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# United States' Trade Policy and the Exportation of United States' Culture

By Beverly I. Moran\*

The United States trade deficit grows larger each year.<sup>1</sup> What the trade deficit means and what is to be done in response to its growth shifts with administrations and over time.<sup>2</sup> Nevertheless, since World War II, the United States' general position on international trade has been unbridled support for free access to free markets.<sup>3</sup>

Now, the world economy is changing and our economy is responding. When the international trade regime we work under began, cross border trade meant steel and oil and cotton. Now, our Gross Domestic Product and employment comes from services as much as anything else.<sup>4</sup> Just as the United States supported its manufacturers seeking to export goods in the last century, the United States government supports the new U.S. economy by being at the forefront of the push to open foreign markets to services.<sup>5</sup>

The Curb Center is dedicated to the study of the arts and public policy. Not just the high arts that concern Old World European ministries of culture, but also the street arts, the market arts, the arts that feed into our Gross Domestic Product and employment rates. Further, the Curb Center is concerned with both self-conscious public policy and public policy that comes from seemingly culture neutral government functions. In the case of the United States trade deficit and our government's policy

to open markets to services, we see culture and public policy combine in our push to maintain world dominance in the film industry.

The dilemma presented by U.S. trade policy is that in the world of trade deficits, the general view is that selling abroad is desirable.<sup>6</sup> In this regard, the cultural industry tests our general understanding of trade. Because, if movies, books, music and videos are simply commodities, then thank God for Hollywood. It is one of the few United States' industries that exports much more than it imports in every market in every year

“Does it matter if there is no local Australian film industry, as was the case for almost a decade in the late 1950s and early 1960s?”

throughout the world. The United States is not only one of the top five producers of motion pictures in the world; it is the premier exporter of film worldwide. But if these moving images, sounds and words are part of something called “culture,” then perhaps there is a problem when United States' movies, television, books, and music fill up so much air time, take over so many screens, and fill so many shelves that people see and hear more U.S. than local products. How might we react if, for example, our children saw fifty French films each year and our television was filled with foreign ideas and words; even in translation? There are at least four issues that surround the question of U.S. domination over the world wide film industry:

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1. What moral questions arise when culture crosses borders? Is there a right, perhaps even a duty, to protect local morals from exposure to sexual promiscuity, violence, drug use, foreign religious beliefs or other matters depicted in United States' media?
2. What about scarce local resources and the need to protect local industries and local employment? Does it matter if there is no local Australian film industry, as was the case for almost a decade in the late 1950s and early 1960s? Does it matter if United States' films fill so many screens that local producers have no outlets for their work? Why might the loss of a local film industry be more disturbing for the United States and the host country than the loss of some other local enterprise?
3. Where do markets fit into this scheme? If the public wants more Sylvester Stallone and less traditional Balinese puppetry should governments interfere with market preferences? Is a free market less desirable in the cultural industry than in other industries? What does an urge to preserve local culture do in the face of free choice and individual freedom?
4. Finally, is there any appropriate way of controlling United States' access to local markets and its impact on indigenous culture? Are quotas wrong but film schools acceptable? Are tax breaks for local productions protectionist but film festivals merely celebratory?

## I. The United States Trade Representative

This article focuses on the United States' trade policy regarding cross border services, particularly international traffic in films. The United States' agency most responsible for creating and achieving that policy is the United States Trade Representative. The United States Trade Representative was born from disappointment with the State Department and its administration of foreign trade policy.<sup>7</sup> By the Kennedy administration, combining trade and politics became anathema to legislators who believed that State always discriminated against trade in favor of diplomacy.<sup>8</sup> When President Kennedy asked for the Trade Expansion Act of 1962, these critics received a separate trade office within the executive branch as part of the price for their support.<sup>9</sup>

The new Act was meant to create and maintain United States' markets overseas.<sup>10</sup> It directed the President to appoint a special representative for trade negotiations<sup>11</sup> with overall responsibility for trade agreement programs.<sup>12</sup> President Kennedy's Executive Order 11075 complied with the Trade Expansion Act by creating the Special Representative for Trade.<sup>13</sup>

As time passed, the position grew in size and responsibilities so that by 1974 it had permanent status within the Executive Office.<sup>14</sup> In 1980, President Carter's Executive Order 12188 enlarged the number of employees under the Special Trade Representative and expanded its powers to cover both international and bilateral trade agreements. At this time, the office's name was changed to United States Trade Representative.<sup>15</sup>

In terms of United States' trade policy, this paper concentrates on the United States Trade Representative although there are a host of other government offices that also have international trade functions, because its Congressional mandate requires an exclusive focus on foreign trade.<sup>16</sup>

## II. International Trade Negotiations and the Cultural Industry

The United States Trade Representative employs many devices for influencing international trade policy. These include proposing legislation and helping shepherd that legislation through Congress, participating in international trade negotiations through the World Trade Organization and other multilateral organizations, negotiating bilateral trade agreements and educating the public on trade issues.<sup>17</sup> For example, the United States and Australia have just completed a bilateral free trade agreement. Canada, Mexico and the United States are members of the multilateral North American Free Trade Agreement. Australia, Canada and India all participate with the United States in the WTO.

Because the World Trade Organization has implications for multilateral and bilateral trade agreements, this section starts with the WTO and the United States' position on trade barriers to the cultural industry.

### A. The World Trade Organization

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The World Trade Organization (WTO) is the only international organization that deals with trade barriers between member nations. It allows member countries to decide on trade rules and

whether the film industry should be completely excluded from any trade regulation under a "cultural exception" giving states the right to keep goods like cinema and audiovisual services outside trade

agreements.<sup>21</sup> As a result of these disputes, no WTO member country is obligated to open its markets to cultural products unless it has made specific commitments in the audiovisual services sector.<sup>22</sup>

As explained by one commentator:

A country is said

to have made a "full" commitment in a particular mode of supply of services if there are no restrictions on market access or national treatment. A country is said to have made "partial" commitments if the commitments are subject to some restrictions on market access or national treatment. If the country does not make any commitments to liberalize the section and retains the right to impose restrictions in the future then it is said to have made an "unbound" commitment.<sup>23</sup>

The question of cultural protection in the context of opening markets was so sensitive that only two countries, the United States and the Central African Republic, made full commitments under GATS as a result of the Uruguay Round.<sup>24</sup>

As one commentator noted: "No other industry [other than audiovisual] has been subject to more exceptions and qualifications to free-trade principles . . ."<sup>25</sup>

In the Uruguay Round, the United States found little support for opening markets for the cultural industry. Now, as the service industry is again a major question in the Doha Round, the United States' position presses forward. The United States supports loosened restrictions to audiovisual trade arguing:

5. The debate over the audiovisual sector in the WTO, whose four cornerstones — the GATT, the GATS, TRIPS and dispute settlement — apply to the audiovisual sector, has sometimes been framed as an "all-or-nothing" game. Some argue as if the only available options were to exclude culture from the WTO or to liberalize completely all aspects of

“ However, the idea that movies should freely cross national borders was not accepted throughout the GATT membership. ”

sets a process for resolving trade disputes among its members. Rules are proposed and agreed to by some portion of member states. Those agreeing are then subject to the rules they accept and WTO enforcement procedures.

The World Trade Organization is a successor to the General Agreement on Tariffs and Trade (GATT). Just as the 1930s saw an explosion in the number of administrative agencies, the end of World War Two saw the birth of many international organizations from the United Nations, to the World Bank, to the International Monetary Fund. One of these international organizations, the General Agreement on Tariffs and Trade was designed to promote free trade by eliminating tariffs and trade barriers while providing a mechanism for resolving trade disputes.<sup>18</sup> The GATT created trade policy through negotiations called "Rounds." Its last round (the "Uruguay Round") created GATT's successor, the World Trade Organization.<sup>19</sup>

In addition to creating the WTO, the Uruguay Round also created the General Agreement on Trade in Services (GATS) which was the first multilateral trade agreement covering services instead of goods. Even before the creation of the World Trade Organization, the United States argued for free trade in films under GATT.<sup>20</sup> However, the idea that movies should freely cross national borders was not accepted throughout the GATT membership. The matter first came to a head during GATT's Uruguay Round when the motion picture industry was a contentious part of international trade negotiations. With the European Community and France on one side and the United States on the other, an unresolved conflict developed about

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audiovisual and related services. Presenting such stark options obscures a number of relevant facts.

6. First is the fact that business and regulatory considerations affect the ability to make and distribute audiovisual products, both to domestic and foreign audiences. Creating audiovisual content is costly, and commercial success is uncertain. Access to international markets is necessary to help recoup production costs. Predictable and clearly defined trade rules will foster internal exhibition and distribution opportunities and provide commercial benefits that audiovisual service providers must have to continue their artistic endeavors.

7. Second, the argument implies that because the audiovisual sector may have special *c u l t u r a l* characteristics, the sector should not be subject to the trade disciplines imposed on other services sectors. Such an argument neglects that other sectors also have unique characteristics for the purpose of fulfilling important social policy objectives and that the GATS has shown the flexibility to accommodate such specific concerns. ...

8. The “all-or-nothing” approach to the audiovisual sector in the WTO implies that trade rules are somehow too rigid to take into account the special cultural qualities of the sector. This is not the case...

9. The choices are not, nor have they ever been, a choice between promoting and preserving a nation’s cultural identity and liberalizing trade in audiovisual services. Especially in light of the quantum increase in exhibition possibilities available in today’s digital environment, it is quite possible to enhance one’s cultural identity and to make trade in audiovisual services more transparent, predictable and open....<sup>26</sup>

### III. Trade in Services — the Film Industry

This story does not cover all the ways that United States’ services are exported abroad or even all the ways that United States’ culture moves across borders.<sup>27</sup> This article does not cover all audiovisual services.<sup>28</sup> The small piece that I carve out of a discussion of United States’ trade policy and the cultural industry is a look at feature films.

I concentrate on movies, instead of music or books or the Internet, because cinema is one of the hard cases for globalization as a result of the fact that the film industry is more concentrated than these other parts of the cultural industry.<sup>29</sup>

“Because films are more expensive to make there are simply fewer of them produced each year and the cost favors wealthy countries over their poorer competitors.”

Because films are more expensive to make there are simply fewer of them produced each year and the cost favors wealthy countries over their poorer competitors. The high costs of film production and the need for concentration in order to take advantage of technological innovation also favor wealthier venues.<sup>30</sup> Further, industry concentration, that is relatively fewer small producers and distributors, results in more information because larger companies and service providers record more information that is easier to find.

Even with these advantages however, available information is both sparse and complicated by the fact that it is kept (or not kept) according to local government and producer standards. Thus domestic production has a different meaning in the United States than in Australia, Canada or India and the information on domestic production, foreign revenues and employment is collected and disseminated by different organizations. Limiting our discussion further, the smaller piece that I carve out of the general topic of the motion picture industry and trade policy is my exclusive concentration on

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Australia, Canada and India and their relationship to US trade policy. This limit serves at least five purposes.

First, Australia, Canada and India are significant motion picture producers in their own right. Thus they are forced to face questions of how, and to what extent, they wish to protect local industries. This set of questions is different than those faced, for example, by African countries that import large amounts of foreign films but have no local film industry to protect.<sup>31</sup>

Second, Australia, Canada and India operate in English, at least on the government level. It is hard enough collecting comparative information in English without venturing into French or Arabic.<sup>32</sup> English also allows a look at countries with some mutual cross border film traffic with the United States. In terms of market penetration, it is true that the United States has a large share of the French speaking market. For example, United States' films occupy 60% of the screen time in France. The United States also has a share of the Arabic speaking market that imports 15 times more films than it produces.<sup>33</sup> On the other hand, there is little cross border traffic the other way with very few French or Arabic films coming across the United States' border. Cross border trade is a difference between other non-English film producers and India. In addition to U.S. films coming to India, India has a large video export market to non-resident Indian populations in North America.<sup>34</sup>

The reason for leaving the United Kingdom out of this paper is that Britain, as part of the European Union, raises questions that are based as much in Europe as in British culture and the European Union brings in issues from a range of non English speaking countries.<sup>35</sup>

Finally, Australia, Canada and India are an interesting mix of countries because they have different approaches to protecting (or supporting) their local film industries and culture. Each is also involved in different negotiations with the United States concerning trade barriers.<sup>36</sup>

## IV. Film Production in the United States, Australia, Canada and India

The United States, Australia, Canada and India represent different models of national movie making.

India and the United States are two of the biggest film producers in the world while Canada and Australia have much smaller, albeit still significant, annual film production.<sup>37</sup> India and the United States are very market driven. They are huge local producers with equally impressive domestic and foreign markets and little direct government aid.

The United States and India differ from Australia and Canada in more than annual film production, for example, in the amount each country earns from overseas sales.<sup>38</sup> In terms of foreign revenues, Canada has a small, but significant, foreign market while Australia makes most of its foreign film revenue from foreign productions within its borders. India and Canada have a higher percentage of smaller producers and distributors than either the United States or Australia. The higher number of small companies makes gathering statistics on their industries more difficult. India and Canada also have multilingual film industries. Canada has significant film production in both French and English and Indian movies are produced in 52 different languages.<sup>39</sup>

What follows is a brief description of each country's film industry.

### A. The United States

UNESCO lists the United States, Japan, Hong Kong combined with China, the Philippines and India as the top five film production centers in the world.<sup>40</sup> The Motion Picture Association of America reports that United States' domestic box office gross was \$9.5 billion in 2002.<sup>41</sup> The Bureau of Labor Statistics reports total motion picture and video industry employment in the United States in 2002 as 370,730.<sup>42</sup>

Domestic film revenues matched overseas revenues in 2002 reaching \$9.64 billion.<sup>43</sup>

About half of these revenues came from Europe, Africa and the Middle East with another 40% from Asia and 10% from Latin America.<sup>44</sup> International markets are not an "add-on" for the United States' film industry. Only one in ten United States' films recoup their investment before being shown overseas.<sup>45</sup> Even with foreign exposure, forty percent of all United States' films fail to make back their initial investment.<sup>46</sup>

### B. Australia

Australia generally produces over 20 films a year.<sup>47</sup> According to UNESCO, annual production

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of over 20 films a year places a country within the mid range of worldwide motion picture production.<sup>48</sup> These 20 plus Australian films are in addition to co-productions with other countries and foreign origin films made in Australia.<sup>49</sup>

When these co-productions and foreign origin films are added to the purely domestic product, Australia routinely produces over 30 films each year.<sup>50</sup>

Film production brings between \$200 million to over \$300 million Australian dollars to the country annually.<sup>51</sup> Foreign origin films often bring as much or more to the local economy than Australian films.<sup>52</sup>

In addition to the \$200 to \$300 million Australian generated by Australian film production, another \$844.8 million Australian is generated each year in gross box office receipts.<sup>53</sup> Australian films' share of this box-office is around 5% or \$41.8 million Australian.<sup>54</sup> Not a single Australian film made the list of top 5 revenue producers in Australia during 2002 and only one Australian film made the list of top five revenue producers in Australia of all time.<sup>55</sup> In fact, only five Australian films are within the top 50 revenue generators of all time in that country.<sup>56</sup>

Around 15,000 Australians make their living in the film industry.<sup>57</sup> According to the Australian Film Commission, more than half of these people work casually or part time and almost 40% of all Australian film workers are women.<sup>58</sup> Slightly more than 9,000 more Australians work in the exhibition industry more than half of whom are women and more than three fourths of whom are casual workers.<sup>59</sup>

### C. Canada

UNESCO lists Canada as a moderate film producer with an annual production of approximately 24 films per year.<sup>60</sup> This compares with over 200 foreign films imported into the country each year.<sup>61</sup> Statistics Canada reports that revenues for film

distributors and video wholesalers in Canada reached \$3 billion Canadian in 2001/02.<sup>62</sup>

Of this \$3 billion, 91% of domestic sales were from foreign films and videos, most notably from the United States.

Nevertheless, Canadian films do have an export market. *The Daily* reports that distribution sales of Canadian film and video productions to other countries brought in \$173 million Canadian in 2000/01 up from around \$30 million Canadian ten years before.<sup>63</sup> According to Statistics Canada, the foreign export market is the most dynamic driver in the Canadian film industry.<sup>64</sup> Producers with foreign sales received a majority of their sales from foreign sources indicating that exports are a vital part of the Canadian film industry.<sup>65</sup> Exporters are different from other Canadian film producers in that they are larger, work on bigger budgets and produce more English language product than those who work exclusively in local markets.<sup>66</sup> Less than 4,000 Canadians work full or part time in film and video distribution according to Statistics Canada.

“Only one in ten United States' films recoup their investment before being shown overseas.”

### D. India

In terms of annual production, India is the largest motion picture producer by far.<sup>67</sup> In terms of revenues, however, India lags behind the United States although perhaps not for long. The Indian entertainment industry produced revenues of \$2.75 billion U.S. in 2001 and experienced a growth rate that year of 30%.<sup>68</sup> The film industry alone produced revenue of \$0.95 billion U.S. and accounts for 19% of the total revenue earned by the Indian entertainment industry.<sup>69</sup>

Like the Canadian film industry, small companies both on the production and the

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distribution sides dominate the Indian film industry.<sup>70</sup> This emphasis on small firms contributes to high employment rates and low costs per feature. It also makes information on Indian film production harder to come by especially since the Indian government does not keep records on film productions.<sup>71</sup> India has approximately one million people directly involved in film production with another 4 million people employed in related industries.<sup>72</sup> The average cost of all Indian production is a little more than a half million dollars US.<sup>73</sup>

India also lags behind the rest of the film-producing world in the size of studios and number of screens.<sup>74</sup> The small number of screens relative to population makes it hard for Indian film producers to find local outlets for their products. India is a great exporter of films sending its product to almost 100 foreign countries.<sup>75</sup>

Major markets for Indian films are countries with large non-resident Indian populations in the Middle East, United States, Canada and the United Kingdom as well as in East Africa and South Asia.<sup>76</sup>

## V. Reports on Foreign Trade Barriers

In terms of educating the public and Congress on trade issues, the USTR issues a number of reports on foreign trade barriers. In its 2003 National Trade Estimate Report on Foreign Trade Barriers, the USTR identified several unfair trade practices in Australia, Canada and India in the area of film and television production.

### A. Australia

USTR cites Australia for having a local content standard that requires 55% of all free television programming between 6 a.m. and midnight to come from Australia. Australia was also cited for requiring pay television channels that have more than 50% drama production to spend 10% of their programming budget on new Australian dramas.

### B. Canada

Canada's Broadcasting Act lists safeguarding, enriching and strengthening "the cultural, political, social and economic fabric of Canada" as one of its

objectives. The Canadian Radio Television and Telecommunications Commission, which is charged with enforcing the Broadcasting Act, is cited by the USTR for requiring that 60 percent of all television time for conventional over the air broadcasters have Canadian content with a minimum of 50 percent Canadian content from 6 p.m. to midnight. The Canadian Broadcasting Corporation is also prohibited from showing "popular foreign feature movies" between 7 p.m. and 11 p.m. and cable TV and direct to home broadcast services must provide more than 50 percent Canadian programming services.

### C. India

Until 2002, India had a series of laws that restricted access to foreign films through licensing requirements. Only 100 foreign films received an import license each year. India eliminated these licenses in February 2002 although importers still have to certify that films do not contain pornographic materials and they must pay a fee for the ministry to view the movie and confirm the content.

## VI. Government Subsidies — What the USTR Did Not Cite as Trade Barriers

In a totally market driven trade scheme it would seem that government subsidies would also count as trade barriers. Yet, the USTR does not cite government grants as a type of unfair trade practice.

Types of government aid differ from country to country. The United States does not have government production companies or large federal grant programs or public film schools but we do see an aggressive and engaged trade policy dedicated to opening up cross border trade in services and some public funds from the National Endowment for the Arts and the Corporation for Public Broadcasting support film production.

In India there is very little government aid to the film industry outside of strong copyright laws with weak actual protections and two federally funded film schools. Canada and Australia, on the other hand, give lots of government support to their local industries. Each has a government production company dedicated to film and television production and each has local content laws that limit the amount



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of foreign product on local television both free to air and cable.

Australia is also an active financier of local private motion picture production. At least a third of all Australian films get substantial government financing.<sup>77</sup> Australia, like India, also has a federally funded film school that was created for the express purpose of producing local filmmakers.

### A. Australia

Australian government subsidies are, in part, a result of Australia's motion picture production history. From the silent period, through the introduction of talkies and onto the end of the Second World War, Australia produced many features.<sup>78</sup> After the Second World War, however, the already vigorous British and United States' motion picture export industry wiped out Australian films for much of the 1950s, 60s and 70s. In fact, no Australian features were produced between 1958 and 1966.<sup>79</sup>

Government support helped turn this trend around.<sup>80</sup> Government help to the Australian film industry includes the federally funded Australian Film Development Corporation established in 1970 and state government funded film agencies established shortly thereafter.<sup>81</sup> During the 1970s these agencies provided most of the funds for Australian film production.<sup>82</sup> This changed in the 1980s when the federal government introduced a tax incentive for film production known as IOBA (division IOBA of the Income Tax Assessment Act).<sup>83</sup> Government subsidies changed again in the late 1980s when the Australian Film Finance Corporation was created. The AFFC is now the principal financier of Australian films.<sup>84</sup> Each Australian state, with the exception of Tasmania, has a government film agency that aids local production.

### B. Canada

Canada supports film production through the Canadian Film Development Corporation (Telefilm) that was formed in 1967 to stimulate domestic content production.<sup>85</sup> Telefilm provides support to the private sector for film production at all stages from development through distribution in Canada and abroad.<sup>86</sup> The National Film Board of Canada co-produces culturally relevant films with independent producers and the Canadian

Production Fund supports independent producers affiliated with private broadcasters.

### C. India

Government support in India consists of two training institutes under the Ministry of Information and Broadcasting and the National Film Development Corporation that produce films with socially relevant themes.<sup>87</sup> These programs are much smaller in size and scope than the subsidies provided by Canada and Australia. For the most part, the programs are not active.

## VII. Five United States' Arguments for Free Trade in Film

The United States makes at least four official arguments in support of free trade in the motion picture industry. These four official arguments are that:

- Free trade in international film is in accordance with WTO policy;
- Cross border trade is a necessary element in all film production;
- The United States' dominance of cross border trade in films is primarily the result of superior products and individual choice; and
- Changes in technology make cross border trade vital for all cultures.

In addition, there are unofficial arguments in support of United States' domination in world culture. Starting with the official positions:

### A. Free trade in international film is in accordance with WTO policy

The argument that WTO policy favors negotiations over the audiovisual sector places the sector within the WTO's larger purpose. The argument points out that the WTO is meant to change international trade negotiations. One change under the WTO is the extension of negotiations to the services sector under the GATS. All services have cultural components. The fact that the WTO membership agreed to include services under GATS knowing that services by their nature have cultural components shows that the membership also agreed

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to face sensitive cultural issues in order to open trade in services. Audiovisual services are just another type of service. Every service has some unique issue. The WTO can handle the culture trade's unique issues as it would any other service within the already agreed upon sector.

The argument that services are just a type of commodity subject to GATS is undercut by the WTO membership. At least for the time being, a majority of the membership has unbound commitments in the audiovisual services sector. If most of the membership stands on the sidelines, then there is no common agreement that audiovisual services are an appropriate subject of trade

aids consumers and producers by adding transparency and predictability to an already large, diverse and vibrant market.<sup>88</sup>

The need for foreign revenues to support the local film industry is an argument that almost exclusively benefits the United States. When it comes to exporting product, the United States is clearly the premier film exporter in the world even though three of the top five film centers produce more films each year.<sup>89</sup> United States' films are shown in over 150 countries worldwide and United States' television appears in over 125 international markets.<sup>90</sup>

Eighty-five percent of the films shown throughout the world originate in the United States.<sup>91</sup> The United States' balance of cinematic trade with Europe is so large that 53 million North Americans saw European films in 1988-89 while 388 million Europeans saw Hollywood films in the same period.<sup>92</sup> The United States' market share in Europe ranges from a low of 60% in

“ The fact that the WTO membership agreed to include services under GATS knowing that services by their nature have cultural components shows that the membership also agreed to face sensitive cultural issues in order to open trade in services. ”

negotiations. On the other hand, there is some movement toward opening audiovisual services through GATS which includes audiovisual services in the services sector. The movement in services, even audiovisual services, is occurring, albeit with caution and without much speed.

## B. Cross border trade is a necessary element in all film production

The assertion is that cross border trade is a necessary element in all film production. In other words, the economics of film production depends on overseas profits. All motion picture producers need large markets in order to take advantage of the technological benefits and restrictions inherent in film production. The widest possible markets give the greatest chance for a film's financial success no matter the producer. Accordingly, negotiations in the audiovisual sector benefit all cultures because free trade gives producers access to the foreign markets they need to turn a profit. Free trade also

France to a high of 90% in Holland.<sup>93</sup> Thus, the United States runs a large trade surplus in motion picture exports in every country and region.<sup>94</sup> As one commentator points out:

One major reason for the slow pace of negotiations [on audiovisual services] is that, apart from the USA, few countries are willing to seek commitments on audio-visual liberalisation [sic] if this requires them to open up their own markets and put further pressure on domestic regulatory regimes. Given the domination of US rights holders in the international audio-visual market, the likelihood is that there would only be one winner (in economic terms).<sup>95</sup>

## C. Superior product and individual choice

The superior product and individual choice perspective argues that the United States dominates

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the international film market because Hollywood produces better films. If Indian rice and Brazilian coffee are tastier than their rivals and Japanese cars need fewer repairs, then why shouldn't everyone be free to buy these products rather than inferior substitutes? Up to this point, the argument is like the two before it in that it essentially sees film as a commodity. However, the argument goes further to assert that commodities that represent ideas deserve more free trade than other commodities because the most compelling idea should have the largest market share.

One response to the view that the United States' dominance in film production is a matter of taste is that the United States' market share results from government interference in support of our domestic industry. Some authors claim that Hollywood's dominance is almost completely the result of four components:

- Hollywood's dodging of United States' anti-trust laws in order to set up a strong vertically integrated industry which functioned as an oligarchy;
- Cinema laws in other parts of the world that were applied more restrictively to local film industries than United States' cinema laws were applied to the American film industry;
- A United States' trade policy which was much more aggressive after each of the World Wars than European trade policy was able to be towards European films; and,
- United States' diplomacy in favor of the motion picture industry throughout the 20<sup>th</sup> century.<sup>96</sup>

Another story of market failures comes from C. Edwin Baker, who argues that four characteristics prevent preferences from achieving optimal market results in films: "public goods";<sup>97</sup> significant positive and negative externalities;<sup>98</sup>

multiple purchasers of media;<sup>99</sup> and media as a shaper of preferences.<sup>100</sup> These four factors tend to favor homogenized programming and monopolistic producers instead of reflecting actual preference. As Baker says:

First, markets work well, if at all, only with respect to "private goods." Because media products have substantial "public-good" aspects – specifically, the possibility of substantial nonrivalrous use of media content – markets fail to produce enough,

and they sometimes inefficiently favor less desired, media products. Second, markets work well only if goods are properly priced, that is, priced at roughly their true cost. Substantial negative and positive externalities of media products result in improper pricing. This pricing leads to excessive demand for and oversupply of media products with substantial negative externalities and to inadequate demand for and underproduction of those with positive externalities. Third, markets work well given the premise that they properly identify and measure people's preferences. Market identification takes place only within market transactions, and measurement is based on an individual's willingness and ability to pay. Significantly, nothing is "objectively" correct or accurate about this method of identification or its results. Although all capitalist societies rely on market-based identification and measurement of preferences for many purposes, all democracies reject these methods for other purposes. Many, though maybe not all, media products have important traits that are similar to those for which societies rely on nonmarket measures of people's values or preferences. This similarity makes reliance on the market questionable in many media contexts.<sup>101</sup>

If the United States' dominance in cross border film sales results from market failures, then asking other countries to accept a free market in film also asks them to ignore prior United States' government policies that made Hollywood an international powerhouse, to not engage in their own attempts to build local film industries that might rival us, and to ignore market failures that act to their detriment.

### D. Changes in technology make cross border trade vital for all cultures

The technology argument asserts that present trade restrictions in film are reactions to past problems that technology now solves. For example, films were shown on screens in theatres.

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Theatres and screens are costly to build and maintain. The high cost of theatres and screens means that there are not enough screens for local product. The need for more local screen space for local productions led to outdated trade barriers, for example, screen quotas.

Screen quotas are based on the idea of a limited resource. However, given present technology, are there truly a limited number of screens worldwide? Are screens even relevant? With satellites, cable systems and the Internet in our present and who knows what else coming in the future, a decidedly 20<sup>th</sup> century technology like film production might disappear on its own at any

trade supports cultural diversity through infusions of foreign revenue. An unofficial perspective is less about markets and individual freedom and more about our position as the last super power on earth. From this perspective, our national security depends to a large extent on expanding our supremacy in world culture.

It is in the general interest of the United States to encourage the development of a world in which the fault lines separating nations are bridged by shared interests. And it is in the economic and political interests of the United States to ensure that if the world is moving toward a common language, it be English; that if the

world is moving toward common telecommunications, safety and quality standards, they be American; that if the world is becoming linked by television, radio, and music, the programming be American; and that if common values are being developed, they be values with which

“ However, given present technology, are there truly a limited number of screens worldwide? Are screens even relevant? ”

time. After all, who will remember vinyl records fifty years from now?

Technology is every producer's friend because technology reduces the cost of getting a product before the public. The best way to take advantage of technology is through free trade because free trade allows knowledge and product to move into new markets and garner more profits. However, like most assets, technology's benefits are not shared equally across borders. In the film industry, technology favors those who are positioned to take on high initial production costs. The high cost of entry favors the United States.

## E. An unofficial view on our role as a super power

The United States' official positions on world culture markets run from the view that culture is merely a commodity that should flow across borders like soap and toilet paper to the assertion that free

American are comfortable.<sup>102</sup>

Some find the idea that Americans would systematically seek to promote their culture to be unattractive. They are concerned that it implies a sense of superiority on Americans' part or that it makes an uncomfortable value judgment. But the realpolitik of the Information Age is that setting technological standards, defining software standards, producing the most popular information products, and leading in the related development of the global trade in services are as essential to the well-being of any would-be leader as once were the resources needed to support empire or industry.<sup>103</sup>

## VIII. Australia, Canada and India reject negotiations on the international film trade

Australia, Canada and India are each engaged in different trade negotiations with the United States. Australia and the United States have just completed a bilateral free trade agreement; Canada and the United States are part of the multilateral North American Free Trade Agreement (NAFTA) and India, Australia and Canada are WTO members currently negotiating the Doha Round on trade in services, including audiovisual services.

Australia, Canada and India each have different but vibrant film industries. India and the United States are major film producers ranked among the top five producers in the world. UNESCO lists Australia and Canada as moderate film producers. Australia, Canada and India each have producers that survive in part through foreign trade. Australia receives considerable revenues from foreigners coming into the country to produce films while Canada, India and the United States make noteworthy sums from exporting their films overseas.

Despite the similarities and differences in their industries and their trade negotiations with the United States, Australia, Canada and India share similar positions on audiovisual services. Each has refused to abandon the "cultural exception" that kept audiovisual services from becoming a major part of the GATS during the Uruguay Round. While participating in trade negotiations for the services sector in general, each sees culture as off the table when it comes to completely free trade.<sup>104</sup>

Further, this theme continues when each country turns to direct negotiations with the United States. The Australian-United States Free Trade Agreement allows Australia to continue to ensure local content in Australian broadcasting and audiovisual services. The Canada-US Free Trade

Agreement that became NAFTA with the inclusion of Mexico has a provision for the protection of Canadian culture.<sup>105</sup> Australia and Canada both have unbound commitments in the audiovisual sector under GATS while India has only agreed to be bound in motion picture and videotape production and distribution.<sup>106</sup>

From the United States' point of view, our trade deficit is aggravated by an international trade system that is fairly open for manufactured goods and fairly restrictive in the services sector. Because our economy is increasingly based on services, we have an incentive to advocate free trade in that sector. Australia, Canada and India have vital motion picture industries that rely on cross border transactions. Why are these countries less open to negotiations in the audiovisual sector?

## IX. It is Culture

Toby Miller and George Yudice point out that "the great historical paradox of culture [is] that its principal exporter, the United States, claims to be free of any policy on the matter."<sup>107</sup> I would add that an even greater paradox is that part of United States' culture is the failure to acknowledge culture at all just as we fail to acknowledge any American cuisine.<sup>108</sup> In the United States we are proud of our unique political system but politics is only one

“ Why are these countries less open to negotiations in the audiovisual sector? ”

part of anyone's culture. In the rest of the world, people speak of their culture often. In the United States, one never hears the phrase "our culture."

Up until now, the United States' arguments for open trade in film have all rested on a commercial footing at least in part because, in the United States, culture is itself a commodity. In the rest of the world, culture is never a commodity.<sup>109</sup> Our purpose is to sell. Their purpose is to get the best cultural result given a world of increasingly intrusive trade. When

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the focus shifts from markets and their strengths or failures and towards preserving cultures, the best United States' argument is that those who advocate trade barriers in audiovisual services do not understand culture or the foundations of cultural pluralism.

Culture is by its nature dynamic. It shifts and changes and grows in response to contact with

“ In the rest of the world, culture is never a commodity.<sup>109</sup> Our purpose is to sell. Their purpose is to get the best cultural result given a world of increasingly intrusive trade.”

others. When we say that some aspect of culture is authentic or corrupt we are simply commenting on a moment in time. Europeans, Americans and Africans meet and the result is hundreds of cultures all playing variations on one theme. Are any of these cultures less authentic than what they replaced? Persia influenced Greece, Greece influenced Rome, Rome influenced Europe and each was influenced in turn. According to this argument, creating barriers to culture is the surest way of undercutting pluralism. Cultures grow through freedom and contact, not through protectionism<sup>110</sup>

Trade in culture has benefits not the least of which is economic. There are also natural barriers to trade in culture. Two of these barriers are local language and local culture. The United States' film industry succeeds best in foreign markets most like its own in terms of language and culture. The more distant the cultures and languages and the more product in the home language or reflecting the home culture, the more a general preference for domestic products slows U.S. culture.<sup>111</sup>

When economic incentives meet natural barriers to United States' trade in culture, the result is sometimes a more open attitude to trade negotiations. For example, Mexico was much less reluctant to negotiate cultural issues under the

NAFTA than Canada because Spanish, Mexican cultural differences and Mexican and other Spanish language product compete well against United States' films.<sup>112</sup> Canada's Quebec Province has the same barriers to U.S. entry where the French speaking public sees fewer United States' films both because Quebec Province has more restrictive local content laws and because local populations prefer product from France, Switzerland and other Francophone providers.

India has a number of natural trade barriers to United States' films including its own massive local industry in 52 languages and a very different culture that itself sells well in India's growing export market. These natural

barriers to trade help explain why India does not have either the direct government subsidies for film production that we see in Australia or Canada or the indirect subsidies of local content laws. India's natural trade barriers protect its local film industry well enough. Perhaps this is why India is one of only a handful of countries with any commitments in the audiovisual sector. Nevertheless, India remains closer to Australia and Canada's view of trade in culture than to the United States' free trade position.

## **B. Countries with moderate film industries and no natural barriers to United States' trade**

Tyler Cowen asserts that culture is dynamic; that it develops from contact; and that it is nurtured by freedom of access brought about by technology and open markets. Technology and open markets mean that people are no longer bound by culture in space. People in Australia can be more authentically Chinese because of access to satellite television, Chinese food products and correspondence over the Internet. People in Kenya can be more authentically Indian just as people in

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Bombay can see American movies and wear European fashions.

Cowen also acknowledges that some cultures disappear in the dynamic process. India's natural barriers to trade do not exist in Australia and Canada. Nor does either country match India or the United States in film production. English makes Australia and Canada vulnerable to the United States' culture industry. Australians feel the threat to their culture enough to justify legislation as when:

In 1969, the Australian Council for the Arts' Film Committee reported to the government that the need for public subvention was "self evident" because of the necessity for Australia "to interpret itself to the rest of the world." Journalists, advertising executive and producer Phillip Adams spoke of the need "to dream our own dreams," making reference to a famous cartoon from the Vietnam War period which depicted an Australian family watching TV that was advertising the opportunity to: "Have your emotions lived for you tonight by American experts."<sup>113</sup>

In Canada, United States' television influenced the new constitution as when:

Canadians through the 1970s saw one American police drama after another in which officers read *Miranda* warnings to criminals as they were apprehended . . . , including "you have the right to remain silent; you have the right to counsel." Despite their different constitutional and political system, which had no explicit bill of rights, a great number of Canadians apparently believed that they had "the right to keep silent, the right to counsel," and so forth. Canada did add a bill of rights as part of the final exercise of patriating its Constitution and ending the role of the British Parliament in the amending process.

This came about at least in part because the average Canadian already assumed such rights. [United States'] Television hardly played a negligible role here.<sup>114</sup>

Nor is a concern for local culture limited to politicians or trade negotiators. Studies show that ordinary Canadians overwhelmingly support their government's attempt to protect local culture.<sup>115</sup>

## X. A Challenge for the USTR

It is not fair to ask the USTR to incorporate cultural sensitivity into its strategy for negotiating in the audiovisual sector for at least two reasons. First, the USTR was created to have only one purpose – the creation and maintenance of United States' foreign trade. After seeing the State Department barter trade for diplomacy, Congress decided that its trade negotiator should have only one purpose, i.e., increasing foreign trade. Cultural sensitivity is simply not a part of that mandate except to the extent that cultural understanding furthers the foreign trade mission. It is also not fair to ask the USTR staff to see culture as something other than a commodity when that idea is such a leap for all Americans. The paradox of United States' culture is that, for us, culture is a commodity. Why should USTR staff see culture any differently than other Americans do?

“They feel the threat even if we see only phantoms. Asserting that there is no threat is not a successful strategy.”

Although the USTR is not the site for developing an understanding of the threat that the United States' film industry is to the rest of the world, that insight does need a home within our trade policy.

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Our image as a cultural imperialist does not help us in our mission of using trade negotiations as one path toward increasing our domestic economy nor do unofficial assertions that our national security rests on dominating world culture.

Feature film production is one of our most robust export industries. If we are to continue to expand in that sector, we need to find a way to make our domination more palatable. The chance of convincing other countries to open themselves to our product through asserting that free trade is not a threat to local culture seems small. The countries that are closest to us and know us the best are also the countries most threatened by our industry because they have no natural barriers to our trade. They feel the threat even if we see only phantoms. Asserting that there is no threat is not a successful strategy.

As a nation, we are willing to accept that other countries use local film schools, government sponsored film festivals and government paid for production companies as ways of protecting their local film industries. Is it such a great leap to accept local content laws as well? Even with local content laws the United States dominates international film. The film industry might just be an area that needs less push and more understanding. At least for the time being.

## Endnotes

*\*Beverly I. Moran is a Professor of Law and Sociology at Vanderbilt University. She extends thanks for their comments to Carol Balassa, Director, Services Trade Negotiations, USTR; William Ivey, Director, Curb Center for Art, Enterprise and Public Policy at Vanderbilt University; Professor Bruce Barry, Owen School of Management and to Heather Connelly, Program Coordinator, Curb Center for her work in coordinating this conference.*

<sup>1</sup> UNITED STATES TRADE DEFICIT REVIEW COMMISSION, 106TH CONG., FINAL REPORT OF THE U.S. TRADE DEFICIT: CAUSES, CONSEQUENCES AND RECOMMENDATIONS FOR ACTION" (Nov. 2000) (reporting that the deficit grew from 30 billion in 1991 to \$450 billion in 2000).

<sup>2</sup> *Id.* The Final Report, which is written by a Republican commissioner, is accompanied by a dissenting view written by a Democratic commissioner. The two sections are called "The Democratic View" and "The Republican View."

<sup>3</sup> World Trade Organization Trade Policy Review Body, United States Trade Policy Review (Oct. 1996), at 22, available at

[http://www.wto.org/english/tratop\\_e/tp46\\_e.htm](http://www.wto.org/english/tratop_e/tp46_e.htm) [hereinafter 1996 Trade Policy Review] ("U.S. policy is based strongly on the premise that the removal of barriers and distortions to global trade enhances higher wage job creation, incomes, living standards and growth potential, in the United States as well as in the economies of our trade partners.").

<sup>4</sup> Services include finance, telecommunications, law, accounting, advertising, engineering, education, health care, energy and transportation, to name a few.

<sup>5</sup> Press Release, United States Trade Representative, U.S. Services Offers in WTO Trade Talks (Mar. 31, 2003) available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2003/March/](http://www.ustr.gov/Document_Library/Press_Releases/2003/March/)

*U.S. Services Offers in WTO Trade Talks.html* ("The service sector comprises 80 percent of U.S. employment and 64 percent of U.S. Gross Domestic Product (GDP). According to a University of Michigan study, a one-third cut in global barriers to trade in services would increase U.S. annual income by \$150 billion (\$2,100 per American family of four). Total elimination of barriers in services would raise U.S. annual income gain by over \$450 billion (\$6,380 per family of four)").

<sup>6</sup> 1996 Trade Policy Review, *supra* note 3 ("The United States Government has focused on trade policy as one of the principal tools available to it to achieving the national economic goal of expanded domestic opportunity.).

<sup>7</sup> GEORGE T. KURIAN & JOSEPH P. HARAHAAN, A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 370-72 (1998); see I. M. DESTLER, AMERICAN TRADE POLITICS 105-18 (3d ed. 1995).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 370-71.

<sup>10</sup> Trade Expansion Act of 1962, § 102, Pub. L. No. 87-794, 76 Stat. 872.

Title I Sec. 102 Statement of Purposes

The purposes of this Act are, through trade agreements affording mutual trade benefits —

- (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining and commerce;
- (2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and
- (3) to prevent Communist economic penetration.

<sup>11</sup> *Id.* § 241(a).

(a) The President shall appoint, by and with the advice and consent of



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the Senate, a Special Representative for Trade Negotiations, who shall be the chief representative of the United States for each negotiation under this title and for such other negotiations as in the President's judgment require that the Special Representative be the chief representative of the United States, and who shall be the chairman of the organization established pursuant to section 242(a). The Special Representative for Trade Negotiations shall hold office at the pleasure of the President, shall be entitled to receive the same compensation and allowances as a chief of mission, and shall have the rank of ambassador extraordinary and plenipotentiary.

<sup>12</sup> S. REP. NO. 87-2059, at 3114 (1962).

<sup>13</sup> Exec. Order No. 11,075, 27 Fed. Reg. 473 (Jan. 15, 1963).

(b) The Special Representative generally shall assist the President in the administration of, and facilitate the carrying out of, the Act. Except as may be unnecessary by reason of delegations of authority contained in this order or for other reasons, the Special Representative shall furnish timely and appropriate recommendations, information, and advice to the President in connection with the administration and execution of the Act by the President.

<sup>14</sup> Trade Act of 1974, Pub. L. No. 93-618, § 141, 88 Stat. 1978.

Office of the Special Representative for Trade Negotiations.

(c)(1) The Special Representative for Trade Negotiations shall —

(A) be the chief representative of the United States for each trade negotiation under this title or section 301;

(B) report directly to the President and the Congress, and be responsible to the President and the Congress for the administration of trade agreements programs under this Act, the Trade Expansion Act of 1962 and

section 350 of the Tariff Act of 1930;

(C) advise the President and Congress with respect to nontariff barriers . . . and other matters which are related to the trade agreements programs.

<sup>15</sup> Exec. Order No. 12,188, 45 Fed. Reg. 989 (Jan. 4, 1980).

§1-101 The United States Trade Representative

(a) Except as may be otherwise expressly provided by law, the United States Trade Representative . . . shall be chief representative of the United States for:

- (1) . . . the General Agreement on Tariffs and Trade;
- (2) discussions, meetings, and negotiations in the Organization for Economic Cooperation and Development when trade or commodity issues are the primary issue under consideration;
- (3) negotiations in the United Nations Conference on Trade and Development and other multilateral institutions when trade or commodity issues are the primary issue under consideration;
- (4) other bilateral or multilateral negotiations when trade, including East-West trade, or commodities is the primary issue under consideration;
- (5) . . .
- (6) negotiations concerning direct investment incentives and disincentives and bilateral investment issues concerning barriers to investment.

<sup>16</sup> For example, the State Department and the Department of Commerce both have international trade functions.

<sup>17</sup> See STEVE DRYDEN, *TRADE WARRIORS: USTR AND THE AMERICAN CRUSADE FOR FREE TRADE* 6-7 (1995). George Schultz opined in describing passage of one trade bill: "Every major legislative proposal, if it is to be successful, must be presented in policy terms. Congress, the people, and the executive branch itself must understand a proposal's central purposes." GEORGE P. SCHULTZ & KENNETH W. DAM, *ECONOMIC POLICY BEYOND THE HEADLINES* 138-39 (Univ. of Chicago Press, 2d ed. 1998).

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<sup>18</sup> For further information on the GATT, see generally ANTHONY M. ENDRES & GRANT A. FLEMING, INTERNATIONAL ORGANIZATIONS AND THE ANALYSIS OF ECONOMIC POLICY, 1919 - 1950 (Cambridge University Press 2002); THOMAS W. ZEILER, FREE TRADE, FREE WORLD (1999).

<sup>19</sup> For information on the World Trade Organization, see generally WORLD TRADE ORGANIZATION, WORLD TRADE ORGANIZATION BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Vol. 1 - 1995 (2002); THE ROLE OF THE WTO IN GLOBAL GOVERNANCE (Gary P. Sampson ed., 2001).

<sup>20</sup> TOBY MILLER & GEORGE YUDICE, CULTURAL POLICY 171-75 (2002); Paul Swann, *The Little State Department: Hollywood and the State Department in the Postwar World*, AM. STUDIES INT'L, Apr. 1991, at 2, 9 ("Both [the U.S. government and the U.S. film industry] wanted to play down the national cultural sovereignty issue of film exports, which was the major concern for some of the nations on the other side of the bargaining table, and to have them treated like other exports.").

<sup>21</sup> ECKHARD JANEBA, INTERNATIONAL TRADE AND CULTURAL IDENTITY 3 (Nat'l Bureau of Econ. Research, Working Paper No. W10426, 2004); UNESCO, A SURVEY ON NATIONAL CINEMATOGRAPHY at 19 (Mar. 2000), available at [http://www.unesco.org/culture/industries/cinema/html\\_eng/survey.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/survey.shtml) [hereinafter UNESCO SURVEY].

<sup>22</sup> In addition, a working Group on Audiovisual Services held a number of meetings during the Uruguay Round and the Secretariat produced a note on "Matters Relating to Trade in Audiovisual Services." World Trade Organization, Council for Trade in Services, *Audiovisual Services: Background Note by the Secretariat*, S/C/W/40 (June 15, 1998). The World Trade Organization's Services Sectoral Classification List lists audio visual services as: Motion picture and video tape production and distributions services, motion picture projection service, radio and television services, radio and television transmission services, and sound recordings. World Trade Organization, *Services Sectoral Classification List*, MTN.GNS/W/120, at 3-4 (Jul. 10, 1991).

<sup>23</sup> ARPITA MUKHERJEE, INDIA'S TRADE POTENTIAL IN AUDIO-VISUAL SERVICES AND GATS 51 (Indian Council for Research on Int'l Econ. Relations, Working Paper No. 81, 2002), available at <http://www.icrier.org/pdf/avpaper.pdf>.

<sup>24</sup> *Id.* at 53.

<sup>25</sup> Des Freedman, *Trade Versus Culture: An Evaluation of the Impact of Current GATS Negotiations on Audio-Visual Industries*, International Studies Association 2002 Convention Paper Archive, at <http://www.isanet.org/noarchive/freedman.html> (last visited Oct. 2, 2004) (quoting Herman Gulperin, *Cultural Issues in the Age of Free-Trade Agreements*, 24 CANADIAN J. OF COMMS. 1 (1999)).

<sup>26</sup> Council for Trade in Services, Special Session, on Audiovisual and Related Services, *Communication from the United States to the World Trade Organization*, S/CSS/W/21, at 2-3 (Dec. 18, 2000).

<sup>27</sup> First, there are too many ways that American culture moves to cover in a short paper. The migration of dance music as teenagers visit relatives in Canada, Mexico or the Caribbean would cover several dissertations alone. Second, technology is changing so quickly that how culture moves at all would fill another set of papers.

<sup>28</sup> In a constantly changing technological world it is hard to name everything that might be covered as an audiovisual service but that category includes at the very least: production of films, distribution of films, creation and production of television content, home video entertainment and transmission services such as cable and satellite.

<sup>29</sup> TYLER COWEN, CREATIVE DESTRUCTION 73 (2002).

<sup>30</sup> *Id.*

<sup>31</sup> UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/trade.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/trade.shtml).

<sup>32</sup> Nevertheless, my lack of focus on the French is a problem because France is both a large motion picture producer, a large film importer from the United States, and a significant leader of the opposition to any trade negotiations on culture. Although France is not within the top 5 film producers each year it does make the top ten with over 150 films each year. UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/prod.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/prod.shtml). France is also the country, along with the European Union, that argued for the cultural exception to trade negotiations during the Uruguay round. *Id.* at [http://www.unesco.org/culture/industries/cinema/html\\_eng/divers.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/divers.shtml); see *supra* text accompanying notes 21-23. Also, Egypt is a significant motion picture center with a foreign market throughout the Arabic speaking world.

<sup>33</sup> UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/trade.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/trade.shtml).

<sup>34</sup> The markets of export interest to India are those with large NRI concentration. Expatriate Indians maintain close ethnic connections with their motherland and have generated a strong demand for both Hindi and regional programs. Countries with high NRI concentration include the USA, EU, Canada, Australia, middle-east countries such as UAE and Kuwait, some south-Asian countries such as Kenya, Nigeria, Tanzania, Uganda, etc. There is a strong demand for Indian language programming from neighboring countries such as Pakistan, Bangladesh and Sri Lanka. In recent years, Indian programs are penetrating into non-traditional markets such as Japan. The Indian film and television industry is also exploring the Latin American market (Brazil and Argentina). MUKHERJEE, *supra* note 23, at 59.

<sup>35</sup> For a broader discussion of the European Union and the United States' film industry see JENS ULFF-MØLLER, HOLLYWOOD'S FILM WARS WITH FRANCE (2001).

<sup>36</sup> Canada and the United States are part of the North American Free Trade Agreement. Australia and the United States are involved in bilateral trade negotiations. India

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(along with Canada and Australia) is part of the World Trade Organization negotiations on services going on as part of the Doha Round.

<sup>37</sup> In March 2000, UNESCO's culture sector, division of creativity, cultural industries and copyright issued the results of "A Survey on National Cinematography." UNESCO SURVEY, *supra* note 21, at <http://www.unesco.org/culture/industries/cinema/html.eng/prod.shtml> (noting that India and the United States are two of the top five producers of films each year, and the top five producers issue over 200 films each year. Using average annual production from 1988 to 1989, UNESCO found that India produced 839 feature length films, followed by China and Hong Kong (469), the Philippines (456), the United States (385) and Japan (238). Canada is listed in the same survey as one of 25 medium producing countries (less than 200 films per year) with an annual average output of 24, while Australia is listed as one of 72 small production countries (less than 20 films per year) with an annual production of 18 films per year).

<sup>38</sup> According to UNESCO, the United States earns 60% of its film revenues from foreign markets. UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/media.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/media.shtml).

<sup>39</sup> MUKHERJEE, *supra* note 23, at 2.

<sup>40</sup> See *supra* text accompanying note 37.

<sup>41</sup> MOTION PICTURE ASSOCIATION, U.S. ENTERTAINMENT INDUSTRY: 2002 MPA MARKET STATISTICS 3 (2003). This \$9.5 billion represents theatre attendance in the United States without regard to overseas sales. Nor does it include DVD, Pay-Per-View or other types of entertainments. The attendance figures are based on 467 films released in the United States in 2002. *Id.* at 13.

<sup>42</sup> 2002 OES Industry-Specific Occupational Employment and Wage Estimates: Motion Picture and Video Industries – Industry Totals, [http://stats.bls.gov/oes/2002/naics4\\_512100.htm#600-0000](http://stats.bls.gov/oes/2002/naics4_512100.htm#600-0000). This figure includes a range of workers from agents to librarians. U.S. Department of Labor, Bureau of Labor Statistics. The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 700 occupations. These are estimates of the number of people employed in certain occupations, and estimates of the wages paid to them. Self-employed persons are not included in the estimates. These estimates are available for the nation as a whole, for individual States, and for metropolitan areas; national occupational estimates for specific industries are also available.

<sup>43</sup> Motion Picture Association of America, *MPA Snap Shot Report: 2002 International Theatrical Market* (2003).

<sup>44</sup> *Id.*

<sup>45</sup> Motion Picture Association of America, *Anti-Piracy: The Economic Picture*, at <http://www.mpa.org/anti-piracy/> (last visited Oct. 2, 2004) [hereinafter MPA *Anti-Piracy*].

<sup>46</sup> *Id.*

<sup>47</sup> Australian Film Commission, *National Survey of Feature film and TV Drama Production 2002/03* (2003). Table I - Production Activity shows thirty-one films produced in 1999, twenty-six films produced in 2000, thirty films produced in 2001 and nineteen films produced in 2002.

<sup>48</sup> UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/trade.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/trade.shtml).

<sup>49</sup> The Australian Film commission defines "Australian" as a "project under Australian creative control (i.e. where the key elements are predominately Australian and the project was originated and developed by Australians)." This includes projects that are 100 percent foreign financed. The Commission defines "Co-production" as "where creative control is shared between Australian and foreign partners and there is a mix of Australian and foreign elements in the key creative positions." "Foreign" productions are "under foreign creative control, originated and developed by non-Australians." Australian Film Commission, *supra* note 47, at 8.

<sup>50</sup> *Id.* Co-productions ranged from one to three during the 1999 to 2003 period and foreign origin films ranged from two to seven during the same period.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* For example, in 1999 Australian films brought 126 million Australian dollars to the local economy while foreign films brought in another 78 million. For 2000 to 2003, however, the amount of monies from foreign films exceeded the monies from Australian films each year with Australian revenues of 79 million vs. 114 million foreign revenues in 2000, 129 million Australian to 185 million foreign in 2001 and 49 million Australian to 169 million foreign in 2002.

<sup>53</sup> Australian Film Commission, *Fast Facts, Cinema Industry*, at <http://www.afc.gov.au/GTP/wcfast.html> (last visited Oct. 2, 2004).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Australian Film Commission, *Fast Facts, Production Industry*, at <http://www.afc.gov.au/gtp/mpfast.html> (last visited Oct. 2, 2004).

<sup>58</sup> *Id.*

<sup>59</sup> Australian Film Commission, *supra* note 53.

<sup>60</sup> UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/prod.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/prod.shtml).

<sup>61</sup> *Id.* at [http://www.unesco.org/culture/industries/cinema/html\\_eng/trade.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/trade.shtml).

# The United States' Trade Policy and the Exportation of United States' Culture

<sup>62</sup> *Film, Video and Audio-Visual Distribution*, THE DAILY (Statistics Canada, Ottawa, Ontario), Dec. 15, 2003, at 5, <http://www.statcan.ca/Daily/English/031215/d031215b.htm>.

<sup>63</sup> *Id.* These figures are confirmed by Statistics Canada, which reports a doubling of Canadian revenues from foreign exports from 1991 to 1994 and again from 1994 to 1996. See Louise Earl, *Spending on Selected Recreation Items in Canada*, 10 FOCUS ON CULTURE 2, 2 (1998), available at <http://www.statcan.ca/english/ads/87-004-XPB/pdf/fcar1998010002s2a01.pdf>.

<sup>64</sup> *Film, Video and Audio-Visual Distribution*, *supra* note 62.

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.* at 5.

<sup>67</sup> UNESCO, *A Survey on National Cinematography* 9, ( Mar. 2000), available at <http://unesdoc.unesco.org/images/0012/001228/122897eo.pdf>.

<sup>68</sup> ARPITA MUKHERJEE, HWWA HAMBURG, *AUDIO-VISUAL POLICIES AND INTERNATIONAL TRADE: THE CASE OF INDIA 2* (2003), available at <http://www.hwwa.de/Publikationen/Report/2003/Report227.pdf>.

<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Id.*

<sup>71</sup> MUKHERJEE, *supra* note 23, at 31.

<sup>72</sup> *Id.* at 30.

<sup>73</sup> *Id.* at 27.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 33.

<sup>76</sup> *Id.*

<sup>77</sup> Of the 19 Australian features produced in 2002/2003, nine received "substantial" government subsidies. *Id.* The Australian Film Commission characterizes these subsidies as "substantial" but does not give dollar figures in this report.

<sup>78</sup> MILLER & YUDICE, *supra* note 20, at 84.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Policy and Regulation Issues for Network-Based Context Services*, Organization for Economic Co-operation and Development (OECD) Doc. DSTI/ICCP/IE(96)9/FINAL (May 1999), at 17-18.

<sup>82</sup> *Id.*

<sup>83</sup> This incentive allowed a \$150 deduction for every \$100 spent on film production and an exemption from tax for a percentage of film profits. *Id.*

<sup>84</sup> *Id.* at 18.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> MUKHERJEE, *supra* note 68, at 8-9.

<sup>88</sup> WTO Council for Trade in Services, *Audiovisual Services, Communication from the United States, S/C/W/78* (98-5007) (Dec. 8, 1998).

<sup>89</sup> UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/table7.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/table7.shtml). The United States comes in fourth of the top 5 film producers preceded by India (839), China and Hong Kong combined (469), the Philippines (456) and followed by Japan (238). Other five figure producers are Thailand (194) and France (183). After this, film production drops to two figures annually with a country able to enter the second tier with as few as 20 motion pictures produced each year. *Id.*

<sup>90</sup> MPA Anti-Piracy, *supra* note 45.

<sup>91</sup> World Trade Organization, Council for Trade in Services, *Audiovisual Services: Background Note by the Secretariat, S/C/W/40* (June 15, 1998).

<sup>92</sup> UNESCO SURVEY, *supra* note 21, at [http://www.unesco.org/culture/industries/cinema/html\\_eng/trade.shtml](http://www.unesco.org/culture/industries/cinema/html_eng/trade.shtml).

<sup>93</sup> JANEBA, *supra* note 21.

<sup>94</sup> *Id.* at 6.

<sup>95</sup> Freedman, *supra* note 25.

<sup>96</sup> ULFF-MØLLER, *supra* note 35; see Simona Fuma Shapiro, *The Culture Thief*, NEW RULES, Fall 2000, at 10, 11 ("Many observers would attribute Hollywood's dominance to simple market forces: moviegoers of the world are asserting a clear preference for Hollywood fare. While there is some truth to this claim it is also true that numerous economic forces tilt the playing field in Hollywood's favor."); Paul Swann, *supra* note 20, at 2,3 ("In general, the U.S. government supported the policies and actions of the U.S. film industry overseas in the post-World War II years . . .").

<sup>97</sup> C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY*, 8-10 (2002) (The "public goods" aspect of the cultural industry means that the sector operates on high initial costs that decrease with each additional purchase. Having products that are very costly to make but cheap to reproduce makes pricing difficult.).

<sup>98</sup> *Id.* at 10-11 (Externalities measure how people not directly involved in the transaction gain or lose from the deal. Media produces both positive and negative externalities because one person's media consumption

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influences other people's lives by creating, for example, more informed citizens —a positive externality— or encouraging teen violence —a negative externality.).

<sup>99</sup> *Id.* at 11-12 (For example, what advertisers want or can pay and what audiences want or will pay produce different and not necessarily compatible price structures. Media more than other businesses has this dual purchaser component.).

<sup>100</sup> *Id.* at 12-14 (People come to media not simply for entertainment but also to learn and grow. In other words, people use audiovisual services in order to shape their preferences. Again, from a pricing perspective, the circle between purchasing because of preference and a commodity that shapes preference creates incentives to favor larger purchasers. Favoring certain purchasers over others undercuts market preference. Favoring certain purchasers over others also shapes market preferences.).

<sup>101</sup> *Id.* at 222-23.

<sup>102</sup> David Rothkopf, *In Praise of Cultural Imperialism? (Effects of Globalization on Culture)*, FOREIGN POL'Y, June 22, 1997, at 38, 45.

<sup>103</sup> *Id.* at 46-47.

<sup>104</sup> This does not mean that Australia, Canada and India will not negotiate on intellectual property laws. Each has agreed to strengthen their copyright protections and to move toward a more uniform system worldwide.

<sup>105</sup> Stephen R. Konigsberg, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption and The Liberalization of the Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281, 284 ("[T]he Canadian fear of both American culture and the domination of its entertainment industry interests prompted Canada to exclude or exempt its own cultural industries from the FTA. In fact, Canadian insistence led to the inclusion of the Cultural Industry Exemption Clause . . .").

<sup>106</sup> MUKHERJEE, *supra* note 23.

<sup>107</sup> MILLER & YUDICE, *supra* note 20, at 35.

<sup>108</sup> Feminists point out that part of United States' culture is that men do not acknowledge their gender. Queer theorists have extended this observation to heterosexuals who do not acknowledge their sexual preference and critical race theorists have made the same observation about white skin privilege. The failure to acknowledge culture is not equally strong in all parts of the United States. Southerners do acknowledge a unique culture as do some westerners.

<sup>109</sup> In this regard, UNESCO's Universal Declaration on Cultural Diversity that states:

Article 8 - Cultural goods and services: commodities of a unique kind:

In the face of present-day economic and technological change, opening up vast

prospects for creation and innovation, particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists and to the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.

*Universal Declaration on Cultural Diversity*, UNESCO, Art. 8 (Nov. 2001), available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

<sup>110</sup> COWEN, *supra* note 29 at 128-52.

<sup>111</sup> *Id.* at 74-75.

<sup>112</sup> Hernan Galperin, *Cultural Industries in the Age of Free-Trade Agreements*, 24 CAN. J. COMM. 1, 49 (1999).

<sup>113</sup> MILLER & YUDICE, *supra* note 20, at 86.

<sup>114</sup> GEORGE H. QUENTER, THE INTERNATIONAL POLITICS OF TELEVISION 110 (1990).

<sup>115</sup> Ian Slotin, *Free Speech and the Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination*,

111 YALE L.J. 2289, 2298 (2002).