Failed to Materialize*, FIN. TIMES (London), June 7, 2004, at 15. Minder likewise observes the weakness of the EU Parliament, the only directly representative EU institution. *Id.*; cf. MICHAEL EFLER & PERCY ROHDE, CRITICAL ANALYSIS OF THE DEMOCRATIC ASPECTS OF THE EU (Mehr Demokratie trans., 2005), available at http://www.mehr-demokratie.de/fileadmin/bund/pdf/EU-Kritik_20050505_en.pdf (observing the absence of a truly European polity and advocating greater direct democratic participation in EU institutions).

90. See *infra* Part V.B.

91. See Galt, *supra* note 37, at 914.

that “each Member State should have the legal flexibility to take all necessary measures in the areas of cultural and audiovisual policy so as to preserve and promote cultural diversity.”⁹²

D. *General Agreement on Trade in Services*

The General Agreement on Trade in Services (GATS), another agreement incorporated into the WTO framework,⁹³ creates obligations more modest in scope than those under the GATT. This difference reflects in large part the influence of France in its negotiation. In the face of Hollywood’s lobbying for greater global market access,⁹⁴ France pushed for the opposite extreme—complete “exclusion of the audiovisual sector from GATS talks.”⁹⁵ Ultimately the parties settled on an uneasy “agreement to disagree,” under which the audiovisual sector would not be formally excluded, but countries could decline to make commitments in the area with the understanding that negotiations would resume within five years.⁹⁶ Perhaps predictably, very few commitments affecting popular culture have been made.⁹⁷ For purposes of on-going negotiations, however, the WTO has described audiovisual services as including “motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission

92. Resolution on the General Agreement on Trade in Services (GATS) Within the WTO, Including Cultural Diversity, EUR. PARL. DOC. P5_TA (2003) 0087, ¶¶ 6, 12 (2003).

93. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments: The Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

94. Cable, *supra* note 20, at 234.

95. Cahn & Schimmel, *supra* note 62, at 295. France played a similar role in the failed effort toward a Multilateral Agreement on Investments (MAI), withdrawing from MAI negotiations with concerns regarding labor, the environment, and “particularly . . . the ability of governments to apply policies for the development and promotion of strategic sectors such as cultural industries.” UNESCO, Questions and Answers, *supra* note 45, no. 20.

96. See Galt, *supra* note 37, at 914; Cahn & Schimmel, *supra* note 62, at 291-301; Galperin, *supra* note 59, at 69; Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT’L ECON. L. 553, 554-55 (2006).

97. See Michael Hahn, *A Clash of Cultures?: The UNESCO Diversity Convention and International Trade Law*, 9 J. INT’L ECON. L. 515, 526 (2006).

services, [and] sound recording.”⁹⁸ As digital technologies advance, however, the substantive distinction between goods and services of this sort appears increasingly arbitrary.⁹⁹

Article XVII of the GATS requires that national treatment be extended by a country only to service sectors “inscribed in its Schedule, and subject to any conditions and qualifications set out therein.”¹⁰⁰ Article XIX, then, requires that “Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization.” Crucially, however, Article XIX also includes a limiting principle, providing that this “process of liberalization shall take place with due respect for national policy objectives.”¹⁰¹ This limit-

98. WTO, Audiovisual Services, http://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm (last visited Jan. 19, 2008). The WTO Secretariat has observed that it can be difficult to distinguish “radio and television transmission services” characterized as “telecommunications” from those characterized as “audiovisual services,” but that as “a general rule of thumb . . . it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications.” Council for Trade in Services, *Audiovisual Services: Background Note by the Secretariat*, ¶ 5, S/C/W/40 (June 15, 1998).

99. Michael Hahn observes that it is largely “arbitrary from a policy standpoint that a Hollywood blockbuster would be subjected to a completely different legal regime if it was to be projected onto foreign screens not from a cinematographic film [a good governed by GATT], but by using digitally transmitted data sent from some central distribution point [a service governed by GATS].” Hahn, *supra* note 97, at 527. Predictably, the United States favors conceptualizing digital products as goods, triggering the more restrictive GATT, while the EU favors conceptualizing them as services and applying the less demanding GATS. The radical divergence between these regimes—and the apparently irreconcilable demands of these central negotiating parties—has led some to call for greater efforts to harmonize the treatment of such products under the WTO system. See, e.g., Tania Voon, *A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS*, 14 UCLA ENT. L. REV. 1, 17-18, 31 (2007) (advocating the application of GATS to digital audiovisual products, though with invigorated MFN and national treatment obligations and subject to a limited exception for discriminatory subsidies).

100. GATS, *supra* note 93, art. XVII(1).

101. *Id.* art. XIX(2). Services have been included in WTO negotiations since January 2000, see WTO, Services Trade, http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (last visited Jan. 18, 2008), but these negotiations were suspended in July 2006 due to a lack of overall progress, notably

ing principle is essential to understanding the purpose and practical significance of UNESCO's Culture Convention, which above all else speaks to a national policy objective of great importance to the countries that adopted it. Indeed, the Culture Convention explicitly requires that the principles it embodies be taken into account in negotiations in other fora, including the WTO.¹⁰²

E. *Bilateral Trade with the United States*

While multilateral GATS negotiations have taken the so-called "positive" approach to liberalization, applying trade disciplines only in those sectors explicitly listed in a schedule, the United States far prefers—and in recent bilateral negotiations, has pursued—the "negative" approach of imposing broad-reaching disciplines and then requiring that any *deviations* from liberalization be scheduled. In the bilateral negotiation setting the United States is much better positioned to demand the more comprehensive negative approach to trade liberalization. The results of this bargaining power are reflected in the degree of liberalization secured by the United States in bilateral agreements entered since 2002 with Chile, Singapore, Central American countries, the Dominican Republic, Australia, and Morocco, respectively.¹⁰³

Beyond use of the negative approach, Bernier identifies some illuminating trends. First, the United States has permitted limited reservations for existing quotas and other restrictions keyed to "traditional technologies," saving its sterner demands for the digital technologies of the future. And second, the relative abilities of these negotiating parties to withstand American demands for liberalization of trade in cultural products "reflect quite accurately the negotiating capacity of the States involved"—meaning that "as usual, the least able to protect themselves . . . end up paying the higher price."¹⁰⁴ Austra-

in agriculture. See General Council, Report by the Chairman of the Trade Negotiations Committee to the General Council (July 27, 2006), http://www.wto.org/english/news_e/news06_e/tnc_chair_report_27july06_e.htm (last visited Jan. 18, 2008).

102. See *infra* Part VI.

103. See IVAN BERNIER, *THE RECENT FREE TRADE AGREEMENTS OF THE UNITED STATES AS ILLUSTRATION OF THEIR NEW STRATEGY REGARDING THE AUDIOVISUAL SECTOR I* (2004).

104. *Id.* at 15.

lia, the most affluent of these states, insisted upon numerous reservations in the audiovisual sector, among other things preserving existing quotas for commercial television and commercial radio.¹⁰⁵ Likewise Singapore and Chile managed to include relatively significant reservations, as did Costa Rica, the Dominican Republic, and Morocco.¹⁰⁶ At the other end of the spectrum, however, the least affluent participants in the negotiations—Guatemala, Honduras, El Salvador, and Nicaragua—left their audiovisual sectors “wide open to imports.”¹⁰⁷ Indeed, it is clear that the relative ability of these countries to withstand U.S. demands for liberalization of cultural products maps well onto per capita gross domestic product for each of these countries.¹⁰⁸

105. “The only thing that was lost in that regard was the capacity to adopt higher quotas or more restrictive measures.” *Id.* at 13. The United States and Australia, of course, each presented the agreement as a victory to their constituents. Whereas the Office of the U.S. Trade Representative claimed that “[i]n broadcasting and audiovisual services, the FTA contains important and unprecedented provisions to improve market access for U.S. films and television programs over a variety of media including cable, satellite, and the Internet,” emphasizing the new technologies, Australia’s Department of Foreign Affairs and Trade focused rather on the maintenance of “existing local content requirements” as well as “Australia’s right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements.” Press Release No. 04-08, Office of the United States Trade Representative, U.S. and Australia Complete Free Trade Agreement (Feb. 8, 2004) (on file with author); *see also* Australian Government, Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement: Key Outcomes, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/02_key_outcomes.html (last visited Jan. 15, 2008) (stating that through the agreement the government had “ensure[d] local content on Australian media, and retains the capacity to regulate new and emerging media, including digital and interactive TV”).

106. BERNIER, *supra* note 103, at 10-15. The Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) is a free trade agreement among the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. *See* U.S. Government Export Portal, U.S.-CAFTA-DR Free Trade Agreement Frequently Asked Questions, <http://www.export.gov/fta/CAFTA/FAQ.asp> (last visited Jan. 19, 2008).

107. BERNIER, *supra* note 103, at 11-12.

108. According to the International Monetary Fund’s World Economic Outlook Database, the purchasing power parity per capita gross domestic product of each of these countries (in current international dollars) for 2006 is estimated to be: Australia, \$32,127.483; Singapore, \$29,742.848; Chile, \$12,737.111; Costa Rica, \$10,747.292; Dominican Republic,

The bilateral setting would appear to offer the United States enormous benefits in terms of the capacity to establish useful precedents for future negotiations in other fora.¹⁰⁹ It is considerably easier for the United States to get what it wants in bilateral negotiations than it is multilateral negotiations, and this clearly applies to the context of cultural products. At the same time, however, commitments undertaken by countries that ratify UNESCO's Culture Convention would seem—at least in theory—to problematize U.S. trade strategies in the bilateral context just as much as in the multilateral context. The Culture Convention requires that “when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention”¹¹⁰—a commitment that applies with equal force in bilateral and regional fora as at the multilateral level. Less affluent countries negotiating one-on-one with the United States will undoubtedly remain subject to greater pressure to liberalize trade in cultural products, as in other areas,¹¹¹ but the Culture Convention could nevertheless present a real legal and diplomatic hurdle to the attainment of the United States' trade agenda if bilateral negotiating parties can point to the Culture Convention as a defense for the preservation of cultural diversity.

IV. UNESCO AND CULTURAL DIVERSITY

The same cultural concerns that have long simmered in the trade context have found expression in other settings as well—notably in the United Nations. In fact, the relationship between trade and culture that emerged through various trade regimes over the decades has been accompanied by distinct though equally salient historical developments unfolding in a

\$8,018.117; Morocco, \$4,818.552; El Salvador, \$4,619.982; Guatemala, \$4,265.803; Nicaragua, \$3,769.531; and Honduras, \$3,130.951. IMF, *World Economic and Financial Surveys: World Economic Outlook Database* (Sept. 2006), <http://www.imf.org/external/pubs/ft/weo/2006/02/data/index.aspx> (last visited Jan. 19, 2008).

109. For an exploration of such negotiating tactics in the FTAA negotiations, see Bruner, *supra* note 73, at 38-52.

110. Culture Convention, *supra* note 26, art. 20(1)(b).

111. See, e.g., International Centre for Trade and Sustainable Development, *UNESCO Overwhelmingly Approves Cultural Diversity Treaty*, BRIDGES WKLY. TRADE NEWS DIG., Oct. 26, 2005, <http://www.ictsd.org/weekly/05-10-26/story4.htm> [hereinafter ICTSD].

very different forum. Just as critical to a full understanding of the Culture Convention's negotiation and role in international law and politics is UNESCO's own treatment and conceptualization of cultural concerns—increasingly defined in recent decades by reference to threats posed by free trade.

UNESCO, like the GATT, was born of a post-war desire to secure the peace by facilitating international connections and modes of exchange. Just as the architects of the GATT believed that the extreme protectionism of the 1930s had contributed to the outbreak of war and that free trade constituted an essential step in achieving economic recovery, stability, and security,¹¹² so UNESCO's founders stated in the organization's 1945 constitution that "ignorance of each other's ways and lives has been a common cause . . . of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war," and that "the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind."¹¹³

The primary purpose of UNESCO, then, is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed . . . by the Charter of the United Nations."¹¹⁴ Crucial questions, of course, include how UNESCO best achieves this and what specific goals the organization can pursue consistent with this expressed purpose. UNESCO's constitution identifies certain means of "realiz[ing] this purpose," including recommending "such international agreements as may be necessary to promote the free flow of ideas by word and image"¹¹⁵—language well suited to the United States' liberalizing agenda

112. Renato Ruggiero, WTO Director-General, Address to the Brookings Institution Forum: "From Vision to Reality: The Multilateral Trading System at Fifty (Mar. 4, 1998), available at http://www.wto.org/english/news_e/spr_e/wash_e.htm.

113. Constitution of UNESCO pmbl., Nov. 16, 1945, 4 U.N.T.S. 275, available at http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.

114. *Id.* art. I(1).

115. *Id.* art. I(2)(a).

in today's trade and culture debate.¹¹⁶ At the same time, however, UNESCO's constitution does recognize and endorse the preservation of "the independence, integrity and fruitful diversity of the cultures and education systems of the States Members of the Organization."¹¹⁷ Although this language technically goes to what the organization will refrain from doing (i.e., interfering in domestic policy), there is broader language that further legitimates UNESCO's actions in the area of cultural diversity—notably, its mandates to "[c]ollaborate in the work of advancing the mutual knowledge and understanding of peoples"; to further conservation of "books, works of art and monuments of history and science"; and to facilitate "methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them."¹¹⁸ Though none of this speaks directly to cultural protectionist policies of the type later embraced in an era of globalization—unsurprising, given the recent history of extreme isolationism and global war preceding UNESCO's creation in 1945—these broadly worded mandates do suggest that the organization's founders envisioned it pursuing various courses of action to further mutual understanding among the peoples and cultures of the world. The Culture Convention is thus in harmony with UNESCO's broad purpose, aiming to legitimate the use of domestic policies not to keep foreign words and images out, but to preserve the means of local cultural production.¹¹⁹

116. See, e.g., Oliver Statement 2, *supra* note 42 (citing this language in explaining the United States' no vote on the Culture Convention). Incidentally, the United States has also emphasized its role in the founding of UNESCO, including the drafting of the preamble to UNESCO's constitution by American author Archibald MacLeish. See U.S. Dept. of State, About U.S. and UNESCO, <http://www.state.gov/p/io/unesco/usunesco/> (last visited Jan. 20, 2008).

117. Constitution of UNESCO, *supra* note 113, pmb., art. I(3).

118. *Id.* art. I(2).

119. The Culture Convention expresses the view that "cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all," while also stating that "cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures." Culture Convention, *supra* note 26, pmb.

A. *Culture as Organism*

UNESCO has facilitated the adoption of a number of instruments relating to cultural preservation,¹²⁰ which have increasingly conceptualized cultural diversity as a form of public good. Notably, in the Universal Declaration on Cultural Diversity (UDCD) adopted in 2001, cultural diversity, “embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind,” is described as being “as necessary for humankind as biodiversity is for nature.” Cultural diversity is likened to genetic diversity; it is “a source of exchange, innovation and creativity.”¹²¹

Elsewhere UNESCO has built on this conception, stating that “‘cultural ecosystems’ made up of a rich and complex mosaic of cultures, more or less powerful, need diversity to preserve and pass on their valuable heritage to future generations.”¹²² Having taken the position that diversity of cultures is itself a good, the UDCD continues to state that while “ensuring the free flow of ideas” is obviously important, “care should be exercised that all cultures can express themselves and make themselves known.”¹²³ If the aim to limit the perceived homogenizing influence of free trade were not already clear enough, the UDCD adds that “cultural goods and services . . . as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.”¹²⁴ Because

120. See, e.g., Universal Declaration on Cultural Diversity, UNESCO Res. 25, 31st Gen. Conference, UNESCO Doc. 31 C/25 (Nov. 2, 2001), available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf> [hereinafter UDCD]; Charter on the Preservation of Digital Heritage, UNESCO Res. 28, 32nd Gen. Conference, UNESCO Doc. 32 C/28 (Oct. 17, 2003), available at http://portal.unesco.org/ci/en/files/13367/10700115911Charter_en.pdf/Charter_en.pdf; Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO Doc. MISC/2003/CLT/CH/14 (Nov. 17, 2003), available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>; UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore, 25th Gen. Conference (Nov. 15, 1989), available at http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html; see also Brooks, *supra* note 11, at 114-20 (discussing UNESCO in general as well as its objectives, obstacles, and significance); Smith, *supra* note 34, at 28-29.

121. UDCD, *supra* note 120, art. 1.

122. UNESCO, Questions and Answers, *supra* note 45, no. 18.

123. UDCD, *supra* note 120, art. 6.

124. *Id.* art. 8.

“[m]arket forces alone cannot guarantee the preservation and promotion of cultural diversity,” each country must, “with due regard to its international obligations, . . . define its cultural policy and . . . implement it through the means it considers fit.”¹²⁵

That this should not come at the expense of individual rights of free speech and expression—including the right to receive information of one’s choosing—is reflected in the frequent use of qualifiers.¹²⁶ But at the same time, the document refers explicitly to a guarantee of the right to participate in the cultural life of one’s community appearing in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.¹²⁷

Perhaps most significantly, however, the UDCD asserts that “the pre-eminence of public policy . . . must be reaffirmed,”¹²⁸ suggesting that in the view of those standing behind this document, a pre-existing political prerogative had been displaced by liberal economics. The attached action plan, then, encourages “consideration of the advisability of an international legal instrument on cultural diversity,”¹²⁹ a step presumably aimed at bolstering the reassertion of domestic policy autonomy in an area increasingly dominated by free trade obligations.

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

Notwithstanding its involvement in the organization’s founding, the United States parted ways with UNESCO for about twenty years starting in 1984 due to “a growing disparity

125. *Id.* arts. 9, 11.

126. The UDCD employs such a structure repeatedly (“While ensuring the free flow of ideas by word and image . . .”; “While ensuring the free circulation of ideas and works . . .”). *Id.* arts. 6, 9.

127. *Id.* art. 5. See also Universal Declaration of Human Rights, G.A. Res. 217A, art. 27, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), at 52, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter ICESCR].

128. UDCD, *supra* note 120, art. 11.

129. *Id.* at 15 ¶ 1 (Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity).

between U.S. foreign policy and UNESCO goals.”¹³⁰ More specifically, the rift reflected diverging views between the United States and developing countries on the propriety of “free-market dominance of the world communications order.”¹³¹ A 1980 UNESCO-sponsored report of a commission led by Irish diplomat Sean MacBride recommended, among other things, that public funding be made available for “non-commercial forms of mass communication” as a means of improving the communications order. Although the report specifically rejected government censorship and affirmed as basic human rights the freedom to speak and receive information, the report was nevertheless tarred by the U.S. government and the American Bar Association as an assault on principles of free speech.¹³²

The United States returned to UNESCO in 2003 with President George W. Bush explaining that the organization had “been reformed.”¹³³ The 2001 UDCD, however, included what U.S. officials must have considered an ominous gesture toward a potential treaty to be negotiated in a forum in which the United States had no formal input. In this light, one might reasonably question whether the real impetus for the return to UNESCO was precisely that it had *not* been reformed, and that it in fact seemed to be moving more decidedly in what U.S. officials considered the wrong direction. An unnamed U.S. official speaking to a journalist in the wake of the Culture Convention’s adoption reportedly “insisted that the United States did not rejoin specifically to address the cultural diversity treaty.”¹³⁴ Regardless, opposition to the Culture Convention would become a major preoccupation for U.S. representatives upon rejoining UNESCO.

V. THE CULTURE CONVENTION

Although the explicit drive toward a treaty on the protection and promotion of cultural diversity most clearly emerged

130. U.S. Dept. of State, *supra* note 116.

131. BAKER, *supra* note 50, at 218; *see also* Smith, *supra* note 34, at 25.

132. BAKER, *supra* note 50, at 271-73 (quotations omitted).

133. U.S. Dept. of State, *supra* note 116.

134. William New, *U.N. Group OKs Diversity Treaty Over U.S. Objections*, NAT’L J. TECH. DAILY, Oct. 17, 2005 (paraphrasing an unnamed “U.S. official”).

within UNESCO in the UDCD, countries that felt particularly vulnerable to U.S. media domination had for years actively advocated such an international instrument. Chief among them were Canada and France¹³⁵—developed nations and allies with whom the United States has long maintained significant trade and cultural ties. Both of these countries have long feared U.S. media domination, and they would prove to be the principal proponents of a cultural diversity treaty that takes direct aim at Hollywood and the U.S. project of liberalizing trade in audiovisual products.

A. *Canada*

Canada's concerns regarding U.S. media power are longstanding. The Canadian Broadcasting Corporation was itself created in the early twentieth century amidst fears of U.S. radio dominance.¹³⁶ Today, the principal governmental body responsible for cultural policy is the Department of Canadian Heritage, and the broad range of domestic legal structures aimed at the preservation of Canadian culture includes content regulations, ownership restrictions, language policies, subsidies, and tax measures.¹³⁷ Content regulation involves a system of quotas requiring that specified amounts of Canadian content be broadcast through a given medium. Whether a given musical performance or television program qualifies as "Canadian" for these purposes turns generally on whether a critical mass of creative decisions were made by Canadians.¹³⁸ In essence, this system permits the employment of Canadianness as a regulatory concept without directly involving the government in specifying the concept's content.¹³⁹ For example,

135. See, e.g., Brooks, *supra* note 11, at 120 (observing that Canada and France were "the driving forces behind" the Culture Convention); Smith, *supra* note 34, at 27, 30.

136. MAN, *Media and Canadian Cultural Policies Chronology*, *supra* note 68.

137. See generally MAN, *Canada's Cultural Policies*, *supra* note 68.

138. See generally MAN, *Canadian Content Rules*, *supra* note 68.

139. See OWEN-VANDERSLUIJ, *supra* note 51, at 130. Owen-Vandersluis points out that Canadian content requirements exclude residents lacking formal citizenship as well as "cultural outsiders" desiring to participate in domestic Canadian debates, and argues that requiring "original" content—that is, content "produced for the Canadian market"—would offer a superior regulatory approach more consistent with cultural diversity concerns. *Id.* at 148-49.

radio stations are required to “ensure that 35% of their popular musical selections are Canadian each week,” and private television stations, networks and “ethnic TV” are generally required, over the course of each year, to ensure that 60% of daytime programming and 50% of evening programming is Canadian.¹⁴⁰ The Canadianness of media is assessed according to guidelines promulgated by the Canadian Radio-television and Telecommunications Commission.¹⁴¹

Canada has likewise sought to protect its capacity to enact and enforce such cultural policies, as discussed *supra*, by insisting that various trade agreements include special provisions governing cultural products or exempting them altogether.¹⁴² The importance of cultural policy to Canadians is reflected in the Canadian Charter of Rights and Freedoms, a component of the Constitution of Canada, which affirms “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication,” while providing that the Charter “be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”¹⁴³

A 1999 report produced by the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), a group advising Canada’s Departments of Cultural Heritage and Foreign Affairs and International Trade, makes clear that the thrust of Canada’s cultural policy is directed at a discrete range of popular media: “Canadian books, magazines, songs, films, new media, radio and television programs reflect who we

140. See Canadian Radio-television and Telecommunications Commission (CRTC), Ensuring a Place for Canadian Music, http://www.crtc.gc.ca/eng/cancon/r_cdn.htm (last visited Jan. 19, 2008); CRTC, Ensuring a Place for Canadian Programs, http://www.crtc.gc.ca/eng/cancon/t_cdn.htm (last visited Jan. 19, 2008).

141. Whether music is sufficiently Canadian is assessed according to the MAPL system (generally requiring that at least two of four creative elements be Canadian or the work of Canadians: the musician, the artist, the place of production and recording, and/or the lyrics). Television programs can be certified as Canadian if the key producer and “creative personnel” are Canadians and “75% of service costs and post-production lab costs are paid to Canadians.” See CRTC, The MAPL System, http://www.crtc.gc.ca/eng/INFO_SHT/R1.htm (last visited Jan. 19, 2008).

142. See *supra* Part III.B.

143. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

are as a people.”¹⁴⁴ Globalized and increasingly liberal markets, however, had made it “more challenging to negotiate trade agreements that recognize cultural diversity and the unique nature of cultural products.”¹⁴⁵ SAGIT concluded that the best solution to this dilemma would be a treaty on cultural diversity, which among other things would permit countries to implement and maintain domestic legal structures promoting cultural and linguistic diversity and to clarify which types of protective measures would be permitted without raising the specter of retaliation.¹⁴⁶

In its report, SAGIT observed that “cultural industries not only help us exchange ideas and experiences, they make a significant contribution to our economy.”¹⁴⁷ The economic contribution of cultural production, however, has a double-edged cultural effect, as Canada has sought not only to spur domestic cultural production and bolster the competitiveness of Canadian cultural producers but also to lure lucrative Hollywood production across the border. Ironically, while the purpose of the former is to maintain cultural distance from the United States, the practicality of the latter depends critically on Canada’s cultural and geographic proximity to the United States.¹⁴⁸ Ultimately the impacts of these measures are difficult to ascertain, though scholars examining the effects of a tax incentive scheme aimed at attracting film producers to Manitoba found that in subsequent years foreign production activities increased substantially while Canadian production activities in the province actually declined.¹⁴⁹

Much like the view later adopted in the UDCD,¹⁵⁰ SAGIT’s report characterizes local cultural production as a public good, observing that the “Canadian government invests in promoting culture, just as it invests in other activities that benefit its citizens.”¹⁵¹ Many commentators have observed that media products exhibit the two principle economic char-

144. *Executive Summary*, in SAGIT REPORT, *supra* note 25, pmb1.

145. *Pressures for Change*, in SAGIT REPORT, *supra* note 25, sec. 1.

146. *Some Made-in-Canada Approaches*, in SAGIT REPORT, *supra* note 25, sec. 23.

147. *Id.*

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

149. *Id.* at 33.

150. *See supra* Part IV.A.

151. *Promoting Canadian Culture*, in SAGIT REPORT, *supra* note 25, sec. 9.

acteristics of public goods: (1) non-exclusive use, meaning that once created, the use of the product by one person does not impinge on its use by another person (which in turn suggests that the cost of providing it to each additional person will be less than the average cost of providing it to all); and (2) non-excludability, meaning that those who do not help defray its cost can get the same benefit as those who do.¹⁵² As the SAGIT report implies, however, the benefits that a society derives from maintaining its own cultural production capacities—“a better understanding among people in Canada,” “a healthy multicultural society,” “a sense of community”¹⁵³—are public goods that only government policy can ensure. Just as the government policymakers who want a vibrant Canadian audiovisual industry might nevertheless find it hard to turn down the economic benefit that comes from facilitating Hollywood production in Canada, so individuals who might favor policies buffering domestic cultural producers might nevertheless, as consumers, choose rather to buy (or watch or listen to) American cultural products.¹⁵⁴

SAGIT’s preference for a new international instrument presumably also reflects its perception that culture exceptions embedded in trade agreements cannot be relied upon to provide sufficient protection—a conclusion reinforced by trade disputes between Canada and the United States.¹⁵⁵ For exam-

152. See, e.g., BAKER, *supra* note 50, at 8-9; Galperin, *supra* note 59, at 52.

153. *Promoting Canadian Culture*, in SAGIT REPORT, *supra* note 25, sec. 9; cf. *Canadian Content and the Information Highway*, in REPORT OF THE CANADIAN CONTENT AND CULTURE WORKING GROUP, sec. 1 (2004), http://www.pch.gc.ca/pc-ch/pubs/ihac/tdm_e.cfm (last visited Jan. 19, 2008) (arguing for “the need to protect the Canadian mirror” of cultural production).

154. See, e.g., *The Impact of Canada’s Cultural Policy Objectives*, in SAGIT REPORT, *supra* note 25, sec. 9 (observing that the vast majority of Canadians live near the U.S. border; that “the fact that we share a common language makes it very easy for English-speaking Canada to become an extension of the American market and for American cultural products to spill over the border”; that 94-97 percent of Canadian screen time is dominated by foreign films; and that “Hollywood studios have historically treated Canada as part of the U.S. market”); *Canadian Content and the Information Highway*, in REPORT OF THE CANADIAN CONTENT AND CULTURE WORKING GROUP, *supra* note 153 (observing “the often conflicting interests of the consumer and citizen that exist within each and every Canadian”).

155. *Trade Challenges to Our Cultural Policies*, in SAGIT REPORT, *supra* note 25, sec. 19 (citing “challenges to [Canada’s] cultural policies,” including disputes with the United States).

ple, Canada had long banned the importation of so-called “split-run” periodicals—essentially editions of foreign periodicals with advertisements directed at a Canadian audience.¹⁵⁶ In 1993 the American publishers of *Sports Illustrated* eluded this ban by electronically transmitting the Canadian edition to Canadian facilities for printing. In response, Canada imposed an eighty percent excise tax on the value of advertisements in such split-run magazines.¹⁵⁷ The United States decided to challenge the legitimacy of this excise tax, but rather than doing so through NAFTA, which included the culture exception from the prior bilateral agreement, opted to do so under the WTO framework.¹⁵⁸ At the WTO, Canada’s primary argument was that advertising is a service falling within the GATS, and that Canada had made no GATS commitments relating to advertising.¹⁵⁹ Ultimately, however, the WTO’s Appellate Body rejected this argument, observing that the tax was actually imposed on the periodical itself, not the advertising directly and that “a periodical is a good comprised of two components: editorial content and advertising content.”¹⁶⁰ The more onerous disciplines of the GATT therefore applied, and the excise tax was found to have violated Canada’s obligations under GATT article III(2) (national treatment).¹⁶¹ Canada set about repealing the tax and making other domestic legal changes required to comply with the decision,¹⁶² while U.S. Trade Representative Charlene Barshefsky celebrated the decision as affirming that “WTO rules prevent governments from using ‘culture’ as a pretense for discriminating against imports.”¹⁶³ The episode could only have left Canadian observers wonder-

156. See OWEN-VANDERSLUIJ, *supra* note 51, at 127-48.

157. Goodenough, *supra* note 10, at 214.

158. See Galt, *supra* note 37, at 925 n.118. Proceeding under the WTO rather than NAFTA not only gave the United States a better chance of success, but also permitted the United States to send a broader global message regarding its position on the trade treatment of cultural products. See OWEN-VANDERSLUIJ, *supra* note 51, at 139.

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

160. *Id.* at 17-18.

161. *Id.* at 35.

162. *Trade Challenges to Our Cultural Policies*, in SAGIT REPORT, *supra* note 25, sec. 19.

163. Press Release, Office of the U.S. Trade Representative, WTO Appellate Body Expands U.S. Victory in Challenge to Canada’s Restrictions on

ing where the “culture exception” that was supposed to have saved them from American media inundation had gone.¹⁶⁴ And consistent with U.S. wishes, this resounding victory essentially represents the totality of WTO case law on the trade treatment of cultural products as such.¹⁶⁵

In any event, the Canadian government was broadly in agreement with the conclusions of SAGIT’s 1999 report, though it tried to downplay the obvious protectionist aim of such an undertaking. As the Department of Foreign Affairs and International Trade put it, “[t]he Government agrees that Canada should pursue a new international instrument on cultural diversity,” characterizing SAGIT’s aim as being “to enable Canada and other countries to maintain policies that promote their culture while respecting the rules of the international trading system and ensuring markets for cultural exports.”¹⁶⁶

By 2002, Canada had made clear that it would not negotiate further audiovisual liberalization under GATS until a multilateral instrument safeguarding domestic cultural policies was in place,¹⁶⁷ and SAGIT had produced a model instrument to do just that. SAGIT described its model agreement as rec-

U.S. Magazine Imports 1 (June 30, 1997) (on file with the New York University Journal of International Law and Politics).

164. Cf. Galt, *supra* note 37, at 926 (observing that Canada’s loss at the WTO “constitut[ed] a dramatic setback to cultural exception proponents around the world”).

165. In 1998, the European Communities requested GATS consultations regarding certain “measures affecting film distribution services” in Canada, but ultimately the matter was not pursued. See Request for Consultations by the European Communities, *Canada—Measures Affecting Film Distribution Services*, WT/DS117/1 (Jan. 22, 1998). Likewise a U.S. challenge to a Turkish “tax on box office receipts from the showing of foreign films” was not pursued beyond consultations because Turkey agreed to “equalize” the tax as between domestic and foreign films. See Notification of Mutually Agreed Solution, *Turkey—Taxation of Foreign Film Revenues*, WT/DS43/3 (July 24, 1997); Hahn, *supra* note 97, at 527-30; Rolf H. Weber, *Cultural Diversity and International Trade—Taking Stock and Looking Ahead*, in *WORLD TRADE ORGANISATION AND TRADE IN SERVICES* 819, 832-34 (Kern Alexander & Mads Andenas eds.) (forthcoming).

166. CANADIAN DEP’T OF FOREIGN AFFAIRS AND INT’L TRADE, CANADA AND THE FUTURE OF THE WORLD TRADE ORGANIZATION: GOVERNMENT RESPONSE TO THE REPORT OF THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE (1999), available at <http://dsp-psd.communication.gc.ca/Collection/E2-195-1999E.pdf>.

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

ognizing “the need to ensure that the international trading system is compatible with the goal of preserving and enhancing cultural diversity” and registered alarm and dissatisfaction at the prospect of pressure to liberalize audiovisual services in future WTO and FTAA negotiations.¹⁶⁸ The model agreement itself extends broad discretion “to take measures with respect to the creation, production, distribution and exhibition of cultural content”¹⁶⁹ and includes a relatively robust dispute resolution body.¹⁷⁰ Pointedly, the draft agreement includes explicit exceptions subordinating its provisions to “legal guarantees of freedom of expression” and “international treaties respecting the protection of intellectual property,” but lacks any such exception for a party’s trade obligations.¹⁷¹

B. *France and the European Union*

As in Canada, the European effort to forge an international instrument on cultural diversity—spearheaded by France—has been explicitly linked with cabining trade obligations. As discussed *supra*, article 151 of the Treaty Establishing the European Community enshrines the “unity in diversity” principle, under which member states simultaneously pursue a common European identity and distinct national identities—a principle reinforced in the Charter of Fundamental Rights of the European Union.¹⁷² The Television Without Frontiers (TWF) Directive represents an attempt to encourage both exposure to other national cultures within Europe and the coalescence of a distinctive pan-European culture, while buffering both from U.S. media dominance. Meanwhile, the EU has refused to make any commitments in the audiovisual sector under the GATS, a position adhered to by the European Commission throughout the Doha round of negotiations, with the resounding support of the European Parliament.¹⁷³

168. CULTURAL INDUSTRIES SECTORAL ADVISORY GROUP ON INT’L TRADE, AN INTERNATIONAL AGREEMENT ON CULTURAL DIVERSITY: A MODEL FOR DISCUSSION (2002), *available at* http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/sagit_en.pdf.

169. *Id.* art. VI(1).

170. *Id.* arts. X-XIV.

171. *Id.* art. VII(1).

172. *See supra* notes 76-81 and accompanying text.

173. *See supra* notes 82-92 and accompanying text.

The market landscape and cultural concerns that prompted the TWF Directive reflect fears of U.S. media domination markedly similar to those in Canada. In the late 1980s, the prevalence of U.S. media products on European television screens grew as European networks increasingly purchased far less expensive American programs.¹⁷⁴ The U.S. audiovisual industry enjoyed a substantial first-mover advantage, greatly reducing production costs by the 1980s relative to those of European competitors. Indeed, by 1986, it cost \$4 million to produce an hour-long drama in Europe, while the cost to produce such a program in the United States was just \$350,000. And that same American program could be broadcast by a European media company for just \$12,000.¹⁷⁵ Europe's solution to this dilemma was the TWF Directive, which essentially binds European broadcasters' hands. Among other things, the Directive aims to protect European culture through the imposition of broadcasting quotas,¹⁷⁶ much like the "Canadian content" requirements described *supra*.¹⁷⁷ Under the TWF Directive, as amended to date, Member States must generally "reserve for European works . . . a majority proportion of their transmission time," and at least ten percent of transmission time or ten percent of their programming budget must be reserved "for European works created by producers who are independent of broadcasters."¹⁷⁸ The term "European works," like the term "Canadian content," is defined by reference to creative decisionmaking,¹⁷⁹ avoiding the thorny problem of defining what it means to be European. For its part, France has established higher quotas than the TWF Directive man-

174. See Middleton, *supra* note 19, at 610-11.

175. *Id.* at 619-20.

176. *Id.* at 612-13.

177. See *supra* text accompanying notes 137-38. Europe and Canada are of course not alone in the use of content quotas. See, e.g., *supra* text accompanying notes 104-05 (discussing Australia's insistence on the preservation of existing quotas in its bilateral trade negotiations with the United States); *How Do Canada's Cultural Policies Compare With Those of Other Countries?*, in SAGIT REPORT, *supra* note 25, sec. 14 (observing that "[c]ontent requirements are a common cultural policy tool" and citing examples in the EU, France, Italy, Spain, Mexico, and Australia).

178. Amended TWF Directive, *supra* note 82, arts. 4-5. There is also a major exception for "time appointed to news, sports events, games, advertising, teletext services and teleshopping."

179. *Id.* art. 6.

dates, and—to the consternation of U.S. officials—has applied them “to both the 24-hour day and prime time slots,” with “the definition of prime time differ[ing] from network to network.” As the Office of the U.S. Trade Representative complained in a recent report, the “prime time rules are a significant barrier to access of U.S. programs to the French market.” This report similarly took aim at “radio broadcast quotas, which have been in effect since 1996,” and which obviously “limit broadcasts of American music.”¹⁸⁰

In a 2003 consultation piece on the GATS negotiations, the European Broadcasting Union (EBU) urged the EU to hold out on any GATS commitments in the audiovisual sector in order to ensure that an international agreement on cultural diversity could be put in place before such negotiations proceeded. The EBU argued that a “[c]onvention on cultural diversity could help to clarify the legitimacy of cultural and audiovisual policy measures at the national or regional level.” The organization noted, among other things, the “cultural, political and social role and importance” of audiovisual services; the production advantage enjoyed by those with larger home markets (permitting cost recovery at home and exporting at lower prices); the pressures toward liberalization under GATS article XIX, which put even limited commitments at risk of expansion in later rounds of negotiations; and the absence of any conceptual mechanism for distinguishing legitimate from illegitimate cultural protectionist policies under existing trade rules. What was needed, in the EBU’s view, was a “‘cultural pillar’, set apart from the existing ‘trade pillar’—the multilateral WTO Agreements”—in order to ensure “more balanced” discussions, mirroring developments in areas such as labor and the environment.¹⁸¹

In a 2003 communication to the Council of Europe and the European Parliament, the European Commission addressed the issue of an international cultural diversity instru-

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

181. European Broadcasting Union (EBU), *Audiovisual Services and GATS Negotiations: EBU Contribution to the Public Consultation on Requests for Access to the EU Market*, at 2-7, DAJ/MW/mp (Jan. 17, 2003), available at http://www.ebu.ch/CMSimages/en/leg_pp_gats_170103_tcm6-4388.pdf.

ment. Noting the unity in diversity principle and cultural policies like those in the TWF Directive, the Commission stressed that the EU had reserved its ability to pursue cultural policies in WTO negotiations.¹⁸² With respect to future negotiations, the Commission concluded that “a legally binding instrument to preserve and promote cultural diversity would be necessary, in order to consolidate certain cultural rights,” though it added that “such instrument would not affect and be without prejudice to the international legal framework applicable to exchanges of cultural goods and services—in particular as regards their trade and intellectual property rights aspects.”¹⁸³

The European Parliament took this up, expressing a much stronger position on the need for such an instrument. The Parliament stated in a resolution that Europe “must continue in [the] future to have the legal right to take all measures in the fields of culture and the audiovisual media necessary to uphold and promote cultural diversity” and explicitly characterized the prospect of new GATS negotiations as threatening “an ongoing liberalisation,” the result of which would be that measures aimed at preserving cultural diversity “would be reviewed and consequently dismantled.”¹⁸⁴ In contrast to the Commission’s more deferential view, the Parliament called for the outright exemption of cultural products from any liberalization under the WTO agreements and likewise called upon the EU “to engage in multilateral talks within the forthcoming negotiations on a Convention on cultural diversity in UNESCO.”¹⁸⁵ The European Parliament’s view on the necessity of a culture convention to the preservation of cultural sovereignty, and its perception that the clearest threat to such sovereignty lay in potential GATS audiovisual negotiations, could not have been made more clear.

182. *Communication from the Commission to the Council and the European Parliament: Towards an International Instrument on Cultural Diversity*, at 3-4, COM (2003) 520 final (Aug. 28, 2003), available at http://ec.europa.eu/avpolicy/docs/ext/com_2003_520final_en.pdf.

183. *Id.* at 6-7.

184. Resolution on Preserving and Promoting Cultural Diversity: The Role of the European Regions and International Organizations Such as UNESCO and the Council of Europe, EUR. PARL. DOC. P5_TA (2004) 0022, pmb. ¶¶ L-M.

185. *Id.* ¶¶ 18-19.

C. *Drafting and Negotiations*

The actual drafting of a culture convention within UNESCO began with the appointment by the Director-General of a group of experts in various areas thought pertinent to the task (anthropology, international law, economics of culture, and philosophy), who were charged with making recommendations on the overall structure and drafting of the convention.¹⁸⁶ In defining the scope of the convention, this committee determined that “precise, but not fixed, definitions” should be employed to reflect “the very broad and constantly evolving field that is the subject of the convention.”¹⁸⁷

With respect to how the contemplated instrument would relate to other international legal instruments, the committee considered two possibilities. Either (1) it would have no effect on other international legal obligations, or (2) it could affect other obligations potentially giving rise to “serious damage” to cultural diversity, “except in the case of international instruments concerning intellectual property rights.”¹⁸⁸ Put differently, in the committee’s view, the convention should in no way affect intellectual property-related rights and obligations, and the only real question was whether trade-related rights and obligations should be affected. The July 2004 preliminary draft of the convention accordingly offered two options regarding the convention’s relationship to other instruments. Either (1) the provision would state that “[n]othing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments,” or (2) it would state that the Convention did not affect existing intellectual property rights and obligations, but that existing rights and obligations would be affected—in an unspecified manner—“wherever exercise of those rights or compliance with those obligations might give rise to serious damage or might threaten such diversity of cultural expressions.”¹⁸⁹

Other international bodies that weighed in on the coalescing culture convention generally registered concern re-

186. UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, ¶ 7, U.N. Doc. CLT/CPD/2004/CONF.201/1 (July 2004).

187. *Id.* ¶ 9.

188. *Id.* ¶ 11.

189. *Id.*

garding potential incursions on the turf of the trade regime. Another UN body, the United Nations Conference on Trade and Development (UNCTAD), observed that “the fact that the draft seems to try to devise ways for countries to maintain policies that promote cultural diversity in spite of existing trade and other agreements give [sic] the impression that WTO agreements currently do not allow governments to maintain such policies.” UNCTAD worried that this could actually hurt developing countries’ ability to negotiate for greater developed market access through the WTO. Though sympathetic with the goal of preserving cultural diversity, UNCTAD felt that “from the trade and development point of view, protectionism should not be encouraged in the name of culture.” UNCTAD also expressed concern about the breadth of the definitions employed and the resulting scope of the document.¹⁹⁰ UNCTAD argued that GATS was sufficiently flexible to permit protection of cultural diversity. UNCTAD felt that the influence of any culture convention on international trade commitments should be clarified and that the provision on the convention’s relationship to other international instruments should be eliminated, given that the Vienna Convention on the Law of Treaties already sets out principles governing the interpretation of treaties, over which the draft convention offered no improvement.¹⁹¹

190. UNESCO Revising Comm., *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, Presentation of Comments and Amendments, Part IV: Comments Proposed by the IGOs*, at 7, UNESCO Doc. CLT/CPD/2004/CONF.607/1 (Dec. 14-17, 2004) [hereinafter IGO Comments].

191. *Id.* at 9. Note that while UNCTAD points to article 31 of the Vienna Convention on the Law of Treaties and “other general principles of public international law,” *id.* at 9, in suggesting that the draft culture convention would create confusion by specifying its relationship with other treaties, the Vienna Convention actually establishes rules in Article 30 addressing situations in which successive treaties address the same subject matter. Vienna Convention, *supra* note 29, art. 30. In particular, article 30(2) states that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” The Vienna Convention thus clearly contemplates treaty provisions explicitly delineating a given treaty’s relationship to other treaties. See *infra* text accompanying notes 233-38 for further discussion of the Culture Convention’s provision addressing its relationship to other treaties and its interpretation in light of the Vienna Convention.

The WTO, for its part, summarized the views expressed by its members during an “informal discussion” of the draft UNESCO convention.¹⁹² The WTO reported that “a majority of the delegations that took the floor expressed concerns of varying degrees,” notably “the potential for conflict or inconsistencies with WTO obligations and ongoing negotiations in various areas.” Many delegations characterized the proposed definitions as “overly broad and imprecise,” potentially “intersect[ing] with various aspects of WTO Agreements.” In particular, cultural policies legitimized by the draft convention, it was feared, “could be used to justify actions inconsistent with WTO obligations and invite protectionist abuse.” The requirement that signatories take the convention into account when entering other agreements left some WTO delegations “fear[ing] that such a provision might negatively affect WTO negotiations by inciting Members not to make offers in certain areas out of concern that these might conflict with the objectives of the UNESCO Convention.” As for the two options concerning the convention’s relationship with other treaties, most delegations preferred the option subordinating the convention to all existing international rights and obligations.¹⁹³

In late 2004 the drafting moved into a second stage in which government representatives took over from the committee of experts.¹⁹⁴ At a meeting in September the government representatives “agreed that [the preliminary draft] could be taken as a sound basis for their work,” though the “definition of ‘cultural goods and services’, and the very use of such terminology (sometimes regarded as too commercial), were the subject of debate.” The provision on the convention’s relationship to other instruments also “provoked considerable comment.”¹⁹⁵ By December the document had swelled to 130

192. Tania Voon has observed that “the need to seek WTO Members’ views separately may have stemmed in part from the fact that different government representatives, from different ministries, may be involved” in the WTO and UNESCO contexts, respectively. Voon, *supra* note 32, at 641.

193. IGO Comments, *supra* note 190, at 25.

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

195. *Id.* at 5-6.

pages as countries contributed different options for various provisions.¹⁹⁶

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

- preamble paragraph 18, stating that “cultural activities, goods and services have both an economic and a cultural nature . . . and must therefore not be treated as solely having commercial value”;
- article 1(g), establishing as an objective “recognition [of] the distinctive nature of cultural activities, goods and services”;
- article 2(4), establishing as a principle the ability of “countries . . . to create and strengthen their means of cultural expression, including their cultural industries”;
- article 4’s definitions of “cultural expressions,” “cultural activities, goods and services,” “cultural industries,” “cultural policies,” and “protection”;
- article 6(2)(b)-(c), permitting the adoption of measures that “provide opportunities for domestic cultural activities, goods and services . . . [and] for their creation, production, dissemination, distribution and enjoyment” (including with respect to language), and measures “aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution”; and
- article 20, providing that the agreement would not “modify[] rights and obligations . . . under any other treaties,” but that at the same time, “without subordinating this Convention to any other treaty,” parties would be obliged to “foster mutual supportiveness” with other treaties and to “take into account the relevant provisions of this Convention” when interpreting or entering into other treaties.¹⁹⁸

196. *Id.* at 7.

197. *Id.* at 12-13.

198. *Id.* at 13-14, annex V (providing the text of the June 2005 draft convention); Oral Report of the Rapporteur, Mr. Artur Wilczynski, at the Clos-

In essence, the United States objected to the provisions that would ultimately be the heart of the document, and the amendments that the United States proposed were roundly rejected. The United States sought to include language recognizing “the need to take measures that are consistent with other international obligations when protecting the diversity of cultural expressions.” In particular, the United States wanted to “clarify that nothing in this Convention can be interpreted as allowing states to violate international agreements in the fields of trade, human rights, or other areas”¹⁹⁹—though of course article 2(1) already established that the convention could not be invoked “to infringe human rights and fundamental freedoms,”²⁰⁰ leaving only the trade regime out in the cold. The United States also wanted language stating that globalization can enhance cultural diversity, not just detract from it. U.S. Ambassador Oliver expressed exasperation at the language of article 20. “In our conversations with delegations over the past few weeks,” Oliver wrote a few days before the Convention’s adoption, “it has been made clear to us that this Article is intended to mean that nothing in this Convention can be interpreted as modifying, or prevailing over, the rights and obligations of Parties arising under other international agreements. So why can’t we just say that?”²⁰¹

Over the months preceding the convention’s adoption on October 20, 2005, Ambassador Oliver repeatedly argued that the document was poorly drafted and susceptible to abuse, ap-

ing of the Third session of the Intergovernmental Meeting of Experts on the Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions 4-8 (May 25–June 3, 2005), available at http://www.unesco.org/culture/culturaldiversity/docs_pre_2007/oral_report_wilczynski_en_03_062005.pdf.

199. Ambassador Louise V. Oliver, Intervention at the 33rd UNESCO General Conference, Draft Resolution Submitted by the United States of America to Item 8.3—Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions and Report by the Director-General Thereon (Oct. 17, 2005), available at http://unesco.usmission.gov/GC_09082006_Item83EX_10172005.cfm [hereinafter Oliver Intervention 1].

200. Director-General Report, *supra* note 194, at annex V. Ambassador Oliver recognized article 2(1) in her intervention, but added that “we remain troubled by other provisions of the Convention that seem to provide undue scope for interference by governments with freedom of expression, information and communication.” Oliver Intervention 1, *supra* note 199.

201. Oliver Intervention 1, *supra* note 199.

pealing to the negotiating parties to adhere to consensus procedures, but her statements met with a cool response at best. In a speech in September 2005, Ambassador Oliver argued that while “some countries feel their cultural expressions are threatened by globalization, . . . throughout history, cultural exchanges across the globe have strengthened cultures and nations, not weakened them.” The issue, ultimately, was “the individual’s fundamental right to choose,” and the draft agreement appeared susceptible to being “used to restrict cultural exchange and individual freedom.” Oliver also took issue with Canada’s push for a deviation from the consensus approach, characterizing it as an attempt to curtail debate.²⁰² In an October 17, 2005 submission, Oliver argued again that “ambiguities in the text might be misused by a government as a justification for adopting policies and measures that would protect and promote the majority culture within its territory, at the expense of minority cultures.” She also reiterated U.S. concerns regarding “the lack of clarity in Article 20,” arguing that “as drafted, any State, in the name of cultural diversity, might invoke the ambiguous provisions of this convention to try to assert a right to erect trade barriers to goods or services that are deemed to be cultural expressions”—a term that had “never been clearly defined and therefore is open to wide misinterpretation.”²⁰³

In the waning moments of the negotiations, Oliver expressed frustration that over “the past four months, we have been told constantly by various states that it was too late to negotiate this text—that not a single comma could be changed.”²⁰⁴ As she would later put it, “the process . . . disturbed us as much as the substance.” Noting that “in mid-April [2005], we were given a completely new text . . . and we were told to negotiate that new text in May,” Oliver complained that over the course of subsequent months “every attempt” to reflect U.S. concerns in the document “was rebuff-

202. Oliver Statement 1, *supra* note 41.

203. Ambassador Louise V. Oliver, Intervention at the 33rd UNESCO General Conference, Item 8.3—Preliminary Report on the Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions (Oct. 17, 2005), *available at* <http://usinfo.state.gov/is/Archive/2005/Oct/20-504183.html>.

204. *Id.*

fed.”²⁰⁵ As one European diplomat said during the week prior to the Culture Convention’s adoption, the “US is trying to do everything it can to reopen the negotiations when the rest of the world is in favour of the current text.”²⁰⁶ Once the writing was on the wall, the United States evidently shifted gears, enlisting the likes of Secretary of State Condoleeza Rice, as well as U.S. ambassadors, to pressure countries not to vote to adopt the convention, an effort that proved unsuccessful.²⁰⁷

D. *The Final Text and Reactions*

On October 20, 2005, the UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions by a vote of 148 to 2, with the United States and Israel in opposition and four countries abstaining from the vote.²⁰⁸ The document states that “cultural activities, goods and services have both an economic and a cultural nature . . . and must therefore not be treated as solely having commercial value,”²⁰⁹ and aims “to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”²¹⁰ The Culture Convention requires that the parties “endeavour to create in their territory an environment which encourages individuals and social groups . . . to create, produce, disseminate, distribute and have access to their own cultural expressions,” while also mandating that they allow “access to diverse cultural expressions from within their territory as well as from other countries of the world” and

205. *U.S. Ambassador, supra* note 24.

206. Bob Sherwood & Frances Williams, *U.S. at Odds With World on Cultural Treaty*, FIN. TIMES (London), Oct. 14, 2005, at 9 (quoting “a Paris-based European diplomat”) (quotations omitted).

207. See Graham Fraser, *Cultural Diversity Policy Voted In*, TORONTO STAR, Oct. 18, 2005, at C05.

208. Press Release No. 2005-128, UNESCO, General Conference Adopts Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), available at http://portal.unesco.org/culture/en/ev.php-URL_ID=29078&URL_DO=DO_TOPIC&URL_SECTION=201.html. The four abstaining countries were Australia, Honduras, Liberia, and Nicaragua. See Riding, *supra* note 28.

209. Culture Convention, *supra* note 26, pmbl.

210. *Id.* arts. 1(h), 2. It is worth noting that the Culture Convention legitimates state, not private, action. See Smith, *supra* note 34, at 26.

prohibiting the instrument's invocation "in order to infringe human rights and fundamental freedoms."²¹¹ It further provides for an International Fund for Cultural Diversity, to be funded in part by UNESCO,²¹² as well as an Intergovernmental Committee²¹³ and a conciliation mechanism for disputes.²¹⁴ The Culture Convention, by its terms, enters into force three months following the thirtieth ratification, acceptance, approval, or accession.²¹⁵ As a result, the Convention became binding on ratifying countries on March 18, 2007.²¹⁶

While the United States disliked the notion of legitimizing cultural protectionist measures from the outset, it was clearly most troubled by the vagueness and breadth of the Culture Convention's scope. The Culture Convention applies, by its terms, to policies and measures "related to the protection and promotion of the diversity of culture expressions." These measures "may include" any or all of a broadly worded laundry list of policies that itself (circularly) references "regulatory measures aimed at protecting and promoting diversity of cultural expressions."²¹⁷ The definitions of key terms, then, offer little or no illumination of the contemplated scope. "Cultural industries" is defined by reference to "cultural goods or services," which is defined by reference to "cultural expressions," which is defined by reference to "cultural content," which is defined by reference to things that "originate from or express cultural identities." The concept of "cultural identities" is itself undefined. Similarly, "cultural policies and measures" is defined by reference to "culture." The concept of "culture" is itself undefined.²¹⁸ United States officials are correct that the theoretical limits of the document are basically unknowable.²¹⁹

211. Culture Convention, *supra* note 26, arts. 2(1), 7(1).

212. *Id.* arts. 14(d)(i), 18.

213. *Id.* art. 23.

214. *Id.* art. 25, annex.

215. *Id.* art. 29.

216. See UNESCO, *supra* note 27. Canada was the first country to ratify, doing so on November 28, 2005. As of January 2008, the Culture Convention had been ratified by 78 countries and the European Community. *Id.*

217. Culture Convention, *supra* note 26, arts. 3, 6(2).

218. *Id.* art. 4.

219. Cf. Voon, *supra* note 32, at 639; Smith, *supra* note 34, at 32, 40-42 (observing the conspicuous absence of any "principle of proportionality").

Equally troubling for the United States is the document's ambiguous relationship to other international regimes. Article 20 retains the structure that the United States had found so objectionable in the negotiations, both confirming that the Culture Convention would not "modify[] rights and obligations . . . under any other treaties" and requiring that "without subordinating [the Convention] to any other treaty," the parties "foster mutual supportiveness" with other treaties and "take into account the relevant provisions" when applying or entering into other treaties.²²⁰ Similarly, the parties "undertake to promote the objectives and principals of this Convention in other international forums."²²¹ In an apparent attempt to assert that the Culture Convention could co-exist amicably with existing trade regimes, the provision renders utterly unclear how parties are obligated to address inevitable conflicts with existing trade obligations.

Responses to the Culture Convention in the United States and elsewhere were generally predictable. As if to confirm U.S. fears, a number of accounts in the popular press described the agreement as "exempt[ing] certain cultural products from free-trade agreements."²²² Similarly, a statement by the International Liaison Committee of Coalitions for Cultural Diversity highlighted the "principle of non-subordination" in the Culture Convention, which it characterized as "meaning the legal status of the convention in international law will be equal to that of other international treaties, including trade agreements."²²³ Likewise, a Canadian government minister called it "a great day for the cultural community" in a statement describing the Culture Convention as being "on an equal footing with other international treaties."²²⁴

220. Culture Convention, *supra* note 26, art. 20.

221. *Id.* art. 21.

222. Fraser, *supra* note 207.

223. Press Release, International Liaison Committee of Coalitions for Cultural Diversity (ILC), Coalitions for Cultural Diversity Hail Adoption of UNESCO Convention on Cultural Diversity; Urge Countries to Ratify on Urgent Basis (Oct. 21, 2005), *available at* http://www.cdc-ccd.org/Anglais/Liensanglais/nouveautes_eng/ENG_Press_Rel_ILC_21-10-05.pdf.

224. Press Release, Office of the Minister of Canadian Heritage and Minister Responsible for Status of Women, Convention on Cultural Diversity is Adopted at UNESCO General Conference (Oct. 20, 2005), *available at* http://www.pch.gc.ca/newsroom/index_e.cfm?fuseaction=displayDocument&DocIDCd=5N0275 (quotations omitted).

Conservative American columnist George Will, meanwhile, took a decidedly dimmer view of the Culture Convention, characterizing it as “mischief tinged with anti-Americanism” of the sort that had led to America’s withdrawal from UNESCO in the 1980s. Will derided the notion that governments could “be trusted to sensibly define and prudently cultivate the proper content of culture and artistic expression,” describing the Convention’s aim as being to “cloak” cultural protectionism “in Orwellian language praising what the convention actually imperils.” Will read the Culture Convention as “implicitly establish[ing] that cultural protectionism is not inhibited by standard free trade agreements,” and foresaw a slippery slope reaching the likes of “wine, coffee, [and] textiles.”²²⁵ The MPAA likewise had nothing good to say about the Culture Convention, observing that “the Convention appears to be more about trade and commercial activities than about the promotion of cultural diversity.”²²⁶

Once again, America’s near isolation was itself a topic of discussion. The United States’ dissent was analogized to its opposition to the Kyoto Protocol on climate change and the creation of the International Criminal Court, with the anticipation that the United States would again “likely remain a critical and perhaps interventionist outsider.”²²⁷ A reporter for the *Austra-*

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

226. Press Release, MPAA, Glickman Expresses Disappointment at Outcome of Cultural Diversity Discussions (Oct. 21, 2005), available at http://www.mpaa.org/press_releases/2005_10_21.pdf.

227. Alan Riding, *Next Lone U.S. Dissent: Cultural Diversity Pact; Entr’acte*, INT’L HERALD TRIB. (Paris), Oct. 13, 2005, at 2; see Alan Riding, *U.S. Stands Alone on UNESCO Cultural Issue*, N.Y. TIMES, Oct. 13, 2005, at 3 (reporting the view of “some UNESCO officials” that “the convention’s principal signifi-

lian noted that “[n]ot since the Iraq war has the US been as isolated in a UN forum.”²²⁸ One observer pointed to the United States’ “disastrous” approach to the negotiations, including voting against UNESCO’s budget in retaliation for rejection of the United States’ proposed amendments, a move characterized as indicating that the United States needed to learn “when to quit debating and cut a deal” at the UN.²²⁹

Observers on both sides of the issue, however, seemed to recognize that article 20 of the Culture Convention, addressing its relationship to other international instruments, was perhaps the critical provision of the treaty—and that the drafting was a mess. Its apparently contradictory language contemplates both that the Culture Convention will affect the application of other treaty regimes while at the same time—somehow—not modifying rights and obligations under them. Commentators have differed regarding whose interests this confusion serves. As one observer put it, “Canada and France won broad support for the convention partly by blurring the question of its impact on trade liberalization or future trade talks.”²³⁰ However, France has emphasized article 20’s potential to “bolster[] the legal case of countries that are resisting pressure in future trade negotiations to open their cultural sectors to foreign imports,”²³¹ suggesting that despite the contradictory language on existing international obligations, the Culture Convention is really a forward-looking document in the eyes of its major proponents.

cance is as a symbol of how the United States and some of its closest allies view the world differently – and not only on culture”).

228. Emma-Kate Symons, *U.S. Fumes Over Cultural Snub*, AUSTRALIAN (Melbourne), Oct. 22, 2005, at 27.

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

230. Riding, *supra* note 28; cf. ICTSD, *supra* note 111, at 7 (observing the apparently contradictory language of article 20).

231. ICTSD, *supra* note 111, at 7.

VI. MARKETS AND POLITICS: THE FUTURE OF INTERNATIONAL TRADE IN CULTURAL PRODUCTS

Were the Culture Convention deemed to trump—or even to be of equal status with—the WTO Agreements, the risk of their collision would appear to be considerable. Given the broad scope of domestic measures permissible under the Culture Convention, it is not difficult to imagine tensions arising over their consistency with a country's established trade obligations.²³² The best interpretation of article 20,²³³ however, is that the Culture Convention is primarily about enhancing negotiating capacity under the GATS regime for countries desiring to protect local cultural producers, and that it is only secondarily (if at all) about affecting the application or scope of existing trade obligations. As previously observed, the language in article 20(1) stating that the Convention should be interpreted “without subordinating this Convention to any other treaty” appears to contradict the language in article 20(2) stating that “[n]othing in this Convention shall be interpreted as modifying rights and obligations . . . under any other treaties to which they are parties.”²³⁴ By reading narrowly the requirement imposed by article 20(1) with respect to pre-existing international obligations, however, the two parts of the provision can be squared with one another. The specific obligation under article 20(1) is to “take into account the relevant provisions of this Convention” when “interpreting and applying the other treaties,” which can be read to obligate countries

232. See, e.g., Voon, *supra* note 32, at 639-40.

233. Article 20 states:

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

Culture Convention, *supra* note 26, art. 20.

234. *Id.*

that are parties both to the Culture Convention and the WTO agreements simply to make a good faith effort to behave within the trade regime in a manner consistent with obligations under the Culture Convention. A plain-language reading of “take into account” would not appear to require more.

Additionally, this narrow reading of the language of article 20(1) is reinforced by the more straightforward language of article 20(2), which virtually paraphrases article 30(2) of the Vienna Convention on the Law of Treaties. The Vienna Convention provides that “[w]hen a treaty specifies that it is subject to, *or that it is not to be considered as incompatible with*, an earlier or later treaty, the provisions of that other treaty prevail.” Article 20(2) of the Culture Convention, then, stating that it does not modify rights or obligations under other treaties, effectively constitutes a statement that “it is not to be considered as incompatible with” prior treaties, resulting in the primacy of pre-existing treaty obligations—including those under the WTO agreements.²³⁵ The language in article 20(1)

235. Vienna Convention, *supra* note 29, art. 30(2) (emphasis added); Hahn, *supra* note 97, at 544; Voon, *supra* note 32, at 650. Hahn in fact goes further, arguing that the specific language of article 20(2)—that the Culture Convention is not to be interpreted as “modifying rights and obligations” under pre-existing treaties—should be read as a nod to article 41(1) of the Vienna Convention, which permits parties to “modify” a treaty as between themselves only if (1) the treaty explicitly permits such modification, or (2) such modification is “not prohibited” and would not preclude the achievement of the treaty’s “object and purpose” or the “enjoyment by the other parties of their rights under the treaty.” Hahn, *supra* note 97, at 544-46. This, says Hahn, precludes parties from arguing that the Culture Convention should trump the WTO Agreement as among themselves because such an interpretation would “compromise the WTO Agreement’s object and purpose to provide a comprehensive basis for all trade relationships,” and introduce “restrictive trade measures affect[ing] potentially all WTO members. *Id.* Hahn does suggest, however, that the WTO would be “ill-advised to not try to accommodate” the Culture Convention’s aims, and suggests that either general exceptions might be interpreted broadly—or the concept of “like” products might be interpreted narrowly—in light of it. *See id.* at 546-50. The viability of either mode of interpretation, however, would obviously depend critically on the Culture Convention’s ratification rate among WTO members. *See id.* at 550-52; *see also* Weber, *supra* note 165, at 830-32, 835-37; Graber, *supra* note 96, at 568-73 (arguing that existing WTO law cannot accommodate cultural diversity concerns, and advocating the creation of a “procedural clause” obliging WTO members to “take into account” the Culture Convention when interpreting or applying WTO law, or to enter into negotiations to amend the WTO framework). Advocates of such approaches would

stating that the Convention is not to be subordinated to other treaties may therefore be read as a sort of corollary to the first sentence of the article, requiring that all treaties be performed in “good faith.”²³⁶ If article 20 can be read to require nothing more than a good faith effort to interpret prior treaties in a manner consistent with the Culture Convention’s goals, then there is real reason to doubt that a WTO dispute resolution panel would exert itself to locate outcome-determinative rules and principles in the Culture Convention²³⁷—particularly when the little relevant WTO case law indicates that cultural products will not be treated differently from anything else subject to trade disciplines.²³⁸

However, the obligation to take Culture Convention obligations into account “when entering into other international obligations”²³⁹ is another matter entirely. With respect to future negotiations, there is no conflicting language under article 20 of the Culture Convention because there are no existing obligations with which to conflict. Recall that article XIX of

likewise confront the WTO Appellate Body’s “generally cautious attitude to the application of [public] international law” to disputes arising under the WTO Agreements. See Voon, *supra* note 32, at 13-14. While article 3(2) of the WTO’s Dispute Settlement Understanding does say that the system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law,” it remains unclear when and to what degree public international law beyond “customary rules of interpretation” may be brought to bear on the resolution of WTO disputes. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art 3(2), Legal Instruments: Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); Voon, *supra* note 32, at 13-14; Graber, *supra* note 96, at 567.

236. See Hahn, *supra* note 97, at 540; Culture Convention, *supra* note 26, art. 20; Vienna Convention, *supra* note 29, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

237. Cf. *supra* text accompanying notes 230-31.

238. See Hahn, *supra* note 97, at 530; see also Weber, *supra* note 165 (observing that the split-run periodicals dispute between the United States and Canada effectively represents the totality of WTO case law on the treatment of cultural products as such); Smith, *supra* note 34, at 48-50; Voon, *supra* note 32, at 11-14. It is also worth recalling in this regard that in its dispute with the United States over split-run periodicals, the NAFTA culture exception was useless to Canada. See *supra* text accompanying notes 158-64.

239. Culture Convention, *supra* note 26, art. 20(1)(b).

the GATS, reflecting the agreement to disagree between the United States and Europe, does require that parties “enter into successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization.” The provision includes a limiting principle, however, stating that such “process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.”²⁴⁰ When a country declines to liberalize a sector like audiovisual services, one would anticipate that the United States would claim that the country in question had not in fact negotiated in good faith “with a view to achieving a progressively higher level of liberalization,” as article XIX requires. The Culture Convention, however, arguably endorses the recognition of domestic cultural policies as important “national policy objectives,” justifying exempting cultural products from this process of liberalization by article XIX’s own terms.²⁴¹

Of course the effect of the Culture Convention on future negotiations depends critically on the circumstances of the country in question—and specifically on the degree to which they need or desire U.S. market access.²⁴² But even in the case of more potent negotiating adversaries like Canada and France, the Culture Convention’s impact will turn largely on the perceived normative legitimacy of the broader argument for the protection of cultural diversity through national protectionist policies. The remaining sections of this Article examine the incentives and goals of Hollywood and the U.S. government, the historical development of pertinent trade norms, and the relative weakness of human-rights based attacks on the Culture Convention, concluding that the burden rests squarely on the United States to demonstrate that such liberalization is in fact necessary or desirable.

A. *Hybridity and Choice*

Philosopher and cultural theorist Kwame Anthony Appiah, in a *New York Times Magazine* article published New Year’s

240. GATS, *supra* note 93, art. XIX.

241. See Voon, *supra* note 32, at 9.

242. See *supra* text accompanying notes 104-08 (discussing such dynamics in the context of bilateral negotiations with the United States); see also Smith, *supra* note 34, at 49-50, 53.

Day 2006, advanced an impassioned argument for what he termed a “new cosmopolitanism,” which he contrasted with “cultural protectionism.” Noting the “fear . . . that the values and images of Western mass culture, like some invasive weed, are threatening to choke out the world’s native flora,” Appiah paints a picture of naïve cultural purists endeavoring to defend “some primordially authentic culture” that in fact does not exist.²⁴³ What we ought to pursue, concludes Appiah, is a “new cosmopolitanism” built on the creative “contamination” of cultures:

I am urging that we should learn about people in other places, take an interest in their civilizations, their arguments, their errors, their achievements, not because that will bring us to agreement but because it will help us get used to one another—something we have a powerful need to do in this globalized era.²⁴⁴

No credible policymaker could disagree. Indeed, Appiah’s conclusion could practically be a paraphrase of the UNESCO constitution, written in 1945, which states that “ignorance of each other’s ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.”²⁴⁵ The idea, in both instances, is to ensure contact among diverse cultures with the goal of mutual understanding and, ultimately, peace. And yet, interestingly, Appiah points to UNESCO’s Culture Convention as expressing the purist perspective, implicitly comparing it with “visitors from England and the United States” who, in his native Ghana, “wince at what they regard as the intrusion of modernity on timeless, traditional rituals—more evidence, they think, of a pressure in the modern world toward uniformity.”²⁴⁶

Appiah’s misconception of the Culture Convention—both its purpose and its likely impact—is striking. Setting aside that scores of developing countries signed onto the agreement and that its major proponents were motivated

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

244. *Id.* at 52.

245. Constitution of UNESCO, *supra* note 113, pmbl.

246. Appiah, *supra* note 243, at 32.

largely, if not entirely, by their own domestic political concerns, Appiah suggests that this is yet another example of Western purists seeking to enforce cultural authenticity on others.²⁴⁷ The problem, of course, is that this depiction bears no resemblance to reality. Not only does the Culture Convention explicitly prohibit its own invocation to justify deviations from established human rights principles,²⁴⁸ but its entire purpose is to enhance speech opportunities by enabling local production capacity alongside imports from America and elsewhere. Like proponents of liberalized trade in the United States and elsewhere, Appiah's rhetorical move is to characterize the Convention's aim as the insulation of a static heritage, without acknowledging or engaging with the forward-looking conception of culture that generally animates cultural protectionist arguments.²⁴⁹ The hybridized meaning of an American television show like "Dallas" in the minds of, say, Ghanaians, though fascinating, is simply irrelevant to the issue at hand, because no one is suggesting that people in Ghana or anywhere else should not have access to Western media.²⁵⁰ The Culture Convention would legitimate policy measures to facilitate the production of alternatives, but they would be just that—alternatives. Because Appiah does not seriously grapple with the nature of markets in cultural products²⁵¹—media

247. *Id.* at 34.

248. See Culture Convention, *supra* note 26, art. 2(1).

249. See BAKER, *supra* note 50, at 250-51; *supra* Part II.B (refuting the argument that cultural protectionism is necessarily backward-looking).

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

251. Appiah makes brief reference to the potential for cheap Western clothing to displace traditional dress in a given country, conceding that if

markets in particular—he simply stares past the possibility that the dominance of a single set of voices, facilitated by the liberalization of trade in cultural products, might ultimately prove to be the greatest barrier to the creative cultural “contamination” for which he argues.

B. *Media Markets and the Hollywood Model*

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

The Motion Picture Association of America—Hollywood’s trade and lobbying organization—is, literally, a group of corporations. According to the MPAA’s website, it is comprised of Paramount, Disney Pictures, Sony Pictures, Twentieth Century Fox, Universal Pictures, and Warner Brothers.²⁵² These well-known film studios are, in turn, owned and controlled by some of the largest and best endowed businesses in the world. Paramount is controlled by Viacom Inc. (Sumner Redstone’s company);²⁵³ Disney Pictures is controlled by The Walt Disney Company;²⁵⁴ Sony Pictures is controlled by Sony Kabushiki

people cannot afford to wear what they like, it is “a genuine problem,” though he dismisses this concern as one affecting all who are “too poor to live the life they want to lead” in any country or culture. Appiah, *supra* note 243, at 34. He does not, however, engage with media markets—at the core of concerns prompting the Culture Convention and the principal sector in which it is expected to have impact—or otherwise entertain the notion that government measures on cultural products could be speech enhancing.

252. MPAA/MPA Members Page, <http://www.mpa.org/AboutUs-Members.asp>, (last visited Jan. 15, 2008).

253. See Viacom Inc., Annual Report (Form 10-K), at I-2 (March 16, 2006), available at <http://www.sec.gov/Archives/edgar/data/1339947/000104746906003584/a2168395z10-k.htm> [hereinafter Viacom 10-K]; Viacom Inc., Definitive Proxy Statement (Schedule 14A), at 13-14 (April 14, 2006).

254. See Walt Disney Co., Annual Report (Form 10-K), at 16 (Dec. 7, 2005), available at https://clients.moultoncommerce.com/disney/pdfs/2005_10-K.pdf?ebizcatalogsid=c048f19f9f343a9d59b438d8b2df9bd3 [hereinafter Disney 10-K].

Kaisha (Sony Corporation);²⁵⁵ Twentieth Century Fox is controlled by News Corporation (Rupert Murdoch's company);²⁵⁶ Universal Pictures is controlled by General Electric Company;²⁵⁷ and Warner Brothers is controlled by Time Warner Inc.²⁵⁸ Anyone who has not lived under a rock for the last thirty years will immediately recognize the sheer wealth, power, and drive for profit that these household names represent.²⁵⁹ The combined fiscal year 2005 revenues of these six companies totaled over \$323.7 billion²⁶⁰—a figure exceeding the 2006 gross domestic product of all but 20 nations on Earth.²⁶¹

From a business perspective, the question facing the MPAA's constituents is how best to generate profit on the sale of media products. Two important considerations for these companies are intellectual property law and international trade law. Disney, for example, observes in its annual report that the "success of our businesses is highly dependent on maintenance of intellectual property rights in the entertainment products and services we create," and that trade restrictions pose a competitive risk, increasing regulatory costs and "restrict[ing] our ability to offer products and services that are

255. See Sony Kabushiki Kaisha, Annual Report (Form 20-F), at 19 (Mar. 31, 2006) [hereinafter Sony 20-F].

256. See News Corp., Annual Report (Form 10-K), at 2 (June 30, 2006) [hereinafter News Corp. 10-K]; News Corp., Definitive Proxy Statement (Schedule 14A), 28 (Sept. 7, 2006).

257. See Gen. Electric Co., Annual Report (Form 10-K), at 11 (Dec. 31, 2005) [hereinafter Gen. Electric 10-K].

258. Time Warner, Inc., Annual Report (Form 10-K), at 11 (Feb. 27, 2006).

259. See *supra* notes 253-58.

260. See Viacom 10-K, *supra* note 253, at II-2 (reporting revenues of \$9,609.6 million); Disney 10-K, *supra* note 254, at 31 (reporting revenues of \$31,944 million); Sony 20-F, *supra* note 255, at 5-6 (reporting revenues of ¥ 7,475,436 million and a period-end exchange rate of 117.78 yen per U.S. dollar, or approximately \$63,469.5 million); News Corp. 10-K, *supra* note 256, at 39 (reporting revenues of \$25,327 million); Gen. Electric, Annual Report (Form 10-K/A), at 49 (Dec. 31, 2005) (filed as Exhibit 13 to Gen. Electric 10-K, *supra* note 257, and reporting revenues of \$149,702 million); Time Warner, Inc., Annual Report (Form 10-K/A, Amendment 1), at 17 (Sept. 13, 2006) (reporting revenues of \$43,652 million).

261. World Bank, Total GDP 2006, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (providing gross domestic product data by country in U.S. dollars).

profitable.”²⁶² In essence, the MPAA’s constituents desire a protectionist intellectual property system imbuing their products with the maximum value attainable (proportionate to the strength of the rights granted by the legal regime) and a liberalized international trade system expanding to the maximum scope possible the market in which their products can move unfettered.

The tension between advocating liberalism in the trade regime while at the same time calling for a form of protectionism in the intellectual property regime has not been lost on observers of the U.S. entertainment industry.²⁶³ Indeed, for decades intellectual property restrictions were not tied to the trade liberalizing program of the GATT system precisely due to the “conceptual problem” that intellectual property laws could themselves “be categorized as non-tariff barriers to trade.”²⁶⁴ Only in the 1990s, when the GATT became subsumed in the WTO system, would the United States “force nations that sought favorable trade in other areas to sign the Agreement on Trade Related Aspects of Intellectual Property (TRIPs), a set of global minimal standards for copyright, patent, trade secret, trademark, semiconductor, and geographic marker regulations.”²⁶⁵

The tie between trade liberalism and intellectual property protectionism is certainly not their intellectual compatibility; it is simply the advancement of corporate interests in the West—and particularly the United States—where intellectual property has become increasingly economically important over time.²⁶⁶ As one might expect, the combined lobbying efforts of the companies standing behind the MPAA have proven

262. Disney 10-K, *supra* note 254, at 22, 24.

263. Rosemary J. Coombe, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 STAN. L. REV. 1357, 1364 (1996).

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

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

266. *See, e.g.*, Coombe, *supra* note 263, at 1363-64; Handa, *supra* note 264, at 974-76.

enormously effective in advancing these interests. As mentioned *supra*, Jack Valenti, the President of the MPAA from 1966 until 2004, “established himself as perhaps the most prominent and effective lobbyist in Washington” and came to be considered “the nation’s foremost extremist when it comes to the nature and scope of ‘creative property.’”²⁶⁷ Indeed, Valenti was characterized as the “most formidable trade lobbyist” in the United States,²⁶⁸ describing the MPAA’s products as “the jewel in America’s trade crown.”²⁶⁹ In terms of maximizing the value of their products and expanding the market for them, protectionist intellectual property law and liberalist international trade law are of a piece.²⁷⁰ As an MPAA anti-piracy statement put it, “trade agreements . . . ensure the free flow and protection of intellectual property.”²⁷¹

In the intellectual property context, Lawrence Lessig has strongly criticized the MPAA’s pursuit of its “naked self-interest,”²⁷² and this perspective was echoed by Justice Breyer in a strongly worded dissent to the Supreme Court majority’s 2003 decision in *Eldred v. Ashcroft*.²⁷³ Lessig, who argued this case challenging the Copyright Term Extension Act, would later recall his surprise at the standing-room-only crowd on hand the first day, as well as the presence of “Valenti sitting in the special section ordinarily reserved for family of the Justices.”²⁷⁴ Ultimately the Court upheld the Act, determining that Congress’ ability to extend copyrights was effectively unlimited.²⁷⁵ Justice Breyer, however, argued in dissent that a statute extending copyrights “involves not pure economic regulation,

267. LESSIG, *supra* note 20, at 116, 118. Lessig essentially devotes a chapter of his book *Free Culture* to refuting the claim advanced by Valenti that “[c]reative property owners must be accorded the same rights and protections resident in all other property owners in the nation,” notwithstanding the constitutional requirement that grants of intellectual property rights be for a “limited time.” See *id.* at 117, 119 (quotations omitted).

268. Cable, *supra* note 20, at 235.

269. Richardson, *supra* note 18, at 17 (quotations omitted).

270. Cf. Richardson, *supra* note 18, at 19 (expressing support for the inclusion of strong intellectual property rights in free trade agreements).

271. MPAA, Anti-Piracy (on file with author).

272. LESSIG, *supra* note 20, at 255.

273. *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting). Lessig himself argued the case for Eric Eldred, who challenged the law.

274. LESSIG, *supra* note 20, at 238.

275. See *id.* at 239-43.

but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture.”²⁷⁶ Breyer also pointed to legislative history suggesting that the true aim of the law was “the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports.”²⁷⁷ “It is easy to understand,” Breyer concluded, “how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.”²⁷⁸

The MPAA has not only advocated stronger intellectual property rights, but has even opposed changes to the intellectual property registration system that would have had no direct impact on their rights over their own intellectual property. The “Eldred Act,” proposed by Lessig in a *New York Times* op-ed, would have freed up unused intellectual property for creative use by others by requiring that, fifty years following its creation, the copyright owner pay a nominal fee and register the work in order to get the protection of the full copyright term. The logic was to eliminate copyright protection “where it is doing nothing except blocking access and the spread of knowledge,” while preserving it “for as long as Congress allows for those works where its worth is at least \$1” to the copyright holder.²⁷⁹ Once the bill was drafted by California’s Zoe Lofgren, however, the “lobbyists began to intervene.” Notably, “Jack Valenti and the MPAA general counsel came to the congresswoman’s office to give the view of the MPAA,” communicating that the MPAA would oppose it even though they appeared to have no substantive reason for doing so.²⁸⁰ Ultimately, Lessig concluded of this effort—quite plausibly—that the “effort to block the Eldred Act is an effort to assure that nothing more passes into the public domain. It is another step

276. *Eldred*, 537 U.S. at 244 (Breyer, J., dissenting).

277. *Id.* at 262.

278. *Id.* at 266.

279. LESSIG, *supra* note 20, at 249.

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

to assure that the public domain will never compete, that there will be no use of content that is not commercially controlled, and that there will be no commercial use of content that doesn't require *their* permission first."²⁸¹

Media products constitute a quintessential example of what Cass Sunstein and Edna Ullmann-Margalit call "solidarity goods"—that is, products that "have more value to the extent that other people are enjoying them; they reflect something like a communal impulse."²⁸² A film, for example, derives at least part of its value to any given consumer from "the range of benefits coming from the fact that other people are also enjoying or buying it," including the "social benefits that come after the show has been watched." Companies in the business "are well aware of this fact; they know that the number of viewers and users will increase, sometimes exponentially, once popularity is known to exceed a certain threshold."²⁸³ To the extent that Hollywood's products constitute solidarity goods, it is not surprising that Hollywood would have a strong incentive to narrow the supply of competing intellectual property-based entertainment by opposing initiatives like the Eldred Act. Not only might competing intellectual property potentially divert sales, but it also might diminish the intrinsic appeal of Hollywood's products to the extent that it steers cultural preferences in another direction. As one scholar put it, "[m]ediated cultural competition is very much about gaining preference for your media product as social glue, which produces a hue of solidarity around it."²⁸⁴ This endeavor to re-

281. *Id.* at 255.

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

283. *Id.* at 3. Disney, for example, recognizes in its annual report the business risks posed by "competition . . . from alternative providers of the products and services we offer and from other forms of entertainment," as well as that Disney's "success depends substantially on consumer tastes and preferences that change in often unpredictable ways. The success of our businesses depends on our ability to consistently create and distribute filmed entertainment" and other products "that meet the changing preferences of the broader consumer market." Disney 10-K, *supra* note 254, at 21, 23.

284. See Guy Pessach, *Copyright Law As a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1083-87 (2003) (discussing the application of Sunstein's and Ullmann-Margalit's "solidarity good" concept to media products); cf. Vaidhy-

strict the supply of competing intellectual property clearly goes hand in hand with advocacy for a protectionist intellectual property regime and a liberalist trade regime.

It is evident that Hollywood stands to profit from restrictive intellectual property rules, liberal international trade rules, and a constricted supply of competing intellectual property. Again, Hollywood's aim in broader terms is to maximize the value of its products and the scope of the market in which they can move unfettered. But what about the substance of those products? What type of subject matter and production maximizes return for shareholders?

Cultural theorists like Appiah and Bhabha certainly make an important point when they emphasize the inevitable hybridity of all national cultures—the permeability of their boundaries and the inevitability, even desirability, of cultural “contamination.” Hollywood production, however, defies categorization in such terms, because Hollywood's aim is precisely to avoid cultural specificity. It neither contaminates nor is contaminated because it is all of us and none of us at the same time. Within a liberalized trade regime, Hollywood seeks to maximize the appeal of its products through a universality intended not to correspond with any national or cultural reality. As A.O. Scott, a film critic for the *New York Times*, has observed that “Hollywood studios, as they try to protect their dominant position in the global entertainment market, are ever more heavily invested in fantasy, in conjuring counterfeit worlds rather than engaging the one that exists.”²⁸⁵ As his colleague Lynn Hirschberg would similarly observe, “corporate finances dictate that they cast the widest net possible,” meaning a cultural universality that—ironically, in light of the complaints of other nations that they are overrun by American popular culture—in fact does not reflect America at all. “Now most big studio films aren't interested in America . . . preferring to depict an invented, imagined world, or one filled with easily rec-

anathan, *supra* note 265, at 125 (arguing that the “academic ‘cultural imperialism thesis’ is in severe need of revision,” and that “if there is a dominant form of cultural imperialism, it concerns the pipelines, not the products—the formats of distribution and the terms of access and use”).

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

ognizable plot devices.”²⁸⁶ As a studio executive (preferring to remain unnamed) told Hirschberg, American films “no longer reflect our culture,” having become “gross, distorted exaggerations.”²⁸⁷ Ironically, the “arrival of globalization is not complicating the American stories being told; it is simplifying them. . . . [N]ow, instead of being known for our sense of conversation or style, we are known for our blood and gore.”²⁸⁸

C. Edwin Baker sets out a compelling economic explanation for Hollywood’s relentless push toward universality. Building on the typology of Eli Noam, Baker assumes that a given national population will tend to value domestic content highly, universal content somewhat, and foreign content relatively less. One country’s foreign content will of course be another’s domestic, but the crucial observation is that all countries value universal content somewhat. In order to maximize profit, “a producer should include each element until its cost becomes greater than the revenue its inclusion allows the producer to extract from potential audiences.” Under a regime of free trade, a producer might be inclined to exploit export opportunities by increasing foreign content, but this would only pay in those markets where that content happened to be domestic and would, of course, come at the cost of diminishing the product’s value in the exporter’s home market. As a consequence, “for a producer seeking to export its creations, generally the dominant strategy is to increase [universal content] and sacrifice some [domestic content].”²⁸⁹

The greater universality that Baker’s and Noam’s analysis predicts accords well with the reality that critics like Scott and Hirschberg have observed in American film. Hirschberg, for example, has observed—again ironically—that the drive for “universal appeal” has led to shooting films abroad in part so

286. Hirschberg, *supra* note 6, at 90-91. This may be further reflected in the increasing number of animated films—“many of them about cute talking animals.” Jeffrey Katzenberg, DreamWorks’ chief executive, related to the *Wall Street Journal* a time when “he was in a movie theater and sat through back-to-back trailers for several near-identical” animated films. “I didn’t realize how similar they were all going to be,” he said. Marr, *supra* note 8, at B14.

287. Hirschberg, *supra* note 6, at 91 (quotations omitted).

288. *Id.* at 94.

289. BAKER, *supra* note 50, at 227-28.

that “films are set in a movie world with no distinct sense of place,” as well as to a generation of “international stars” (mainly men, she observes) “from other English-language-speaking countries.”²⁹⁰

But of course these dynamics are in no sense specific to U.S. media production. In recent years, for example, India’s raucous “Bollywood” film industry has enjoyed greater global popularity, particularly—though not exclusively—with the Indian diaspora. And of course those profiting from this business would love to see it expand further, which raises the question of how best to do that. The first thing to note is that Bollywood’s success outside India to date has resulted at least in part from a concerted effort to achieve “the validation of the west,” including the Indian diaspora.²⁹¹ Accordingly, Bollywood star Shah Rukh Khan has suggested that “[w]hat Indian cinema needs is to wear the garb of western cinema. We have to make shorter films, introduce more special effects and raise the production standards to make our movies more appealing to an international audience.”²⁹² The perceived formula for success is not to condition the West to understand Indian cinema or to expect the audience to encounter it on its own terms, but to universalize it—to conform the art to the requirements of a global audience.

Indeed, filmmakers from other countries who have made inroads in the West have quite consciously made similar universalizing moves. Chinese director Chang Yimou, whose 2004 film “Hero” (starring Zhang Ziyi) did quite well in the United States, “said he kept western audiences in mind as he was shooting. ‘I tried to get across themes that would be understood by a western audience.’”²⁹³ Again, the secret to export success, in China just as in the United States, is to alter the film, not to expect adaptation on the part of the audience. The global economic forces that Baker and Noam identify suggest that what is truly American about Hollywood is not the content it purveys so much as its size and capacity to exploit a

290. Hirschberg, *supra* note 6, at 94.

291. Rahul Jacob, *Melodrama for the Masses*, FIN. TIMES (London), Aug. 28-29, 2004, at 36.

292. Sumathi Bala, *The Empire Strikes Back: Could Bollywood Be Bigger Than Hollywood?*, FIN. TIMES (London), Aug. 28-29, 2004, at 34.

293. Ien Cheng, *Hero’s Success Sweeps the U.S.*, FIN. TIMES (London), Sept. 13, 2004, at 12.

global market. As Baker puts it, “[m]aybe the often criticized shallowness of American cultural products is less intrinsic to American creativity or tastes . . . than to the commercial realities of producing these products for export.”²⁹⁴

One aspect of Hollywood’s dominance that is quite specific to America, though, is the sheer size of the home market, which helps explain the push for bigger, more expensive films as well as their global dominance. The growth of DVD sales revenues over recent years—sometimes far exceeding what a film makes at the box office—has placed enormous power in the hands of a small number of retail chains that together account for a huge percentage of sales in the United States. Jon Gertner reports that “a handful of big chains have assumed a near-cartel on retail DVD sales,” with Best Buy, Target, Costco, Sam’s Club, Circuit City, and Blockbuster accounting together for about forty-two percent of DVD sales in the United States. But each of these pales beside Wal-Mart, which evidently wields such extraordinary buying power that even Hollywood executives are terrified of it. Gertner learned an “axiom of the DVD business . . . that no one discusses Wal-Mart’s influence or its negotiating tactics,” though according to one analyst Wal-Mart “alone controls about 22 percent of the overall DVD market in the United States and up to 40 percent on any one hit title.” As a consequence of these market dynamics, studio heads listen closely to what the retailers have to say, and the upshot is that “limited shelf space . . . has made it increasingly unappealing for studios to acquire smaller projects for distribution,” such as independent and foreign films.²⁹⁵ This drive for expensive productions and ability to recoup costs through domestic sales, however, clearly works to Hollywood’s advan-

294. BAKER, *supra* note 50, at 228.

295. Jon Gertner, *Box Office in a Box*, N.Y. TIMES MAG., Nov. 14, 2004, at 104, 108-9. This is of course not to say that studio heads have no appetite for independent films. In fact, “big studios send some of their brightest people to [the Sundance Film Festival] to shop for films and future projects, potential stars and possible franchises.” As Manohla Dargis has pointed out, “Hollywood’s incursion into the independent film realm has not only radically affected festivals like Sundance and turned them into a growth market, it has also changed the stakes for everyone involved. Modesty, after all, isn’t much of a virtue when you’re releasing a film with a multimillion-dollar ad campaign on thousands of screens.” Manohla Dargis, *Gold Rush Mentality at a Hustlin’ Sundance*, N.Y. TIMES, Jan. 26, 2007, at E13.

tage in the international market, where it has the consequence of rendering it increasingly difficult for others to compete.²⁹⁶

Interestingly, however, even though financial realities push the big Hollywood cinemas to think grand and global, it is these same studios that can afford so-called “specialty divisions” that do aim to produce authentically American films, notwithstanding their diminished global appeal. Hirschberg points to the example of “Sideways,” starring “four relative unknowns,” which, after having been rejected by Universal, was produced by Searchlight—a division of Fox that “largely concentrates on reaching a small North American audience.” Films like this (with “no international stars and no action”), and the divisions that make them, are clearly not where the money is. “A mediocre film released in thousands of theaters will usually be more successful than a small movie, without stars, that requires clever marketing.”²⁹⁷ That they are made at all should perhaps be considered, from the culture maven’s perspective, a point in Hollywood’s favor and an indication of the devotion to the craft that some within these mega-companies bring to their work. But consider another question: If worldwide sales of Hollywood “event films” are what it takes in a globally liberalized marketplace to free up small divisions of enormous film companies to produce authentically American films on occasion, then what pays for authentic local cultural production in the rest of the world?

The examination of Hollywood’s business model and its consequences brings us back to UNESCO’s Culture Convention—what it represents, and what it might accomplish. Awkward as the drafting may be, the Culture Convention is perhaps best read as an assertion of the legitimacy of the very

296. See *infra* text accompanying notes 299-300. It should, however, be noted that reliance on DVD sales can create its own risks. In 2005 DreamWorks had to restate earnings estimates more than once due to miscalculation of “Shrek 2” DVD sales, leading to an informal Securities and Exchange Commission inquiry. Marr, *supra* note 8, at B1.

297. Hirschberg, *supra* note 6, at 90, 92. “Sideways” involves a “wine-tasting road trip” in Santa Barbara by Miles, “a would-be novelist,” and Jack, “his old college buddy and washed-up actor,” before Jack’s wedding. The film won awards for Best Adapted Screenplay at the Academy Awards and the Writers Guild Awards, as well as Golden Globes for Best Picture (comedy/musical) and Best Screenplay. See Fox Searchlight, Sideways, <http://www2.foxsearchlight.com/sideways> (last visited Jan. 15. 2008).

types of governmental structures that, in the absence of any capable market actor or mechanism, could fill this void. It is, in essence, an assertion of the rights of peoples and of governments to register preferences about cultural production other than through a globalized marketplace that disfavors the small and local. It is easy to criticize this from the American perspective. As described *supra*, given its market share, the United States simply does not face this dilemma and in fact profits enormously from maintenance of the status quo. While protectionism is often tarred as paternalism, “this complaint, not intervention, is what is really paternalistic. Paternalism lies not in subsidized government structural intervention but in refusing to treat the decision about subsidies and intervention as a matter of democratic choice.”²⁹⁸

Baker has compellingly argued that such legal measures should be permitted to the extent that liberalized trade exacerbates market failures,²⁹⁹ emphasizing (among other things) that the size of its home market gives the United States an enormous advantage on the international playing field. Countries importing U.S. cultural products, for example, cannot look to anti-dumping rules (which generally penalize countries exporting goods below cost), because once media products have been created, there is little added cost to producing additional copies for export. The size of Hollywood’s home market permits it to recoup production costs through domestic sales as well as to create more expensive products beyond the reach of producers elsewhere (who lack the home market to support their creation), and then to sell those products abroad at lower prices—which still brings in a nice return due to the low cost of subsequent copies.³⁰⁰

298. BAKER, *supra* note 50, at 121.

299. *Id.* at 222.

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

The MPAA, of course, simply sidesteps these issues, emphasizing that “in the e-commerce world” channel scarcity is no longer a problem, and arguing on this basis that protectionist measures like quotas are not justified.³⁰¹ But the hypocrisy of the U.S. position on trade in cultural products—not to mention the U.S. no-vote on UNESCO’s Culture Convention—stands out perhaps most starkly on the rare occasion that the United States itself actually feels culturally threatened by the trade regime or can benefit rhetorically by posturing as if it did. For example, when a WTO dispute resolution panel ruled for Antigua and Barbuda in 2004, finding that certain aspects of U.S. law regarding online gambling violated the United States’ WTO obligations, incensed congressional leaders did not hesitate to play the culture card. According to the *New York Times*, “several members of Congress said they would rather have an international trade war or withdraw from future rounds of the World Trade Organization than have American social policy dictated from abroad.” As Bob Goodlatte, a Republican Representative from Virginia, intoned, “[i]t cannot be allowed to stand that another nation can impose its values on the U.S. and make it a trade issue.” For his part, Sir Ronald Sanders, the foreign affairs representative of Antigua and Barbuda, observed that the United States “says it wants open competition,” but “it only wants free trade when it suits the U.S.”³⁰²

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

301. Richardson, *supra* note 18, at 20.

302. Matt Richtel, *U.S. Online Gambling Policy Violates Law, W.T.O. Rules*, N.Y. TIMES, Mar. 26, 2004, at C5. Ultimately the WTO’s Appellate Body agreed that the U.S. actions at issue restricted trade in services contrary to U.S. GATS commitments, but found that the ban on Internet gambling was justified under the exception for the protection of “public morals.” See Joost Pauwelyn, *WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation*, ASIL INSIGHT, Apr. 12, 2005, <http://www.asil.org/insights/2005/04/insights050412.html>.

C. *Hard Power, Soft Power, and Enabling Rhetoric*

While Hollywood's movers and shakers are enormously powerful, it must be recognized that their business strategy depends critically on the actions of individuals and institutions that are—at least formally—not under their control. Domestic laws come from Congress.³⁰³ And foreign commitments come from the President, as refracted through the Senate, due to the latter's power to approve treaties.³⁰⁴ These constitutional principles themselves give rise to additional questions: Why might the U.S. government work so hard to advance Hollywood's (or rather its shareholders') interests? Setting aside the unsavory thought that our government's attention can simply be bought, and recognizing that elected officials will of course be happy to hear Hollywood report that media industries bring in substantial export revenues and employ many people,³⁰⁵ the question nevertheless remains: How might the U.S. government's own goals be advanced through the global dominance of Hollywood?

There is an element of raw power politics in the U.S. pursuit of dominance in cultural products trade. Political scientists Robert Keohane and Joseph Nye, Jr. have drawn a useful distinction between "hard" power—that is, "the ability to get others to do what they otherwise would not do through threats or rewards"—and "soft" power—that is, "the ability to get desired outcomes because others want what you want." Getting what one wants "through attraction rather than coercion" is the stuff of soft power, and this "can rest on the appeal of one's ideas or culture." Keohane and Nye observe that the achievement of soft power can result in a country "not need[ing] to expend as many costly traditional economic or military resources."³⁰⁶

In their exploration of expressions of such power, Keohane and Nye observe that "soft power is strongly affected by

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

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

305. See *supra* text accompanying note 18.

306. Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, FOREIGN AFF., Sept./Oct. 1998, at 81, 86 (1998).

the cultural content of movies and television programs,” and that because economies of scale aid such production in the United States, the “dominant American market share in films and television programs in world markets is therefore likely to continue.”³⁰⁷ The strategic value of ensuring that global media remain primarily in the business of piping content basically amenable to American values and viewpoints is obvious. Monroe Price’s notion of a “market for loyalties” essentially emphasizes this strategic value. Price identifies a global “competition for influence,” and contends that “the argument for free trade is a central element of masking or shaping a particular entrant into this market for loyalties on a global basis.”³⁰⁸ In this light, the U.S. approach to trade negotiations affecting cultural products might be viewed as the employment of hard power (diplomatic pressure coupled with the carrot of U.S. market access) in order to facilitate the achievement of soft power (the global spread of cultural products broadly amenable to American values).

The endeavor to make the world safe for American ideas is itself, however, facilitated and enabled by rhetoric that aims to give trade liberalism a patina of inevitability, notwithstanding its relatively recent vintage and political contingency. In a well-known article published in *International Organization* in 1982, political scientist John Ruggie described the post-World War II order as the “embedded liberalism compromise.” Rejecting both the extreme economic nationalism of the 1930s and the extreme liberalism of the prewar gold standard and free trade, embedded liberalism—built upon the Bretton Woods institutions (the International Monetary Fund and the World Bank) and the GATT regime—represented a middle road that was at once “multilateral in character” and “predicated upon domestic interventionism.”³⁰⁹ With respect to the trading system, “principles of multilateralism and tariff reductions were affirmed, but so were safeguards, exemptions, exceptions, and restrictions—all designed to protect the balance

307. *Id.* at 87-88.

308. *Panel III: Discussion Transcript*, 27 *BROOK. J. INT’L L.* 1003, 1022 (2002) (Monroe Price participating in panel discussion on international trade in media products).

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

of payments and a variety of domestic social policies.”³¹⁰ Liberalism was, quite literally, to be embedded within the larger goal of domestic stability. This history is important because the debate over cultural products reflects what Ruggie observes more broadly of the entire postwar global economic order: “[I]f we compare changes in the monetary and trade regimes against some ideal of orthodox liberalism, then we are bound to be disappointed if not shocked by recent trends. But,” he continues, “we are also bound to be misled. For orthodox liberalism has not governed international economic relations at any time during the postwar period.”³¹¹

The United States has expended enormous effort to make things appear otherwise. Recall, for example, that the Culture Convention is very likely aimed at legitimating the refusal to liberalize audiovisual services under future GATS negotiations, notwithstanding the general commitment to continue negotiating toward further liberalization. It is worth pausing to consider, however, the origin of the perhaps counterintuitive notion that services can be traded in the first place. Unlike goods, with respect to which the modern argument for gains through trade dates back at least to the early nineteenth century,³¹² as late as 1972 virtually no one would have thought of a

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

311. Ruggie, *supra* note 309, at 405.

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

service as something that could be traded. That year, however, “a group of experts” meeting “under the auspices of the Organization for Economic Cooperation and Development (OECD) . . . coined the phrase ‘trade in services.’” This was the beginning of what Drake and Nicolaidis describe as “a revolution in social ontology” that “redefined how governments thought about the nature of services, their movement across borders, their roles in society, and the objectives and principles according to which they should be governed.”³¹³ The new terminology was “embraced quickly in the United States,” with a large enough market to have “nurtured some of the world’s largest services firms” eager to dismantle barriers to market entry abroad. And the rhetorical benefits of this shift were enormous:

For American-based [transnational corporations], the “trade” category had a dual appeal. Internally, it rolled together a new political coalition of companies from diverse industries by underscoring their common problems and justifying their individual demands. Externally, it gave them each a potent discursive weapon with which to advance these demands by redefining industry-specific policies as “protectionism,” a charge that was less easily ignored by foreign governments than were ad hoc appeals for regulatory flexibility.³¹⁴

Even by the 1980s, those pushing the idea that services should be considered tradable consisted principally of American government officials and businesspeople as opposed to independent outsiders or scholars. The U.S. Chamber of Commerce, the U.S. Council for International Business, the Conference Board, and other business organizations were instrumental in advocating the idea “on the conference circuit, in public and private sector meetings, and in a handful of publications.” As a consequence, “classical liberal thinking in

ities. This notion of comparative advantage “remains the linchpin of liberal trade theory.” ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987), excerpted in BHALA, *supra*, at 9.

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

314. *Id.* at 46.

the American mode shaped the agendas of those who were aware of the issues.”³¹⁵ Meanwhile, the United States government pursued the negotiating strategy of pushing to get services included in bilateral trade deals “to gain quick entry for American-based [companies] in key markets, set a standard for services initiatives, and pressure other GATT members into negotiations.”³¹⁶ As discussed *supra*, the Europeans (spearheaded by the French) were ultimately able to resist audiovisual services liberalization under the GATS by declining to make commitments in that sector, but the very fact that by the 1990s services were broadly spoken of as tradable constituted a huge rhetorical victory for the U.S. government and industry. As Drake and Nicolaidis observe, “the predominantly Anglo-American analysts who first posed the issues established the terms of discourse to which other members later had to respond.” And by linking services liberalization to the concept of trade, they were able as a practical matter to reverse the burden of persuasion. In “defining services transactions as ‘trade’” they “established normative presumptions that ‘free’ trade was the yardstick for good policy against which regulations, redefined as nontariff barriers . . . , should be measured and justified only exceptionally.”³¹⁷

315. *Id.* at 49-50.

316. *Id.* at 57. I have written elsewhere about the efficacy of this U.S. trade negotiation strategy. See Bruner, *supra* note 73, at 38-52. See generally Christopher M. Bruner & Rawi Abdelal, *To Judge Leviathan: Sovereign Credit Ratings, National Law, and the World Economy*, 25 J. PUB. POL’Y 191 (2005) (discussing the efficacy of gatekeeper status vis-à-vis the U.S. capital market as a means of enforcing U.S. values and market practices globally); RAWI ABDELAL, *CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE* (2007) (exploring the emergence of the norm favoring capital liberalization as a collision of America’s preference for “ad hoc” globalization versus Europe’s desire for “managed” globalization); Drake & Nicolaidis, *supra* note 313, at 41 (contrasting “the largely American partisans of comprehensive liberalization” with the “more European-style managed liberalism”).

317. Drake & Nicolaidis, *supra* note 313, at 40; see also John Gerard Ruggie, *At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy*, 24 MILLENNIUM 507, 514-15 (1995) [hereinafter Ruggie, *At Home Abroad*] (observing that “because the concept of services has no well-established place in economic theory, its definition tends to be *ad hoc* and arbitrary,” and there is consequently “no reason to expect that contested definitions will yield to consensus simply because a GATS has been reached”).

Though initially caught on their heels, those who have ultimately come to recognize an interest in opposing services liberalization in cultural sectors have endeavored in the Culture Convention to reset the default presumptions about the relative wisdom of liberalism versus regulation in this area. As Ruggie observed close to the time of the WTO's creation, the trade regime created in the wake of World War II "was intended to achieve and maintain a sustainable balance between the internal and external policy objectives of governments It was not designed to restructure domestic institutional arrangements. Yet, domestic restructuring is what the trade policy agenda increasingly has come to be about."³¹⁸ The Culture Convention essentially builds on this recognition and rejects the normative premise that liberalization of media products is inevitable or even desirable. It is an attempt to place back onto the United States the burden of demonstrating why liberalization in this area is appropriate and/or desirable, and by all indication the United States is failing in that effort.

In the area of cultural products, however, the United States has deployed not only trade rhetoric, but also human rights-based arguments aimed at painting cultural protectionist measures as a violation of speech and related rights—notably the right to receive information of one's choosing. Emphasizing the United States' own diversity and openness to new ideas, U.S. Ambassador Oliver and others suggest that the Culture Convention will lead to stasis and homogeneity within national cultures due to government control of access to ideas.³¹⁹ Likewise, Appiah implicitly makes a human rights-based attack on the Culture Convention when he suggests that its "principle of equal dignity of and respect for all cultures" is contradictory in that "all cultures" would also include "those of the K.K.K. and the Taliban."³²⁰

Such "contradictions" are more apparent than real. As an interpretive matter, the notion that the Culture Convention somehow endorses the racism and ethnocentrism of the K.K.K. and the Taliban is plainly incorrect. The principle selectively quoted by Appiah reads in full: "The protection and promotion of the diversity of cultural expressions presuppose

318. Ruggie, *At Home Abroad*, *supra* note 317, at 516.

319. See *supra* text accompanying notes 41, 42, 203, 225.

320. Appiah, *supra* note 243, at 37.

the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.”³²¹ In other words, to accord with the objective, one’s conduct would have to reflect recognition of the equal dignity of all. It is precisely the likes of the Taliban and the K.K.K. whose conduct would accord with neither the objective nor the underlying principle of this provision: Taliban- and K.K.K.-like views and conduct are rather *condemned* by the Culture Convention (read in full), not respected or permitted by it.³²²

And just like U.S. officials speaking on the Culture Convention, Appiah omits to mention another principle—the first listed in the instrument—which states that “[n]o one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.” Both “freedom of expression” and “the ability of individuals to choose cultural expressions” are provided as explicit examples, and the principle is stated without exception or qualification.³²³ In an explanatory document, UNESCO cites this principle as ensuring that “the risk of cultural relativism, which in the name of diversity would recognize cultural practices that infringe the fundamental principles of human rights, has been eliminated.”³²⁴ Should governments try to justify censorship by reference to the Culture Convention, they would immediately run into human rights commitments (via article 2(1) of the Culture Convention) that they have already made in other documents.³²⁵ Whatever ambiguity article 20 of the Culture Con-

321. Culture Convention, *supra* note 26, art. 2(3).

322. Any pluralist cultural policy will ultimately require a “non-interference” principle of this sort to delineate the outer boundaries of acceptable social conduct. OWEN-VANDERSLUIS, *supra* note 51, at 123-24. In essence, “no group conscious policy can be supported if it conflicts with the realization of social justice for other groups.” *Id.*

323. Culture Convention, *supra* note 26, art. 2(1).

324. Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 33rd Gen. Conference, UNESCO Doc. CLT/CEI/DCE/2007/PI/32, at 7 (n.d.), *available at* http://www.unesco.org/culture/culturaldiversity/docs_pre_2007/10_keys_en.pdf.

325. *See generally* Office of the United Nations High Commissioner for Human Rights (UNHCHR), Ratifications and Reservations: International Covenant on Civil and Political Rights, <http://www.unhchr.ch/tbs/doc.nsf/>

vention may engender with respect to its status vis-à-vis trade agreements, there is no such ambiguity with respect to human rights. The latter trumps the Culture Convention by its own terms.

And what does the body of human rights law itself have to say about speech and cultural diversity? In essence it endeavors to balance them—a reality hardly militating toward comprehensively defaulting to the market on cultural matters. The Universal Declaration on Human Rights, which is not a treaty but a proclamation of the UN General Assembly similar in status to the UDCD, says both that all have the right “to seek, receive and impart information and ideas through any media and regardless of frontiers” and that all have the right “freely to participate in the cultural life of the community.”³²⁶ The International Covenant on Civil and Political Rights says that “peoples have the right of self-determination,” including the right to “freely pursue their economic, social and cultural development” but also that all have the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”³²⁷ The International Covenant on Economic, Social and Cultural Rights likewise says that “peoples have the right of self-determination,” including the right to “freely pursue their economic, social and cultural development,” but also requires parties to take steps “necessary for the conservation, the development and the diffusion of science and culture.”³²⁸

Important human rights documents recognize that the expression of preferences about culture and values takes place both at the level of consumers acting individually in markets and at the level of citizens acting collectively as a polity. These instruments likewise do not rule out the possibility that gov-

newhvsatbytreaty?OpenView&Start=1&Count=250&Expand=3.2#3.2 (last visited Jan. 18, 2008); UNHCHR, Ratifications and Reservations: International Covenant on Economic, Social and Cultural Rights, <http://www.unhchr.ch/tbs/doc.nsf/newhvsatbytreaty?OpenView&Start=1&Count=250&Expand=10.2#10.2> (last visited Jan. 18, 2008).

326. UDHR, *supra* note 127, arts. 19, 27.

327. International Covenant on Civil and Political Rights arts. 1(1), 19(2), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

328. ICESCR, *supra* note 127, arts. 1(1), 15(2).

ernment intervention may be necessary to enhance overall speech opportunities due to media market failures. For example, a significant problem with measuring what audiences want solely by reference to what they will pay in a market for cultural products is that this ignores larger social externalities—including the formation of values and beliefs—which are particularly potent in the realm of media. This is in large part what media regulation endeavors to address, and such intangible externalities are virtually impossible to measure in dollar terms.³²⁹ In light of the potential for over-commodification of communications through the market, “why not merely allow people to choose” to what degree communications should be commodified?³³⁰ The MPAA, of course, has traditionally dismissed non-market modes of expression of preferences. Valenti, for example, “argued that Europeans prefer American programming, claiming that Europeans ‘like, admire, and patronize what we offer them,’” and dismissed the possibility that such policies themselves constitute an expression of a cultural preference.³³¹ Indeed, people might rationally choose to curtail the influence of media market actors precisely because they recognize the media’s capacity to distort their own preferences.³³²

It is undoubtedly the case that one’s view on the role of media in society is intimately bound up with one’s view of democracy and the proper bounds of governmental power.³³³ However, it is important not to lose sight of the fact that the legal regime most directly addressing such issues is the corpus of human rights law described *supra*, to which virtually all

329. BAKER, *supra* note 50, at 42-43.

330. *Id.* at 63-67.

331. See Middleton, *supra* note 19, at 614.

332. See, e.g., Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1417-18 (2004) (“[C]ommercial media enterprises successfully use various programming and marketing techniques to develop tastes in the kinds of fare that they intend to produce, and consumer desires developed in this way will naturally agitate for more of the same.”); BAKER, *supra* note 50, at 72-74 (observing the range of settings in which the expression of preferences is not left to the market, such as voting and citizenship).

333. See, e.g., Neil Weinstock Netanel, *The Commercial Mass Media’s Continuing Fourth Estate Role*, in *THE COMMODIFICATION OF INFORMATION* 317, 317-18 (N. Elkin-Koren & Neil Weinstock Netanel eds., 2002); BAKER, *supra* note 50, at 125-216.

states (at least purportedly) adhere³³⁴ and the primacy of which is clearly established in the Culture Convention. No credible participant in the discussion is actually claiming that outright censorship is desirable or legally permissible.³³⁵ The Culture Convention instead affirms that there is a balance to be struck—an approach resonating not only with the instrument’s principal sponsors, Canada and France,³³⁶ but also with developing countries seeking to avoid the twin dangers of excessive government control and excessive market control. While state domination of the media remains a problem in many developing countries, there is likewise “a real danger that newspapers and other publications may be free from state control only to be swallowed up by international interests”—especially in broadcasting, for which production costs “are such that many . . . networks have already allowed themselves to become dumping grounds for old, and often inferior, western programmes.”³³⁷ Ironically, it was precisely this form of

334. Cf. BAKER, *supra* note 50, at 270 (arguing that human rights law should be used “to identify impermissible national burdens or restraints on imported media products” in a manner analogous to the “use of the First Amendment to forbid objectionable restrictions on communications while allowing governmental structural regulation of the communications industries”). *But see* Barton, *supra* note 300, at 98, 103-04 (arguing that human rights laws on speech limit the ability of national governments to impose media access restrictions, but that the WTO is the correct forum for hashing out the intersection of trade and culture, and that a side agreement to the GATS might provide for “a limited share of reserved local content channels”).

335. *See, e.g.*, Goodenough, *supra* note 10, at 211, 235-36 (distinguishing between “strong” protectionism with an exclusionary aim and “weak” protectionism aimed at preserving local cultural production, and ultimately finding weak protectionism “far preferable”); BAKER, *supra* note 50, at 267-68 (endorsing Goodenough’s distinction).

336. This of course is not to say that elites—even in liberal Western democracies like France—might not endeavor to use cultural concerns to their domestic political advantage. *See, e.g.*, Riding, *supra* note 48. Rather, I simply point out that such an effort is neither enabled nor endorsed by the Culture Convention.

337. Robert Martin, *Building Independent Mass Media in Africa*, 30 J. MOD. AFR. STUD. 331, 335 (1992); *see also* Dima Dabbous-Sensenig, *From Defending “Cultural Exception” to Promoting “Cultural Diversity”: European Cultural Policy and the Arab World*, 14 QUADERNS DEL CAC 33, 35-36, 40, 42 (2002) (citing “public service broadcasting” of North America and Europe as a useful model of non-market, non-governmental media encouraging cultural diversity).

balance that UNESCO's MacBride report—over which the United States left UNESCO—reflected,³³⁸ and which the United States continues to impede today.

VII. FROM CANNES TO HOLLYWOOD

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

Maybe the thoughts we generate today and flick around from mind to mind, like the jokes that turn up simultaneously at dinner parties in Hong Kong and Boston, or the sudden changes in the way we wear our hair, or all the popular love songs, are the primitive precursors of more complicated, polymerized structures that will come later, analogous to the prokaryotic cells that drifted through shallow pools in the early days of biological evolution.³³⁹

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

338. Martin, *supra* note 337, at 335-36.

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

mind to mind, until something like natural selection makes the final selection, all on grounds of fitness.”³⁴⁰

In the meantime, however, note that the implicit requirements for such fruitful exchanges include both diversity and contact. Both are essential, or the benefits of cultural contact are lost utterly. Thomas’ perspective was essentially identical to that of UNESCO’s founders in the 1940s. Just like UNESCO’s constitution, Thomas assumed that cultural diversity could be taken for granted but that contact could not.³⁴¹ By late 2005, however, when the Culture Convention was adopted, the reality had radically changed—at least in the view of the 148 national delegations that voted to approve the Culture Convention. In an ever-shrinking global media landscape, in which U.S. content grows ever more dominant, it would appear that the situation has reversed: Contact can be taken for granted (if only one-way), but cultural diversity cannot. The end goal—the fruitful encounter of diverse cultures—remains the same, but the steps needed to reach this goal have changed considerably. France, Canada, and many other countries around the world fear that in the absence of some means of facilitating local cultural production, the market will select a single global winner by very different criteria of fitness than we might favor upon reflection. Domestic politics, embedding cultural production in a larger set of values and preferences than the market can accommodate—a sort of “embedded cultural liberalism,” as it were—will be the policy context in which the intersection of culture and trade will be determined. Or at least so says the Culture Convention.

The United States’ denial of this reality rings increasingly hollow. People know special interest capture when they see it—especially before the backdrop of such resounding global consensus. The United States may, to be sure, get what it wants moving forward; there is already evidence to suggest that the Culture Convention has not altered America’s negotiating position in any fundamental way in bilateral negotiations.³⁴² But it will not be easy, and if it comes, it will not come for free.

340. *Id.* at 168.

341. *See supra* text accompanying note 113.

342. One observer characterized the Culture Convention as “‘a safety valve at best,’ suggesting that it might be of use to countries such as France, Canada, and Korea, but perhaps not to smaller countries engaged in bilat-

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

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

eral negotiations with the US.” See ICTSD, *supra* note 111, at 7. While its screen quota was widely applauded, particularly by France and Canada, around the time of the Culture Convention’s signing, little time would pass before South Korea would agree to cut the quota in half as a concession to gain U.S. market access through a bilateral trade agreement. See Barbara Demick, *U.S., South Korea in a Cinema War*, L.A. TIMES, Oct. 31, 2005, at C1; Darcy Paquet, *Koreans Cut Pic Quotas*, VARIETY, Jan. 30, 2006 – Feb. 5, 2006, at 19. As of early 2007, local films were enjoying significant successes in East Asia’s booming film markets—including not only China and Japan, but also South Korea—though domestic protectionist measures remained important policy levers and the Culture Convention was clearly viewed as an important buffer against American competition in the future. See Geoffrey A. Fowler & Juying Qin, *Asian-Produced Movies Reel In Viewers*, WALL ST. J., Jan. 11, 2007, at B7; *China Ratifies UNESCO Convention on Protecting Cultural Diversity*, XINHUA GEN. NEWS SERV., Dec. 29, 2006.