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Rhetoric and reality - the debate over trade and culture¹

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*“Nothing’s ever what it seems,
Skim milk masquerades as cream.” (W.S.Gilbert)*

Introduction

For the past 40 years a nationalist vision of protection and preservation has captured policy makers in the cultural industries. While some have presented opposing views, until recently they have been sidelined. Like the Northern Alliance in Afghanistan, the opposition to protectionism was confined to a small part of the terrain where it could do little harm to the current regime. Circumstances are changing. In both instances, technology is in part responsible for upsetting the status quo, and an international coalition may be required for lasting change.

The purpose of this article is to assess where Canada and a number of other countries stand in the debate over the treatment of trade in the cultural industries. There is some complexity bordering on confusion over Canada’s position as it shows more than one face to the world. The US is viewed as an opponent and France a supporter of Canada. Other countries fall more into one or other camp but the nuances of the debate suggest that categorizing countries in this way is not simple. In any particular situation different interest groups may hold conflicting positions. Canadian consumers favour greater liberalization by watching a wide array of foreign material, but at the same time support protectionist policies at the ballot box. Most producer groups in Canada opt for continuing protection.

¹ The subject matter of this paper was discussed at a November 28th, 2001 conference in Ottawa on Trade and Culture organized by the Centre for Trade Policy and Law. The original conference papers can be found at <http://www.carleton.ca/ctpl/completed.htm> The author is grateful for comments on earlier drafts from Keith Acheson, Bill Dymond, Geoffrey Elliot, and Elizabet Filleul. The text draws on research co-authored with Keith Acheson listed at <http://members.rogers.com/c.maule/c.maule/publications.htm>

The terrain of this debate embraces the so-called cultural industries. In the NAFTA they are defined, but elsewhere there is disagreement over where the boundary should be drawn, especially as so-called new media firms are evolving with applications relating to print, sound and video. At the same time mergers and acquisitions are creating conglomerates that combine telecommunications and the Internet with more traditional cultural activities.

UNESCO's definition of culture differs from that of NAFTA and, for example, from the departmental responsibilities of the UK ministry in charge of many of the areas included in NAFTA. The relevant UK department has been referred to as the Ministry of Fun, officially the Department of Culture, Media and Sport (DCMS). It receives government funding of about one million pounds a year plus an allotment from the National Lottery that more than doubles this total. Gambling has become one of the new benefactors for the arts. The BBC is one of DCMS' responsibilities.²

Canada's current position on trade and culture can be traced from the passage of the Canada-US Free Trade Agreement (CUFTA) in 1988 and the WTO agreement in 1995. Prior to this, trade in cultural goods was subject to the General Agreement on Tariffs and Trade (GATT) 1947 that included an exemption (Article IV) for theatrical film quotas imposed by countries. This was a concession by the US to European film studios whose operations had been had damaged during the war and which were having difficulty in competing with American imports. Not all in Europe favoured quotas. Theatre owners were interested in showing films that attracted audiences, and the US probably agreed to Article IV knowing it would likely have limited effect if audiences were denied access to popular films. Canada has been free to impose theatrical quotas from 1947, but has chosen never to do so, while continuing to complain about American film imports. In 1988, Jack Valenti proposed that Canada introduce screen quotas.³

Over the years the US position on cultural trade has been influenced by the Motion Picture Association of America (MPAA) and its predecessor organizations as discussed in detail by Ian Jarvie (1992).⁴ Currently, the USTR remains attentive to the interests of the MPAA, which now represents major foreign investors including Vivendi, a firm that has close ties to the French government.⁵ On its website, the MPAA refers to itself as "a little state department." The position of the French government is well known and was clearly articulated in the recent negotiations concerning the OECD's Multilateral Agreement on Investment. Other European governments have expressed a variety of pro and anti protectionist sentiments.

² Royal Economic Society Newsletter, October 2001, No.115, 3-4.

³ *Cinema Canada*, May 1988, 20.

⁴ *Hollywood's Overseas Campaign*, Cambridge University Press, Victoria, 1992

⁵ At meetings of the World Services Congress in Atlanta 1999 and Hong Kong 2001, a representative of the MPAA took a leading role in the sessions at which audiovisual services were discussed.

Present situation in Canada

Culture is traded as a good and a service. At times the two are combined as in advertising services in a newspaper or magazine. Canada's trade obligations are contained in the WTO, the NAFTA, in bilateral agreements with Israel and Chile and in the proposed Free Trade Agreement of the Americas (FTAA). Canada also has a web of coproduction treaties for film and television programs that condition trading relationships since they give preferences to some countries over others. The wording of each agreement differs giving some plaintiffs the option to forum shop in the event of a dispute.

In the WTO, cultural goods are subject to the disciplines of the GATT with the above noted exemption for theatrical screen quotas. The provisions of the General Agreement on Trade in Services (GATS) apply to trade in cultural services but any obligations regarding market access and national treatment are subject to a country making commitments. The GATS sector most closely related to culture is audio-visual services, where less than 20 countries including the US have made partial or complete commitments. Canada along with most other countries has made no commitments. No mention is made in the GATS of what happens when a good is packaged with a service, an issue that arose in the periodical and some non-cultural disputes.

The provisions of the NAFTA, drawing on wording in the CUFTA, dealing with cultural trade has three components:

- Article 2005(1) states that cultural industries are exempt from the provisions of the agreement except as specifically provided.
- Article 2005(2) states that a party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with the agreement but for Article 2005(1) – the retaliation clause.
- Exceptions to Article 2005(1) relate to the removal of certain tariffs; the assurance of receiving fair market value in cases of divestment required to meet foreign ownership restrictions; the removal of a requirement that magazines be typeset and printed in Canada for a company to be able to deduct advertising in the magazine as a business expense; and the introduction of a retransmission royalty scheme for broadcast signals.

In the Canada-Chile and Canada-Israel Free Trade Agreements an exemption is provided for measures taken by each country with respect to the cultural industries⁶ and no provisions for retaliation are included. In the ongoing negotiations for a FTAA, Canada's

⁶ Text of Canada-Chile agreement, Annex O-06.

position is to seek a cultural exemption based on the model of the Canada-Chile and Canada-Israel agreements. Canada has proposed language for the preamble of the FTAA in support of cultural diversity.⁷

Currently, negotiations are underway on services in the GATS and in the FTAA. In the GATS, Canada states that the agreement does not and will not limit Canada's ability to promote its culture.⁸

The preservation and promotion of cultural identity is one of our core objectives. We will not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument can be established that is designed to specifically safeguard the right of countries to promote and preserve their cultural identity.

The proposal for a new international instrument originated in the 1999 report of the cultural SAGIT.⁹ The government responded to the proposal stating that the purpose of such an agreement would be to enable Canada to maintain its cultural policies “while respecting the rules of the international trading system and ensuring markets for cultural exports.”

More recently, the Minister of International Trade stated that the government is keeping all options open on the most appropriate forum for negotiating such an instrument, including the WTO, and that the United States should be included in the discussions if they were to have any credibility.¹⁰

Subsequently, the Minister of Canadian Heritage in an interview stated that, “Canada has taken a lead on the creation of a new international instrument outside of the WTO because we do not want culture traded on the table of WTO.”¹¹ The SAGIT report did not provide details of the wording for the proposed instrument nor did it state where it should be located.

A final aspect of Canada's cultural trade policy resides in the web of coproduction treaties that exist with individual countries. Content produced under these treaties often gives producers preferential access to government funds in Canada and abroad and allows the material to be counted as national content in both countries.

Canada now presents several faces to the world in addition to the coproduction treaties:

- A cultural exemption with possible retaliation rights with the US and Mexico,

⁷ See FTAA agreement at <http://www.dfait-maeci.gc.ca/tna-nac/C-P&P-e.asp>

⁸ <http://strategis.ic.gc.ca/SSG/sk00100e.html#environment>

⁹ Canada, *Canadian Culture in a Global World, New Strategies for Culture and Trade*, Report of the Cultural Industries Sectoral Advisory Group on International Trade, February 1999

¹⁰ Pettigrew Speech, 2001/24, June 11, 2001, on DFAIT Web site.

¹¹ *Hill Times*, Ottawa, Oct. 15, 2001, Communication Policy Briefing

- A cultural exemption without retaliation rights with Chile and Israel and in negotiations with countries of the FTAA that include amongst others the US, Mexico and Chile, and
- Commitments on cultural goods but no commitments on audiovisual services with countries of the WTO that include all of the above. Canada has stated that it will make no commitments on cultural services in the GATS until the signing of a New International Instrument on Cultural Diversity (NIICD).

Promotion of a NIICD has been spearheaded on two fronts by Canada in conjunction with a number of other countries, a Ministerial grouping of relevant ministers of culture, heritage or communications, wherever these responsibilities reside, and a grouping of associations of artists and creative professions. The ministerial grouping is called the International Network on Cultural Policy (INCP) while the artists are grouped into the International Network on Cultural Diversity (INCD).

(The INCP)... is an international forum through which culture ministers can exchange views on emerging cultural policy issues. The INCP was born out of an idea to create an informal, international venue where national ministers responsible for culture could explore new and emerging cultural policy issues and consider integrated ways to promote cultural diversity in our increasingly globalized world.

As of March 2001, the INCP had 45 member countries with a steering committee made up of 9 countries including Canada.¹²

The INCD describes itself as:¹³

.... a world wide network of artists and cultural groups dedicated to countering the homogenizing effects of globalization on culture.

The INCD represents individual artists and cultural activists, cultural organizations and creative industries. We come from all continents, sectors and disciplines of the cultural community, ranging from new media artists to traditional artisans. Organizations from more than fifty countries belong to the network.

The INCD is established as a-not-for-profit corporation under the laws of Canada; receives funding from governments in Canada, Switzerland, Korea, South Africa, Greece, and Sweden; and from institutions such as the Rockefeller Foundation and Arts International. It has members from 53 countries, and a steering committee of 14, two of whom are Canadians, and one from the US. The US does not belong to the INCP although it can be invited as an observer by the government hosting the meeting.¹⁴

¹² See http://64.26.177.19/index_e.shtml

¹³ See <http://www.incd.net>

¹⁴ The US was invited to earlier INCP meetings in Ottawa and Mexico City but not to recent meetings in Greece and Switzerland.

Both the INCP and the INCD met most recently in Lucerne, Switzerland in September 2001. The tenor of discussion in these groupings is to create an instrument under the auspices of some organization other than the WTO. This is confirmed in the interview with the Minister of Canadian Heritage noted above.¹⁵

The wording of an instrument is currently being drafted. The objectives would include the preservation of cultural diversity. Provisions will have to deal with the rights and obligations of countries regarding matters such as subsidies, content quotas, ownership restrictions, use of public enterprises, protection of intellectual property and competition policy issues as they relate to the cultural industries.

In the WTO, the ongoing services negotiations have led to position papers being filed on audiovisual services by the United States, Brazil and Switzerland with interest expressed by Japan and Hong Kong.¹⁶ While the position of each country differs, there is a common desire to move ahead with negotiations on audiovisual services in contrast with Canada's position of no negotiations until the introduction of a NIICD. Canada's approach appears to be an attempt to negotiate a cultural exemption from trade agreements that has international backing.

The uncertainty surrounding Canada's current position is due to the different stances presented according to which country or trade agreement is being referred to, as well as to support for the status quo in the GATS unless a satisfactory new instrument is negotiated. Differences also arise as to the preferred location of a NIICD – the Minister of International Trade talks about it being inside and the Minister of Canadian Heritage outside the WTO. Multiple stances present opportunities for those negotiating with Canada to play off one interest against another.

Other national interests

The official Canadian position regarding trade and culture, though complex and confusing, is in contrast to that of the United States which has traditionally opposed protectionist measures and considers the cultural industries as providing commercial entertainment that should be subject to international trade disciplines similar to any other industry. As discussed below, the US attitude shows some signs of change. As for other countries, France is usually seen as a supporter of Canada and many expect Mexico, Canada's other NAFTA partner, to be equally supportive. A brief overview of developments in these and some other countries reveals a more multifaceted and changing situation.

In the case of Mexico, the Spanish speaking market in the US is viewed by Mexican film and television producers as presenting an opportunity for their creative artists. Any

¹⁵ A report of the meetings is contained on the INCD website - see fn.13 under Conference 2001, and on the website of Heritage Canada.

¹⁶ The filings by each country can be found on the WTO website.

restrictions on this market would be seen as counterproductive. Spanish language telenovellas also sell well in Russia and other eastern European markets. In contrast, Canadian government rhetoric on behalf of its creative artists sees the large English speaking US market as a threat rather than an opportunity. Not so in the case of Canadian private producers such as Alliance Atlantis, Lions Gate Films, and Corus' Nelvana whose film and television portfolios are replete with coproductions having a US network as a partner. Even within Canada therefore government rhetoric is coinciding less and less with private sector reality. The same is true in other cultural sectors, where politicians press for continuing protection but at the same time note the success of Canadian artists in the film, television, music and publishing industries. All these would be hurt if other countries placed restrictions on these Canadian exports.

France is often identified as an ally of Canada on cultural trade issues and favouring the promotion of a NIICD. Even here there are signs of change. At the government level, France, along with other countries, was unwilling to support the inclusion of wording, proposed by Canada for the WTO declaration at Doha, that would refer to the need to address the issue of cultural diversity in the WTO at this time. France appears to regard no mention as being the best way to avoid discussing the issue and maintaining the status quo. At the same time, France has given its support for discussion of a NIICD but in some other forum.¹⁷ In the private sector, ownership of an American studio Universal by Vivendi means that influential French corporate interests will see the benefits of maintaining open markets around the world for its film, television and music interests. On copyright related trade issues, France on behalf of Vivendi, is likely to be allied with Germany on behalf of Bertelsman.¹⁸

Elsewhere references are appearing to the adverse or unintended consequences of protectionist cultural policies in France. Patrick Messerlin notes:¹⁹

When supporters of the quotas and subsidies say that these instruments work, they simply mean that quotas have been enforced and subsidies have been spent ... [but] these instruments, even when zealously enforced, as in France, have not produced the effects desired by their supporters (p. 18).

Being protected from American films, French film-makers have tried to direct and produce quasi-American films ... French film policy has led to an accelerated 'Americanisation' of French film production - from soap operas to sitcoms for teenagers and hard thrillers (p. 20).

Cracks are thus appearing in the support of a nation that Canadian cultural nationalists have long thought of as a reliable ally.

¹⁷ Remarks (recorded on audiotape) by Don Stephenson at the CTPL Trade and Culture conference, Ottawa, November 28th, 2001.

¹⁸ Mr Messier, the chief executive if Vivendi has been involved in a public debate in France over the viability of the French cultural exemption and French cultural policies, see *Economist*, Jan. 12th, 2002, 47.

¹⁹ "European Film Policy: La Grande Illusion," *Trade Policy Review 1996/97*, London Centre for Policy Studies. Professor Messerlin has recently been appointed an advisor to The WTO.

Similar criticisms have been expressed elsewhere in Europe. A report for the European Union (EU) is critical of European policies that have not only been costly but have not stimulated European audiovisual production.²⁰ It concluded that the financing schemes of subsidies used in Europe have been in large part responsible for the commercial failure of European films and television programs. Amongst others, it noted a study of film making policy in Germany. The study is described as “a merciless analysis of the atomization of aid systems...through the policies of the Lander and the catastrophic results on the situation of the film industry in Germany (p.22).”

The Movie Game by Martin Dale is equally critical of UK film policies.²¹

The state now decides the cultural agenda of the nation and appoints the key commissioning editors whose editorial remit make it very difficult for them to make popular films. At best, commissioners are excellent film professionals who do their best to make good films within the limits that have been placed on them. At worst, commissioning is the result of bribery and corruption and the films that are made are mediocre (p.183).

Mike Figgis, a British director comments even more directly,

It's (government policy) so inundated with class snobbery and nepotism that all the talent that is waiting there to be used, waiting to be involved, waiting to be creative – and I have no doubt that it is there, it's there in spades – is not welcome, is not brought in (quoted in Dale, p.117).

At the same time UK musical artists have international recognition and some of their films have had considerable success in foreign including the US markets – *The Crying Game*, *Three Weddings and a Funeral*, *The Full Monty*, and this year in the scripts of films based on the Harry Potter books and the works of Tolkien. Even the public broadcaster is actively promoting its interests abroad. *BBC Canada* and *BBC Kids* have been licensed recently as new digital services in Canada. The former is a television equivalent of a split-run that Canada has made strong efforts to discourage in the case of periodicals.

Australia has typically been supportive of the official Canadian line but like Canada the Australian industry has divided loyalties. Some parts are eager to maintain facilities that will support the export earnings from foreign location shooting for American films and television programs – the state of Queensland is a particular beneficiary. Canadian and Australian film and television studios and the associated employees would be hurt if actions were taken to reduce these activities as appears to be a possibility resulting from the new complaint by certain unions in the US against the subsidies and tax incentives offered by Canada for film and television productions.²²

²⁰ European Communities, *Report by the Think-Tank on the Audiovisual Policy in the European Union*, Brussels, 1994.

²¹ London, Cassell, 1997.

²² Petition filed before the International Trade Administration, US Department of Commerce and the US International Trade Commission re provincial subsidies of film and television production, December 4th, 2001. The petition has been withdrawn but a Section 301 action initiated.

Finally, the United States provides an interesting case. Although a staunch opponent of cultural protectionism in wording supported and possibly crafted by the MPAA, there is now official recognition that there may be some merit to the arguments for preserving cultural diversity, the term used by cultural nationalists in arguing their case. The US however argues that diversity is enhanced by open markets and that there is little to fear from moving in this direction.²³ A further development is the support given by the Rockefeller Foundation to the INCD and the attendance at its meeting by a representative from the Smithsonian Institution. The US has been invited as an observer to two meetings of the INCD in Ottawa and Mexico City, but not the two most recent meetings in Santorini, Greece and Lucerne, Switzerland.

Conclusion

While in many countries the rhetoric of cultural nationalism has not abated, there are signs that some are finding it less persuasive and, by their actions, governments and firms are revealing a growing preference for exports and more open markets. At a recent conference in Ottawa, the Minister of Canadian Heritage announced a program to assist the export of Canadian cultural products (Press release, November 28th, 2001). A move towards more openness is not surprising given that protectionist arguments have a weak logical foundation, based as they are on what David Henderson calls do-it-yourself-economics (DIYE), or the arguments of those who have no use for economic doctrines except the ones they create through intuitive economic reasoning to support their case.²⁴

For example, most economists (and the profession is notoriously divided) would argue that countries with small domestic markets need access to international markets and a rules based system to adjudicate international disputes in order for their industries to flourish. They would point to the examples of firms based in countries with small domestic markets like Sweden, Switzerland and the Netherlands that have thrived due to exports. Canadian firms such as Alcan and Nortel provide examples of firms that earn most of their revenues in foreign markets - Nortel would be in even worse shape or much smaller if it relied solely on the Canadian market. New media firms will have little chance of success unless they are able to sell abroad. And, as shown, Canadian cultural producers like Alliance Atlantis recognize the logic of open markets by generating increasing revenues from abroad.

DIYE has not been a friend of the cultural industries. This suggests the need to re-examine the logic of existing cultural policies in general and especially those that are linked to trade disputes.

- Does it make sense, as DIYE contends, to maintain ownership restrictions when the need is to attract more investment to the cultural industries?

²³ The US position is contained in Communication from the United States, Audiovisual and Related Services, WTO, S/CSS/W/21, 18 December 2000 – available on the WTO website.

²⁴ DIYE is the theme of David Henderson's 1985 BBC Reith Lectures, *Innocence and Design: The influence of economic ideas on policy*, Oxford, Blackwell, 1986.

- Does nationality of ownership make any difference to the type of films, television programs and music made?
- Did it make any measurable difference when Canadians owned Universal studios and Cineplex-Odeon?
- Is there any significance to the fact that major American studios are owned by Vivendi, Viacom, News Corp. and Sony?
- Do content quotas for radio and television mean that audiences consume more domestic content or that just more gets made at taxpayers expense?
- Can nationality be ascribed to content?
- Are content quotas effective at a time when more content is being distributed over the Internet, as well as by cable and satellite? The CRTC appears to think not in the case of the Internet.
- Does the statistic that Canadian films occupy less than five percent of theatrical screen time have the significance that cultural nationalists want it to have, or does it have something to do with the type and appeal of films produced, often with subsidies, in Canada?
- What is the role for the public broadcaster at a time when many of the markets that it has been mandated to serve are now supplied by other interests?

Subsidies have received the support of DIYE and may make sense. They were also given the approval of the WTO in the periodical dispute under certain circumstances that includes greater transparency. Canada has now introduced a new subsidy arrangement in the Canadian Magazine Fund that provides support for editorial content. The first recipients (over 350 magazines) of these monies have now been listed and include titles such as *Airports America*, *Bar and Beverage Business Magazine*, *Canadian Pizza Magazine*, *Electrical Business*, *Sanitation Canada* and *Today's Trucking*. Contributions range from \$12,000 to \$1.4 million per magazine. The exact contribution to Canadian culture of these trade magazines is unclear but at least the taxpayer knows who the recipients are.²⁵

There is little doubt that Canadians want a society that promotes the creativity of their citizens. They are also aware that the arts, especially the so-called high arts, have always needed private or public sponsors in addition to markets providing a source of funding. The issue that begs to be discussed is the development of policies that achieve these objectives. The issue that is usually discussed is how to maintain existing policies that support the iron triangle of special interests together with their bureaucratic and political supporters. Trade disputes result from protectionist domestic policies. Designing a NIICD should follow not precede an examination of which domestic policies Canada and other countries might want to maintain.

²⁵ See http://www.pch.gc.ca/culture/cult_ind/cmf/2000-2001-list.htm