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Mamas, Don't Let Your Babies Grow Up to Be Cowboys:* Reconciling Trade and Cultural Independence

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The United States produces and exports a dominant share of the world's movies, television programs, and audio and video music recordings.¹ Countries with smaller production capabilities often fear that the unrestricted importation of American cultural products will cause American cultural values to displace their own.² To counteract the perceived threat of American dominance, countries with smaller producers have established quotas limiting the use of foreign cultural products, imposed numerous types of discriminatory taxes, and granted direct subsidies and other investment incentives to their domestic

* WILLIE NELSON, *Mamas, Don't Let Your Babies Grow Up to Be Cowboys*, on WILLIE NELSON'S GREATEST HITS (CBS Records 1981).

1. David Reiff, *The Culture that Conquered the Earth; Why Conformist Consumerism is America's Greatest Export*, WASH. POST, Jan. 2, 1994, at C1. Reiff states that:

[I]t should come as no surprise that the global consumer culture—particularly in the realm of movies, music and food—has remained almost an American monopoly in a time when America's hegemony in other industries, ranging from automobiles to consumer electronics, has been shattered irrevocably With some real exceptions (e.g., an Indian film industry whose appeal does not extend beyond the considerable market share of the subcontinent itself and the Indian diaspora) it is Hollywood, Burbank, the American music industry and such fast food chains or providers as McDonald's, Coca-Cola, Burger King and Domino's Pizza, that predominate.

Id. Despite protectionist measures, 80% of films and 50% of television programs in Europe come from the United States. *GATT/Broadcasting: Towards a Cultural Code in the GATT*, TECH EUR., Sept. 9, 1993, available in LEXIS, News Library, Curnws File. American films dominate the theaters in almost every European country. *Movies Eclipse Films*, ECONOMIST, Feb. 5, 1994, at 89. In Britain, the most popular 19 films were American, with Kenneth Branagh's "Much Ado About Nothing" taking 20th place. *Id.* Spanish films comprised less than 20% of their home market and German films comprised only 9% of the German market. *Id.* In Italy, American films comprised 90% of the market. *Id.* In France, which is the only European country to have a substantial film industry, domestic films comprise only 37% of the market. *Id.*

2. Canada and France have been active in pursuing protection of domestic cultural products. See *infra* notes 30-32, 59-61 and accompanying text.

producers.³ Countries concerned about domestic culture have also resisted international attempts to liberalize trade in cultural products, particularly when the United States is a party.⁴

The Canada-United States Free Trade Agreement (FTA)⁵ was the first free trade agreement to broadly exempt cultural products from its general free trade provisions. In what may be the only international legal definition of "cultural industries," the FTA defines the term to include the publication, distribution or sale of books, magazines, periodicals, newspapers, films, video recordings, audio or video music recordings, and music in print, as well as all radio, television, cable, and satellite broadcasting services.⁶

Disagreement between the European Union (EU) and the United States over coverage of cultural industries under the General Agreement on Tariffs and Trade (GATT)⁷ became a major obstacle to final agreement⁸ in the Uruguay Round⁹ negotia-

3. See *infra* notes 36-40, 48-49, 69-70 and accompanying text.

4. See *infra* notes 7-9, 30-31 and accompanying text.

5. Canada-United States Free Trade Agreement, art. 2005, Jan. 1, 1989, 27 I.L.M. 281 [hereinafter FTA].

6. *Id.* art. 2012.

7. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (current version in GENERAL AGREEMENT ON TARIFFS AND TRADE, 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter GATT, BISD]).

8. *France Wants Audiovisual Sector Excluded from GATT Talks, Culture Minister Says*, Daily Rep. for Executives (BNA), at A182 (Sept. 22, 1993), available in LEXIS, News Library, Curnws File. On July 15, 1993, the European Parliament resolved to demand explicit protection for cultural industries within the GATT. *GATT/Broadcasting: Towards a Cultural Code in the GATT*, Eur. Rep. No. 1876 (July 19, 1993), available in LEXIS, News Library, Curnws File. An express clause might have included, for example, the right to regulate broadcasting activity for social purposes. *Id.* Meanwhile, France threatened to reject any new GATT agreement purporting to cover the trade of audio-visual industries. Paul Webster, *France Promises Big-Screen Showdown Over GATT Talks*, GUARDIAN, Sept. 15, 1993, at 10. France is primarily concerned with the trade of television programs and films, which it refers to as "audio-visual" industries. Supported by Spain and Belgium, France asserted that the only way to protect European audio-visual industries is to exclude them completely from coverage by GATT provisions. *GATT/Audio-Visual: Mitterand Calls for Cultural Exemption Clause*, Eur. Rep. No. 1888 (Sept. 25, 1993), available in LEXIS, News Library, Curnws File. On December 14, 1993, one day before the scheduled finalization of the Uruguay Round GATT accord, the EU still refused to consider any liberalization of the trade of audio-visual products. Bill Holland, *Final GATT Treaty Disappoints U.S. Entertainment Biz*, BILLBOARD, Dec. 25, 1993, at 5.

9. In September 1986, representatives from countries worldwide met in Punta del Este, Uruguay, to launch the eighth round of multilateral trade negotiations in the 40 years of GATT's existence. Mario Marconini, *The Uruguay*

tions. To save the rest of the trade negotiations, the United States agreed to completely exclude reference to cultural industries within the new GATT.¹⁰ However, the Clinton Administration has commented that excluding cultural industries entirely from GATT leaves open the possibility that the United States may retaliate against the EU's protectionist policies under Section 301¹¹ of the Trade Act of 1974.¹² The United States has also warned Indonesia, Australia, Egypt, India, and Thailand

Round Negotiations on Services: An Overview, in *THE URUGUAY ROUND: SERVICES IN THE WORLD ECONOMY 19* (Patrick A. Messerlin & Karl P. Sauvants eds., 1990).

10. *Clinton Says Emerging Uruguay Round Pact is in U.S. Interest Despite Shortcomings*, Int'l Trade Daily (BNA) (Dec. 16, 1993), available in LEXIS, News Library, Arcnws File [hereinafter *Clinton Says*]. President Clinton stated that removing cultural industries entirely from GATT is "certainly better than leaving a weak agreement in or cratering the whole round over it, because there's just to [sic] much aggregate economic benefit to the United States from the overall tariff reductions to not try to keep the round intact." *Id.*

11. *Id.* (referring to Trade Act of 1974, Pub. L. No. 93-618, tit. III, § 301, 88 Stat. 1978, 2041 (codified as amended 19 U.S.C. § 2411 (1988))). Section 301 provides for mandatory action by the United States Trade Representative (USTR) if "an act, policy, or practice of a foreign country . . . is unjustifiable and burdens or restricts United States commerce," 19 U.S.C. § 2411(a)(1)(B)(ii), and discretionary action if "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and . . . action by the United States is appropriate," 19 U.S.C. § 2411(b)(1), (2). In taking action, the USTR is authorized to:

- (A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection;
- (B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate; or
- (C) enter into binding agreements with such foreign country that commit such foreign country to-
 - (i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section,
 - (ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or
 - (iii) provide the United States with compensatory trade benefits that-
 - (I) are satisfactory to the Trade Representative, and
 - (II) meet the requirements of paragraph (4).

19 U.S.C. § 2411(c)(1).

12. Jacques Attali, *Fragile Cease Fire; Hollywood vs. Europe: Setting the Stage for the Next Round*, PHOENIX GAZETTE, Dec. 23, 1993, at B7. The USTR will continue to negotiate for freer trade in cultural industries but has not yet determined its specific course of action or whether it will initiate retaliatory action. Telephone Interview with Joe Papovich, USTR Department of Services, Investment, and Intellectual Property (Feb. 17, 1993).

about possible Section 301 action for restricting the access of foreign producers to their audio-visual markets.¹³

This Note considers whether cultural products should be covered by GATT obligations in liberalizing trade. Part I discusses the policies that led to the cinema exception in GATT and the cultural products exemption in the FTA. Part I also describes the arguments between the United States and Europe which led to the present postponement of GATT coverage for cultural industries. Part II analyzes the arguments for and against extending trade liberalization to cultural industries. The analysis considers the impact of changing technology on cultural industries, the effects of international competition on cultural industries, and the effects of trade protections on cultural preservation efforts. Part III examines the potential effects of specific GATT provisions on cultural industries. This Note concludes that the application of GATT principles to cultural products may result in a workable balance between the benefits of free trade and governmental support of national cultural values.

I. TREATMENT OF CULTURAL INDUSTRIES IN INTERNATIONAL TRADE

A. HISTORICAL TREATMENT OF CULTURAL INDUSTRIES UNDER GATT

In 1947, the original parties to GATT created the Article IV cinema exception.¹⁴ The cinema exception modifies GATT's Article III national treatment obligation, which requires foreign imported products to be treated no less favorably than like domestic products with respect to taxes and regulations affecting

13. *U.S. Cites India, Taiwan, Thailand for Worst Records on Intellectual Property*, Int'l Trade Daily (BNA) (May 1, 1992), available in LEXIS, News Library, Arcnws File; *USTR Hills Names China, India, Thailand As Offenders Under Special 301 Provisions*, Int'l Trade Daily (BNA) (Apr. 29, 1991), available in LEXIS, News Library, Arcnws File; *Proposed Egyptian Law Would Lengthen Patent Protection Term to 20 Years*, Int'l Trade Daily (BNA) (June 14, 1993), available in LEXIS, News Library, Curnws File; Murali Ranganathan, *US Loosens Stand On Special 301*, Ethnic Newswatch (News India) (June 4, 1993) at 2, available in LEXIS, News Library, Curnws File; *U.S. to Investigate Brazil's Patent, Copyright Protection*, Reuter Bus. Rep. (May 28, 1993), available in LEXIS, News Library, Curnws File.

14. Article IV provides that "screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized," and that "screen quotas shall be subject to negotiation for their limitation, liberalization, or elimination." GATT, BISD, *supra* note 7, art. IV(a), (d).

their internal sale, distribution, or use.¹⁵ The cinema exception thus permits governments to impose screen quotas upon theaters by establishing a minimum percentage of films of national origin to be exhibited, as long as that minimum percentage is no greater than the percentage that was required under domestic law in 1947.¹⁶ The United Kingdom, Norway and Czechoslovakia particularly advocated the cinema exemption, citing the cultural importance of film.¹⁷ The economic importance of the film industry to domestic economies was also purported to justify the exemptions.¹⁸

Although GATT specifically exempts quotas imposed on movie theaters from the national treatment obligation, it does not otherwise mention cultural products. As a result, contracting parties have disputed whether such products are actually covered by GATT. In 1961, for example, the United States advocated GATT coverage of television programs. The United States pointed to the express cinema exception as proof that the contracting parties intended that GATT cover cultural products generally.¹⁹ In 1962, a GATT Working Party was formed to determine whether television programs were goods subject to GATT requirements, and, if so, whether the "cinema exception" should be applied by analogy to television programs.²⁰ France argued that television programs are more like services than goods, and therefore are not covered by GATT.²¹ The Working

15. *Id.* art. III:2. See *infra* notes 129-34 and accompanying text.

16. *Id.* art. IV(a), (c). Screen time not allocated to films of national origin may not be allocated formally or in effect among sources of supply. *Id.* art. IV(b).

17. WILLIAM A. BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 110 (1950).

18. Soon after GATT was signed, the French and English asserted that cinema quotas were necessary to build up trade and improve their balance of payments in the postwar adjustment period. Joint Declaration on Motion Pictures, Sept. 16, 1948, U.S.-Fr., 62 Stat. 3001, 3002-03 ("Recognizing its obligations under . . . the General Agreement, the French Government undertakes to relax progressively the restriction . . . as its balance of payments situation improves and to eliminate the restriction when conditions no longer justify its maintenance."); James E. Webb, *British Attitude Toward Film Quotas*, 20 DEPT ST. BULL. 825 (1949).

19. *Application of GATT to International Trade in Television Programmes: Statement Made by the United States Representative on 21 November 1961*, at 2, GATT Doc. L/1646 (Nov. 24, 1961).

20. *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, at 4, GATT Doc. L/1741 (Mar. 13, 1962).

21. *Id.* at 2.

Party decided to postpone resolution of the matter.²² When the United States raised the issue again in 1962 and 1964, no Working Party was formed and no further action was taken.²³ By the time the Uruguay Round approached final resolution twenty years later, it had become clear that the treatment of cultural industries under GATT would have to be expressly clarified through multilateral negotiation and agreement.

B. TREATMENT OF CULTURAL PRODUCTS IN THE CANADA-UNITED STATES FREE TRADE AGREEMENT

Other than the GATT exemption for cinema quotas, the FTA was the first modern trade agreement to expressly provide for the separate treatment of cultural products. Article 2005 expressly exempts cultural products from coverage by general free trade provisions.²⁴ Under the agreement, cultural industries include: film and home video distribution, radio and television broadcasting, the production of audio and video recordings, and the publication of newspapers, periodicals, and books.²⁵ Article 2005 also provides a unique retaliatory device. If one country is harmed by a trade restriction allowed under the cultural exemption, it may take retaliatory action economically equivalent to

22. *Id.* at 5.

23. *Application of GATT to International Trade in Television Programmes: Proposal by the Government of the United States*, GATT Doc. L/2120 (Mar. 18, 1964); *Application of GATT to International Trade in Television Programmes: Revised United States Draft Recommendation*, GATT Doc. L/1908 (Nov. 10, 1962).

24. FTA, *supra* note 5. Article 2005(1) provides: "Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter." *Id.*

25. *Id.* art. 2012. Article 2012 defines "cultural industry" as an enterprise engaged in any of the following activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,
- (b) the production, distribution, sale or exhibition of film or video recordings,
- (c) the production, distribution, sale or exhibition of audio or video music recordings,
- (d) the publication, distribution, or sale of music in print or machine readable form, or
- (e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

the harm it suffers.²⁶ The retaliatory measures may be aimed at any product, including non-cultural products, as long as the economic injury to the offending country is of the same magnitude as that felt by the retaliating country.²⁷ The North American Free Trade Agreement²⁸ (NAFTA) maintains the FTA's treatment of cultural products between the United States and Canada. Annex 2106 of NAFTA specifies that any measure adopted or maintained by the United States or Canada with respect to cultural industries, as well as any measure of equivalent economic effect taken in response, shall be governed in accordance with the terms of the FTA.²⁹

During the FTA negotiations, Canada's desire to protect its own cultural sovereignty was a subject of repeated discussion.³⁰ Canadians see themselves as uniquely vulnerable to being overwhelmed by the effects of U.S. popular culture because of their geographical proximity and common language.³¹ In 1985, Canada's Minister of Communications, Benoit Bouchard, stated:

26. *Id.* art. 2005(2). Article 2005(2) provides: "Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1." *Id.*

27. BNA, U.S.-CANADA FREE TRADE AGREEMENT: THE COMPLETE RESOURCE GUIDE 106 (1988).

28. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605 [hereinafter NAFTA].

29. NAFTA, *supra* note 28. Annex 2106 provides:

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access—Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

Id.

30. Ivan Bernier, *Cultural Sovereignty and Free Trade*, in *ASSESSING THE CANADA-U.S. FREE TRADE AGREEMENT* 235 (Murray G. Smith & Frank Stone eds., 1987). Cultural sovereignty or cultural nationalism "can include everything from an author complaining in 1832 about 'American spelling books, dictionaries and grammar' teaching Canadian children an 'anti-British dialect and idiom' to Archibald MacMechan's complaint in 1920 that Canada is a 'vassal state,' citing as evidence 'the popularity of such toys as the Teddy-bear' and 'the spread by seductive advertising of the chewing gum habit.'" Roger Frank Swanson, *Canadian Cultural Nationalism and the U.S. Public Interest*, in *CANADIAN CULTURAL NATIONALISM* 55, 57 (Janice L. Murray ed., 1977).

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

We believe that, just as retaining our territorial sovereignty is essential if we are to remain an independent nation, so it is true that we must always retain our cultural sovereignty—the absolute right in the eyes of the world to use all the instruments at our disposal to enhance and defend our unique identity.³²

Canadian media organizations have set a goal of protecting Canada's unique identity and perspective. For example, the Canadian Broadcasting Act aims to "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view."³³ Canadians agree, however, that their unique identity is difficult to define in terms of specific Canadian values and a specific Canadian way of life.³⁴ *Maclean's* writer, Peter C. Newman, attempted to explain that Canadian culture "articulates the way we are and what we want to become . . . [and] also embodies our sense of values, the social contract, our laws, manners, prevailing deference to authority and the admission that treading water is our national sport."³⁵

For almost a century, Canada has attempted to control the perceived deleterious onslaught of U.S. popular culture.³⁶ Each year, the Canadian government distributes billions of dollars in subsidies to cultural industries.³⁷ Canada has also experimented with various other protectionist measures. Until 1987, Canada's Income Tax Act provided for a 100% Capital Cost Al-

population lives within 100 kilometers of the U.S. border. *Id.* In addition, in contrast to Europe, Canada lacks a long history of cultural development. *Id.*

32. Bernier, *supra* note 30, at 241.

33. Broadcasting Act of Feb. 1, 1991, ch. 11, 1991 S.C. 117, 119 (Can.).

34. Bernier, *supra* note 30, at 240. In a 1987 public speech, *Calgary Herald* publisher J. Patrick O'Callaghan asked: "What culture do we have that is so distinct, so fragile, so valuable in historic terms, that we allow it to become the focal point of an agreement that can determine whether or not Canada achieves its growth potential in the decades to come?" *Id.*

35. Peter C. Newman, *Defending the Canadian Dream*, *MACLEAN'S*, July 8, 1991, at 50.

36. Thompson, *supra* note 31, at 270.

37. The Federal Cultural Policy Review Committee estimated that in 1981-1982, direct federal expenditures on cultural activities totaled C\$1.2 billion, one-sixth of all the resources devoted to culture. STEVEN GLOBERMAN, *CULTURAL REGULATION IN CANADA* xvii (1983). By 1989-1990, total indirect and direct federal spending on the arts reached an estimated high of C\$2.93 billion, and then declined in 1993-1994 to an estimated C\$1.84 billion. Susan Walker, *Sinking Arts Groups Send SOS to New Government*, *TORONTO STAR*, Oct. 23, 1993, at L15.

lowance which allowed any investment in Canadian-produced films to be completely tax deductible.³⁸ The Income Tax Act currently denies deductions for advertising costs to Canadian advertisers who attempt to reach their domestic market through non-Canadian newspapers, periodicals, or broadcasters.³⁹ In addition, the Canadian Radio-television and Telecommunications Commission has gradually increased domestic programming requirements in license renewals for radio and television broadcasters in an attempt to reduce American programming.⁴⁰

Canadian producers cite numerous economic threats to the continued existence of Canadian cultural industries. For example, the Canadian Magazine Publishers Association (CMPA) claims that "[t]he Canadian magazine industry remains in a developmental stage; publishers have not reached the maturity and powerful financial position of their American counterparts."⁴¹ In 1993, the CMPA expressed fear over the debut of *Sports Illustrated Canada*, published by the U.S. company Time-Warner, because of its potential popularity with readers and advertisers.⁴² The CMPA estimated that the entire magazine industry's profits "could be wiped out completely with only a three percent shift in [Canadian advertising] dollars to Ameri-

38. Walker, *supra* note 37, at L15. The 1974 Amendment to the Income Tax Act increased the Capital Cost Allowance for investment in Canadian films from 60% to 100%. In 1976, the allowance for non-certified films was reduced from 60% to 30%. GLOBERMAN, *supra* note 37, at 12-13. In 1987, the 100% Capital Cost Allowance on certified films was also reduced to 30%. Charles Falzon, *Renewed Film Investment Incentive Needed*, TORONTO STAR, Apr. 20, 1992, at A18.

39. Income Tax Act, R.S.C., ch. 1, § 19 (1985, 5th Supp.) (Can.). When the Act was amended in 1976, it also denied deductions for Canadian advertisements on foreign television and radio broadcastings intended to reach the Canadian market. Act of July 16, 1976, ch. 106, 1974-1976 S.C. 2145-46 (Can.) (amendment to the Income Tax Act). U.S. television broadcasters on the Canadian border petitioned the U.S. government to take action in response to the discriminatory tax policy. Although retaliatory mirror legislation was enacted in 1984, no change in Canadian tax policy was achieved. THOMAS O. BAYARD & KIMBERLY ANN ELLIOT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* 394 (1994).

40. Tony Van Alphen, *Cultural Rules Under Siege*, TORONTO STAR, Mar. 16, 1991, at C1. See also *Canadian Radio-Television and Telecommunications Commission: An FM Policy for the Nineties*, Pub. Notice 1990-111, C. Gaz. pt. I (Can.), Dec. 29, 1990, at 455; *Television Broadcasting Regulations*, SOR/87-49, C. Gaz. pt. II (Can.), Jan. 21, 1987, at 339.

41. Cathleen Cole, *Canadian Publishers Wary of Trade Pact: North American Free Trade Agreement*, FOLIO, Apr. 1, 1992, at 52.

42. Richard Siklos, *Sports Illustrated Plan Stirs Murky Debate in Canada: "Canadian" Edition a Threat to Domestic Industry?*, FIN. POST, Jan. 26, 1993, at 11.

can publications.”⁴³ Ian Morrison, spokesperson for the Friends of Canadian Broadcasting, expressed a similar fear that, without protection from American competition, English Canadian broadcasters would never be profitable unless they merely wrapped Canadian commercials around American entertainment programs.⁴⁴ Morrison estimates that the current economic benefit to private Canadian television broadcasters and networks from federal protectionist policies is close to C\$200 million.⁴⁵ The benefits of cultural industry protection include not only the mitigation of economic threats to producers, but also include a positive effect upon the Canadian economy. The cultural sector employs about 360,000 Canadians, a labor force which has grown by 122% over the last ten years, twice the growth rate of the general labor market.⁴⁶

C. THE EU'S ARGUMENTS FOR PROTECTION OF CULTURAL PRODUCTS UNDER GATT

Just as Canada's sensitivity to its cultural sovereignty resulted in the FTA's exemption for cultural industries, the EU's cultural concerns have precluded treatment of cultural industries by GATT. In fact, the EU points to the FTA exemption to support its position that cultural industries should receive special treatment under GATT.⁴⁷ GATT coverage of cultural indus-

43. *Id.* The CMPA asserted that advertising sales by *Sports Illustrated Canada* would violate Canadian dumping rules not because its advertisement prices per thousand subscribers were low, but because it averages five readers per copy while two major Canadian publications average 1.1 and 1.9 readers per copy. *Id.* The CMPA speculated that this attractive “gross audience impression” would precipitate a transfer of advertising dollars from Canadian magazines to *Sports Illustrated*. *Id.* In December 1994, Canadian Heritage Minister, Michel Dupuy, unveiled a proposed 80% excise tax on *Sports Illustrated Canada's* advertising revenues. Val Ross & Drew Fagan, *Magazine Tax Brings U.S. Threat*, *GLOBE & MAIL* (Toronto), Dec. 23, 1994, at A1. Time Canada stated that if the tax is implemented, it will challenge its legal validity in the Canadian courts. *Id.*

44. Ian Morrison, *A Plea to Perrin Beatty: “Don’t Ignore Needs of Viewers and CBC at Meeting on Television Industry,”* *GAZETTE* (MONTREAL), Dec. 9, 1991, at B3.

45. *Id.*

46. Walker, *supra* note 37, at L15.

47. “It’s a precedent,” says France’s former culture minister, Jack Lang. Barbara Novovitch, *Film, Music Not Commodities for GATT*, *Reuter Bus. Rep.* (July 21, 1993), available in LEXIS, News Library, Curnws File. French President Francois Mitterrand argues: “We are only defending a legitimate cause. We have the right to ask the American government to have the same regard for Europeans as they do for our friends, the Canadians.” Jamie Portman, *Will Ottawa Protect Culture?*, *CALGARY HERALD*, Dec. 28, 1993, at B7.

tries is especially problematic for the EU at this time because acceptance of GATT obligations would almost certainly require limitation of the EU's controversial 1989 "Television Without Frontiers" Directive (the "Directive").⁴⁸ The Directive requires member states to ensure that television broadcasters reserve fifty percent of transmission time for European programs, excluding time appointed to news, sports events, games, and advertising.⁴⁹

The EU claims that protection of its audio-visual markets is necessary because the United States is already dominant in these markets.⁵⁰ European imports of audio-visual products total \$3.8 billion annually, most of which come from the United States, while European exports of audio-visual products total only \$250 million annually.⁵¹ The EU claims that despite restrictions imposed by the Directive, eighty percent of films and fifty percent of television programs shown in Europe are imported from the United States.⁵² According to the EU, the European deficit in audio-visual products results from the economic

48. Council Directive 981552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 [hereinafter "Council Directive"].

49. *Id.* art. 4. Article 4 states:

Member states shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Id. "European works" are works originating from Member States or from European third states that are party to the Convention on Transfrontier Television of the Council of Europe if:

- (a) they are made by one or more producers established in one or more of those States; or
- (b) production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or
- (c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

Id. art. 6.

50. See *supra* note 1.

51. Scott Kraft, *Culture Clash; New Turner Network is Galling the French*, L.A. TIMES, Sept. 25, 1993, at D1. For example, in France, American films account for more than 60% of box office revenue, while French film revenues account for only 0.5% of the U.S. market. *Id.*

52. *GATT/Broadcasting: Towards a Cultural Code in the GATT*, *supra* note 8.

advantages enjoyed by U.S. producers, advantages that are inherent in large-scale production of mass entertainment.⁵³ The EU argues that the large fixed production costs of American mass-produced entertainment are often substantially covered by sales in the comparatively large U.S. market.⁵⁴ American producers can later sell additional copies of movies and television programs to foreign distributors and broadcasters at variable-cost prices that European and other producers, with small domestic markets, cannot match.⁵⁵ Furthermore, because of their massive domestic sales, American producers can routinely afford to spend significantly more than European producers on a product, thus making it more competitive in quality.⁵⁶

As a result of the competitive advantages enjoyed by American producers, an increasing number of European producers have claimed that they are unable to operate profitably. At the 1993 Venice Film Festival, European filmmakers blamed U.S. imports for the disappearance of production sectors in Eastern Europe, Italy, and Germany.⁵⁷ European producers have also asserted that they are being forced to appease the tastes established by the dominant cultural trends. Venice Film Festival director, Gillo Pontecorvo, complained: "The objective conditions in which we work today are suffocating our inspiration [W]e must fight against the homogenization . . . of art."⁵⁸

53. William Pfaff, *A Phony Farm War, With 'Cultural' Skirmishing*, INT'L HERALD TRIB., Sept. 24, 1993, at 8.

54. *Id.*

55. For example, European broadcasting executives estimate that they can usually buy the rights to an hour-long American program for less than one-tenth of what it would cost for them to produce an hour-long domestic program. Steven Greenhouse, *For Europe, U.S. May Spell TV*, N.Y. TIMES, July 31, 1989, at D1, D6. Similarly, in most split-run editions of U.S. magazines in Canada, because production costs are largely covered by U.S. advertising revenue, the publishers can sell advertisements in Canada at rates well below those actually reflecting the magazine's cost of production. Tom Fennell, *Time Warner's Gambit*, MACLEAN'S, Apr. 5, 1993, at 42.

56. American television studios routinely spend \$1 million per hour on a big series. This level of expenditure is beyond the means of most European producers. John Marcom, Jr., *Empty Threat?*, FORBES, Nov. 13, 1989, at 43. France is the only European country to have a substantial film industry and it is heavily subsidized. Yet, the average French film budget in 1993 was only \$4 million, compared with an average budget of \$20 million for Hollywood films. *Movies Eclipse Films*, *supra* note 1, at 89.

57. James Ulmer, *Directors at Venice Film Festival Urge Battle for Artists' Rights*, HOLLYWOOD REP., Sept. 7, 1993, available in LEXIS, News Library, Curnws File.

58. *Id.*

The EU asserts that the culture, traditions, and languages of its member states are endangered by the decline in genuine European products.⁵⁹ French President Francois Mitterrand argues that each country must prevent its own creative activity from being overwhelmed by economic forces.⁶⁰ French Ministers of Culture, Communications, and Audio-Visual Affairs, Jacques Toubon and Alain Carignon, likewise claim that the objective of French policy is to shield European productions from total American domination and to guarantee them access to their own market.⁶¹

French Communications Minister Carignon acknowledges that opening up the European audio-visual market threatens more than just cultural traditions.⁶² He estimates that free trade in cultural industries would jeopardize 50,000 jobs and 50 billion French francs (\$8.5 billion) in revenue for television and film.⁶³ Carignon explains that the audio-visual industry is especially important economically because it is likely to grow five percent annually for the next five years.⁶⁴

D. U.S. RESPONSE TO THE CALL FOR PROTECTION OF CULTURAL PRODUCTS UNDER GATT

American producers counter that they have difficulty understanding why entertainment products such as television programs and movies are so important culturally and thus deserve special protection. U.S. Motion Picture Association (MPA) President, Jack Valenti, asks: "Is the culture of any European country so flimsily anchored, so tenuously rooted, that European consumers and viewers must be caged and blinded else their

59. Suzanne Perry, *Pinheiro Says U.S. Film Exports Will Grow Despite Limits*, Reuter E.C. Rep. (Sept. 23, 1993), available in LEXIS, News Library, Curnws File.

60. *GATT/Audio-Visual: Mitterrand Calls for Cultural Exemption Clause*, *supra* note 8. The French also assert that the United States already has its own form of cultural barrier to audio-visual imports in that Americans will not watch subtitled or dubbed films. Pfaff, *supra* note 53, at 8. Language is a strong protectionist device and works largely in favor of Hollywood because English is the common language among many continental Europeans who do not speak each other's language. Attali, *supra* note 12, at B7.

61. Attali, *supra* note 12, at B7.

62. Pia Farrell, *Turner's Euro Nets Scrutinized*, HOLLYWOOD REP., Aug. 31, 1993, available in LEXIS, News Library, Curnws File.

63. *Id.*

64. *Id.*

links with their historic and distinguished past suddenly vanish?"⁶⁵

Films and television programs are second only to commercial aircraft as the most exported American products.⁶⁶ The foreign demand for American films and television programs helped U.S. producers survive weak domestic consumption during the recession of the early 1990s.⁶⁷

In 1992, the MPA expressed the fear that a cultural-products exemption from GATT would open the door to "all manner of restrictions" on the distribution of audio-visual material.⁶⁸ Just six days after the Uruguay Round ended without extending GATT provisions to cultural products, the French Senate approved a new regulation requiring that French radio stations dedicate forty percent of air-time to French music.⁶⁹ The same day, Spain's Parliament passed legislation requiring that one-fourth to one-third of all movies shown in Spanish theaters be European.⁷⁰ Because of its concern about even further deterioration of the situation for American producers, the United States intends to continue negotiating for free markets for cultural products, including the coverage of cultural products under GATT.⁷¹ In the meantime, U.S. Senator Max Baucus, chairman of the International Trade Subcommittee of the U.S. Senate Finance Committee, has urged President Clinton to ask the United States Trade Representative (USTR) to retaliate against the Europeans under Section 301 of the Trade Act in order to achieve an open market for audio-visual industries.⁷² The EU argues, however, that because of the exploding demand for au-

65. Jacqueline Frank, *European Television Without Borders or Without Americans?*, Reuter Bus. Rep. (July 26, 1989), available in LEXIS, News Library, Arcnws File.

66. Pfaff, *supra* note 53, at 8.

67. Patrick Lee & James Bates, *Hollywood: It's Boffo! What It Isn't Is a Ticket Out of the Recession*, L.A. TIMES, Sept. 11, 1993, at D1. In September 1993, domestic box office gross receipts totalled 13% more than the previous year in part because of summer films that won huge audiences worldwide, such as *Jurassic Park* and *The Firm*. *Id.*

68. *Sen. Baucus Calls on U.S. to Halt GATT Trade Talks Pending Clinton Input*, Int'l Trade Daily (BNA) (Dec. 10, 1992), available in LEXIS, News Library, Curnws File.

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

70. *Id.*

71. Telephone interview with Joe Papovich, *supra* note 12. See also *supra* note 13 and accompanying text.

72. Holland, *supra* note 8, at 5. See *supra* note 11 and accompanying text for an explanation of Section 301.

dio-visual products in Europe, U.S. television and film exports will grow regardless of European restrictions.⁷³

II. EXTENDING THE GOALS OF FREE TRADE TO CULTURAL INDUSTRIES

GATT was founded on the principle that removing international trade restrictions leads to greater global economic productivity.⁷⁴ The Leutwiler Report prepared for GATT explains:

Trade allows countries to concentrate on what they can do best. No two countries are exactly alike in resources, climate or work force. Those differences give each country a "comparative advantage" over the others in some products. Trade translates the individual advantages of many countries into maximum productivity for all. This is the classic theory of international trade. It is still valid today.⁷⁵

The framers of GATT acknowledged, however, that the benefits of free trade⁷⁶ must be balanced against other welfare goals. For example, GATT recognizes that the protection of health, natural resources,⁷⁷ or national security⁷⁸ may justify trade re-

73. Perry, *supra* note 59 (quoting EC Communications Commissioner Joao de Deus Pinheiro). According to European audio-visual professionals, the application of the Television Without Frontiers Directive did not damage the U.S. industry. Television program production in Europe increased and the amount of American programs shown on European screens remained the same, the quotas notwithstanding. *GATT/Audiovisual: Commission Ready to Give In to the Americans?*, TECH EUR., July 8, 1993, at 84, available in LEXIS, News Library, Curnws File.

74. The preamble to GATT recognizes that trade agreements between the contracting parties "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods." GATT, BISD, *supra* note 7, pmbl.

75. GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION 23 (1985) (also called "The Leutwiler Report").

76. The basic gains that are expected from trade liberalization can be classified as "consumption gains," "production gains," and "economies of scale gains." Consumption gains result when consumers are able to obtain products at lower prices. Production gains occur when producers reallocate land, labor, and capital from inefficient industries to industries in which the country has a comparative advantage. Finally, economies of scale gains accrue when producers have the opportunity to increase their scale of operations and reduce average fixed costs. See R. BLACKHURST ET AL., *TRADE LIBERALIZATION, PROTECTIONISM AND INTERDEPENDENCE* (GATT Studies in Intl. Trade, No. 5, Geneva 1977).

77. GATT Article XX covers a series of exceptions whereby governments may violate GATT provisions when necessary to protect, for example, public morals, human, animal, or plant life and health, national treasures of artistic, historic, or archaeological value, and exhaustible natural resources. GATT, BISD, *supra* note 7, art. XX.

strictions.⁷⁹ Proponents of an exemption for cultural industries under GATT argue that the protection and promotion of national culture are also objectives which justify some degree of trade restriction.⁸⁰

Advocates of cultural protection fear that foreign entertainment products will overwhelm local culture. English legal scholar M.J. Michael further argues that in order to ensure or promote the greatest diversity of information and opinion, it may be necessary to redistribute access to the information market by limiting the position of those who dominate that market.⁸¹ The stated objective is not to exclude foreign cultural values, but rather to ensure that national cultural values will retain a share of the population's viewing time.

The objective to reserve market share for national cultural products has attracted significant consideration, as is demonstrated by the experiences of GATT, the Canada-U.S. FTA, the Uruguay Round, and the EU's Television Directive. Although the preservation of cultural values clearly merits serious treatment, there are several reasons to be skeptical about the value of cultural quotas such as those required by the Directive and allowed by GATT's cinema exemption. First, technology increasingly allows market protection to be circumvented and makes the gains from such protection short-lived. Second, experience demonstrates that the best way to stimulate quality production is through open markets. Finally, a protected market will not necessarily achieve the local and regional cultural values desired.

78. *Id.* art. XXI. "Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . ." *Id.*

79. Professor John Jackson explains that "a nation may feel that its national security requires an airplane (or shipbuilding) industry regardless of whether such industry has a 'comparative advantage' or is even viable on world markets." JOHN JACKSON, *THE WORLD TRADING SYSTEM* 18 (1989).

80. See *supra* note 60 and accompanying text.

81. *TRANSFRONTIER TELEVISION IN EUROPE: THE HUMAN RIGHTS DIMENSION* 206 (Antonio Cassese & Andrew Clapham eds., 1990) (quoting M.J. Michael, a lecturer in public law at University College, London). "This may be by redistributing advertising revenue to minor publications . . . or providing a right of access to the media of communication for particular producers who otherwise would not have a chance to communicate their information." *Id.*

A. THE IMPACT OF CHANGING TECHNOLOGY ON CULTURAL INDUSTRIES

Communications technology is transforming traditionally limited national distribution systems into unlimited international distribution systems. Television services, once restricted by the channel capacity of the broadcast spectrum, are increasingly delivered by satellite and cable, enabling unlimited channel capabilities.⁸² Pre-recorded movies and other programs on videotape and laserdisc bypass the competitive and limited theater system and are directly distributed for home entertainment. Even magazines and newspapers are transmitted by satellite for simultaneous publishing with alternative editorial copy in other countries.⁸³ The total integration within the home of telephone lines, televisions, and computers will soon overshadow yesterday's technological advances.⁸⁴ Future technology will deliver an almost unlimited variety of products tailored to the desires of the individual user.⁸⁵

Communication advances increasingly allow international producers to break down protectionist barriers and other restrictions to entertainment markets.⁸⁶ Satellite technology has arguably been the most important tool for circumventing protectionist national policies. Through direct broadcast satellites, individual homes with small satellite dishes can receive cable channels without content or advertising regulation.⁸⁷ U.S. magazine publishers are discovering how to manipulate tough border restrictions on Canadian content of magazines by beaming editorial copy via satellite to their printing presses in Can-

82. PETER LYMAN, CANADA'S VIDEO REVOLUTION: PAY TV, HOME VIDEO AND BEYOND 22 (1983).

83. See *infra* note 88 and accompanying text.

84. Barbara Kantrowitz & Joshua Cooper Ramo, *An Interactive Life*, NEWSWEEK, May 31, 1993, at 42, 42. Home viewers may someday use a TV monitor that functions like a computer screen and is connected via fiber-optic cables to a gigantic hard disc full of all kinds of data, from games and movies to specially created programs. *Id.* at 43.

85. *Id.*

86. LYMAN, *supra* note 82, at 40.

87. Five large U.S. consortia have announced plans to have Direct-Broadcast Satellite systems in place by 1994. Jim Carney, *Revolution in the Airwaves: Things Are Happening in the TV Industry, Things That Will Affect What You See, How You See It and How Much You Pay For It*, VANCOUVER SUN, Dec. 7, 1991, at D4. Canada, which allows Canadian cable companies to simultaneously substitute Canadian advertising on American programming and under Bill C-58 provides tax protection from U.S. competition, refers to DTH ("direct-to-home") satellite antennas as "death stars." Morrison, *supra* note 44, at B3.

ada.⁸⁸ In addition, consumers naturally want access to attractive new services and products as they become available.⁸⁹ Hubert Astier, advisor to French Culture Minister Jacques Toubon, realistically concedes that "[i]n the new universe of digital broadcasting, our quotas won't protect us. They may give us a breathing space but that's all."⁹⁰

Although the new technology undermines government protection of smaller local producers, it is at the same time creating an expanding number of market opportunities for smaller producers of cultural products. Distribution through cable, satellite, videotapes,⁹¹ and computers is dramatically reducing the scarcity of capacity which was prevalent in the traditional distribution systems. Enhanced methods of distribution also reduce the cost of access to the market for cultural products, facilitating the participation of smaller producers.⁹² Satellite technology in particular has provided information transmittal to previously remote countries.⁹³ As a result, the enhanced means of distribu-

88. At the border, the Canadian government applies heavy tariffs on Canadian editions of foreign magazines with little Canadian content. *Sports Illustrated Canada* avoided these tariffs by sending the editorial content of the magazine electronically via satellite from the United States to be printed in Canada. Shawn McCarthy, *Sports Illustrated Not Off the Hook in What May Be End-Run of Policy*, TORONTO STAR, Apr. 20, 1993, at D3. James Warrillow, President of Maclean Hunter Canadian Publishing, asserts that "if *Sports Illustrated* is not stopped, a number of other U.S. publications could start selling their magazines in Canada." Fennell, *supra* note 55, at 43. Warrillow continued, "[t]o be a Canadian magazine you launch a magazine here, and have management and editorial offices But that is not what *Sports Illustrated* is doing." *Id.* Revenue Minister Otto Jelinek stated that a task force is needed because Canadian law is not equipped to deal with advances such as satellite printing. *Id.*

89. LYMAN, *supra* note 82, at 50. "In Europe, 700 million people are eager to discover new images and are prepared to buy the VCRs, personal computers, cable systems and telephone equipment that will enable them to consume those images. The more people possess the requisite technology, the more entertainment products . . . they are willing to buy." Attali, *supra* note 12, at B7.

90. Michael Williams & Adam Dawtrey, *GATT Spat Wake-Up on Yank Market Muscle*, VARIETY EUR., Dec. 27, 1993, at 45, 49.

91. LYMAN, *supra* note 82, at 31.

92. For example, more than 5000 new magazine titles have been established in the United States in the last five years. Matt Nesvisky, *Decisions, Decisions*, JERUSALEM POST, Aug. 20, 1993. This is most likely due to the ease of desktop publishing and the demand for niche publications. *Id.* For cable and specialty channels, "costs have increased modestly while revenues have risen spectacularly," because of much lower acquisition and production requirements and access to both subscriber and advertising revenue. Carney, *supra* note 87, at D4.

93. Previously remote countries benefitting from satellite technology include those with "large land areas, such as India and Brazil, . . . geographically

tion and expanded markets for cultural products have stimulated the demand for differentiated products.⁹⁴ Production of such differentiated products is much more suited to the abilities of small producers because they often allow for lower budgets.⁹⁵

In order to enable local cultural industries to survive in the new market structure created by advances in distribution technology and increased globalization, the primary goal of governments should be to encourage domestic producers to upgrade their content and quality. The goal must be to produce local cultural products that can compete in the new international marketplace.⁹⁶

B. EFFECTS OF TRADE PROTECTION ON CULTURAL INDUSTRIES

Notwithstanding the competitive threat posed by low-cost American products, such low-cost products may play a significant role in supporting local cultural industries. A large producing country such as the United States is able to sell inexpensive and broadly appealing products to small foreign broadcasters or theaters who cannot afford to buy only the higher-priced products of their own country.⁹⁷ The inability to afford domestic

divided or widely scattered countries, such as Pakistan and Indonesia, and . . . groups of countries sharing the same language and traditions, such as those of Latin America." Jean d'Arcy, *Direct Broadcast Satellites and the Right to Communicate*, in *RIGHT TO COMMUNICATE* 1, 5 (L.S. Harms et al. eds., 1977).

94. Years ago, Canadian programs were unable to penetrate the three U.S. commercial networks: CBS, ABC, and NBC. Now, however, cable channels such as HBO, the Cable Health Network, ABC Arts, and others frequently purchase Canadian programs. LYMAN, *supra* note 82, at 51-52.

95. For example, "original drama productions for pay-TV are, like low-budget movies, more within the range of Canadian producers." *Id.* at 51.

96. European researcher Stylianos Papathanassopoulos agrees that "[c]learly, satellite broadcasting demonstrates very dramatically that states will have to adapt their policies to a new framework of interdependence." Stylianos Papathanassopoulos, *Broadcasting and the European Community: The Commission's Audiovisual Policy*, in *THE POLITICAL ECONOMY OF COMMUNICATIONS* 107, 115 (Kenneth Dyson & Peter Humphreys eds., 1990).

"The goal that is consistent with cultural objectives is the creation and development of a domestic industry that is internationally competitive and enjoys a fair representation of Canadian concepts, creative input and producer involvement." LYMAN, *supra* note 82, at 32. Canadian producers are now demonstrating their ability to produce quality Canadian programs that can compete internationally. Carney, *supra* note 87, at D4.

97. Younger and smaller European television stations worry that the "Television Without Frontiers" quotas may drive them out of business. Greenhouse, *supra* note 55, at D6. Canadian commercial broadcasters, aware that their interests directly conflict with those of Canadian independent producers, have pushed the government for relaxed Canadian content requirements. Carney, *supra* note 87, at D4. One reason that distributors cannot afford to buy only

products is especially true for broadcasters and theaters with a limited number of program suppliers, such as those offering specialized thematic programming and those in small countries with a limited linguistic area.⁹⁸ The very existence of many smaller broadcasters is dependent upon low-cost programs, movies, and recordings available from foreign producers.⁹⁹ In effect, therefore, lower-priced U.S. products may actually help subsidize the distribution of the higher-priced domestic products by maintaining the existence of the broadcaster. When low-cost products help maintain the existence of broadcasters, consumers benefit from the greater variety of both foreign and domestic programming. A degree of trade restriction which prevents low-cost foreign products from playing this role may harm rather than help local cultural industries.

In manufacturing industries, the reduction or removal of protection usually results in increased specialization, which leads to increased productivity for domestic producers.¹⁰⁰ A crucial issue, therefore, is whether smaller producers in cultural industries can successfully compete against their larger U.S. counterparts by identifying market niches and specializing their output. Anecdotal evidence indicates that smaller producers are already successfully competing by specializing in narrowly defined artistic fields. In Canada, while Canadian general interest magazines demanded protection, small regional or specialized magazines were prospering and did not support the calls for protectionism.¹⁰¹ In the face of popular American television programs, aspiring European television producers have discovered that the "miniseries" is the quickest route to an internationally

domestic products is explained by British director Michael Winner. Enraged by the European protection, he declared, "[i]t's impossible to force people to pay money at the box-office for a film they don't want to see. The simple fact is that most countries prefer American films to their own." Jamie Portman, *Europeans Battle American Cultural Juggernaut in Trade Talks*, GAZETTE (MONTREAL), Oct. 6, 1993, at B3.

98. TRANSFRONTIER TELEVISION IN EUROPE, *supra* note 81, at 195-96.

99. In late December 1993, as the Spanish Parliament considered new content restrictions for movie theaters, all 1807 Spanish theaters closed in protest because their livelihood was threatened. Cohen, *supra* note 69, at C15. The president of La Cinq, a new Paris television station, also claimed that American programs were so important to the station that the Television Directive could drive it out of business. Greenhouse, *supra* note 55, at D6. The programming director at La Cinq explained, "[a] young station needs to buy programs until it develops the riches to be able to produce a lot of programs on its own." *Id.*

100. GLOBERMAN, *supra* note 37, at 55.

101. *Id.* at 56.

saleable product.¹⁰² Recent hits from small, independent movie producers suggest that there is a viable alternative to the Hollywood blockbuster, even in the U.S. market.¹⁰³ Finally, when the Canadian 100% Capital Cost Allowance¹⁰⁴ was reduced to 50% in 1981¹⁰⁵ and to 30% in 1987,¹⁰⁶ a number of what are now world-class Canadian television and film production companies developed their successful strategies.¹⁰⁷ Rather than risking money on big budget films, the new production companies focus on "niche films that garner critical attention."¹⁰⁸

As previously discussed, specialization assumes even greater importance in the face of changing communication technology. The expanding number of markets that are increasingly tailored to specialized interests will continue to stimulate the demand for differentiated products by smaller producers.¹⁰⁹ Protection of cultural industries could in the long-term lead to their demise if such industries are not allowed to compete in the rapidly expanding and changing market.

102. Marcom, *supra* note 56, at 43.

103. Jennifer Pendleton, *Film Marketing Savvy Shapes, Shakes Indies*, DAILY VARIETY, Aug. 17, 1993, available in LEXIS, News Library, Curnws File. In 1992, independent movie companies produced *The Crying Game*, *Howards End*, and *The Player*, all of which were hits at the box office and received high critical acclaim. *Id.* Then, during the summer of 1993, *Like Water For Chocolate*, a Mexican movie filmed in Spanish, became the top-grossing foreign language feature of the past decade. *Id.* *Menace II Society* earned \$18.6 million by its 33rd day of release. It had been produced for only \$3 million and marketed for another \$2 million. *Id.* October Films promoted its French-language film involving a classical music theme, *Un Coeur en Hiver*, by staging a violin giveaway with classical stations and record stores. *Id.* Although they struggle, independent movie marketers can make up for lack of financial clout with ingenuity. Ultimate success then depends on the quality of the film. *Id.*

104. See *supra* note 38 and accompanying text.

105. Scott Haggett, *Canadian Movie Makers Come of Age*, FIN. POST, Sept. 9, 1993, at 15.

106. Falzon, *supra* note 38, at A18.

107. Haggett, *supra* note 105, at 15. "While film-makers and investors screamed at the time and production plummeted, it might have been the biggest favor anyone has ever done the business. From the ashes of a decrepit film industry arose a number of world-class television and film production and distribution companies." *Id.*

108. *Id.*

109. See *supra* notes 91-95 and accompanying text.

C. EFFECTS OF TRADE PROTECTION ON THE PRESERVATION OF
LOCAL CULTURE

Social scientists agree that mass communication and entertainment are important vehicles for transmission of cultural values.¹¹⁰ Products of the mass media, such as television programs, movies, and magazines, reach much larger audiences than traditional cultural products such as books, live entertainment and original art.¹¹¹ Communications analyst Peter Lyman asserts that although commercialized cultural products normally take the form of entertainment and information, they constitute "the creative effort that is the main expression of a modern society's arts and culture."¹¹² In many circumstances, the messages of the media may influence the behavior of viewers, promote new and different attitudes among viewers, and accelerate social change on a broad level.¹¹³

Trade barriers imposed upon entertainment and communication products, however, are not always effective in protecting and promoting national cultural identity.¹¹⁴ Trade restrictions that seek to address problems of cultural identity usually regulate the nationality of the producers and geographic location of production, rather than affect the content of such products.¹¹⁵

110. Clint N. Smith, Note, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT'L TAX & BUS. LAW. 97, 133 (1993).

111. *Id.*

112. LYMAN, *supra* note 82, at 1.

113. CONRAK P. KOTTAK, PRIME-TIME SOCIETY: AN ANTHROPOLOGICAL ANALYSIS OF TELEVISION AND CULTURE 10-12 (1990).

114. In 1973, the Canadian Commission for the United Nations Educational, Scientific, and Cultural Organization (UNESCO) studied the problem of the survival of the Eskimo culture in the face of the snowmobile and the satellite. The group concluded that apart from total isolation, "we have no means of preventing any culture from being influenced by another. Each living culture is dynamic and in a process of constant evolution. Freezing it at a particular point is neither possible nor desirable." Olga Jurgens, *Communications: Individual Rights/State Rights*, in RIGHT TO COMMUNICATE 36-37 (L.S. Harms et al. eds., 1977).

115. See, e.g., Council Directive, *supra* note 48, art. 6(2). Eli Noam, the director of the Institute for Tele-Information at Columbia Business School, argues that cultural preservation is simply an all-purpose excuse for trade protections. He points out that "[i]t's one thing to sweeten the pot for the best of the domestic product: virtually every government subsidizes high culture. It is quite another to put a quota on American cop shows so that French studios can crank out their own car chases." Peter Passell, *Economic Scene: Is France's Cultural Protection a Handy-Dandy Trade Excuse?*, N.Y. TIMES, Jan. 6, 1994, at D2.

Neither nationality nor geography precludes the imitation of American cultural products, if those products generate greater profits. For example, Canada's attempts to encourage domestic filmmaking have resulted in many films produced in Canada, but "set" in American locations.¹¹⁶ These products contribute little to national cultural identity.

Contrary to the present interest in restricting trade in cultural products, governments have at times viewed free trade as a necessary condition of cultural development.¹¹⁷ Under the United Nation's Agreement on the Importation of Educational, Scientific and Cultural Material (Florence Agreement),¹¹⁸ sixty-one parties including France, Germany, Spain, and the United States agreed to eliminate customs duties and grant unconditional licenses for the importation of books and other cultural materials.¹¹⁹ The Florence Agreement also provided that the contracting states would "[c]ontinue their common efforts to promote by every means the free circulation of educational, scientific or cultural materials, and abolish or reduce any restrictions to that free circulation."¹²⁰

116. Canada's Bill C-58, providing a tax credit for films meeting a certain complicated formula of actors and support staff, has helped to make Toronto a filmmaking center for North America. Malcolm Gladwell, *Bridging the Barriers*, WASH. POST, June 25, 1989, at H1. The cultural contribution is unclear, however, since "most of the films made in Canada—like the ostensibly New York-based 'Moonstruck' or 'Atlantic City'—are actually about America." *Id.*

117. Walter Lippman once said: "No official yet born on this earth is wise enough or generous enough to separate good ideas from bad ideas, good beliefs from bad beliefs." *Free Speech and Free Press*, in BULLETIN OF THE LEAGUE OF FREE NATIONS ASSOCIATION, Mar. 1920, at 1, *quoted in* MARK VAN DOREN, MAN'S RIGHT TO KNOWLEDGE AND THE FREE USE THEREOF 37 (1953). British director Michael Winner seems to agree, recently declaring, "[s]urely there is something inherently suspect about any culture which has so alienated its citizens that only a government edict can keep them in touch with it." Portman, *supra* note 97, at B3.

118. United Nations Educational, Scientific, and Cultural Organization: Agreement on the Importation of Educational, Scientific and Cultural Material (1950), arts. I and II.

119. *Id.*

120. *Id.* art. IV. The UNESCO Guide to the Agreement addressed the increasing importance of other mass produced cultural materials:

Films . . . have assumed an increasingly important role since the Agreement was drafted. The development of television has revolutionized the use of films, particularly for education, and this has been accompanied by striking innovations in production and distribution techniques. The experts accordingly recommended that all Member States should review their policy on the importation of films and other audio-visual material. More specifically, they recommended that the Agreement should be considered to cover new types of recordings of visual images (. . . videotapes, etc.). They also recommended that the

Advocates of trade restrictions are quick to point out that books and other cultural materials have never posed the threat of competitive dominance as that posed by American movies and television programs. Nonetheless, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms declares a broad injunction against all controls over information flows: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."¹²¹ Many European public officials and legal scholars have argued that production quotas such as those instituted under the "Television Without Frontiers" Directive are inconsistent with the

privileges of the Agreement should be accorded to sound recordings, irrespective of their physical base, so as to include tapes, discs, etc., as well as ordinary gramophone records.

UNESCO, A GUIDE TO THE OPERATION OF THE AGREEMENT ON THE IMPORTATION OF EDUCATIONAL, SCIENTIFIC AND CULTURAL MATERIAL 12 (1969).

121. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10(1), Europ. T. S. No. 5, 213 U.N.T.S. 221, 230. Under this convention, a party may still require licensing of broadcasting, television, or cinema enterprises. *Id.* In doing so, however, the party may impose restrictions only if they are necessary in the interests of national security, territorial integrity or public safety, the prevention of crime, the protection of health or morals, the protection of the reputation of others, the protection of confidential information, or maintenance of the impartiality of the judiciary. Hans-Christian Krüger & Maud Buquicchio-de Boer, *The Case Law of the European Commission of Human Rights Concerning the Application of Article 10 ECHR*, in *TRANSFRONTIER TELEVISION IN EUROPE*, *supra* note 81, at 109 (explaining the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10(2)).

The European Commission of Human Rights stated that although Article 10 does not guarantee any private individual or organization an unfettered right to broadcasting time, the denial of broadcasting time to a particular group may violate Article 10, especially in conjunction with Article 14 of the Convention. Application No. 4515/70 to the European Commission on Human Rights, *X and the Association of Z v. the United Kingdom*, decided July 12, 1971, Coll. 38 at 86. Article 14 prohibits discrimination with respect to the rights of the Convention on the basis of language, political or other opinion, national or social origin, or other statuses. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14. The Commission also stated more generally that the refusal of permission to broadcast radio and television programs could raise an issue under Article 10 if such refusal were arbitrary, discriminatory or otherwise contrary to the requirements of objectivity and impartiality. Krüger & Buquicchio-de Boer, *supra*, at 102 (citing Application No. 9297/81, *X Association v. Sweden*, decided Mar. 1, 1982, D.R. 28 at 204; Application No. 12734/87, *Stiftelsen Contra v. Sweden*, decided Dec. 9, 1988, unpublished). It appears that a refusal to broadcast on the basis of national origin of programs is clearly the type of discrimination contemplated by Articles 10 and 14.

European Convention.¹²² Even the Commission of the European Communities, in its Green Paper setting forth the Directive, conceded that under the European Convention's freedom of expression provision, "laws cannot be used to impose restrictions on grounds of the social and cultural order of a country, either generally or in specific areas such as . . . broadcasting."¹²³ Although the European Convention's rules were the basis upon which the original proposal of the Commission on broadcasting had been conceived, the proposal was later modified without express recognition of the resulting inconsistency.¹²⁴

Free trade in cultural products may be defended as the best way to promote culture generally. Arguably, the strongest and richest culture is the one that develops naturally, when citizens have opportunities to gain knowledge and to access creative in-

122. Wolfgang Hoffmann-Riem, *Freedom of Information and Technological Developments in the Federal Republic of Germany: A Case Law Analysis*, in *TRANSFRONTIER TELEVISION IN EUROPE*, *supra* note 81. Hoffmann-Riem, Professor of Public Law at the University of Hambourg, argued that the "quota rules for European productions cannot be justified under Art. 10(2) of the ECHR." *Id.* at 65. B.M. Blanck, Deputy Assistant Under-Secretary of the Ministry of Education and Cultural Affairs in Stockholm, agreed, saying, "I think [the quotas] are negative limits on freedom of expression and I cannot find any basis for their inclusion within Article 10, paragraph 2." *Id.* at 206. Finally, Jochen Abr. Frowein, former Director of the Max Planck Institute of International Law and Professor of Law at the University of Heidelberg, expressed doubts, stating, "I do not see that [the quota system] could be justified under the terms of Article 10, paragraph 2." *Id.* at 258.

Article 10 is similar to other international provisions covering freedom of expression. For example, the International Covenant on Civil and Political Rights states that everyone has the right to freedom of expression, which "shall include freedom 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." International Covenant on Civil and Political Rights, art. 19(2), G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368. This right is subject only to restrictions necessary to protect the rights or reputations of others, or national security and public order. *Id.* art 19(3).

Also note Article 19 of the Universal Declaration of Human Rights, which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

123. Television Without Frontiers: Green Paper on the Establishment of a Common Market for Broadcasting, Especially for Satellite and Cable, COM (84)300 final at 135.

124. Hoffmann-Riem, *supra* note 122, at 65. "The EC Commission seemingly wishes to tolerate only those rules that can be justified within the context of Art. 10(2) of the ECHR. However, it has not acted consistently in this regard." *Id.*

puts from any source.¹²⁵ Foreign and indigenous cultures are equally valuable in that they both have the potential to promote knowledge and communication between citizens.¹²⁶ Moreover, consumers are competent to reject or at least recognize imported culture that is not congenial to their own convictions and social ideals.¹²⁷ Finally, government promotion of culture may be misdirected because it substitutes the preferences of bureaucrats for the preferences of the consuming populace.

III. EXTENDING GATT TO COVER CULTURAL INDUSTRIES

On balance, cultural protectionism is a short-term expedient that may be unnecessary and may actually cause more harm than good to local consumers and local cultural industries. In the face of changing technology, trade without barriers continues to become even more culturally desirable and economically efficient. If governments persist, however, in seeking to promote domestic cultural industries, protection constructed in accordance with GATT principles offers a solution that minimizes undesirable side effects. GATT does not prevent governments from promoting national policies. Rather, GATT encourages governments to utilize the most efficient and visible policy instruments for attaining domestic policy goals.¹²⁸

125. VAN DOREN, *supra* note 117, at 29. "Freedom of information is the right of every person to have access to all available facts, ideas, and opinions regardless of source and not only to the information approved by his government or any party." *Id.* (quoting Carroll Binder, 24 DEP'T ST. BULL. 195 (1951)).

126. *Id.* at 44. "The value of knowledge in the conflict of truth and error is an ideal value, since there is never enough knowledge to resolve the conflict Knowledge accumulates as forests do, through the falling of many leaves from which new leaves will grow." *Id.* at 8-9. An extreme example of an opposing policy is the system of Canadian non-tariff barriers against the importation of foreign elementary and high school textbooks, which has resulted in considerably higher prices for these products. GLOBERMAN, *supra* note 37, at 85.

127. GLOBERMAN, *supra* note 37, at 44 (citing B.K. Sandwell, *Present Day Influences on Canadian Society*, in ROYAL COMMISSION STUDIES: A SELECTION OF ESSAYS PREPARED FOR THE ROYAL COMMISSION ON NATIONAL DEVELOPMENT IN THE ARTS, LETTERS AND SCIENCES 6-11 (Edmond Cloutier ed., 1951)). As an example, Sandwell uses the incidence of U.S. newspaper columnists that are frequently printed in Canada, arguing that "because they are recognized as Americans expressing an American viewpoint, their material is judged for what it is and probably does a great deal more good than harm." *Id.*

128. Frieder Roessler, *The Constitutional Function of the Multilateral Trade Order*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 54 (Meinhard Hilf & Ernst-ülrich Petersmann eds., 1993).

A. NATIONAL TREATMENT

The GATT provision most applicable to current protectionist policies in the cultural sector is the Article III national treatment obligation.¹²⁹ Article III requires that foreign imported products be treated no less favorably than like domestic products¹³⁰ with respect to taxes and other measures affecting their sale, distribution, or use.¹³¹ The national treatment obligation applies to all products covered by GATT¹³² and renders discriminatory treatment illegal even when no material injury can be

129. Indeed, in general, "[t]he GATT obligations which impinge most directly on the domestic policies and internal politics of member governments are the national treatment obligations." JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 273 (1969).

130. "Like products" have been defined as: "those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, etc.)." *Certain Canned Tuna Fish*, Inv. No. TA 201-53, USITC Pub. No. 1558 (Aug. 1984) (citing the REPORT OF THE SENATE COMMITTEE ON FINANCE ON THE TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93rd Cong., 2d. Sess. 122 (1974)). See also GATT Dispute Resolution Panel, *Spain—Tariff Treatment of Unroasted Coffee*, GATT Doc. L/5135, 28th Supp. BISD 102 (1982) (panel report adopted June 11, 1981). In considering the subdivision of unroasted, non-decaffeinated coffee into five different tariff headings, the Panel concluded that although the taste and aroma of the end-product often differed because of "geographical factors, cultivation methods, the processing of the beans, and the genetic factor," the coffee should still be regarded as "like" products. *Id.*

For the purposes of this Note, it is assumed that cultural products of the same type, such as movies, but which are from different countries, are "like products." The accuracy of this assumption is debatable, especially in light of the 1949 *Brazilian Internal Taxes* case in which the GATT Working Party accepted Brazil's distinction between domestic cognac and imported cognac, after Brazil explained that their ingredients differed. GATT Dispute Resolution Panel, *Brazilian Internal Taxes*, GATT/CP.3/42, 2 BISD 181, 182-83 (1952) (first report adopted June 30, 1949; second report adopted Dec. 13, 1950). This argument is less than important, however, because if cultural products of differing countries are found *not* to be "like products" and are subject to differing treatment, that treatment will likely be considered a clear case of "disguised" or "de facto" discrimination. De facto discrimination, which exists when a facially neutral regulation has a disparate impact on imported goods, violates the national treatment obligation.

131. GATT, BISD, *supra* note 7, art. III:4. Article III states in part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Id.

132. The national treatment obligation includes products not covered by tariff concessions. John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207, 209 (1989).

proved.¹³³ If cultural industries were covered by GATT, quotas requiring a minimum percentage of domestic entertainment product would be prohibited by Article III.¹³⁴

Article III does, however, exempt subsidies given directly to domestic producers.¹³⁵ This exception would preserve the direct aid that many national governments now give to their cultural industries. Subsidies are the most efficient means by which a government may promote cultural industries. Subsidy costs are easier to determine and their distributive effects are more identifiable.¹³⁶ The use of subsidies without additional protection reduces the costs of local producers but does not interfere with the public's freedom of choice. Because subsidized producers must still compete with foreign producers, the market continues to reward high quality and punish mediocrity, thus stimulating the production of higher-quality and lower-priced cultural products.¹³⁷

Subsidies on exported products may be subject to countervailing duties in the importing country.¹³⁸ The possibility of countervailing duties is greatly mitigated, however, by the fact that material injury to a domestic industry must be causally

133. See GATT Dispute Resolution Panel, *EEC-Measures on Animal Feed Proteins*, GATT Doc. L/4599, 25th Supp. BISD 49 (1979) (panel report adopted Mar. 14, 1978) (rejecting the European Community's argument that U.S. animal feed imports had not declined after they implemented the contested regulation).

134. Movies were exempted from Article III in 1947. See *supra* notes 14-18 and accompanying text. The analysis of the effects of GATT coverage of cultural industries on protectionist policies assumes that the Article IV exception for movies would be repealed.

135. GATT, BISD, *supra* note 7, art. III:8(b). Article III states in part: "The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products." *Id.*

136. GLOBERMAN, *supra* note 37, at 96-97.

137. Some experts in Britain and other European countries argue that "the lavish subsidies which the French government pours into the cinema [which are accompanied by extremely protective quota systems] encourages [sic] self-indulgence and parochial products." Charles Bremner, *Phoenix Stays Cold to Charms of Dubbed Deneuve*, *TIMES*, July 21, 1993, at 10, 10. One Canadian writer expressed a similar thought, arguing that "[n]ationalists are lobbying for the imposition of Canadian content quotas in our bookshops and theatres In a word, largely second-rate writers are demanding from Ottawa what talent has denied them, an audience." Mordecai Richler, *Canadian Identity*, in *THE FUTURE OF NORTH AMERICA: CANADA, THE UNITED STATES AND QUEBEC NATIONALISM* 37, 50 (Elliot J. Feldman & Neil Nevitte eds., 1979).

138. GATT, BISD, *supra* note 7, art. VI.

linked to the subsidization before countervailing duties may be applied.¹³⁹ It is unlikely that the countries that complain of disappearing production sectors will be able to cause a material injury in countries which import their subsidized products.

B. PRICE-BASED PROTECTIONS

If countries concerned with preserving their cultural industries ultimately decide that subsidies are insufficient, GATT policies leave open the option of price-based protections in a form analogous to tariffs on other products.¹⁴⁰ Although tariffs raise prices and thus have undesirable side effects, they permit the price mechanism to function and thereby reward efficiency and quality. Tariffs are also preferable as an instrument for protection because they are visible and thus easier to negotiate,¹⁴¹ providing the possibility of a long-term reduction in trade barriers.¹⁴²

Tariffs may not be effectively applied to movies or to other cultural products whose value typically depends upon earnings, rather than the number of units sold. However, the policy goals underlying the preference for tariffs could largely be met by permitting discriminatory internal taxes on product revenues. Internal taxes on cultural product receipts could be bound and negotiated by GATT contracting parties, as tariffs currently are under GATT.

139. *Id.* art. VI:6(a). Article VI states in part:

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

Id.

140. "[T]he GATT structure provides for multilateral, international negotiation of the level of each tariff." JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 367 (2d ed. 1986). If a country has not agreed to limit the tariff of a particular product, it may set any tariff it wishes. *Id.*

141. *Id.* at 366-67.

142. The first seven GATT trade negotiating rounds were so successful in reducing tariffs on nonprimary goods imported into industrialized contracting parties "that many economists and businessmen feel that they are no longer a meaningful barrier to imports." JACKSON, *supra* note 79, at 53. The Uruguay Round, concluded December 15, 1993, was the eighth such round.

IV. CONCLUSION

The framers of GATT and other proponents of free trade have long recognized that certain important public welfare goals must be considered along with the economic benefits associated with free trade. The preservation of national culture is one such goal, assuming great importance for many governments. Overly protectionist policies, however, do not aid, and may actually hinder the goal of cultural preservation. Trade barriers imposed upon cultural products are becoming less advantageous and increasingly difficult to maintain in light of changing communication technology. Smaller producers of cultural products are already achieving high quality and competing with large producers by specializing their output. Overly protectionist policies are also inconsistent with international human rights agreements that protect the free transmission of information and ideas.

In light of the balances to be achieved in protecting national cultures, countries with both large and small producers must consider including cultural products within the overall GATT regime. GATT policies will not prevent governments from pursuing the protection of culture. Rather, GATT policies encourage governments to use measures which are not only the most efficient generally in free trade, but are also the most effective in protecting national culture. Including cultural industries in the overall GATT regime would allow contracting parties to protect their domestic cultural industries through subsidies and negotiated discriminatory taxes. More importantly, GATT coverage would ultimately foster the benefits associated with competition and free trade by encouraging high-quality and specialized cultural products.