

# A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS

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## I. INTRODUCTION

On October 20, 2005,<sup>1</sup> the General Conference of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) approved the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions (“UNESCO Convention”).<sup>2</sup> Israel and the United States (“US”) voted against the convention,<sup>3</sup> the latter citing concerns about conflict with the World Trade Organization (“WTO”) and inhibiting international trade.<sup>4</sup> This was but the latest illustration of the stalemate among the 149 Members of the WTO regarding the relationship between trade and culture. This problem has dogged the organization from the days of the General Agreement on Tariffs and Trade (“GATT”) of 1947 to the present, punctuated by disputes regarding European television regulation,<sup>5</sup> Turkish film taxes,<sup>6</sup> and Canadian periodicals,<sup>7</sup> and left unresolved by the Uruguay

<sup>1</sup> Press Release, UNESCO, General Conference Adopts Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), available at [http://portal.unesco.org/en/ev.php-URL\\_ID=30297&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=30297&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>2</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO (Oct. 20, 2005), available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

<sup>3</sup> Alan Riding, *U.S. All But Alone in Opposing UNESCO Cultural Pact*, INT’L HERALD TRIB., Oct. 20, 2005, available at <http://www.iht.com/articles/2005/10/20/news/unesco.php>.

<sup>4</sup> Press Release, United States Mission to UNESCO, UNESCO Convention Could Limit Freedom of Cultural Expressions and Trade (Oct. 20, 2005), available at <http://www.us-mission.ch/Press2005/2010Oliver.htm>.

<sup>5</sup> See GATT, *EEC—Directive on Transfrontier Television: Response to Request for Consultations under Article XXII:1 by the United States*, DS4/4 (Nov. 8, 1989), available at [http://www.wto.org/gatt\\_docs/English/SULPDF/91450290.pdf](http://www.wto.org/gatt_docs/English/SULPDF/91450290.pdf). See also Jon Filipek, “Culture Quotas”: *The Trade Controversy over the European Community’s Broadcasting Directive*, 28 STAN. J. INT’L L. 323 (1992).

<sup>6</sup> Dispute Settlement Body, WTO, *Turkey—Taxation of Foreign Film Revenues: Request for Consultations by the United States*, WT/DS43/1, G/L/85 (June 17, 1996); Dispute Settlement Body, WTO, *Turkey—Taxation of Foreign Film Revenues: Request for the Establishment of a Panel by the United States*, WT/DS43/2 (Jan. 10, 1997).

<sup>7</sup> Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997); Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/

Round.<sup>8</sup> One of the most challenging aspects of the trade–culture contest involves audiovisual products such as films, radio, television, and sound recordings. WTO dispute settlement alone cannot be relied upon to provide a satisfactory compromise among WTO Members regarding these products, and neither the UNESCO Convention (which is set to enter into force on March 18, 2007) nor any other international instrument appears likely to resolve the issue. Accordingly, WTO Members must consider a third, final option for achieving a solution: trying again to reach agreement. This approach will give Members the best chance of reconciling cultural and trade values and the greatest control over the outcome.

Members are already locked in intense negotiations to improve and build on the Uruguay Round agreements, as part of the Doha Development Agenda. However, these negotiations are limited by tight deadlines (several of which were already missed before the negotiations were suspended in July 2006)<sup>9</sup> and a restricted mandate. For example, the negotiations on the General Agreement on Trade in Services (“GATS”) are to “take place within and . . . respect the existing structure and principles of the GATS, including the right to specify sectors in which commitments will be undertaken and the four modes of supply.”<sup>10</sup> Similarly, although the Doha negotiations cover some cross-cutting issues such as development, Members lack a general mandate to review GATT 1994. The outcome of Doha will also depend on various political matters and horse-trading. In other words, Members’ positions and flexibility in relation to audiovisual products are likely to be influenced by factors such as lobbying by the cultural industries and gains or concessions in other areas of the negotiations, such as agriculture. Ac-

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DS31/AB/R (June 30, 1997). See also Trevor Knight, *The Dual Nature of Cultural Products: An Analysis of the World Trade Organization’s Decisions Regarding Canadian Periodicals*, 57 U. TORONTO FAC. L. REV. 165 (1999).

<sup>8</sup> See, e.g., Council for Trade in Services, WTO, *Audiovisual Services: Background Note by the Secretariat*, paras. 24, 30, S/C/W/40 (June 15, 1998); GATT, *Peter Sutherland Responds to Debate on Audiovisual Sector*, NUR 069 (Oct. 14, 1993).

<sup>9</sup> See, e.g., WTO, *Talks Suspended*. “Today there are only losers.” (July 24, 2006), available at [http://www.wto.org/english/news\\_e/news06\\_e/mod06\\_summary\\_24july\\_e.htm](http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm); Ministerial Conference, WTO, *Doha Work Programme: Ministerial Declaration Adopted on 18 December 2005*, para. 1, WT/MIN(05)/DEC (Dec. 22, 2005); General Council, WTO, *Decision Adopted by the General Council on 1 August 2004*, para. 3, WT/L/579 (Aug. 2, 2004); Ministerial Conference, WTO, *Ministerial Declaration Adopted on 14 November 2001*, para. 45, WT/MIN(01)/DEC/1 (Nov. 20, 2001), available at [http://www.wto.org/English/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm). Negotiations appear to have resumed: WTO, *Lamy: “We have resumed negotiations fully across the board”* (Feb. 7, 2007), available at [http://www.wto.org/english/news\\_e/news07\\_e/gc\\_dg\\_stat\\_7feb07\\_e.htm](http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.htm).

<sup>10</sup> Council for Trade in Services, WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, para. 4, S/L/93 (Mar. 29, 2001).

cordingly, this article is intended neither as a guide for negotiators nor as a prediction of what Doha could achieve in relation to audiovisual products. Rather, it takes a more radical, long-term view of possible improvements to the current treatment of audiovisual products in order to encourage creative thinking and reflection in this area, and to offer a suggestion for accommodating the different views of WTO Members.

Below, I first identify several problems with the current treatment of audiovisual products in the WTO, focusing on GATT 1994 and GATS. Here I highlight why all WTO Members should be concerned about the status quo, regardless of their positions on the nature of audiovisual products and the rationale for discriminatory or trade-restrictive measures imposed on these products in the name of cultural policy. I then set out a new approach to audiovisual products in the WTO, taking a holistic view of GATT 1994 and GATS rather than seeing them as two separate and independent agreements, and proposing sectoral treatment of audiovisual services analogous to the existing GATS Annexes on Telecommunications, Air Transport Services, and Financial Services. Finally, I consider certain alternative proposals suggested by other authors.

In this article, I aim to avoid addressing matters I have covered elsewhere. Thus, I do not describe in any detail the complex framework of WTO rules that applies to audiovisual products and the historical background that created it,<sup>11</sup> or the implications of the UNESCO Convention for the WTO.<sup>12</sup> Nor do I enter the difficult debate over whether audiovisual products deserve special treatment or are qualitatively different from other kinds of products.<sup>13</sup>

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<sup>11</sup> Tania Voon, *Cultural Products and the World Trade Organization* (forthcoming 2007). See also Americo Beviglia-Zampetti, *WTO Rules in the Audio-Visual Sector*, in *Cultural Diversity and International Economic Integration: The Global Governance of the Audio-Visual Sector* 261 (Paulo Guerrieri, Lelio Lapedra & Georg Koopmann eds., 2005); Mary Footer & Christoph Graber, *Trade Liberalization and Cultural Policy*, 3 *J. INT'L ECON L.* 115 (2000).

<sup>12</sup> Tania Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55 *INT'L & COMP. L.Q.* 635 (2006). See also Keith Acheson & Christopher Maule, *Convention on Cultural Diversity*, 28 *J. CULTURAL ECON.* 243 (2004); IVAN BERNIER & HÉLÈNE RUIZ FABRI, *ÉVALUATION DE LA FAISABILITÉ JURIDIQUE D'UN INSTRUMENT INTERNATIONAL SUR LA DIVERSITÉ CULTURELLE* (2002); Gilbert Gagné, *Une Convention internationale sur la diversité culturelle et le dilemme culture-commerce*, in *LA DIVERSITÉ CULTURELLE: VERS UNE CONVENTION INTERNATIONALE EFFECTIVE?* 37 (Gilbert Gagné ed., 2005).

<sup>13</sup> Tania Voon, *State Support for Audiovisual Products in the World Trade Organization: Protectionism or Cultural Policy?*, 13 *INT'L J. CULTURAL PROP.* 129 (2006). See also PETER GRANT & CHRIS WOOD, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (2004); David Throsby, *Cultural Capital*, 23 *J. CULTURAL ECON.* 3 (1999).

## II. PROBLEMS WITH THE STATUS QUO

### A. Overview

Audiovisual products are treated quite differently in WTO law depending on whether they are classified as goods or services. To the extent that they are goods, they are subject to exacting disciplines under GATT 1994. The only special treatment for these particular products is in Article IV, which provides certain exceptions to national treatment and most-favored nation (“MFN”) treatment<sup>14</sup> for film screening quotas.<sup>15</sup> At the same time, GATT 1994 offers additional leeway for Members imposing cultural policy measures on these products through generally applicable provisions, such as the allowance for emergency safeguard measures under Article XIX<sup>16</sup> and the exemption from the national treatment requirement of certain kinds of subsidies under Article III:8(b).<sup>17</sup> In contrast, to the extent that audiovisual products are services, GATS simultaneously imposes fewer general disciplines and offers fewer general escape routes. In addition to the possibility of listing MFN exemptions under GATS,<sup>18</sup> Members may refrain from making national treatment or market access commitments in relation to audiovisual products.<sup>19</sup> However, if Members do make unlimited commitments of this kind they may be more restricted in granting subsidies than under GATT 1994, in particular because GATS contains no general exemption from national treatment commitments with respect to

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<sup>14</sup> National treatment and MFN treatment are two key WTO disciplines, reflected in several WTO agreements, that are intended to minimize discriminatory barriers to international trade. Article III of GATT 1994 essentially requires WTO Members to treat imported products of other Members no less favorably than like domestic products with respect to such matters as internal taxation and other regulations related to sale and distribution. This is a national treatment obligation. Article I of GATT 1994 essentially requires, with respect to customs duties and other rules affecting import or export, that WTO Members provide any benefit offered to a product originating in or destined for any other country to all like products originating in or destined for any other WTO Member. This is an MFN obligation.

<sup>15</sup> Article IV relates to “internal quantitative regulations relating to exposed cinematograph films,” which must take the form of “screen quotas” conforming to certain requirements. Contrary to national treatment, such quotas “may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized” (paragraph a). Contrary to MFN treatment, such quotas may “reserve a minimum proportion of screen time for films of a specified origin other than that of the Member imposing such screen quotas; *Provided* that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947” (paragraph c).

<sup>16</sup> The Agreement on Safeguards imposes additional conditions and disciplines on safeguards.

<sup>17</sup> The Agreement on Subsidies and Countervailing Measures imposes additional conditions and disciplines on subsidies.

<sup>18</sup> General Agreement on Trade in Services, Apr. 15, 1994, art. II:2, 33 I.L.M. 1167 (1994) [hereinafter GATS].

<sup>19</sup> GATS, arts. XVII:1, XVI:1.

subsidies. GATS also lacks provisions equivalent to GATT Article IV for screen quotas and to GATT Article XIX for safeguards.<sup>20</sup>

The present GATS framework may restrict further liberalization in the audiovisual industries, hampering the goal of further liberalization among WTO Members and its attendant benefits. In addition, the disparity of treatment under GATT 1994 and GATS aggravates uncertainties regarding matters such as classifying digital products as goods or services, applying more than one WTO agreement to a single measure, and the scope of exceptions for public morals, national treasures, and screen quotas. These issues should concern Members on both sides of the trade–culture debate.

## B. *Distinction between Goods and Services*

### 1. Digital Products: Goods or Services?

The classification as goods or services of products that are, or could take, a digital rather than physical form has long been disputed in the GATT and WTO. In 1961, a Working Party was established at the request of the US to examine the application of GATT 1947 to television programs.<sup>21</sup> The US argued that television programs are goods under GATT 1947, but that Article IV should not extend to these programs because of the different nature of television compared to “cinematograph films.” Instead, it proposed that Members be required to balance any national regulations reserving transmission time to domestic producers with provisions for reasonable access to foreign programs.<sup>22</sup> Other members of the Working Party suggested that Article IV should apply equally to television programs, or that television programming is a service not covered by GATT 1947.<sup>23</sup> The Working Party

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<sup>20</sup> See GATS, art. X:1.

<sup>21</sup> GATT, *Application of GATT to International Trade in Television Programmes*, L/1615 (Nov. 16, 1961).

<sup>22</sup> GATT, *Application of GATT to International Trade in Television Programmes: Statement made by the United States Representative on 21 November 1961*, L/1646 (Nov. 24, 1961). See also GATT, *Application of GATT to International Trade in Television Programmes: Proposal by the Government of the United States*, L/2120 (Mar. 18, 1964); GATT, *Application of GATT to International Trade in Television Programmes: Revised United States Draft Recommendations*, at 2, L/1908 (Nov. 10, 1962).

<sup>23</sup> GATT, *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, paras. 6, 10, L/1741 (Mar. 13, 1962). See also Uruguay Round Group of Negotiations on Services, Working Group on Audiovisual Services, *Note on the Meeting of 27-28 August 1990*, para. 8, MTN.GNS/AUD/1 (Sept. 27, 1990) (where Japan states that GATT Article IV does not apply to radio or television).

made draft recommendations<sup>24</sup> but did not resolve this issue.<sup>25</sup> Jackson wrote in 1969:

The initial United States proposal recognized that a number of television restrictions then existed that were probably violations of GATT . . . [P]resumably, the alleged violations continue.<sup>26</sup>

On October 3, 1989, the Council of the European Communities (“EC”) adopted the “Television without Frontiers Directive.”<sup>27</sup> Broadly, the Directive requires EC Member States, “where practicable and by appropriate means,” to ensure that broadcasters reserve a majority of their transmission time for European works,<sup>28</sup> as well as at least 10% of their transmission time, or 10% of their programming budget, for European works created by producers who are independent of broadcasters.<sup>29</sup> The Directive specifically refers to the role of television in providing information, education, culture and entertainment,<sup>30</sup> and it “was largely drafted at France’s insistence and is largely in line with the main aspects of French audio-visual policy.”<sup>31</sup> The US requested consultations under GATT 1947 with the EC and a number of European countries regarding the Directive, claiming that certain of its provisions could require Member States to take actions that would violate GATT.<sup>32</sup> The US Trade Representative also placed the EC on its

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<sup>24</sup> GATT, *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, annex 1, L/1741 (Mar. 13, 1962).

<sup>25</sup> Filipek, *supra* note 5, at 342.

<sup>26</sup> JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 294 (1969).

<sup>27</sup> See generally Filipek, *supra* note 5.

<sup>28</sup> Council of the European Communities, EC, *Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities*, art. 4(1), OJ L298, 23 (Oct. 17, 1989) (as amended by European Parliament and Council of the European Union, *Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, OJ L202, 60 (July 30, 1997)).

<sup>29</sup> *Id.* at art. 5.

<sup>30</sup> *Id.* at arts. 4(1), 5, 19(a).

<sup>31</sup> Emmanuel Cocq & Patrick Messerlin, *French Audio-Visual Policy: Impact and Compatibility with Trade Negotiations*, in Guerrieri et al. eds., *supra* note 11, at 21, 22.

<sup>32</sup> GATT, *Austria/Luxembourg/Netherlands/Norway/Spain/Sweden/Switzerland/United Kingdom—Measures to be Taken under the European Convention on Transfrontier Television: Request for Consultations under Article XXII:1 by the United States*, DS4/1 (Sept. 11, 1989); GATT, *EEC—Directive on Transfrontier Television: Request for Consultations under Article XXII:1 by the United States*, DS4/3 (Nov. 8, 1989); GATT, *France—Television Broadcasting of Cinematographic and Audiovisual Works: Request for Consultations under Article XXII:1 by the United States*, DS4/5 (May 8, 1990); Uruguay Round Group of Negotiations on Services, Working Group on Audiovisual Services, *Matters Relating to Trade in Audiovisual Services: Note by the Secretariat*, n. 8, MTN.GNS/AUD/W/1 (Oct. 4, 1990).

“Special 301 Priority Watch List.”<sup>33</sup> The EC contended that the Directive fell outside GATT 1947.<sup>34</sup> Eventually, this dispute was merged into the Uruguay Round negotiations on services.<sup>35</sup> Some commentators suggest that GATT Article IV cannot now be regarded as applicable to television programming due to the subsequent practice of Members (in particular, the discussion of television during the Uruguay Round negotiations on services).<sup>36</sup> Instead, television programs are subsumed under the GATS treatment of audiovisual services.

Classifying television broadcasting is not the only problem. Audiovisual products generally involve elements of both goods and services. They may be created or provided through services such as film distribution, but they may also take physical forms such as film reels,<sup>37</sup> CDs, DVDs, and video and audio tapes.<sup>38</sup> These things seem like ordinary goods (things you can drop on your foot), whether ordered online and then delivered in physical form,<sup>39</sup> or purchased in a shop.<sup>40</sup> However, an audiovisual product that is delivered via satellite or the Internet may be more like a service. The question of whether to classify these “digitized” or “digital” products as goods or services remains unresolved

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<sup>33</sup> Filipek, *supra* note 5, at 326 (citing Press Release, USTR, Hills Announces Implementation of Special 301 and Title VII (Apr. 26, 1991)).

<sup>34</sup> GATT, *EEC—Directive on Transfrontier Television: Response to Request for Consultations under Article XXII:1 by the United States*, at 1, DS4/4 (Nov. 8, 1989).

<sup>35</sup> GATT, *Major Proposals Tabled on Safeguards while First Sectoral Discussions Take Place in Services Group*, NUR 029 (July 7, 1989); Bruno de Witte, *Trade in Culture: International Legal Regimes and EU Constitutional Values*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 237, 243 (Gráinne de Búrca & Joanne Scott eds., 2001).

<sup>36</sup> Andrew Carlson, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 *MINN. J. GLOBAL TRADE* 585, 599-600 (1997); de Witte, *supra* note 35, at 245-46.

<sup>37</sup> Uruguay Round Group of Negotiations on Services, Working Group on Audiovisual Services, *Note on the Meeting of 27-28 August 1990*, para. 19, MTN.GNS/AUD/1 (Sept. 27, 1990) (representative of Switzerland).

<sup>38</sup> See International Convention on the Harmonized Commodity Description and Coding Systems, annex, headings 37.06, 85.24, June 14, 1983, 1503 U.N.T.S. 167.

<sup>39</sup> Working Party on the Information Economy, OECD, *Digital Broadband Content: Music*, at 19, DSTI/ICCP/IE(2004)12/FINAL (June 8, 2005).

<sup>40</sup> Council for Trade in Services, *The Work Programme on Electronic Commerce: Note by the Secretariat*, para. 30, S/C/W/68 (Nov. 16, 1998); Andrew Mitchell, *Towards Compatibility: The Future of Electronic Commerce Within the Global Trading System*, 4 *J. INT'L ECON. L.* 683, 703 (2001); Arvind Panagariya, *Electronic Commerce, WTO and Developing Countries*, 23 *WORLD ECON.* 959, 960-61 (2000).

within the WTO<sup>41</sup> and is presently the subject of a work program on electronic commerce.<sup>42</sup>

In the EC's view, "[e]lectronic deliveries consist of supplies of services which fall within the scope of the GATS."<sup>43</sup> Its preferred approach would ensure that music, films, and similar products delivered electronically fall within the EC's effective exclusion of audiovisual services from GATS (through the EC's MFN exemptions and absence of national treatment and market access commitments for this sector) instead of being subject to GATT 1994.<sup>44</sup> Not surprisingly, the US has suggested that, due to "the broader reach of WTO disciplines accorded by the GATT . . . there may be an advantage to a GATT versus GATS approach to [digital] products which could provide for a more trade-liberalizing outcome for electronic commerce."<sup>45</sup> The failure of WTO Members to agree on how to classify digital products is thus symptomatic of a larger difficulty, namely the starkly different treatment of audiovisual products under GATT 1994 and GATS.

Pending consensus on whether digital products are goods or services, WTO Members have reached an informal agreement not to impose customs duties on electronic transmissions (including transmissions of audiovisual products), which is still in effect.<sup>46</sup> This sit-

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<sup>41</sup> Council for Trade in Goods, WTO, *Work Programme on Electronic Commerce: Background Note by the Secretariat*, para. 1.2, G/C/W/128 (Nov. 5, 1998); Secretariat, WTO, *Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 16 May and 11 July 2003: Summary by the Secretariat of the Issues Raised*, WT/GC/W/509 (July 31, 2003).

<sup>42</sup> Ministerial Conference, WTO, *Ministerial Declaration adopted on 14 November 2001*, para. 34, WT/MIN(01)/DEC/1 (Nov. 20, 2001); Secretariat, WTO, *Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 16 May and 11 July 2003: Summary by the Secretariat of the Issues Raised*, WT/GC/W/509 (July 31, 2003); WTO, *Work Programme on Electronic Commerce Adopted by the General Council on 25 September 1998*, para. 2.1, 3.1, WT/L/274 (Sept. 30, 1998).

<sup>43</sup> Council for Trade in Services, WTO, *Communication from the European Communities and their Member States: Electronic Commerce Work Programme*, para. 6(a), S/C/W/183 (Nov. 30, 2000).

<sup>44</sup> William Drake & Kalypso Nicolaïdis, *Global Electronic Commerce and GATS: The Millennium Round and Beyond*, in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION* 399, 408 (Pierre Sauvé and Robert Stern eds., 2000).

<sup>45</sup> WTO, *Work Programme on Electronic Commerce: Submission by the United States*, para. 7, WT/COMTD/17; WT/GC/16; G/C/2; S/C/7; IP/C/16 (Feb. 12, 1999). See also Sacha Wunsch-Vincent, *The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*, 58 *AUSSENWIRTSCHAFT* 7, 13-15 (2003); SACHA WUNSCH-VINCENT, *THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS: EC-US PERSPECTIVES* 52 (2006) [hereinafter Wunsch-Vincent, *The WTO, the Internet*].

<sup>46</sup> Ministerial Conference, WTO, *Doha Work Programme: Ministerial Declaration Adopted on 18 December 2005*, para. 46, WT/MIN(05)/DEC (Dec. 22, 2005); SACHA WUNSCH-VINCENT, *WTO, E-COMMERCE AND INFORMATION TECHNOLOGIES: FROM THE URUGUAY ROUND THROUGH THE DOHA DEVELOPMENT AGENDA* para. 40 (2004).

uation is problematic. For one thing, the moratorium is temporary and non-binding.<sup>47</sup> Moreover, its effectiveness is limited. Customs duties are rarely imposed on services anyway, and “if a Member has not made a national treatment commitment, then it remains free to impose discriminatory internal taxes, so the commitment not to impose customs duties would not preclude recourse to discriminatory measures with an identical effect.”<sup>48</sup>

## 2. Applying Multiple WTO Agreements to Audiovisual Products

As explained in the previous section, the line between goods and services is becoming increasingly blurred. However, even apart from the complications created by new technologies and new forms of delivering products, it is unhelpful to suggest simply that GATT 1994 applies to trade in goods and GATS to trade in services. For example, the national treatment provision in GATT Article III:4 applies to laws, regulations and requirements affecting internal transportation or distribution of products. Thus, “certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4.”<sup>49</sup> Moreover, GATS may apply to measures affecting services that relate to or are supplied in conjunction with goods. For example, the Appellate Body has found that “trade in services” includes “wholesale trade services of motor vehicles”<sup>50</sup> and “banana import licensing procedures,”<sup>51</sup> even though both motor vehicles and bananas are goods. Thus, it is well-settled as a matter of WTO law that GATT 1994 and GATS may both apply to a particular measure and that, in principle, neither takes precedence.<sup>52</sup>

The overlap between GATT 1994 and GATS could raise thorny interpretational questions in the case of a conflict between these two agreements. The general interpretative note to annex 1A of the Mar-

<sup>47</sup> Wunsch-Vincent, *supra* note 46, para. 319.

<sup>48</sup> Council for Trade in Services, *The Work Programme on Electronic Commerce: Note by the Secretariat*, para. 34, 35, S/C/W/68 (Nov. 16, 1998).

<sup>49</sup> Panel Report, *Canada—Certain Measures Concerning Periodicals*, para. 5.18, WT/DS31/R (Mar. 14, 1997).

<sup>50</sup> Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, para. 157, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000).

<sup>51</sup> Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, para. 222, WT/DS27/AB/R (Sept. 9, 1997).

<sup>52</sup> Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, at 19, WT/DS31/AB/R (June 30, 1997); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, para. 221, WT/DS27/AB/R (Sept. 9, 1997). See also JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 399-405 (2003).

rakesh Agreement Establishing the WTO (“Marrakesh Agreement”) indicates how to resolve conflicts between GATT 1994 and the other multilateral agreements on trade in goods in that annex. However, the WTO agreements contain no such indication regarding the general relationship between GATT 1994 and GATS. Thus, a screen quota exempted under GATT Article IV might appear to violate GATS Article XVI.<sup>53</sup> In that case, it might be argued that the parties clearly intended to exclude these measures from their agreements and therefore that no GATS violation should be found. On the other hand, if a Member has made a specific commitment to provide market access in relation to audiovisual services and has not listed a limitation for the quota, one might conclude that the Member has waived any agreed exclusion implied by GATT Article IV.

Similar issues could arise in relation to other agreements as applied to audiovisual products. For example, a discriminatory subsidy could violate a GATS national treatment commitment, given the absence of any general exemption from national treatment under GATS for subsidies. Would this conclusion be different if the subsidy fell within the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) and complied with its provisions? Conversely, is the freedom flowing from the dearth of subsidy disciplines under GATS illusory, given that subsidies for audiovisual products might in any case be caught by GATT 1994 and the SCM Agreement? As services are sometimes “embodied” in goods, “as for example, the case of a compact disc on which music is recorded,” “some subsidies affecting the supply of services appear, or are treated as, subsidies on goods.”<sup>54</sup>

These examples highlight the negative implications of the overlapping, inconsistent nature of WTO agreements with respect to audiovisual products. Although these problems are not exclusive to audiovisual products, they are particularly acute in this area due to the vast difference in treatment of these products when classified as goods or services, and the sensitivity of these products for many Members. Moreover, the possibility that the goods–service distinction is problematic for products other than audiovisual products does not mean that Members should simply accept the difficulties associated with this distinction in relation to audiovisual products.

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<sup>53</sup> GATS art. XVI concerns market access, preventing Members from maintaining certain types of restrictions in sectors where market access commitments are undertaken.

<sup>54</sup> Working Party on GATS Rules, WTO, *Subsidies and Trade in Services: Note by the Secretariat*, at 4, S/WPGR/W/9 (Mar. 6, 1996).

### C. *Uncertain Exceptions*

In addition to uncertainties regarding the relationship between GATT 1994 and GATS, and other ambiguities in the distinction between goods and services in WTO law, the content of certain exceptions that are particularly crucial for audiovisual products remains unclear. In particular, it is difficult to define the scope of the exceptions under GATT Article XX(a)<sup>55</sup> and GATS Article XIV(a)<sup>56</sup> for public morals, as well as the exception under GATT Article XX(f) for national treasures.<sup>57</sup> The coverage of GATT Article IV is also unclear, as discussed earlier. In particular, does it cover only films screened in cinemas, or could it also extend to video recordings, and films or other broadcasts on television?

The US has suggested that GATT Article XX(a) represents one way in which WTO trade rules “take into account the special cultural qualities of the [audiovisual] sector,”<sup>58</sup> and that GATS Article XIV(a) might also apply to the audiovisual sector in view of its “special cultural qualities.”<sup>59</sup> However, the term “public morals” in these provisions is not defined, and neither the Appellate Body nor any WTO panel has interpreted or applied Article XX(a). The *US – Gambling* case involved GATS Article XIV(a) but provides little guidance about the meaning of public morals. The panel did, however, recognize the potential relevance of cultural concerns to this exception, stating:

We are well aware that there may be sensitivities associated with the interpretation of the terms “public morals” and “public order” in the context of Article XIV. In the Panel’s view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.<sup>60</sup>

The extent to which GATT Article XX(a) and GATS Article XIV(a) could cover cultural matters and therefore cultural policy measures imposed on audiovisual products is uncertain. However, these exceptions are unlikely to extend to measures designed to promote local culture generally rather than to define or enforce “standards of right

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<sup>55</sup> Subject to the *chapeau*, GATT art. XX(a) exempts measures “necessary to protect public morals.”

<sup>56</sup> Subject to the *chapeau*, GATS art. XIV(a) exempts measures “necessary to protect public morals or to maintain public order.”

<sup>57</sup> Subject to the *chapeau*, GATT art. XX(f) exempts measures “imposed for the protection of national treasures of artistic, historic or archaeological value.”

<sup>58</sup> Council for Trade in Services, WTO, *Communication from the United States—Audiovisual and Related Services*, para. 8, S/CSS/W/21 (Dec. 18, 2000).

<sup>59</sup> *Id.* para. 8.

<sup>60</sup> Panel Report, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, para. 6.461, WT/DS285/R (Nov. 10, 2004).

and wrong conduct.”<sup>61</sup> For example, in Egypt, “it is difficult to find a foreign film that does not offend the religious and social traditions of Egyptian society and, hence, will be allowed by the Censorship Authority over audio-visual products.”<sup>62</sup> This measure might involve *de facto* discrimination against foreign films, but, if it were covered by a national treatment commitment, it could well be saved under Article XIV(a). Chinese measures to prevent the promotion of “western ideology and politics”<sup>63</sup> might be less easily characterized as measures protecting public morals. Similarly, discriminatory support to local audiovisual products for the sake of enhancing or developing local culture seems further removed from moral concerns.

The exception for national treasures in Article XX(f) of GATT 1994 (which finds no equivalent in GATS) is subject to significant and uncertain limitations. First, the item must be not only a “treasure” but also “national.” This could prevent restrictions designed to protect a treasure that overlaps national boundaries, or is a treasure at some level that is less than national. However, it would be difficult to state in the abstract any criteria for identifying a national treasure or to determine in advance whether this exception might cover audiovisual products. Second, the exception does not refer to “cultural value,” so this concept is covered only to the extent that it is coextensive with “artistic, historic or archaeological value.” New or “current” products of the audiovisual industries are unlikely to be of historic or archaeological value, and they might not be of sufficient artistic value to be described as national treasures.<sup>64</sup>

These kinds of uncertainties are not unusual in the context of the WTO, international treaties generally, or even domestic statutes. All laws involve some unsettled aspects, and ambiguity may even be deliberate, to accommodate the views of different individuals or groups involved in drafting. The drafters of the WTO agreements recognized that they could not anticipate every issue that might arise in the future, revealing ambiguities in the text. Accordingly, one of the purposes of the WTO dispute settlement system is to clarify the meaning of the

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<sup>61</sup> *Id.* para. 6.465. See also Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 700 (1998).

<sup>62</sup> Ahmed Farouk Ghoneim, *The Audio-Visual Sector in Egypt*, in Guerrieri et al. eds., *supra* note 11, at 192, 201.

<sup>63</sup> Joe McDonald, *China Shuts Door on New Foreign TV Channels*, THE GUARDIAN, Aug. 5, 2005, available at <http://www.guardian.co.uk/china/story/0,7369,1542827,00.html>.

<sup>64</sup> See Christoph Graber, *Audio-visual Policy: The Stumbling Block of Trade Liberalization*, in THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES 165, 200 (Damien Geradin & David Luff eds., 2004) (declaring that “this provision obviously cannot be alleged when trade in audio-visual media is concerned”).

provisions, and hence provide security and predictability in international trade.<sup>65</sup> Therefore, uncertainties alone may provide an insufficient basis for changing the treatment of audiovisual products in WTO law. This is nevertheless a factor to bear in mind when evaluating the present situation, and it may contribute to the limitations on liberalization under GATS, as discussed in the following section.

#### D. *Limits on Liberalization under GATS*

The preamble to GATS makes clear that one objective of this agreement is:

the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives.

This objective is reflected in Part IV of GATS, entitled “Progressive Liberalization.” Successive rounds of negotiation are to take place “with a view to achieving a progressively higher level of liberalization,” and “with due respect for national policy objectives.”<sup>66</sup> However, at least in relation to audiovisual products, this aim is being thwarted. The failure of the GATT contracting parties to achieve a satisfactory resolution to this matter during the Uruguay Round means that the structure of GATS is not at all conducive to increasing liberalization in relation to audiovisual products.

The GATS structure and principles appear to be designed to ensure “an overall balance of rights and obligations, while giving due respect to national policy objectives,” as stated in the preamble. However, the outcome for audiovisual services has tipped too far in favor of Members’ rights to regulate as they see fit, because relatively few of the WTO’s 149 Members have made national treatment or market access commitments in relation to audiovisual services<sup>67</sup> (although a greater proportion of Members acceding after the Uruguay Round were required to make these commitments),<sup>68</sup> and several have listed

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<sup>65</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3.2, 33 I.L.M. 1125 (1994).

<sup>66</sup> GATS, art. XIX:1, 2.

<sup>67</sup> At the time of writing, twenty-seven Members have made national treatment or market access commitments in relation to “audiovisual services”: WTO, *Services Database: Predefined Report – All Sectors in Each Country* (Mar. 21, 2005), available at <http://tsdb.wto.org/wto/WTOHomepublic.htm> (last accessed June 26, 2006); WTO, *The Kingdom of Saudi Arabia – Schedule of Specific Commitments*, GATS/SC/141 (Mar. 29, 2006).

<sup>68</sup> Martin Roy, *Audiovisual Services in the Doha Round: “Dialogue de Sourds, The Sequel”?* 6 J. WORLD INV. AND TRADE 923, 929 (2005).

MFN exemptions in this sector.<sup>69</sup> This is not a problem merely for other Members (such as the US and Chile)<sup>70</sup> seeking to diminish barriers to trade in audiovisual services. Even those Members who wish to promote or preserve their cultural industries for cultural reasons (such as the EC and Canada) may have complex motives and interests. The EC may be competitive in sound recordings<sup>71</sup> and wish to open foreign markets to these products. Australia may want to retain local content requirements on broadcasting<sup>72</sup> but open foreign markets to its own audiovisual products.<sup>73</sup> Had the EC included audiovisual policies in its GATS schedule, it also might have been shielded from “unilateral trade pressures from the US.”<sup>74</sup>

As presently drafted, GATS contains no equivalent to the GATT 1994 provisions on anti-dumping, subsidies,<sup>75</sup> or safeguards,<sup>76</sup> nor to GATT Article IV or XX(f). This absence of “escape routes” or “safety valves” may explain, in part, Members’ reluctance to make commitments in relation to audiovisual products. Indeed, one group of Members “feels that the availability of safeguards in the event of unforeseeable market disruptions would encourage more liberal commitments in services negotiations” more generally<sup>77</sup> (although Bernard Hoekman avows that the “economic case for safeguards instruments” in GATS is “weak”).<sup>78</sup> Of course, Members could make commitments in relation to audiovisual products subject to limitations, but, given the political sensitivity and significance of this issue for many Members,

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<sup>69</sup> At the time of writing, forty-four Members (including the European Communities) have listed MFN exemptions specifically for the audiovisual sector: WTO, *Services Database: Predefined Report – All Countries’ MFN Exemptions* (Mar. 21, 2005), available at <http://tsdb.wto.org/wto/WTOHomepublic.htm> (last accessed June 13, 2006).

<sup>70</sup> See, e.g., Council for Trade in Services, *Report of the Meeting Held on 23 September 2004: Note by the Secretariat*, para. 74, S/C/M/74 (Nov. 10, 2004).

<sup>71</sup> DAVID HELD et al., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 353 (1999).

<sup>72</sup> See, e.g., Donald Rothwell, *Quasi-incorporation of International Law in Australia: Broadcasting Standards, Cultural Sovereignty and International Trade*, 27 *FED. L. REV.* 527 (1999).

<sup>73</sup> See generally Australian Department of Communications, Information Technology and the Arts, *From Cottages to Corporations: Building a Global Industry from Australian Creativity—Report on Access to Overseas Markets for Australia’s Creative Digital Industry* (Dec. 12, 2003), available at [http://www.cultureandrecreation.gov.au/cics/access2markets\\_FP.pdf](http://www.cultureandrecreation.gov.au/cics/access2markets_FP.pdf).

<sup>74</sup> Karl Falkenberg, *The Audiovisual Sector*, in *THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS’ PERSPECTIVE* (Jacques Bourgeois, Frédérique Berrod & Eric Gippini Fournier eds.) 429, 432 (1995).

<sup>75</sup> See GATS, art. XV.

<sup>76</sup> See GATS, art. X.

<sup>77</sup> WTO SECRETARIAT, *A HANDBOOK ON THE GATS AGREEMENT* 37 (2005).

<sup>78</sup> Bernard Hoekman, *Toward a More Balanced and Comprehensive Services Agreement*, in *THE WTO AFTER SEATTLE* 119, 130 (Jeffrey J. Schott ed., 2000).

this could be too much of a concession. These limitations could also be more vulnerable to negotiation in future rounds than provisions of the GATS framework itself. This may explain most Members' apparent preference for refraining from making any commitments in relation to audiovisual services rather than making commitments subject to limitations.<sup>79</sup>

### III. IMPROVING TREATMENT OF AUDIOVISUAL PRODUCTS

I now propose certain possibilities for improving the treatment of audiovisual products under GATT 1994 and GATS, taking into account the problems identified in the previous section.

#### A. *Underlying Objectives*

In assessing the options for improving the existing agreements, it is important to keep in mind the objectives of GATT 1994, GATS and the WTO as a whole. The preamble to the Marrakesh Agreement declares the desire of Members to contribute to broader objectives (such as raising standards of living and ensuring full employment) "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international relations." The preamble to GATT 1994 contains almost identical wording.<sup>80</sup> The preamble to GATS, as already mentioned, similarly reflects the desire of Members for "the early achievement of progressively higher levels of liberalization of trade in services." This objective is reflected in the built-in agenda for successive rounds of services trade liberalization under Article XIX of GATS and the Hong Kong Ministerial Declaration of December 2005.<sup>81</sup> Against this background, it seems clear that the WTO agreements aim to dismantle trade barriers over time for the mutual benefit of all Members. Therefore, in principle, any changes to or clarifications of the agreements to accommodate cultural policy measures in connection with audiovisual products should not weaken the existing disciplines.

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<sup>79</sup> Roy, *supra* note 68, at 934-35.

<sup>80</sup> The preamble to GATT 1994 contains the phrase quoted but ends with "international commerce" rather than "international relations."

<sup>81</sup> Ministerial Conference, WTO, *Doha Work Programme: Ministerial Declaration Adopted on 18 December 2005*, para. 26, WT/MIN(05)/DEC (Dec. 22, 2005).

## B. *Digital Audiovisual Products as Services*

As mentioned above, Members have imposed a moratorium on applying customs duties on digital products such as films or music delivered electronically, as a temporary and partial solution to the problem of classifying audiovisual products as goods or services.<sup>82</sup> The future of this moratorium raises two overlapping questions — should these products be explicitly identified as goods or services, and should Members be free to impose duties on them?

Regarding the first of these questions, it would be artificial to treat digital products as goods when they are not delivered in a tangible form recognized in the Harmonized System,<sup>83</sup> just as it would be artificial to deem all digitizable products to be services even when they are delivered in tangible form (e.g., on CD). It is true that, in order to avoid trade distortions, a given product should ideally be treated in the same way in international trade, regardless of the form it takes or the technology used to provide it.<sup>84</sup> However, the WTO system already establishes a clear distinction between goods and services. Although this distinction may be somewhat arbitrary in some circumstances and in relation to some products, the treatment of goods under the GATT 1994 rules has a long history and is easily applicable to products traded by physically crossing borders. In contrast, products transmitted electronically via the Internet or similar means fall more easily within the new world of GATS, in which Members are still learning and deciding how best to formulate trade rules.

Accordingly, I propose explicitly recognizing digital audiovisual products as services subject to GATS and not GATT 1994. Any resulting distortion would be minimized if the disciplines imposed on audiovisual products under GATT 1994 and GATS were more closely matched, as elaborated further below. This matching process would also diminish the significance of the classification issue from a political perspective. As already mentioned, the EC argues that digital products should be treated as services because the EC has very broad discretion in relation to audiovisual products under GATS, whereas the US favors classifying digital products as goods because of the stronger GATT dis-

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<sup>82</sup> See sources cited *supra* note 46.

<sup>83</sup> The “Harmonized System” is the nomenclature set out in the annex to the International Convention on the Harmonized Commodity Description and Coding System, *supra* note 38. It was developed by the World Customs Organization and provides a widely accepted method of classifying traded goods.

<sup>84</sup> Aaditya Mattoo & Ludger Schuknecht, *Trade Policies for Electronic Commerce*, World Bank Policy Research Paper 2380 (June 2000) at 11, available at [http://wbln0018.worldbank.org/research/workpapers.nsf/0/7ba84d39a5a5bddb8525690b0057c1d0/\\$FILE/wps2380.pdf](http://wbln0018.worldbank.org/research/workpapers.nsf/0/7ba84d39a5a5bddb8525690b0057c1d0/$FILE/wps2380.pdf).

ciplines.<sup>85</sup> If GATT 1994 and GATS were more closely aligned in connection with audiovisual products, these countries would have less to disagree about.

As for whether Members should extend their agreement not to impose customs duties on digital products, it follows that if these products are services they would ordinarily not be subject to customs duties. Moreover, technological limitations may prevent Members from imposing these duties for some time.<sup>86</sup> Therefore, keeping in mind the underlying objectives of GATS, extending the moratorium on customs duties on a permanent and binding basis seems advisable, at least for digital audiovisual products. This would likely distort trade by encouraging electronic delivery over other means, but it could also reduce distribution costs and give developing country Members easier access to foreign markets for audiovisual products. In addition, although the unavailability of customs duties would have some revenue implications, which could be of greater concern to developing country Members, research shows that these implications would be limited.<sup>87</sup>

### C. *Mandated National Treatment, Market Access, and MFN*

To bring GATS disciplines on audiovisual products more closely in line with those under GATT 1994, and to pursue the objective of progressively increasing liberalization under GATS, a new approach could be adopted. Currently, the GATS framework primarily involves a “bottom-up” or “positive list” approach, with Members choosing the service sectors in which they are willing to make national treatment or market access commitments. In contrast, obligations under GATT 1994 regarding national treatment and quantitative restrictions apply across the board, subject to specified exceptions. This is more of a “top-down” or “negative list” approach.

Reversing the onus under GATS so that disciplines apply unless otherwise exempted (as is already the case for the MFN obligation under GATS) could be unrealistic and undesirable as a general proposition. As Low and Mattoo have suggested, “members are simply not ready to make commitments in all services sectors, and . . . even if they did, they would be tempted to specify heavy-handed restricting measures in their negative lists that would take the substance out of commitments in sectors that they regarded as sensitive.”<sup>88</sup> However, even

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<sup>85</sup> See discussion *supra* Part 2.B.i.

<sup>86</sup> Mattoo & Schuknecht, *supra* note 84, at 10, 13.

<sup>87</sup> *Id.* at 10.

<sup>88</sup> Patrick Low & Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under GATS*, in Sauv e & Stern eds., *supra* note 44, at 449, 468.

in 2000, Feketekuty recognized the existence of “strong arguments for integrating GATT and GATS rules on a step-by-step basis.”<sup>89</sup> Mattoo and Shuknecht have also suggested “deepening and widening the limited cross-border trade commitments” under GATS,<sup>90</sup> while Mann and Knight propose classifying digital products “as services, but [making] all such products subject to most favored nation and national treatment provisions.”<sup>91</sup> Similarly, Wunsch-Vincent maintains in relation to “digitally-delivered content products” that “the single best and most forward-looking method is undoubtedly the adoption of a negative list approach coupled with very limited derogations.”<sup>92</sup>

My proposal goes further: subject all audiovisual products under GATS to the requirements of national treatment and market access. This includes not only digital products such as television and music delivered over the Internet, but also other forms of audiovisual products caught by GATS, such as film production services and sound recording services. Trade restrictions in the form of market access limitations should not be allowed on the grounds that they are necessary to preserve or promote culture. Culture will be better preserved and promoted in the absence of quantitative restrictions, thus ensuring a broad range of foreign and domestic voices.<sup>93</sup> In addition, although some discrimination against foreign audiovisual products may be justified,<sup>94</sup> the starting point should be national treatment.

Members should reach an agreement that the many MFN exemptions relating to the audiovisual sector<sup>95</sup> listed on January 1, 1995 have expired. This is consistent with paragraph 6 of the GATS Annex on Article II Exemptions (limiting the duration of these exemptions to 10 years in principle) and with the need for progressive liberalization under GATS, and it goes further than the agreed objective of WTO Members to remove or substantially reduce MFN exemptions gener-

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<sup>89</sup> Geza Feketekuty, *Assessing and Improving the Architecture of GATS*, in Sauvé & Stern eds., *supra* note 44, at 85, 110.

<sup>90</sup> Mattoo & Schuknecht, *supra* note 84, summary findings.

<sup>91</sup> Catherine Mann & Sarah Knight, *Electronic Commerce in the WTO*, in Schott ed., *supra* note 78, at 253, 259.

<sup>92</sup> Wunsch-Vincent, *The WTO, the Internet*, *supra* note 45, at 78-79.

<sup>93</sup> See, e.g., UNESCO, Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, arts. I, II, III:1, 197 U.N.T.S. 3 (Dec. 10, 1948). For further explanation of my views on this point, see Voon, *supra* note 13.

<sup>94</sup> For an explanation of my view that *de jure* or *de facto* discrimination contrary to the national treatment requirement and *de facto* discrimination contrary to the MFN rule may be justified on cultural grounds, see Voon, *supra* note 13.

<sup>95</sup> *Supra* note 69.

ally.<sup>96</sup> However, some MFN exemptions for cultural policy measures would still be protected where they relate to members of an “agreement liberalizing trade in services” that complies with Article V of GATS. Thus, members of a regional trade agreement meeting the requirements of Article V may be able to accord to services and service suppliers of other members of that agreement treatment more favorable than that provided to like services and service suppliers of other WTO Members.

A negative list approach under GATS to national treatment, market access and MFN for audiovisual products supplied by any of the four modes could be achieved, provided that Members had sufficient “escape routes” for their cultural policy measures (in addition to those already provided, for example for regional trade agreements and public morals), as discussed in the next section.

#### D. *Escape Routes*

##### 1. Discriminatory Subsidies

In goods trade, subsidies are generally seen as the least trade-distorting instrument of protection, followed by tariffs and then quotas. From an economic perspective, subsidies are also preferable to quotas (and tariffs, assuming they can be applied as a practical matter) in the context of trade in services.<sup>97</sup> Moreover, “often subsidies are the most efficient instrument for pursuing noneconomic objectives,”<sup>98</sup> such as preserving or promoting local culture through audiovisual products. Sykes thus distinguishes between “good” subsidies (directed towards correcting a market failure or promoting human rights) and “bad” subsidies (directed simply towards transferring resources to “well-organized interest groups”).<sup>99</sup> Messerlin and Cocq propose that a WTO “reference paper” on audiovisual subsidies be agreed, “to allow subsidies for cultural reasons, while banning subsidies for mere industrial reasons.”<sup>100</sup> Against this background, it makes sense to allow a limited exception for Members to impose discriminatory cultural policy measures in the form of subsidies in preference to any other form. When combined with general national treatment, market access and MFN ob-

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<sup>96</sup> Ministerial Conference, WTO, *Doha Work Programme: Ministerial Declaration Adopted on 18 December 2005*, annex C, para. 1(e)(i), WT/MIN(05)/DEC (Dec. 22, 2005).

<sup>97</sup> UNCTAD & WORLD BANK, *LIBERALIZING INTERNATIONAL TRANSACTIONS IN SERVICES: A HANDBOOK* 53-55 (1994).

<sup>98</sup> Hoekman, *supra* note 78, at 129.

<sup>99</sup> Alan Sykes, *Subsidies and Countervailing Measures*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 81, 88-89 (Patrick Macrory, Arthur Appleton & Michael Plummer eds., vol. II, 2005).

<sup>100</sup> Cocq & Messerlin, *supra* note 31, at 48-49.

ligations under GATS, as well as conditions and disciplines on the granting of subsidies, this approach begins to resemble that under GATT 1994.

The scarcity of statistics on subsidies in connection with trade in services has posed a problem for the current negotiations on subsidies under GATS, with Members understandably reluctant to disclose information about their own subsidies schemes before disciplines are agreed, despite the exhortation to do so under Article XVI:1.<sup>101</sup> Nevertheless, “entertainment services” comprise one area in which countries frequently use subsidies, and these subsidies “are typically predicated on cultural considerations.”<sup>102</sup>

Subsidies are, of course, also granted in many other sectors, and the problem of how to agree on disciplines in this area is correspondingly broad. Members have not yet reached agreement,<sup>103</sup> although the goal is to do so before the end of the negotiations on specific commitments (including national treatment and market access commitments).<sup>104</sup> It is not the purpose of this article to suggest a comprehensive solution to the problem of services subsidies.<sup>105</sup> The following recommendations are limited to subsidies for audiovisual products.

In defining subsidies in the audiovisual sector, it would be preferable to take a narrow approach focusing on financial contributions (including a direct transfer of funds or the forgoing of government revenue that is otherwise due), similar to that in the SCM Agreement.<sup>106</sup> This would leave regulatory or other actions, which might have equivalent economic effects, to be governed by the usual MFN, national treatment and market access obligations. Narrowing the subsidies exception in this way would have a liberalizing effect and would

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<sup>101</sup> Working Party on GATS Rules, WTO, *Negotiations on Subsidies: Report by the Chairperson of the Working Party on GATS Rules*, para. 16, S/WPGR/10 (June 30, 2003).

<sup>102</sup> Working Party on GATS Rules, WTO, *Subsidies and Trade in Services: Note by the Secretariat*, at 2, S/WPGR/W/9 (Mar. 6, 1996).

<sup>103</sup> Ministerial Conference, *supra* note 96, para. 4(c); Working Party on GATS Rules, WTO, *Report of the Meeting of 10 February 2006: Note by the Secretariat*, para.17, S/WPGR/M/54 (Feb. 22, 2006).

<sup>104</sup> Council for Trade in Services, WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, para. 7, S/L/93 (Mar. 29, 2001); Council for Trade in Services, WTO, *Special Session—Report of the Meeting Held on 28, 29 and 30 March 2001: Note by the Secretariat*, para. 6, S/CSS/M/8 (May 14, 2001); Working Party on GATS Rules, WTO, *Negotiations on Subsidies: Report by the Chairperson of the Working Party on GATS Rules*, para. 5, S/WPGR/10 (June 30, 2003).

<sup>105</sup> For further discussion, see Pierre Sauvé, *Completing the GATS Framework: Addressing Uruguay Round Leftovers*, 57 *AUSSENWIRTSCHAFT* 301, 327-33 (2002).

<sup>106</sup> WTO, Agreement on Subsidies and Countervailing Measures, art. 1.1(a)(i),(ii).

minimize “problems associated with identifying and measuring subsidies.”<sup>107</sup>

Turning to the discriminatory use of subsidies, in the case of audiovisual products this could be allowed subject to conditions. The granting of subsidies for audiovisual products in a manner that discriminates against foreign services or service suppliers *de jure* or *de facto* could be allowed,<sup>108</sup> notwithstanding the general national treatment requirement. GATS treatment depends on the origin of the service or service supplier.<sup>109</sup> Thus, a Member could subsidize national service suppliers (such as national film producers) or national services (such as national film production) without subsidizing suppliers of services through any of the four modes (foreign film producers, whether located in another Member’s territory and supplying through mode 1 or 2, or located in the subsidizing Member’s territory and supplying through mode 3 or 4), or the services they supply (producing foreign films). As in GATT 1994, some difficulties may arise in determining the origin of the relevant service or service supplier for the purpose of granting the subsidy (given that goods and services from various sources may contribute to the production of, say, a film). Members could agree on more detailed rules in this regard. Based on certain of its free trade agreements, the US might be willing to accept the discriminatory use of subsidies in this manner.<sup>110</sup>

The granting of subsidies for audiovisual products in a manner that discriminates between foreign services or service suppliers *de facto* could also be allowed, notwithstanding the general MFN requirement. Thus, a Member could choose to subsidize only certain films of other Members, based on objective and transparent cultural criteria such as language. This is similar to the standard that applies to Members who wish to differentiate between the beneficiaries of their GSP schemes.<sup>111</sup> However, *de jure* discrimination between foreign audiovisual products is not necessary on cultural grounds.<sup>112</sup>

As is evident from the SCM Agreement in the goods context, subsidies may have trade-distorting or injurious effects even if they do not discriminate against foreign products or between products from differ-

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<sup>107</sup> Working Party on GATS Rules, *supra* note 102, at 3.

<sup>108</sup> *See supra* note 94.

<sup>109</sup> GATS, art. XXVIII:(f); Werner Zdouc, *WTO Dispute Settlement Practice Relating to the GATS*, 2 J. INT’L ECON. L. 295, 327-31 (1999).

<sup>110</sup> *See* Wunsch-Vincent, *The WTO, the Internet*, *supra* note 45, at 214.

<sup>111</sup> *See* Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, para. 183, 187-88, WT/DS246/AB/R (Apr. 7, 2004).

<sup>112</sup> *See supra* note 94.

ent sources. In the audiovisual sector, a Member may wish to grant subsidies to protect or promote local culture by ensuring that the audiovisual industry remains vibrant even though it might not be able to compete unaided against foreign industries. However, the legitimate need to protect culture through audiovisual products (assuming it exists) should not require promoting these products abroad or using domestic over imported goods in the production process. In any case, such subsidies may be less prevalent than in the goods area.<sup>113</sup> Therefore, as in Part II of the SCM Agreement, new GATS disciplines on subsidies in the audiovisual sector should prohibit export subsidies (being those contingent on export) and import substitution subsidies (being those contingent on the use of domestic rather than imported goods or services). Members could challenge a breach of this prohibition, as with a breach of most WTO provisions, through dispute settlement. Dispute settlement action could also be available to remedy subsidies causing injury to other Members, although this could be particularly difficult to establish in a services context.

Parts III and V of the SCM Agreement address subsidies causing injury or other adverse effects to the interests of other Members, providing remedies through dispute settlement or countervailing measures. However, at least in the audiovisual context, Members often appear to use subsidies in response to domination of the market by foreign products. This foreign dominance arises most frequently from factors such as economies of scale and consumer tastes, rather than from foreign subsidization. This differs from, for example, the situation governed by the Agreement on Agriculture, where massive subsidization by certain (typically developed country)<sup>114</sup> Members often leads to a flood of cheap imports into other Members' markets.<sup>115</sup> The difference in these factual scenarios suggests that, at this stage, the need to provide separately for unilateral actions to be taken against audiovisual subsidies causing adverse effects to other Members may be less pressing. If countervailing measures were allowed, this could unnecessarily weaken the existing broad-based MFN obligation under GATS because they would be imposed selectively on certain subsidizing Members<sup>116</sup> (as occurs for

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<sup>113</sup> Working Party on GATS Rules, WTO, *Communication from Argentina and Hong Kong, China: Development of Multilateral Disciplines Governing Trade Distortive Subsidies in Services*, S/WPGR/W/31, para. 6, (Mar. 16, 2000).

<sup>114</sup> *Id.* at 5.

<sup>115</sup> See, e.g., the major disputes in Appellate Body Report, *EC—Export Subsidies on Sugar*; WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, (Apr. 28, 2005); Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R, (Mar. 3, 2005).

<sup>116</sup> See Working Party on GATS Rules, WTO, *Subsidies and Trade in Services: Note by the Secretariat*, at 2, S/WPGR/W/9 (Mar. 6, 1996).

goods under GATT 1994). It would also be difficult to agree on disciplines governing countervailing measures in the services context.<sup>117</sup>

## 2. Developing Countries

It could be argued that an allowance for discriminatory subsidies would provide an escape route for developed country Members but would be of little use to developing country Members. This is perhaps a little too simplistic. Audiovisual products such as film and television are far more resource-intensive than some other audiovisual products such as sound recording.<sup>118</sup> Nevertheless, some of the leading film-making countries, such as India, are developing countries. This is not just a developed country game. Moreover, a Member's developing country status does not necessarily mean that it lacks the capacity to grant subsidies. Thus, Article 27 of the SCM Agreement provides special and differential treatment to developing country Members in connection with their granting of subsidies. In the agricultural context, developing countries have continued to argue for special and differential treatment in relation to the granting of subsidies (that is, more lenient subsidies disciplines for developing country Members), rather than for a general prohibition on subsidies.<sup>119</sup> Like other Members, developing country Members may fund a discriminatory subsidy through a non-discriminatory tax, such as a tax on box-office receipts.

That said, developing countries may find subsidies less effective as cultural policy measures, whether due to insufficient funds or because they lack the technology to develop their audiovisual industries.<sup>120</sup> It may therefore be necessary to provide some additional leeway for developing countries, or at least the least-developed countries, in relation to subsidies for audiovisual products. For example, prohibitions on export subsidies or import substitution subsidies could be applied to developed countries only, either indefinitely or for some agreed period of time.

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<sup>117</sup> Hoekman, *supra* note 78, at 129.

<sup>118</sup> See DAVID HESMONDHALGH, *THE CULTURAL INDUSTRIES: AN INTRODUCTION* 74-75 (2002).

<sup>119</sup> See, e.g., Agreement on Agriculture, art. 6.2; Ministerial Conference, WTO, *Agriculture—Framework Proposal: Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, paras. 1.3, 1.4, 3.4, WT/MIN(03)/W/6 (Sept. 4, 2003).

<sup>120</sup> See UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries—Note by the UNCTAD Secretariat*, at 11, TD/B/COM.1/EM.20/2 (Sept. 30, 2002); UNCTAD, *Report of the Expert Meeting on Audiovisual Services: Improving Participation of Developing Countries, 13-15 November 2002*, para. 8, TD/B/COM.1/56, TD/B/COM.1/EM.20/3 (Dec. 4, 2002).

The revenue and capacity-building implications of allowing developing countries to erect certain trade barriers to audiovisual products may also temporarily justify the resulting trade distortion. A blanket national treatment limitation could allow developing countries to fund subsidies for audiovisual products through taxes on foreign enterprises creating these products — that is, enterprises supplying audiovisual, printing or publishing services through mode 3 (commercial presence). Another national treatment limitation on modes 3 and 4 could allow developing countries to require these enterprises to use some local employees (rather than only natural persons supplying services through mode 4) as a form of technical assistance.

### 3. Screen Quotas

Removing Article IV would mean screen quotas would be subject to the usual GATT disciplines and exceptions. However, given the long history of this provision and the reliance of several Members on it, consensus on removal of Article IV could be practically difficult to achieve. Assuming GATT Article IV were retained, certain changes to GATS might be required. First, to remove uncertainty, Members might wish to confirm that a measure that complied with Article IV of GATT 1994 would not be regarded as violating GATS. Second, if necessary to achieve consensus, Members could be granted a similar entitlement to impose minimum local content quotas on television and radio broadcasts (although the effectiveness of these measures is diminishing, as technology allows consumers to access audiovisual materials in a range of ways).<sup>121</sup> A general GATS provision applicable to all Members could recognize that national treatment commitments do not prevent the imposition or maintenance of minimum local content quotas for television and radio broadcasts up to the level imposed by the relevant Member upon a certain specified date, without the need for a specific limitation in the relevant Member's schedule. Perhaps this standstill element could be excluded for developing country Members.

Experience with recent free trade agreements suggests that the US might accept this change,<sup>122</sup> which would cater to the needs of Members concerned about cultural policy measures while restricting the nature and extent of these measures. For example, in the free trade agreement between Australia and the US that came into effect on Janu-

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<sup>121</sup> Roy, *supra* note 68, at 942-43.

<sup>122</sup> See Bonnie Richardson, *Hollywood's Vision of a Clear, Predictable Trade Framework Consistent with Cultural Diversity*, in *FREE TRADE VERSUS CULTURAL DIVERSITY: WTO NEGOTIATIONS IN THE FIELD OF AUDIOVISUAL SERVICES* 111, 126 (Christoph Graber, Michael Girsburger & Mira Nenova eds., 2004).

ary 1, 2005, Australia retains the right to impose minimum local content quotas on television at a specific level, which corresponds to the level existing at the time the agreement was concluded.<sup>123</sup> Similarly, in the free trade agreement between Chile and the US that entered into force on January 1, 2004, the Chilean “*Consejo Nacional de Televisión* may establish, as a general requirement, that programs broadcast through public (open) television channels include up to 40 percent of Chilean production.”<sup>124</sup> Interestingly, the parties note in a side agreement that “the *Consejo* monitors the percentage of national content by calculating at the end of the year the content level based on a two months sample of that year. As the level of national content has never been less than that required by law, the *Consejo* has never imposed the requirement.”<sup>125</sup> Other Members might wish to take similar approaches, which would involve government intervention only to the extent that the market fails to reach the desired level of local content, and which could also assist in developing data for future policy-making in the sector.

#### IV. OTHER PROPOSALS

##### A. *Cultural Exceptions*

The European Union,<sup>126</sup> the North American Free Trade Agreement,<sup>127</sup> and various free trade agreements provide divergent examples of cultural exceptions or exemptions,<sup>128</sup> representing substantive compromises that were considered acceptable by some of the WTO Members with the strongest views on this issue (the US, the EC, and Canada) in the specific contexts of those agreements. However, the agreement to disagree on this issue during the Uruguay Round<sup>129</sup> and the failed negotiations for a Multilateral Agreement on Investment within the Organisation for Economic Co-operation and Develop-

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<sup>123</sup> Australia—United States Free Trade Agreement (*signed* May 18, 2004) annex I (Australia) at 14; Australian Department of Foreign Affairs and Trade, *Australia—United States Free Trade Agreement: Guide to the Agreement* (Mar. 2004) ch. 10.

<sup>124</sup> Chile—United States Free Trade Agreement (*signed* June 6, 2003) annex I (Chile) at 3.

<sup>125</sup> Letter from María Soledad Alvear Valenzuela, Chilean Minister of Foreign Relations, to Robert Zoellick, United States Trade Representative, *Side letter on television*, June 6, 2003.

<sup>126</sup> Treaty establishing the European Community, art. 87(3)(d), OJ C340, 173; 37 I.L.M. 79 (*signed* Mar. 25, 1957), consolidated version OJ C325, 33 (Dec. 24, 2002).

<sup>127</sup> North American Free Trade Agreement, 32 I.L.M. 289 and 605 (*signed* Dec. 17, 1992) annex 2106.

<sup>128</sup> *See, e.g.*, Australia—United States Free Trade Agreement (*signed* May 18, 2004) annex I (Australia) at 14; Chile—United States Free Trade Agreement (*signed* June 6, 2003) annex I (Chile) at 3.

<sup>129</sup> Drake & Nicolaïdis, *supra* note 44, at 408; JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 328 (1999).

ment<sup>130</sup> provide reminders of the difficult process leading to such a compromise and the limited chance of success.

Short of a broad exemption for “cultural industries,” what other form might a new exception under Article XX of GATT 1994 or GATS Article XIV take? Graber proposes a “cultural exemption restricted to the protection of art film.”<sup>131</sup> Bernier suggests an exception “for the preservation of cultural and linguistic diversity, including national cultures.”<sup>132</sup> Messerlin advocates a “distinction between industrial and cultural audiovisuals,” with an exemption for “cultural audiovisuals from WTO disciplines.”<sup>133</sup> However, these kinds of exceptions would be difficult to negotiate and hard to limit in terms of scope. The definition of an “art film” or “cultural” film would likely be elusive, and the value of these films as compared to other types of films is debatable, even assuming that “cultural” aspects of films deserve special protection.

Another problem with all these proposals for a new cultural exception, especially in the context of GATT 1994, is that they are regressive. WTO Members agreed to significant goods trade liberalization in concluding GATT 1994. This was a major achievement, and if it were necessary to agree on GATT 1994 again today, it might not be possible. For example, just as some Members might wish they had held out for greater flexibility regarding treatment of audiovisual products, others might wish they had never agreed to the principle of national treatment at all. Rather than attempting to water down commitments agreed in 1994 (assuming Members could ever agree to this), the objective of reducing trade barriers and eliminating discriminatory treatment would be better achieved by considering how to address Members’ concerns about audiovisual products while moving towards greater trade liberalization.

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<sup>130</sup> UNCTAD, *Lessons from the MAI*, at 1, 15, UNCTAD/ITE/IIT, UN Sales No E.99.II (1999).

<sup>131</sup> Christoph Graber, *WTO: A Threat to European Films?* (Paper presented at the Conference on European Culture, University of Navarra, Pamplona, 28-31 October 1991) at 18. See also Christoph Graber, *Audiovisual Media and the Law of the WTO*, in *FREE TRADE VERSUS CULTURAL DIVERSITY: WTO NEGOTIATIONS IN THE FIELD OF AUDIOVISUAL SERVICES* 15, 62, 64 (Christoph Graber et al. eds., 2004); Graber, *supra* note 64, at 212-14.

<sup>132</sup> Ivan Bernier, *Cultural Goods and Services in International Trade Law*, in *THE CULTURE/TRADE QUANDARY: CANADA’S POLICY OPTIONS* 108, 147 (Dennis Browne ed., 1998).

<sup>133</sup> Patrick Messerlin, *Regulating Culture: Has it “Gone with the Wind”?* (Paper presented at the Productivity Commission and Australian National University (Joint Conference) on Achieving Better Regulation of Services, Canberra, June 26-27, 2000) at 17.

## B. *Anti-Dumping Measures Against Audiovisual Services*

In the current services negotiations, some have suggested allowing Members to impose anti-dumping measures in a services context, and particularly in response to “dumping” of audiovisual services.<sup>134</sup> This will not happen in the current round, given the absence of any mandate to negotiate this issue. The suggestion that audiovisual producers dump products in foreign markets after recovering costs in the domestic market (typically the US)<sup>135</sup> is also contrary to the way in which business is actually conducted in this sector.

In any case, I would not endorse the allowance of anti-dumping measures against services, for two main reasons. First, the economic justification for imposing anti-dumping measures and the utility of doing so are highly questionable. Many economists point out that when a country dumps products (in a WTO sense, meaning that they are exported at prices below their normal value in the home market),<sup>136</sup> consumers in the importing country benefit from the lower prices. By imposing anti-dumping duties on the imports, the importing country may appease the competing domestic industry, but at the expense of consumers and industrial users of the imports, who must then generally pay higher prices to cover the additional duties. The widespread use of anti-dumping measures, traditionally by developed countries but now also by some developing countries, is often seen as an outbreak of protectionism.<sup>137</sup> Therefore, it would be unwise to allow this new form of trade-distorting measure in the services context, particularly when the structure of GATS already provides Members with substantial flexibility in making commitments.

Second, it is far from clear how a Member could impose anti-dumping measures in a services context. The goods model would provide little guidance because it is largely based on imposing tariffs when imports cross the border. In addition, the value and price of services in different countries is much harder to compare, given variables such as differing labor costs and regulatory standards.

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<sup>134</sup> Council for Trade in Services, WTO, *Communication from Brazil—Audiovisual Services*, para. 10, S/CSS/W/99 (July 9, 2001); Council for Trade in Services, WTO, *Report of the Meeting Held on 19-22 March 2002: Note by the Secretariat*, para. 316, TN/S/M/1 (June 5, 2002).

<sup>135</sup> See, e.g., HARRY REDNER, *CONSERVING CULTURES: TECHNOLOGY, GLOBALIZATION, AND THE FUTURE OF LOCAL CULTURES* 77 (2004).

<sup>136</sup> GATT 1994, art VI:1; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art 2.1.

<sup>137</sup> See generally, Michael Finger, Francis Ng & Sonam Wangchuk, *Antidumping as safe-guard policy*, World Bank Policy Research Paper 2730 (2001).

### C. *Cultural Diversity Safeguard*

In the current negotiations, some Members have proposed a specific “cultural diversity safeguard.”<sup>138</sup> I do not wish to resolve the entire problem of safeguards for services.<sup>139</sup> Indeed, despite the attention paid to this broader issue by the Working Party on GATS Rules (which is also addressing subsidies and government procurement under GATS) during a period of several years, little progress has been made to date, and Members have not even reached agreement on such fundamental matters as whether it is desirable or feasible to provide a safeguard mechanism under GATS.<sup>140</sup> However, a safeguard measure to respond to a significant increase in the screening of foreign cinematograph films seems unnecessary as long as GATT Article IV remains. Similarly, increased imports of music or film on DVDs, CDs, or similar media, would be covered by GATT Article XIX and the Agreement on Safeguards. In addition, the need for these emergency measures should be significantly reduced if Members are all able to provide discriminatory subsidies for audiovisual products as I have suggested.

Graber proposes a variation on the cultural diversity safeguard. He suggests creating a “reference paper” similar to the model reference paper that many Members added to their GATS schedules extending the usual GATS disciplines for the telecommunications sector.<sup>141</sup> The new reference paper would oblige Members adopting it to provide national treatment and market access commitments in the audiovisual sector. Like the telecommunications reference paper, Graber’s proposed solution for audiovisual products would thus open audiovisual markets while providing a safeguard for cultural policy measures in the form of a “universal service” clause allowing Members to maintain diversity in broadcasting and film supply.<sup>142</sup> The equivalent clause in the standard telecommunications reference paper states:

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<sup>138</sup> See, e.g., Council for Trade in Services, WTO, *Report of the Meeting Held on 19-22 March 2002: Note by the Secretariat*, paras. 315-17, TN/S/M/1 (June 5, 2002).

<sup>139</sup> For further discussion, see Yong-Shik Lee, *Emergency Safeguard Measures under Article X in GATS: Applicability of the Concepts in the WTO Agreement on Safeguards*, 33 J. WORLD TRADE 47, 51-58 (1999); Sauv , *supra* note 105, at 311-24.

<sup>140</sup> See, e.g., Ministerial Conference, WTO, *Doha Work Programme: Ministerial Declaration Adopted on 18 December 2005*, annex C, para. 4(a), WT/MIN(05)/DEC (Dec. 22, 2005); Working Party on GATS Rules, WTO, *Report of the Meeting of 10 February 2006*, para. 2, S/ WPGR/M/54 (Feb. 22, 2006).

<sup>141</sup> See WTO, *Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services)*, 36 I.L.M. 254 (1997).

<sup>142</sup> CHRISTOPH GRABER, *HANDEL UND KULTUR IM AUDIOVISIONSRECHT DER WTO: VÖLKERRECHTLICHE, ÖKONOMISCHE UND KULTURPOLITISCHE GRUNDLAGEN EINER GLOBALEN MEDIENORDNUNG* 333-34 (2003).

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.<sup>143</sup>

In Graber's version, the requirement of "non-discrimination" in the universal service clause would apply only to audiovisual programs defined as "high budget," being those with a marketing and production budget of, say, \$5 million or more.<sup>144</sup> (Graber also calls for an interpretative note to the Annex on Article II Exemptions to the effect that high and low budget films are not "like" for the purpose of the GATS MFN obligation.)<sup>145</sup> However, I find this distinction rather blunt and uncertain and therefore unlikely to assist in progressively liberalizing the audiovisual sector.

#### D. *Intellectual Property Rights and Anti-Competitive Conduct*

Both cultural rights and intellectual property rights seek to "strike a balance between promoting general public interests in accessing new knowledge as easily as possible and in protecting the interests of authors and inventors in such knowledge."<sup>146</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") may, through copyright, "make idea generation more profitable and bring us a wider menu of cultural choices."<sup>147</sup> However, some contend that copyright in audiovisual products has become too strong and now threatens cultural diversity instead of nurturing it.<sup>148</sup> The same has been said more broadly of the relationship between intellectual property rights (including trademarks) and culture.<sup>149</sup>

One proposed solution to the problem of overbroad intellectual property rights is competition laws, which are currently outside the negotiating mandate of the WTO Members and left largely to domestic

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<sup>143</sup> WTO, *Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services)*, at 368, 36 I.L.M. 254 (1997).

<sup>144</sup> Graber, *supra* note 142, at 335-36.

<sup>145</sup> *Id.* at 331-32.

<sup>146</sup> Sub-Commission on the Promotion and Protection of Human Rights, UN, *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights: Report of the High Commissioner*, para. 10, E/CN.4/Sub.2/2001/13 (June 27, 2001).

<sup>147</sup> TYLER COWEN, *Good and Plenty: The Creative Successes of American Arts Funding* 103, 113 (2006).

<sup>148</sup> See, e.g., Johnlee Curtis, *Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity*, 13 INT'L J. CULTURAL PROP. 59, 80 (2006).

<sup>149</sup> Cf. Jason Bosland, *The Culture of Trade Marks: An Alternative Cultural Theory Perspective*, 10 MEDIA & ARTS L. REV. 99, 101 (2005); de Witte, *supra* note 35, at 248.

regulation.<sup>150</sup> The utility of a competition-based approach to prevent the TRIPS Agreement from infringing the right to health is under debate.<sup>151</sup> Graber suggests the same approach in connection with audiovisual products: introduce antitrust or competition principles into the TRIPS Agreement to counteract the highly concentrated audiovisual industry.<sup>152</sup> Germann makes a slightly different proposal, suggesting that existing provisions in the TRIPS Agreement (including Articles 7, 8 and 40) are flexible enough to prevent anti-competitive conduct in the cultural industries,<sup>153</sup> as is Article IX of the GATS.<sup>154</sup> These proposals warrant further consideration.

## V. CONCLUSION

This article has suggested ways of improving the existing WTO agreements on trade in goods and services as applied to audiovisual products, primarily by increasing liberalization, harmonizing the treatment of audiovisual products under GATT 1994 and GATS, and reducing uncertainty about the treatment of audiovisual products. Under GATS, MFN exemptions should be confirmed to terminate after 10 years, and national treatment and market access commitments should apply to audiovisual products across the board. This would be subject to an exception for discriminatory subsidies for audiovisual products under GATS. If GATT Article IV is retained, it should be made effective by a provision in GATS confirming that a measure complying with GATT Article IV will not violate GATS. If necessary, an analogous allowance for local content quotas in television and radio broadcasting under GATS could also be introduced. This would correspond with an acknowledgment that these and other digital products delivered electronically are services under GATS and not goods under GATT 1994. The moratorium on customs duties applied to these products should be

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<sup>150</sup> General Council, WTO, *Decision Adopted by the General Council on 1 August 2004*, at 3, WT/L/579 (Aug. 2, 2004).

<sup>151</sup> Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, UN, *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights: Report of the High Commissioner*, para. 64, E/CN.4/Sub.2/2001/13 (June 27, 2001); Frederick Abbott, *The "Rule of Reason" and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 279, 296 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005).

<sup>152</sup> Graber, *supra* note 142, at 327-28, 343 (referring to Eleanor Fox, *Competition Law and the Millennium Round*, J. INT'L ECON. L. 665, 672-73 (1999)).

<sup>153</sup> Christophe Germann, *Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity*, 1 ERA—FORUM 109, 118-19 (2005).

<sup>154</sup> Christophe Germann, *Diversité culturelle à l'OMC et l'UNESCO à l'exemple du cinéma*, 3 REVUE INTERNATIONALE DE DROIT ECONOMIQUE 325, 338-39 (2004).

extended on a more formal and permanent basis. Certain special and differential treatment provisions should be included, recognizing the special needs of developing country Members.

What would the “pro-trade” and “pro-culture” WTO Members get out of these changes? Countries like the US who seek increased liberalization in relation to audiovisual products would have the comfort of national treatment and market access commitments subject to certain agreed exceptions, primarily for subsidies. Members like the EC and Canada who seek the right to impose discriminatory cultural policy measures would benefit from a guaranteed subsidy exemption that is currently missing from GATS. Minimal trade-restrictiveness of cultural policy measures would be ensured by requiring the use of subsidies rather than more trade-distorting quotas or regulations.

The proposals outlined here are not intended to be practical suggestions to be implemented in the Doha Round of negotiations. Many of the changes proposed fall outside the scope of the current negotiations, which largely accept the broad GATT 1994 and GATS frameworks. In addition, although matters such as subsidies and safeguards are being examined in the current services negotiations, these areas are controversial in themselves, meaning that any attempt to marry them with provisions specific to audiovisual products would likely be rebuffed. Nevertheless, this article has identified certain possible approaches to the problem of audiovisual products in the WTO that further the objectives of the WTO agreements. This shows that a solution is possible, and Members should not resign themselves to an indefinite stalemate.