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A Room of Our Own: Cultural Policies and Trade Agreements

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Standing at Canada's Cultural Policy Crossroads (Again)

The wisdom and sustainability of a number of measures now forming part of Canada's cultural policy arsenal are often being questioned by some members of the public, private industry, foreign providers of cultural content, and even people from within Canada's own cultural community. One reason is extraneous forces, such as the Internet and trade agreements, that are forcing a rethinking of our ability to maintain some of the policy instruments we are used to. Moreover, as I noted in an earlier paper,[1] Canada's cultural policies often suffer from not being clearly related to their stated objectives. These objectives are to promote the availability of Canadian expression and storytelling to all Canadians, to foster excellence, to build capacity and infrastructure in cultural matters, to connect Canadians to one another, to promote Canadian interests and values abroad and to ensure that Canada is open to the world's diverse cultures.[2] Often, however, much is done in the name of Canadian culture that exceeds or is inconsistent with what these policy objectives require and even produces or exposes Canada to harmful results. Arguably, the risk of adopting misguided or ineffective policies has increased in an environment of more open borders and greater ease of communications.

A number of events of the past two years also suggest that confusion exists about the proper role of public intervention on the Canadian cultural scene:

- As two national newspaper chains carried out a major divestiture of their titles across the country, commentators worried that the purchase of these newspapers by other communications conglomerates could diminish diversity in the Canadian media. These concerns were expressed on account of both the concentration of ownership of this particular medium and the increasing convergence of the media to better exploit the existing content. Yet Canada maintains policies that restrict foreign ownership in a number of cultural industries, including newspapers and magazines, thus limiting the diversity of the potential ownership pool and reducing the incentive for new local players to invest capital in the Canadian industry.
- The sale of 25 percent of venerable Canadian publisher McClelland and Stewart (M & S) to global giant Random House — itself owned by the German conglomerate Bertelsmann AG — similarly raises questions about Canadian policies toward foreign ownership and the capital needs of Canada's cultural industries. Although the other 75 percent of the company's publishing arm was given to the University of Toronto, ensuring both majority Canadian ownership and tax benefits for the seller of M&S, critics raised fears that Random House would become effectively in charge of marketing. Canadian publishers seem divided on the impact on Canadian culture, some saying that the move violates the spirit of federal ownership rules, but others hoping similar flexibility will be afforded them in the future.[3]
- When the Ontario-based French-language educational television service TFO asked to be made available on the discretionary tier of Quebec's cable distributors, the Canadian Radio-tele-

vision and Telecommunications Commission (CRTC) denied the application, despite overwhelming advice to the contrary from citizens across Canada and from Quebec's cultural community in particular. By so doing, the CRTC continued to deny most Quebecers access to this excellent French-language service while, somewhat disingenuously, stating as a priority the expansion of high-quality French-language cultural and children's programming by other services. Many people saw this decision as flying in the face of any conceivable objective of a Canadian cultural policy.

- The President of the Canadian Broadcasting Corporation (CBC), faced with declining ratings of the corporation's local news coverage, publicly concluded that perhaps the local news market was well covered by private broadcasters. He proposed a plan that would have seen the CBC concentrate relatively more resources in areas less well covered by the marketplace, making its regional reports more available to Canadians across the country and reducing its reliance on commercial advertising. But he was forced to backtrack somewhat in the face of what appear to be considerations at least partly related to short-term political issues.
- Time and again, Canadian advertisers strike uniquely Canadian chords with the public. Consider the beer television ad "The Rant," which won a Bronze Lion at the 2000 Cannes International Advertising Festival. Yet regulators continue to place limits on the quantity of Canadian advertising that is allowed in foreign magazines distributed in Canada. While these limits are less restrictive than the outright ban that was envisaged before an accord was struck with the United States on magazines in May 1999, they result in some Canadians' continuing to be unable to communicate with others through the advertising medium of their choice. This approach seems to at least partly defeat the purpose of cultural policy.

These developments suggest that Canada's cultural policies require further examination. Moreover, new information technologies and expanded trade and investment relations with other nations have taken on an unparalled importance in the everyday life of Canadians. These changes make it important to better adapt our cultural instruments to our policy objectives and to choose instruments that preserve the cultural room necessary for manoeuvre, while posing the least potential harm to opportunities afforded Canadians by new technologies and trade links.

This paper is about how to better integrate the objectives of cultural policy with those of trade relations, but I find it useful in the next two sections first to delineate the proper objectives of cultural policy per se and then to review some criteria for the choice of policy instruments Canadians can use to achieve these objectives and to consider the extent to which we are now meeting these criteria. In subsequent sections, I address how culture is treated in trade agreements and then how it should be treated to make these agreements fully compatible with Canada's cultural interests. The penultimate substantive section of the paper presents a draft proposal for an interpretive code on culture in trade agreements, one that I feel would both address Canada's trade-related concerns with respect to culture and have a reasonable chance of being found congenial by our trading partners.

The last substantive section examines in greater detail the question of the acceptance of such a code by the United States, our major trading partner and our chief foreign source of cultural material.

The paper's main conclusions are that Canada has many good reasons to maintain an active cultural policy, and its role ultimately comes down to enhancing the conditions under which Canadian cultural goods and services are produced and distributed, with the main purpose being to see that Canadians take, in a very broad sense, (including a commercial sense), an active interest and pleasure in their own culture.[4] Some of our current policies — namely, foreign investment restrictions, rules on eligibility for support and Canadian content quotas — are to varying degrees not properly related to these objectives. Other elements of the policy remain essential, however; a specific example is the ability to treat cultural products with Canadian content differently from other cultural products in terms of direct financial support or tax incentives.

In the meantime, Canada's traditional insistence that culture be off the table in trade discussions is giving way to the idea that some international instrument protecting cultural diversity might best be suited to today's highly integrated world. As worthy as this idea is, we cannot realistically think that such an instrument would safeguard our essential cultural interests from the reach of globalization unless we are also ready to give up non-essential tools that others may consider irritants. To put the point another way, an ambitious instrument on cultural diversity that attempted to validate all of Canada's current policies could not likely be made binding on others. Instead, I argue here that if Canada is ready to bargain about giving away or modifying some policy tools that are of dubious value anyway, it could have essential cultural policy objectives and instruments protected in a more limited but binding code for the interpretation of trade agreements with respect to cultural matters.

Refocusing on the Role of Cultural Policy

A useful way to start the analysis is to think through the rationales for public intervention that are relevant to the cultural sector. I discuss these rationales from the perspective of economics, a perspective that is useful both because it provides a general framework for analyzing public choices, and because the nuts and bolts of cultural policy itself often include important economic components.

In general, public support for an activity may be warranted whenever there is a reasonable basis for thinking that its benefits extend well into society at large beyond those who directly partake in it.

With regard to an activity falling under the broad umbrella of cultural activities, four types of benefits potentially extend beyond the private rewards of either its producers or its consumers. These benefits flow from better information permitting better choices, the transmission of cultural knowledge to future generations, the establishment or maintenance of social bonds, and the creation of sources of wealth that otherwise would not have emerged. Each is worth reviewing as a rationale for some degree of public support of cultural activities.

Information and Choice

The possibility of individuals' making informed choices, whether concerning political, business, career, or household decisions, is central to the proper functioning of a modern economy. Information is thus valuable in itself, which is why much of it is available commercially. However, individuals' ability to handle information is limited. Thus, in practice, people must choose among sources of information, and this choice can matter greatly to their decisions, since listening to one source may preclude considering another.

In some cases, information is readily available in the marketplace — for example, because it is cheap or omnipresent. But it may not contain elements of crucial importance to choices that must be made by those who belong to a particular community. Generally, if the information available to the members of an organization, whether public or private, does not contain elements that are relevant to its very existence, that organization itself risks becoming, in the words of Nobel Prize winner in economics Kenneth Arrow, "non-agenda," even to its own members, ensuring its ultimate demise.[5]

Translated to the topic at hand, Arrow's analysis means that information specifically aimed at Canadians creates a virtual meeting place for them. As long as they are interested in maintaining the possibility of a national character and institutional underpinnings that differ from those that would sustain other countries or communities, they must have convenient access to information that contains at least some Canadian content and references. Otherwise, the basic elements necessary for making informed choices — political, educational, and others — disappear or become muted and Canada risks becoming "non-agenda" to many of its citizens.

Consider an analogy. Most Canadians are relentlessly exposed to advertisements about products and lifestyles that, if carelessly embraced, would have a detrimental impact on their health. But the fact that they were also exposed for years to advertisements from the partially publicly funded ParticipAction agency, whose mandate is to promote healthy living, has probably helped ensure that the choices many individuals make in this context better matched their true preference.

Even where governments have little presence in the broadcasting business per se, legislation tends to recognize the need to ensure that information relevant to public choices is available to the community. In the United States, for example, the Federal Communications Commission (FCC) expects broadcasters to "be aware of the important problems or issues in their communities and to foster public understanding by presenting some programs and/or announcements about local issues."[6] Noncommercial stations may exercise "must-carry" rights on cable television in their local markets. Other rules include making broadcast time available to candidates for public office and limiting advertising on programming specifically designed for children. A major issue currently facing the FCC is the clearing of part of the broadcast spectrum currently occupied by television stations in order to reallocate it to public safety services — in essence, creating a virtual meeting place for Americans in times of emergency.

Whether public authorities should devote or command scarce resources to support the capacity for informed choices depends on two conditions. First, there should be evidence that the marketplace is not always providing this capacity for choice or that, for some reason, individuals do not search for relevant information. In Canada, this situation has often been presumed to exist because of what the Fowler Commission report refers to as "our disabilities of geography, sparse population and vast distances."[7] Second, it should be demonstrated that, over time, recipients of the information have an interest in or act upon it. That is, the information delivered is eventually shown not to be trivial to them.

Under these conditions, ensuring that individuals have choices of information and, more generally, cultural products that are relevant to their own community becomes the first rationale for cultural policy.

Transmission of Culture

Many economists note that public subsidies for culture tend to provide benefits to people who are already well off, because, for example, audiences for artistic events tend to be drawn from that

group. On that score, public support for the arts can indeed be seen as suspect from a social equity standpoint. Nevertheless, many among these same economists tend to see public support for cultural activities as worthwhile if their purpose is educational.

For example, Tibor Scitovsky one of the most important welfare economists of the era after the Second World War, argued "[T]he only valid argument for Government aid to the arts is that it is a means of educating the public's taste, and that the public would benefit from a more educated taste." Individuals who are exposed to various types of cultural expressions cannot be coerced in deciding which ones will enrich their lives. But continued state support for cultural education is warranted on behalf of future generations, who need to be given the same ability to make the choice of what does or does not appeal to them. To quote Scitovsky again, "[O]ne cannot expect society to share mortal man's ability to learn once and be the wiser for life. Society, being immortal, must acquire every bit of wisdom at the cost of continuing education."[8]

A.T. Peacock is another economist who has written extensively on the question of public subsidy for the arts. He notes that the argument of conferring benefits on future generations by not narrowing the range of choices available to them is analogous to the argument for conserving natural resources, particularly "if the object is to preserve a *national* culture rather than a transplanted one." But, he adds, even this lofty goal does not suggest that just any amounts or any forms of support for the arts are equally valid, lest we ask, in effect, the poor of today and tomorrow to "support the rich today and the sons of the rich tomorrow." Peacock suggests that this undesirable outcome can be avoided in the long run by "altering the preference functions of future generations," so that culture is sustained "through the market as well as through the political mechanism which offers state support." On this point, he notes: "[T]he diffusion of benefits might best be brought about by directing a large part of any increase in funds for the Arts through the education system."[9]

A second rationale for cultural policy can be derived from these authors' discussion of the topic. It is closely related to the first, but it goes further than simply making relevant information and cultural manifestations available. It also and especially involves educating individuals of successive generations about particular cultural legacies, thus affording them the choice of sustaining such legacies in their own time.

Social Capital

Much has been said recently about the value of social capital in underpinning a well-functioning market economy. The concept itself is far from new, but it has more recently been spotlighted in two widely cited studies by Robert Putnam.[10] He argues that the performance of the economy and the quality of public governance are related to a number of social variables, including the degree of civic engagement, social connectedness and trust. Together these variables constitute what can be called social capital. In turn, a highly developed social capital facilitates the coordination and cooperation that are the prerequisites of socio-economic success.

The idea that social capital plays an important role underpinning economic performance has acquired even greater currency with observation of the difficulties which Russia is encountering in its transition toward a market economy. These difficulties are much greater than those in neighbouring countries such as Poland and the Czech Republic that had operated as market-based economies before the Second World War. Prominent observers link this difference to the question of whether Russia's basic social structures — including its political and legal traditions — are compatible with a quick transition to a market economy and its intricate underlying web of con-

tracts and rights. In the words of Alan Greenspan, Chairman of the US Federal Reserve Board, this experience reminds us that "[m]uch of what we took for granted in our free market system and assumed to be human nature was not nature at all, but culture. The dismantling of the central planning function in an economy does not, as some had supposed, automatically establish a free market entrepreneurial system."[11]

Although a common culture is often viewed as a form of social capital, it is not homogeneity but voluntary sharing and trust that essentially characterize the pertinent social variables. In that light, cultural policy can assist in maintaining social capital by encouraging, with the help of arm's length state support (such as tax deductions for sponsors), events that involve some citizens' sharing activities with the public at large.[12] Thus, the third rationale for cultural policy can be described as the state's encouraging citizens to initiate or support private events that benefit others in the community.

New Sources of Wealth

One of the most overlooked benefits of public support for culture is its role in wealth creation. Although economists continue to search for a better understanding of the process of economic growth, few question that parts of the equation are new ideas embodied in available products and the insatiable quest for a better quality of life. Activities defined as "cultural" (often wrongly in opposition to "productive") are fundamental to this process, as demonstrated by Richard Goldthwaite in his masterful study of the interplay of arts, consumption patterns and wealth in renaissance Italy.[13]

Indeed, one can compare activities aimed at new cultural creation to those classified as "research and development." Both types of activities are fundamental to economic growth (witness the much increased importance of design in keeping Canada's furniture and clothing industries competitive, in spite of lower production costs elsewhere). They also tend to create benefits that extend beyond the private gains of those who engage in them and are quite risky, two factors that result in their typically being underfunded by the private sector unless it is offered public inducements.

Like research and development, cultural activities outside the country doubtless benefit Canadians to some extent and those occurring here have positive spillover effects abroad. However, one expects the benefits of domestic cultural funding to primarily accrue at home (for example, domestic industry benefits from creative ideas transmitted locally). Thus, although the existence of spillovers can justify support for cross-border cultural co-production agreements, similar to those underpinning cross-border scientific research consortia and, indeed, for making a variety of foreign cultural products generally more accessible to the domestic audience, the primary focus of support should be on domestic cultural activities. The fourth rationale for cultural policy can, therefore, be described as support for creative endeavours by a country's own residents without denying the benefits of exposition to a wide range of foreign influences.

Matching Policies with Rationales

Readers may have noticed a fair amount of correspondence between the official objectives of Canada's cultural policies, as summarized at the beginning of this study, and the four rationales for cultural policy that have just been described. It is worth investigating in a more detailed fashion whether the existing use we make of cultural policy tools

in Canada correspond to these reasons for having a cultural policy in the first place.

How well do Canada's policies match the rationales described here? All of these rationales – more informed choices, better education, social cohesion and new forms of well-being — speak to qualities of cultural endeavours that warrant some degree of public support. This support is justified by what economists call the "positive externalities" and the "public good" aspects of culture. The first term refers to the fact that certain activities that provide private benefits also benefit others in the public at large. As a result, public support for these activities may be called for to stimulate output beyond what the marketplace would otherwise provide. The second term means that no citizen can appropriate for him or herself certain benefits flowing from a vibrant culture, such as a better informed citizenry and enhanced social capital. Furthermore, even those unwilling to pay for these benefits cannot be excluded from them. As a result, the private marketplace will generally not provide these benefits. For this reason, generating them may require involvement by public authorities.

Underpinnings of a Successful Cultural Policy

Implementing a cultural policy based on these four rationales requires the state to be able to distinguish between cultural products that should be supported and those that should not. That is, it must be able to support those activities that generate public benefits in contrast to not those that yield only private benefits.

If Canadians are to gain access to information relevant to their community and means of sustaining cultural legacies relevant to them as Canadians, it seems essential to be able to effect a distinction between "Canadian" and "non-Canadian" information and cultural products.[14] With respect to fostering social capital by providing support for those who help involve the community in cultural activities, an adequate criterion seems to be that the activity involve an audience in Canada. For encouraging new creations, a probably sufficient criterion is that whoever engages in the creative activity be a resident of Canada.

In all four cases, the rationales of cultural policy require that these products or activities can reach Canadians in a format and by a route that makes them a real alternative to other cultural products. That route may indeed be the marketplace, which is a naturally powerful conduit. Decision-makers would do well to remember that to the extent that the providers of Canadian cultural products and the Canadian public have reciprocal knowledge and affinity, the market will, to some degree, look after the needs for Canadians to connect and make their own stories available to each other. Indeed, the additional positive effects generated by government intervention probably decrease with the extent to which local information and cultural products are already available and in demand in the marketplace.

Ideally, the need to hear and ability to tell Canadian stories would be to such a degree that the official support required would be minimal. For example, the ParticipAction ads referred to above may have alerted Canadians to opportunities for an improved lifestyle. But to the extent that health and fitness have acquired a higher social and personal status since the program was launched, the fact that the agency may now be discontinued for lack of funding[15] need not be worrisome. Consumers may have been sufficiently alerted to their options to be able to make informed choices, thus reducing the need for state support for information, at least that provided at such a general level.

Logically, therefore, before directly intervening in the Canadian cultural landscape, governments should ensure that both providers and the clientele for cultural goods and services are able to interact without interference, in a properly func-

tioning marketplace when it is their mutual benefit to do so. Otherwise, public policy is trying to do what the market could just as easily achieve by itself. Any future review of Canadian cultural policy should therefore include an independent inquiry (conducted, for example, by Canada's Competition Bureau) into the competitive conditions faced by cultural producers in their bid to reach their public.

Testing the Success or Failure of Cultural Policy

The ultimate test of a successful cultural policy is in residents' voluntary take-up of cultural activities and products of Canadian origin that are both commercially available and state-supported. If given the choice of listening to, attending, viewing or reacting to products from their own culture, available alongside other cultural products, Canadians show a general indifference toward them, the policy has failed or is failing and should be reconsidered.

Unfortunately, many supporters of the need for public support for culture implicitly reject this relevance test vis-à-vis their public. They use the language typical of those seeking government economic support for their own private benefit: that, for example, cultural industries create jobs, generate exports or expand faster than the rest of the economy. This approach has serious drawbacks for securing long-term state support because it fails to express why governments should support cultural industries relative to others that would presumably generate equally valuable jobs or exports (or, perhaps a lesser number of jobs, but at higher wages, and so on). And why seek support if cultural industries are so dynamic?

Naturally, no one can expect cultural industry participants to be purer than others in their clamouring for public support for their private benefit, which may or may not correspond to the public good. But in a world of competing interests, we must remember that what is at stake is our ability to achieve the core goals of cultural policy, as opposed to economic support per se for existing cultural businesses.

Evaluating the Cultural Policy Toolkit

A recent report of the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), a group of representatives of Canada's cultural industries that advises the federal government, identifies five types of policy tools used to promote Canadian culture: financial and program incentives; Canadian content requirements and other regulatory support mechanisms; tax measures; foreign investment and ownership rules; and measures to protect intellectual property.[16]

Space here precludes fully evaluating how these policy tools are used across a wide range of industries and activities. For giving effect to the cultural policy rationales described above, many of these applications are sensible, including, in principle, direct funding, tax measures, and protection for intellectual property.[17] However, current rules regarding the type of cultural products eligible for support, minimum Canadian-content requirements and foreign ownership restrictions, are sometimes difficult to relate to the objectives of cultural policy.

The interplay of these latter three types of rules is illustrated by how they work to bring Canadian productions to television viewers. The $200 million Canadian Television Fund, financed partly by the Department of Canadian Heritage, and compulsory fees from the cable industry and other distributors of broadcast services, is available to help finance productions that (1) are made by Canadian-owned and controlled production companies, (2) meet the definition of Canadian content, and (3) are shown during prime time within two years of completion by a Canadian television licensee. In turn, rules and licences issued by the CRTC are

used in part to create space for these Canadian cultural products. For example, 60 percent of overall broadcasts on private television must meet the definition of Canadian content. Between 6:00 p.m. and midnight, the requirement is 50 percent. Pay-per-view services must run one Canadian film for every twenty they offer, one Canadian event for every seven they offer, and so on.

What are the problems with these types of measures? Let us briefly examine each in turn.

Eligibility for Support

Talented personnel and first-class facilities at each phase of the production of cultural goods and services all play a part in the success of Canadian cultural productions. This being said, defining exactly what constitutes a Canadian cultural production or activity worthy of support should have some relation to the rationales for having a cultural policy in the first place. It should inform or teach about Canada, be made for Canadian audiences, or prominently involve Canadian creative talent.

Indeed, detailed criteria exist for the purpose of determining eligibility for public subsidies, tax credits, or reserved space on broadcast channels. However, these criteria often refer not only to the creative personnel involved but also to the amounts of money spent in Canada at various stages of the production or post-production processes. Many of these conditions seem more calculated to ensure employment in certain industries (admittedly classified as cultural industries) than to really ensure the display or distribution to Canadians of products with a uniquely Canadian cultural content. In some cases, one can legitimately ask whether these rigid conditions defeat the purposes of cultural policy. A musical selection performed by Canadian artists may be deemed ineligible under Canadian-content quotas only because it has not been recorded "wholly" in Canada — unless the music or lyrics were written by a Canadian. A film written, produced and directed by a Canadian, and starring Canadian actors, may not be eligible for the Canadian Film or Video Production Tax Credit, if post-production functions such as editing, lab work, and sound re-recording have not been overwhelmingly performed in Canada.

Furthermore, significant public support is sometimes extended from the cultural budgetary envelope to activities or productions that can have only the most tenuous connection to the above-described rationales underlying cultural policy. Today, Canadian taxpayers incur costs of $60 million each year to fund the Film Production Service Tax Credit. It subsidizes the labour costs associated with various productions that, although made in Canada, mostly involve American personnel in key creative positions, are aimed at the US market, and indeed actively attempt to make their Canadian filming locations look like places in the United States. A number of provincial fiscal measures also support similar activities across the country, regardless of Canadian artistic content.

A recent report published by the International Trade Administration of the US Department of Commerce illustrates the outcomes that are, at least in part, fostered by these policies. For example, the report notes an increase in American feature films and television programs set in Chicago but filmed in Canada. For apparently similar reasons, a large number of films scouted for location in Texas have recently ended up being shot in Canada, including the historical feature *Texas Rangers*.[18]

These content rules and fiscal measures overtly aim at sustaining jobs in Canada in the audiovisual and related sectors. They should be evaluated on the basis of their success in doing so relative to the cost incurred by the general public. In many cases, the industries involved are firmly geared to US cultural production, as are other Canadian industries employing equally talented individuals

(designers, engineers, technicians, and so on). There may, at some point, have been an infant-industry argument for subsidizing these activities, but they are now thriving, so the question from a cultural policy perspective today is whether our continued subsidies are really supporting the US entertainment industry. Should we not instead focus the use of these rules and funds to foster more specifically Canadian cultural products?

Minimum Canadian Content Requirements

Canadian-content regulations are used to protect domestic market share for some cultural products. In addition to the requirements for television mentioned above, minimum Canadian-content requirements also apply to radio broadcasters. For example, 35 percent of popular music selections on an English radio station must meet Canadian-content rules. (Different rules apply to specialty channels.)

The rationales for cultural policy certainly call for domestic cultural products to have a window on the public. Where the total space for certain products is limited — by, for example, the number of channels, stations or movie theatres, it is reasonable to expect that some percentage of this space will be occupied by domestic cultural products and, when this does not happen, that regulators will institute "shelf-space" or quotas to that effect. Even when space is virtually unlimited ("the 500-channel universe"), it is not unreasonable to expect that channels devoted mainly to Canadian content and labelled as such will be made easily accessible.

However, the inevitable restrictions on foreign cultural products that such quotas imply, the new capabilities offered by competing services, such as satellite- and internet-based services, which may not be hampered by similar quotas and especially the test of relevance to the public that cultural policy must ultimately pass, all suggest that quotas should not be set arbitrarily high in relation to what the marketplace would otherwise sustain. In my view, quotas should exceed that level only by a set percentage and only when the share of the market occupied by domestic products is markedly low.

Foreign Ownership Restrictions

Restrictions on foreign direct investment are said to reflect the fact that Canadian-owned cultural industries are more likely to create, produce, distribute and exhibit products with Canadian content. That is a bit like saying that the reason Canadian milk producers should be protected from foreign competition is that they are more likely to sell milk to Canadians. This statement is quite true, but since by and large milk produced by non-Canadians is not allowed into the country, the reasoning is circular. Clearly, for example, since foreign-owned companies are essentially forbidden to enter Canada's book distribution market, Canadian book retailers show up in the statistics as being particularly important to the distribution of Canadian books. Foreign film distribution businesses established in Canada since February 1987 cannot distribute non-proprietary films, (films for which they do not hold world rights or are not a major investor). Thus, it is not surprising to find that foreign-controlled distribution companies contribute only a minuscule portion of the rights and royalties paid to Canadian film producers. And so on. The statistical fact in these and other sectors — that most Canadian cultural products are sold by Canadian-owned businesses — cannot logically be used to support restrictions on foreign ownership, since the restriction itself is responsible for the fact. It does not prove, as the SAGIT report implies, that Canadian ownership is a prerequisite of producing and distributing Canadian culture.

Certainly, in the music recording industry, foreign ownership of the large labels has not been a determinant factor in either promoting or retard-

ing the emergence of Canadian artists on the domestic and international scene. Conversely, I can find no evidence that large Canadian media and communications conglomerates, when they invest abroad, are particularly interested in the promotion of Canadian culture.

Indeed, foreign ownership restrictions make less and less sense given the increased capitalization needs of cultural industries. One also gets the impression that restrictive ownership rules on the distribution side have hurt competition to the detriment of the cultural producers themselves, as is alleged to have happened in book retailing in Canada.[19] More foreign capital in the cultural industries generally might also lessen the need for subsidization and, even more important, might direct the available support closer to the creative sources, as opposed to cultural businesses.

I am not denying that foreign investment should receive particular scrutiny in these sensitive sectors where the source of the content is an important policy variable. But such scrutiny should focus on the possibility that foreign ownership will lessen the availability of Canadian content or make it more difficult for this content to reach the public. It could even focus (as is now the case for foreign film distributors that acquire one another's Canadian operations) on whether the foreign owner is ready to make additional contributions to Canadian cultural production. But each proposed investment should be evaluated on its own merits on account of these concerns. Blanket restrictions on foreign ownership should generally be removed.

Dealing with Trade Agreements

The point of the discussion above is to emphasize that some aspects of cultural policy could be redrawn without endangering its key objectives. The importance of this conclusion, in the context of possible international negotiations, is clear. Canada could give up some measures in return for international recognition for what we need. Before exploring this potential tradeoff in greater detail, however, it is necessary to review the existing treatment of culture in trade agreements.

To what extent do these existing agreements inhibit Canada's ability to implement cultural policy measures — or to reach its cultural policy objectives more generally along the lines described above? We can consider this question with reference to three major agreements to which Canada is party: at the multilateral level, the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), both operating under the aegis of the World Trade Organization (WTO); and at the regional level, the North American Free Trade Agreement (NAFTA).

The GATT grants only a few exceptions for cultural products, one being that countries are allowed to set quotas on the screen time devoted in movie theatres to films of national origin (article IV). The relatively newly minted GATS contains no cultural exceptions as such. However, most GATS rules (but not all, as we will see) apply only to sectors for which countries have made specific commitments, and Canada has made no commitments that would require it to change its existing cultural policies. The most explicit protection from trade rules for the cultural sector is found in the NAFTA, which exempts key cultural sectors from most of its provisions, although it does allow the signatories to retaliate for cultural measures that would otherwise be inconsistent with the agreement.

Despite the NAFTA exemption and the absence of GATS commitments by Canada in the cultural sector, the treatment of culture in these three major agreements is in many ways unsatisfactory if one accepts as legitimate the need for governments to be able to implement cultural policies based on the rationales described above.

The GATT and the Magazine Case

For the GATT rules as interpreted by WTO dispute-settlement panels, this lack of satisfactory treatment is exemplified by the reasoning of the WTO Appellate Body in the most recent Canada — United States dispute on magazines. Among the measures the United States complained about, the one that triggered its action was a Canadian excise tax on any new split-run editions of magazines (editions containing editorial content developed for one market but sold in a secondary market with advertising aimed at the latter). The tax, known as Part V.1 of the Excise Tax Act, was prohibitive, thereby preventing entry into the Canadian market for split-runs.

At issue was whether the tax contravened article III :2 of the GATT. The first sentence of that article states that imported products "shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." The second sentence of the article prohibits, in effect, the imposition of different taxes on "directly competitive or substitutable" imported products and domestic products "so as to afford protection to domestic production."[20] A key question here obviously was whether Canadian magazines — such as Maclean's — and magazines with editorial content chiefly developed for the United States but containing advertising aimed at Canada — such as TIME Canada — were in some ways "like products," or at any rate "directly competitive or substitutable."

The initial WTO ruling on this issue found against Canada. The panel did not reject the idea that magazines with Canadian content could differ from other magazines. But its rejection of Canada's position was based in part on an argument presented by the United States, which pointed out in its submission that Part V.1 of the Canadian Excise Tax Act did not draw any distinction based on the type of editorial content:

> A split-run periodical could theoretically be entirely Canadian-oriented. By the same token, a non-split-run periodical need not have any articles with a particular Canadian focus. Thus, according to the United States, Canada's attempt to demonstrate that TIME Canada and Maclean's reflect a different editorial orientation is simply irrelevant because the application of the Excise Tax Act is not based on any such difference."[21]

Notwithstanding this US point, Canada argued, in its appeal of the panel's determination before the Appellate Body, that a proper determination of the case "requires an analysis based upon the specific properties of the magazines in a Canadian context... Canada argues that the Panel evaded a determination of whether split-run periodicals containing foreign content are substantially identical to magazines developed specifically for a Canadian readership."[22]

Much to its dismay, Canada soon found out the answer to that question when the Appellate Body ruled the tax illegal because the directly competitive and substitutable nature of split-run magazines and domestic magazines made the two belong to the same market segment. To quote the Appellate Body report:

> Our conclusion that imported split-run periodicals and domestic non-split-run periodicals are "directly competitive or substitutable" does not mean that all periodicals belong to the same relevant market, whatever their editorial content. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine. But newsmagazines, like TIME, TIME Canada and Maclean's, are directly competitive or substitutable in spite of the "Canadian" content of Maclean's.... We, therefore, conclude that imported split-run periodicals and domestic non-split run periodicals are directly competitive or substitutable products in so far as they are part of the same segment of the Canadian market for periodicals."[23]

One wonders at the subjective underpinnings of that interpretation. It is quite illogical in an

important way. The dispute itself would not have arisen had Canadian advertising not been different from — indeed not substitutable for — US advertising. The United States had argued that advertising is more often than not an integral part of the product called a magazine, and the Appellate Body agreed with this view. But if both these statements are true, then it must be that magazines developed for the Canadian market perform a substantially different role from those aimed at the US or other markets — that in an important sense they are not substitutable. Nor, as the case of TIME and TIME Canada clearly shows, are they even generally competing against each other.

What the Appellate Body did clearly indicate, however, is that advertising, and not only editorial content, should come into account when defining the "Canadian-ness" of a magazine.

Effectiveness of the GATS and the NAFTA

The magazine case concerned GATT rules. But with many cultural products classified as services rather than goods, should we not be reassured by the fact that Canada has simply refused to make GATS commitments concerning culture?

Not necessarily. First, with convergence and the evolution of technology, the distinction between goods and services — between what does and does not fall under the GATT — may become blurred. (In the magazine case, Canada had strenuously argued that the disputed measure concerned advertising services, not magazines as goods, but was turned down because advertising was considered an integral part of magazines.)

Second, the GATS includes language suggesting strongly that at least some currently excluded policies will have to become subject to negotiations. Such is the case, for example, of existing film treaties under which material co-produced by the nationals of signatory countries obtain national status under each country's quotas and subsidies systems. From a GATS perspective, these arrangements violate a key principle of multilateral trade arrangements called most-favoured-nation treatment (MFN, which means roughly that the treatment extended by one signatory to the products of another must also be accorded to the like products of all other signatories). Although Canada has exempted itself from the extension of MFN to the cultural sector in the GATS, signatories have agreed that such exemptions to the MFN principle will be temporary.[24]

Third, the United States is certainly disappointed at the fact that the GATS negotiations did not open cultural industries more, and it will continue to revisit the issue or attempt to reclassify some products as goods rather than services.[25] In future negotations, not wanting to put culture on the table would be costly to other Canadian services industries, and even some cultural workers themselves, that could benefit from markets opening in other countries.

Even the NAFTA exemption is hardly an endorsement of freedom for manoeuver on cultural policy generally. It applies to specific industries only. And given the United States' entrenched right to retaliate when its commercial interests are threatened by Canada's cultural measures, over the long run, the cultural protection may not be as strong as it seems.

Recognizing Legitimate Cultural Policy Objectives in Trade Agreements

These evolving prospects on the trade policy front call for Canadian governments to strengthen their ability to achieve legitimate policy objectives in the cultural area in a context of open trade.

Many observers heralded the 1999 SAGIT report, issued after the WTO decision on magazines, as a major shift in the approach of Canada's cultural

industries toward trade issues. Questioning the usefulness of the cultural exemption strategy as the one that Canada should maintain in future trade negotiations, the report suggested contemplating a strategy that would involve negotiating a new international instrument that would specifically address cultural diversity, and acknowledge the legitimate role of domestic cultural policies in ensuring cultural diversity. Such an instrument would, according to the SAGIT, "acknowledge that cultural goods and services are significantly different from other products" and "acknowledge that domestic measures and policies intended to ensure access to a variety of indigenous cultural products are significantly different from other policies."[26]

Are Cultural Products Different?

I agree with the general idea underlying the SAGIT report: that Canada's cultural interests should be safeguarded in a positive way, through an affirmation of the space that must be accorded cultural policy, rather than negatively by avoiding the problem of the interaction of cultural policies and trade.

The Canadian government is also trying to build an international consensus around the need for a cultural instrument, such as that advocated by the SAGIT. This strategy presents two problems, however. The first is that negotiations on a wide-ranging instrument on cultural diversity would likely be time consuming, and the result would face numerous difficulties in terms of practical implementation, not least with respect to enforceability. Developing some type of broad cultural diversity instrument would be a valid exercise, but it may be easier to persuade our key trading partners to go along with a more circumscribed agreement, whose practical implications are clearer. What might be easier to pin down is an agreement specifically on culture and trade rules that could be brought under the same umbrella and subjected to the same dispute-settlement mechanisms as existing trade agreements. Such an agreement could address a number of practical anxieties about trade and culture that led to the idea of a cultural instrument in the first place.

The second problem is more fundamental. I do not believe that the approach of treating all cultural products or policies differently from other products or policies simply because they involve cultural industries is the best one for Canada. As suggested by the short analysis of the rationales for cultural policy presented above, the real key to the matter for Canada is preserving its ability, in certain respects and within reasonable bounds, to treat Canadian cultural products differently from others. This treatment would involve making them subject to existing trade rules but only as they apply to products that are not "like" or "directly substitutable or competitive."

An analogy may help in explaining what this distinction would accomplish. Consider a bicycle and a motorcycle. Both are pieces of transportation equipment. They are even substitutable and in a competitive relationship to a degree. But clearly, even if the two were comparable as to speed and comfort, governments ought to be able to look beyond the common classification of transportation equipment when evaluating the respective impact on a legitimate public policy objective — for example, that of environmental protection. On that ground alone, governments should be able to encourage the use of one relative to the other, and if trade agreements did not allow achievement of this legitimate objective, they should be amended to allow that possibility.

Such a distinction between foreign and domestic cultural products is necessary and desirable only to the extent that the promotion of legitimate cultural policy objectives depends on the ability to make it. Thus, as part of any agreement, Canada would probably have to accept that any such differential treatment should depend on objective

criteria, based on the reasonably defensible public properties of domestic cultural products.

What Grounds Exist for Differentiating on the Basis of Origin?

The concept of products' possessing different qualities based on their origin arises naturally in cultural matters (Consider the common phrases: "Russian literature," "French impressionists" and "Chinese calligraphy"). But it is widespread in other policy contexts as well. For example, Canada's Competition Bureau uses its *Guide to "Made in Canada" Labelling and Advertising* to help in "determining whether a representation, either implicit or explicit, that a product is 'Made in Canada' is false or misleading to prospective purchasers of the product." Such representations, if they materially influence the decision of prospective buyers, run afoul of the misleading representations and deceptive marketing practices provisions of Canada's Competition Act. In turn, these provisions exist to "promote fair competition in the marketplace" in part by "encouraging provision of sufficient information to enable informed buyer choice."

Thus, the Competition Bureau interprets "implicit declarations of domestic origin of products such as 'Shop Canadian', 'Proudly Canadian', 'Think Canadian', the Canadian flag symbol, the maple leaf symbol, which appear on labels or in advertisements...as giving the same general impression to the public as explicit statements such as "Made in Canada" and "Product of Canada."[27] The Bureau is empowered to recommend the use of other statements if they more accurately reflect the origin of the product being labelled.

Similarly, the new Canadian Internet Registration Authority (CIRA) has issued new rules for the registration of domain names with ".ca" as top-level domain.[28] These rules stipulate that these domain names are available to those who are either Canadian or have a presence in Canada (not in California, for example, apparently much to the dismay of those who were hoping to benefit from the confusion). The idea is that knowing the geographical location of those who operate a site on the Internet is an important piece of information that helps in making a decision about whether the site is relevant to the reader.

Geographical indications are also protected in trade agreements such as the NAFTA, in order to prevent misleading the public about the origin of a good.

Need Cultural Differentiation Be Equated with Social Engineering?

A potentially powerful objection to the idea of treating cultural products differentially on account of their origin is that any policy aimed at keeping out foreign competition and hence foreign influence could be introduced in the name of maintaining the purity of culture. For example, tax policies or quotas that blocked the importation of agricultural products could be justified as a policy that hlped to maintain rural values and lifestyles. In comparison to such a prospect, the NAFTA strategy of simply exempting a list of cultural industries from trade agreements has at least the merit of being less open-ended since it requires a clear specification of which goods and services are involved.

For a trade agreement to include provisions with respect to culture that support policies aimed at preventing the penetration of foreign influences or other forces for change would, per se, be antithetical. A strong case can be made that supporting such policies would also be antithetical to a thriving cultural life itself. Cultures evolve continually and are generally at any point in time, the product of many earlier influences. As philosopher Will Kymlicka makes clear, the only valid reason for protecting and promoting the right to cultural membership is to protect the "context of choice" for individuals, not to "protect the charac-

ter of a given cultural community" where character is defined as the norms, values and institutions within a community — those of Victorian England, for example, or of pre-1960 French-Canada. The character of a culture can change without destroying the cultural community itself. More strongly, "[p]rotecting people from changes in the character of the culture can't be viewed as protecting their ability to choose. On the contrary, it would be a limitation on their ability to choose."[29]

Thus, no international agreement regarding culture and trade should endorse the type of forced "identity formation" policies that characterized nineteenth-century France, for example, and that seem to go against the very nature of Canada.[30] The type of cultural room for manoeuvre promoted by an international code should focus on positive self-expression and communication across a particular political space, with as few barriers as possible against outside influences.

What Type of Agreement Is Possible?

As discussed, many Canadian policies go beyond what is necessary to ensure the promotion of the country's cultural objectives. At the same time, as the language of the WTO Appellate Body report in the magazine case illustrates, policies that distinguish between cultural products as to their origin may not be sustainable under the current interpretation of existing international trade rules.

If this analysis is correct, Canada could promote a solution to the trade and culture issue by dividing its cultural policies into two components: one comprised of ways of intervening that have a great deal of bearing on whether Canadians can hear their own stories and tell them to each other, and the other made up of policies that are difficult to justify from the simple point of view of fostering and making available Canadian content to Canadians.

The key move would be to accept that Canada should abandon or relax the second set of policies, which I briefly inventoried above, in exchange for securing recognition in trade agreements for the first component. In other words, Canada should offer and secure a fundamental tradeoff between abandoning policies at home that are redundant from the standpoint of legitimate cultural objectives (even if they protect some players on the cultural scene) and gaining an international recognition for the right to foster a specifically Canadian choice, which is central to its goals.

In this area, as in others where concerns have emerged about the dynamic impact of trade agreements on legitimate public policy goals (consider issues concerning health care, water exports and the meaning of expropriation or regulatory takings), I think that the answer may lie in mutually agreed codes of interpretation that effectively direct how dispute settlement panels should interpret trade agreements in specific circumstances. These codes could be agreed upon multilaterally, by countries party to a regional trade agreement interested in delineating how disputes will be handled in an area of mutual interest, or simply on a bilateral basis.

Precedents exist for such an approach. The signatories to the GATT and the WTO have often returned to the bargaining table in order to clarify existing rules or to improve their practical application. In the 1960s and 1970s, codes of conduct were developed in a number of areas, including anti-dumping and subsidies, and incorporated into the GATT rules. In turn, these codes can be improved upon in subsequent negotiations.[31]

Thus, as a result of the Uruguay Round of negotiations, completed in 1994, GATT signatories implemented a radically revised subsidies code (renamed the Agreement on Subsidies and Countervailing Measures). That particular case is interesting, because it shows that codes can be used to clarify not only what practices are unacceptable, but also those that are acceptable. The Agreement did so by introducing the concept of "non-action-

able subsidies" — that are not deemed to distort international trade and about which WTO members therefore agreed not to levy complaints against each other.

A Proposed Interpretive Code

Consideration of the fundamental tradeoff just described points, in my view, to a code such as the one set out in Box 1 (p. 20). Naturally the text presented here is highly speculative, and it contains a few comments in brackets to indicate where precise numbers and definitions need to be filled in. Following is a description of what each part of the proposed code aims to accomplish.

The Preamble establishes the principle that governments may support and ensure access to cultural products and activities, provided that this right is exercised in ways that minimize restrictions on the availability of foreign cultural products in the marketplace.

Paragraph 1 Simply defines the terms used in the code. In particular, it defines the code as being concerned with all works covered by article 2 of the Berne Convention for the Protection of Literary and Artistic Works. That convention protects an extensive array of literary, scientific and artistic productions, whatever the mode or form of expression. Thus, I prefer to refer to it, rather than using a more restrictive list of cultural industries, which would by definition be less responsive to the evolution of technology.

Paragraph 2 simply states the right to financially support cultural producers and performers residing in the country (a right that is not generally in dispute to my knowledge).

Paragraph 3 establishes that government financial support for the production or dissemination of information or of works by domestic creators or performers is allowed, if the initial wide distribution of the work, or of the information vehicle in its original form, is primarily intended for a domestic audience. The idea is that products that are specifically created for wide distribution in a foreign market do not need to be protected by this paragraph (although the code would not forbid support for such products).

Paragraph 4 says that governments should be able not only to provide direct cash subsidies to domestic producers in cultural industries, as they already can under the GATT, and to fund the costs of domestic distribution or exhibition of domestic cultural products, but that they should also be able to extend tax incentives to encourage sponsors and clients to support these products (e.g., the current tax deduction for advertising in magazines with a certain amount of Canadian content). However, so as to make this a general incentive for cultural production rather than a protective device for specific cultural industries, any tax incentive should apply similarly across all products and activities covered by the code.

Paragraph 5 addresses the difficult issue of quotas. It recognizes that a quota may be a legitimate tool of cultural policy under certain circumstances but uses actual take-up by the public to limit the amount of space that can be reserved. When domestic products occupy a low share of the market, incremental space can be reserved for them, and it can then be expanded, up to a point, if take-up by the public also grows. The idea is to weed out or reduce quotas that do not have the desired effect of increasing the public's voluntary interest in domestic cultural products.

Paragraph 6 allows foreign cultural products or co-productions to count as domestic under quotas and other forms of public support, given certain conditions that would respect the MFN principle, without requiring Canada to accept a huge number of productions from any one country under these provisions. (This would be unlike the current situation, in which, if Canada had to apply

the MFN principle to co-production treaties, it would probably have to count a flood of Canadian-US co-productions under Canadian quotas.)

Paragraphs 7 and 8 say in effect, "other than in the situations above, the market is open to foreign products, creators, performers and investors." This open-door policy is subject, however, to the same kinds of general exceptions and limitiations currently found in other trade agreements that permit trade-restrictive measures to be taken as necessary to enforce public morals and compliance with domestic laws, among other reasons. Of particular relevance here is that the GATT, article XX, explicitly allows signatories to restrict trade as needed to protect copyrights as well as national treasures of artistic or historic value.

Paragraphs 9 and 10 ensure that the code and all other agreements to which it is applied, to the extent that they allow foreign cultural producers and investors to enter a country's market and be treated on par with domestic producers and investors, do not in any way give foreign producers or investors the right to set educational standards (if they are involved in the market for educational products), to establish undue market power over any sector within the cultural marketplace, or to misidentify the origin of their products, three potential dangers to an effective cultural policy.

What's in It for the United States?

The question of attraction for the United States is obviously crucial for Canada and other countries interested in securing a meaningful, workable code of interpretation of trade agreements with respect to the cultural sector.

The interests of Canada and the United States are often portrayed as polar opposites on this issue because the United States has generally been a complainant and Canada has often had to retreat in trade battles related to specific cultural policies. And indeed, as implied by the earlier discussion, the United States is unlikely to wish to discuss extending blanket exemptions or exceptions for cultural industries in trade agreements. But it might be open to discussing specific proposals from which it too would gain in terms of clearer and potentially more open rules of the game. If Canada accepts the possibility that its own policies would become more focused on fostering the production and availability of Canadian content, it would be in a realistic position to offer something of interest to the United States and other major trading nations. It would be closer, therefore, to attaining an international agreement that spoke meaningfully to core Canadian cultural objectives.

Why would or should the United States be interested in being party to such a code of interpretation? I offer three potential reasons.

Market Opening for US Entertainment Products

To my mind, the United States could unquestionably obtain from such a code a less arbitrary environment for its cultural and entertainment products and services in the Canadian marketplace and elsewhere. The way past cultural disputes between the two countries have been resolved suggests that this approach would be a significant inducement for the United States to bargain.[32]

Indeed, while answering questions following a recent speech on the "The Networked World Initiatives: Trade Policy Enters a New Era," US Trade Representative Charlene Barshefsky has been quoted as saying that the United States has not decided how to address audiovisual services in trade negotiations. Noting that this issue is very complex, she speculated that an element in future negotiations might be a better definition of when a cultural measure is "meaningful" and when it is

An Interpretive Code on Cultural Policies and Trade

Preamble: The Parties agree that supporting domestic cultural activities and ensuring access by residents to products from these activities are legitimate objectives of governments, provided that the means of support minimize restrictions on the availability of similar products originating in other jurisdictions.

1. (Definitions) For the purpose of this Code, *creative and performing activities* include activities directly leading to the production of any content that is protected under Article 2 of the Berne Convention for the Protection of Literary and Artistic Works, regardless of the medium through which that content is communicated. A *creator or performer* of a Party is a person who creates or performs such content and who is a permanent resident of the Party, or one that is a collective undertaking in which at least 50 percent [say] of the key creative or performing personnel [to be defined] are permanent residents of the Party. *Domestic cultural products* of a Party are goods or services that are aimed particularly at informing residents of that Party or that are substantially based on the work of the Party's creators or performers. [The term "substantially based" would have to be defined numerically. For example, with respect to broadcast channels, it may refer to those presenting a certain high percentage of programs based on the work of domestic creators or performers.]
2. Each Party may support, through the use of public funds, the creative and performing activities of its residents.
3. Each party may financially support the production and dissemination of domestic cultural products (goods or services) when the audience for the product being supported is — in its initial release — primarily a domestic audience. [Again, key concepts in this paragraph would have to be defined numerically. In the case of magazines, a publication with a primarily domestic audience could be defined as one for which no more than 10 percent of the total circulation is foreign, unless the content of the foreign circulation, including advertising, is substantially different. "Domestic audience" would in all cases include non-residents travelling to Canada, which might be important for certain Canadian festivals and events.]
4. Such financial support may include any direct subsidy to domestic producers permitted under article III, paragraph 8, of GATT; general (i.e., not industry-specific) income tax inducements for the sponsors or clients of domestic cultural products and direct public subsidies for the domestic distribution or exhibition of such domestic cultural products, provided such subsidies do not exceed the cost of domestic distribution or exhibition.
5. Where distribution channels for cultural products are limited by physical constraints (e.g., theatres, bookstores, broadcast channels, magazine displays), governments may mandate easily accessible, reserved "shelf space" for products covered by paragraph 3, and/or require that all distribution channels carry a certain percentage of domestic cultural products covered by paragraph 3, provided that the total "shelf space" thus reserved not exceed by more than 10 percentage points of [say], and in any case is no more than double, the actual audience or clientele as measured by sales of the prod-

uct being displayed (e.g., sales, audience ratings, theatre attendance, or other objective measurement criteria.) Measures allowed under this paragraph are applicable only to cultural products, covered by paragraph 3, for which the audience or clientele constitutes less than 30 percent [say] of the total audience or clientele (i.e. the clientele for both domestic and foreign products) within the territory of the Party.

6. For the purpose of this code, a cultural production or performance involving among its key creative personnel more than 50 percent of non-residents of a Party may, with respect to measures defined in paragraphs 3, 4 and 5, obtain for those non-residents a status equivalent to that of resident creators or performers ("national treatment") provided that a reciprocal agreement to that effect has been arranged between the Party and the government of the non-residents involved. Parties may limit the total market or audience share of products that can benefit from national treatment under this paragraph. Parties may also apportion this limited share according to the nationality of the non-residents involved, provided the share allowed residents of a given country is no lower than that country's share in world population. No reasonable request for such a reciprocal agreement by any Party to another shall be denied.
7. Except in the application of paragraph 5 above, no Party may limit the circulation of a foreign cultural product or service on its territory or of a creator or performer of any Party, except as allowed under the GATT, articles XX (General Exceptions) and XXI (Security Exceptions), and GATS articles XIV (General Exceptions) and XIV *bis* (Security Exceptions).
8. With respect to undertakings involved in the production or distribution of cultural products, whether domestic or foreign, Parties will accord national treatment to investors of another Party and to their investments, except where this would compromise national security. Such investment may be subject to prior review along objective lines, in order to ensure no negative impact on fair access to markets for domestic cultural products.
9. Each Party affirms the unrestricted right of competent authorities on its territory to set its own educational curriculum, standards, and qualification requirements.
10. Each Party affirms the right of competent authorities on its territory to ensure, through domestic competition laws, that vigorous choice and competition exist for consumers and the public in general in the marketplace for cultural products. Each party also affirms the right of these authorities to ensure that the origin of a cultural product not be misidentified where such misidentification could materially influence the decision of the prospective clientele or audience or would otherwise constitute a misleading representation of the product.

simply protectionism.[33] This distinction is a key underlay to the code on culture in trade agreements proposed in this paper.

Making the World Safe for Disney

A code of interpretation of trade rules as they affect cultural policy, along the lines described above, could also help secure diversity in countries where governments still attempt to impose severe restrictions on the flow of information and on entertainment products not conforming with official views. China is perhaps the most prominent example of the latter. Although it officially encourages (and has invested massively) in the adoption of new communication and information technologies, the Chinese government seems bent on ensuring maximum control over content. An example is the recurrent blocking of web sites of major global news organizations.[34] With China also on the verge of joining the core WTO agreements, it might not, in the long run, be able to ignore a code on the interface between trade and culture that its major trading partners adhered to.

US Trade and Cultural Objectives

People often say that to the United States, cultural industries are just like other industries, albeit part of the wider world of entertainment, and should therefore enjoy as wide an access to foreign markets as possible. But beyond the issue of ownership concentration, raised by the past few years' wave of media and communications mergers, the United States itself may be experiencing at least some pangs of concerns about the wider implications of commercial agreements on its society.

For example, in a recent submission to a WTO panel, the United States put forward what appears to be a cultural defence. The panel was examining a challenge by the European Union of the US Copyright Act's "home style" exemption for small retailers that wish to retransmit copyrighted artistic work within their establishment. The United States explained its position in part by invoking "the legitimacy of the policy objectives that a particular country might consider special in light of its own history and national priorities." It also stated:

> [T]he policy purpose justifying [this policy] is the protection of small "mom and pop" businesses which "play an important role in the American social fabric" because they "offer economic opportunities for women, minorities, immigrants and welfare recipients for entering the economic and social mainstream."[35]

Although the United States ended up on the losing side of the panel decision, the issue it raised — almost a call for a cultural exception — clearly goes beyond the question of rights and obligations as spelled out by international agreements. It speaks in part to the potentially unforeseen impact of these agreements on legitimate domestic policy objectives, which is what an interpretive code could address in the area of culture.

Conclusion: Aiming for an Effective Compromise

Canada has many good reasons for maintaining an active cultural policy. Ultimately, however, the role of such a policy must be to enhance the conditions under which the country's cultural goods and services are produced and distributed, with the main purpose of making available to Canadians products from their own culture and encouraging them to take an interest in those products.

Some current policies — namely, foreign investment restrictions, rules on eligibility for support, and Canadian-content quotas — are, to varying degrees, not properly related to these objectives. What remain essential, however, are other policy elements, such as the ability to treat cultural products with Canadian content differently from other cultural products in terms of direct financial support or tax incentives.

Canada's traditional insistence that culture be off the table in trade discussions has given way in some circles to the idea that an international instrument on cultural diversity might best be suited to today's highly integrated world. However, thinking that such an instrument would safeguard Canada's essential cultural interests from the reach of globalization is unrealistic, unless Canadians are ready to give up the kind of non-essential tools which may be irritants to others. What I have argued here is that a code on culture, embodying such a tradeoff, embedded directly in trade agreements and subject to their dispute settlement provisions, would be more useful for both Canada and its trading partners than an international code on cultural diversity and would better protect our cultural room for manoeuvre.

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2 These are the strategic priorities of the Department of Canadian Heritage, as stated on its website under "The Department: Who we Are and What We Do," at *http://www.pch.gc.ca/mindep/english.htm*

3 Brian Bethune "Giving Away the Store," *Maclean's*, July 10, 2000, pp. 48-49.

4 To be clear from the outset, the implication is not that there is or should be a homogeneous Canadian culture. Nevertheless, the premise is that a federal cultural policy, ideally working in conjunction with the cultural policies of other levels of government, can benefit all Canadians, regardless of their culture.

5 Kenneth J. Arrow, *The Limits of Organization* (New York: W.W. Norton, 1974).

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7 Canada, Royal Commission on Broadcasting (Fowler Commission), *Report*, 1957, p. 9.

8 See Tibor Scitovsky, "What's Wrong with the Arts Is What's Wrong with Society," Mark Blaug (ed.), *The Economics of the Arts* (Boulder, Colo: Westview Press, 1976), p. 46. First published in *American Economic Review* (May 1972).

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10 Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993); and "Bowling Alone: America's Declining Social Capital," *Journal of Democracy*, 6:1 (January 1995), pp. 65-78 (Washington: DC and Baltimore, Md, National Endowment for Democracy and Johns Hopkins University Press).

11 Alan Greenspan, *The Embrace of Free Markets* (Remarks at the Woodrow Wilson Award Dinner of the Woodrow Wilson International Center for Scholars, New York, NY June 10, 1997).

12 Cultural activities here have to be understood in the broadest sense, encompassing amateur sports, education, and so on.

13 Richard A. Goldthwaite, *Wealth and the Demand for Art in Italy, 1300-1600* (Baltimore, Md.: Johns Hopkins University Press, 1993).

14 This, incidentally, is also the case with respect to the cultural aspects of foreign policy and commercial policy, such as making Canadians or Canadian products better known abroad.

15 See André Picard, "Cash Crisis May Put End to Fitness Agency's Run," *The Globe and Mail*, November 13, 2000, p. A2.

16 Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), *New Strategies for Culture and Trade: Canadian Culture in a Global World* (Ottawa: Department of Foreign Affairs and International Trade, February 1999), p. 8.

17 Protection of intellectual property can be seen as a key element in ensuring the integrity of the private market for cultural products.

18 United States Department of Commerce, International Trade Administration (ITA), *The Migration of U.S. Film and Television Production* (Washington: ITA, 2001). See especially pp. 38-41.

19 See Gina Mallet, "Book Store Wars," in *The Financial Post Magazine* (May 1997), pp. 42-49.

20 General Agreement on Tariffs and Trade (GATT), *Text of the General Agreement* (Geneva: GATT, 1986).

21 World Trade Organization, Canada – *Certain Measures Concerning Periodicals*, Report of the Appellate Body, WTO document WT/DS31/AB/R, June 30, 1997, p.13.

22 World Trade Organization, *Canada – Certain Measures Concerning Periodicals*, p. 7.

23 World Trade Organization, *Canada – Certain Measures Concerning Periodicals*, pp. 30-31.

24 Keith Acheson and Christopher Maule, *International Agreements and the Cultural Industries* (Ottawa: Centre for Trade Policy and Law, 1996), p. 3.

25 See Glenn A. Gottselig, "Canada and Culture: Can Current Cultural Policies Be Sustained in the Global Trade Regime?" *International Journal of Communications Law and Policy*, no. 5 (Summer 2000), pp. 1-44.

26 SAGIT, New Strategies, p. 3

27 Competition Bureau, *Notice of Consultation: Diamonds and "Made in Canada" Representations* (Ottawa: Competition Bureau, October 9, 1996), Accessed on June 13, 2000 at *http://www.competition.ic.gc.ca*, p. 1.

28 Canadian Internet Registration Authority (CIRA), *CIRA Announces New, Broader Rules for .ca Domain Registration*, press release, October 18, 2000. Accessed on November 2, 2000 at *http://www.cira.ca/en/E17oct.html*

29 Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1991), pp. 169, 167.

30 See Patricia M. Goff, "Canadian Culture and Identity in an Era of Globalization" (paper presented at the Policy Research Secretariat Conference, Rethinking the Line: The Canada-US Border, Vancouver, October 25 2000), esp. pp. 6-12.

31 See Michael Hart, *Fifty Years of Canadian Tradecraft: Canada at the GATT 1947-1997* (Ottawa: Centre for Trade Policy and Law, University of Ottawa, 1998), pp. 91-92, 133-34, and 201.

32 A dispute over the "de-listing" by the CRTC of a US country music channel in favor of a Canadian one ended in 1996 when the US and Canadian channels merged. The magazine dispute was eventually settled in 1999, when foreign magazine publishers were allowed some limited

access to the Canadian advertising market, with the limit being waived for new magazines that, among other conditions, generate majority Canadian editorial content.

33 Personal communication.

34 See "Wired China: The Flies Swarm In," *The Economist*, July 22-28, 2000, pp. 24-28.

35 World Trade Organization, *United States – Section 110(5) of the US Copyright Act*, Report of the Panel, WTO Document WT/DS160/R, June 15, 2000.

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Résumé

A Room of Our Own : Cultural Policies and Trade Agreements

Daniel Schwanen

Le Canada devrait-il accepter d'inclure les industries culturelles parmi celles qui feront l'objet de négociations commerciales ? Dans cette étude, Daniel Schwanen, économiste principal à l'IRPP, soutient que la stratégie qui consiste à soustraire les industries culturelles à l'application des règles commerciales rend les politiques culturelles canadiennes vulnérables aux changements à venir. Exclure certaines industries de la portée des accords commerciaux, comme cela s'est fait avec l'Accord de libre-échange nord-américain, pourrait s'avérer être une approche trop limitée, vu les changements technologiques rapides et la convergence des industries. Pour des raisons semblables, on peut douter que le Canada puisse maintenir indéfiniment sa position actuelle de ne pas soumettre les industries culturelles aux règles de l'Accord général sur le commerce des services (AGCS). Ses partenaires commerciaux, notamment les États-Unis, n'auront de cesse d'inclure les produits culturels dans des ententes comme le GATS, ou encore tenteront de les soumettre aux règles existantes de l'Accord général sur les tarifs douaniers et le commerce (GATT). De plus, la nature des négociations commerciales signifie que le refus du Canada de traiter de ces questions entraînera un accès réduit aux marchés d'exportation pour les industries culturelles et autres.

L'auteur de l'étude soutient par ailleurs que bon nombre de mesures prises par le Canada au chapitre de la politique culturelle sont mal adaptées aux raisons invoquées pour justifier l'existence d'une telle politique. Certains critères d'admissibilité au financement public, les quotas de contenu canadien minimum à la radio et à la télévision, ainsi que les restrictions sur l'investissement étranger, ne servent pas nécessairement les objectifs de la politique culturelle et peuvent même être néfastes. Ainsi, les subventions sont souvent octroyées sur la base des emplois maintenus et de l'argent dépensé au Canada, plutôt qu'en fonction du contenu créatif. De plus, les quotas sont établis sans égard à l'intérêt réel des Canadiens pour les produits offerts, alors que les restrictions à l'investissement laissent la partie belle à quelques entreprises locales, aux dépens d'une nécessaire diversité en matière de capital, d'expertise et de propriété.

Devant ces constats, explique l'auteur, le Canada devrait accepter de mettre certaines mesures existantes sur la table, en retour d'une garantie, à l'intérieur même des accords commerciaux, qu'il pourra utiliser tout moyen raisonnable pour atteindre les objectifs-clés de sa politique culturelle. La décision de l'Organisation mondiale du commerce concernant le plus récent différend canado-américain au sujet des périodiques a montré que les règles du jeu existantes sur le commerce n'offrent aucune garantie que les gouvernements pourront effectuer une distinction entre produits culturels nationaux et étrangers. Or, cette distinction, quand elle se base sur certaines propriétés des produits culturels qui en font des biens publics, est fondamentale aux politiques culturelles, tout comme l'est la possibilité d'appuyer financièrement les productions culturelles nationales et de s'assurer que le public ait accès à celles-ci. À ce chapitre, l'auteur souligne que, dans d'autres sphères que celles des politiques culturelles, il est considéré important de pouvoir distinguer les produits selon leur origine. Cette capacité de distinguer devrait s'appliquer a fortiori aux produits culturels.

Monsieur Schwanen soutient qu'afin de mieux asseoir sa capacité de mettre en oeuvre ses principaux objectifs en matière de culture, le Canada devrait proposer un code interprétatif des politiques culturelles qui serait enchâssé dans les accords commerciaux. Par le passé, les signataires d'accords commerciaux sont souvent retournés à la table de négociations afin de renforcer, clarifier ou modifier des règles auxquelles ils avaient consenti. Dans plusieurs cas, ils y sont arrivés en négociant des codes d'interprétation qui sont devenus parties intégrantes de ces accords.

Cette étude propose une ébauche d'un tel code. Celui-ci comprendrait, entre autres, une définition élargie des produits culturels visés — quel que soit le mode d'expression — et des règles protégeant, à l'intérieur de limites bien définies, l'utilisation d'incitatifs fiscaux et de quotas à l'appui des produits culturels nationaux qui sont destinés en premier lieu à un public national.

L'étude aborde aussi la question de l'intérêt qu'auraient les États-Unis, source la plus importante de produits culturels étrangers au Canada, pour un tel code interprétatif. Un code comme celui proposé ici comporterait plusieurs avantages pour les États-Unis comme pour d'autres pays : il fournirait des règles du jeu claires, accompagnées d'un meilleur accès aux marchés, un encouragement à la diversité dans les pays où elle n'est pas tolérée présentement, et, potentiellement, certaines réponses à des problèmes que les Américains eux-même ont soulevés quant à la portée des accords commerciaux.

Summary

A Room of Our Own: Cultural Policies and Trade Agreements

Daniel Schwanen

Should Canada accept to include cultural industries among those that will be subjected to trade negotiations? In this study, IRPP Senior Economist Daniel Schwanen argues that the strategy of excluding cultural industries from trade rules leaves Canadian cultural policies vulnerable to evolving trends. Excluding a finite list of industries from the reach of trade agreements, as was done in the North American Free Trade Agreement (NAFTA), may be too limiting in light of rapid technological changes and convergence between industries. For similar reasons, it is doubtful that Canada can maintain indefinitely its current position of not making commitments for these industries under the General Agreement on Trade in Services (GATS). The United States and many other trading partners will repeatedly seek to include cultural products in agreements such as the GATS or argue that they fall under existing General Agreement on Tariffs and Trade (GATT) rules. The nature of trade negotiations also means that Canada's refusal to deal will result in its cultural and other industries having reduced access to export markets.

At the same time, the study's author argues that a number of measures Canada has taken in the name of culture are not well adapted to the rationales for having a cultural policy in the first place. He points to some existing eligibility criteria for public support, Canadian content quotas on radio and television, and foreign investment restrictions as rules that do not always help and even hinder the goals of cultural policy. Financial support is often extended on the basis of employment sustained and money spent in Canada, rather than creative content. Quotas are set without regard for whether Canadians are truly interested in the product offered. And investment restrictions can result in entrenching a few domestic producers at the expense of much-needed capital, expertise, and diversity of ownership.

This situation, says the author, opens the door for Canada to put some of its existing measures on the table in return for securing, within trade agreements, the right to use reasonable means to achieve key cultural policy objectives. The World Trade Organization's ruling on the most recent Canada-US dispute on magazines has shown that current trade rules do not assure governments' ability to distinguish between domestic and foreign cultural products. Yet such a distinction, when based on the public properties of cultural products, is fundamental to the conduct of cultural policy, as is the ability to offer various means of public support and of securing a window on the public for domestic cultural products. Schwanen notes that, in other areas of public policy, distinction on the basis of origin is considered an important component of a product. The importance of this distinction applies a fortiori to cultural products.

Schwanen argues that, to better secure its ability to implement key cultural goals in a context of open trade, Canada should propose an interpretive code for cultural policies in trade agreements. In the past, signatories to trade agreements have often returned to the table to strengthen, clarify, or modify rules they had agreed to. In several instances, they achieved this by negotiating codes of interpretation that became an integral part of these agreements.

The paper offers a draft text of such a code. It includes, inter alia, a wide definition of the cultural products being covered — regardless of the medium of expression — and rules protecting, albeit within well-defined bounds, the use of tax inducements and quotas to support domestic cultural products aimed principally at a domestic audience.

The study also considers why the United States, Canada's main source of foreign cultural products, would agree to an interpretive code on cultural policies. One such as that suggested here, he argues, could provide that country – and others – with several benefits: clear rules of the game coupled with improved market access, encouragement to cultural diversity in countries that are not now open to it, and some potential for assuaging American's own concerns about the reach of trade agreements.