Members where the same conditions prevail or a disguised restriction on international trade.\textsuperscript{30}

Similarly, the Enabling Clause allows some discrimination in favour of developing countries, contrary to the usual WTO rules, recognising the importance of development.\textsuperscript{31} The WTO rules also recognise the potential problem of trade and security, providing that GATT 1994 is not to be construed to prevent a Member ‘from taking any action which it considers necessary for the protection of its essential security interests’ relating to traffic in arms, for example.\textsuperscript{32}

Other ‘exceptions’\textsuperscript{33} to WTO disciplines are not necessarily or ordinarily characterised as such. For example, to counter injury to their domestic industries, Members are entitled to impose anti-dumping duties on dumped imports,\textsuperscript{34} and countervailing duties on certain subsidised imports,\textsuperscript{35} subject to compliance with certain procedural and substantive requirements set out in the WTO agreements. That these kinds of ‘trade remedies’ involve exceptions to WTO disciplines is clear. They might otherwise violate the WTO obligation or tariff bindings.\textsuperscript{36} They are also examples of ‘trade and ... problems. Although their rationale is debatable,\textsuperscript{36} some might describe anti-dumping and countervailing duties as reflecting the conflict between free trade and unfair trade.\textsuperscript{37} This conflict is purportedly resolved by creating strict

\textsuperscript{30} Ibid., preamble (see also art. 2.3). The wording of this passage is comparable to that in the \textit{chapeau} of GATT 1994, art. XX.

\textsuperscript{31} Enabling Clause, \[1\].

\textsuperscript{32} GATT 1994, art. XXI. See also GATS, art. XIV \textit{bis}.

\textsuperscript{33} Although the point was disputed, the Appellate Body found that the Enabling Clause is an exception to MFN treatment in Appellate Body Report, \textit{EC – Tariff Preferences}, \[98\]–\[99\].

\textsuperscript{34} GATT 1994, art. VI:2; Anti-Dumping Agreement, art. 1. In the WTO, ‘dumping’ occurs where ‘products of one country are introduced into the commerce of another country at less than the normal value of the products’: GATT 1994, art. XVI:1; SCM Agreement, art. 1.1.

\textsuperscript{35} GATT 1994, art. VI:3; SCM Agreement, art. 10. In the WTO, a ‘subsidy’ essentially involves conferring a benefit through either a ‘financial contribution’ by a government or public body or ‘income or price support’ that increases exports from or reduces imports to that country: GATT 1994, art. XVI:1; SCM Agreement, art. 1.1.

\textsuperscript{36} See below, \textit{237}.

\textsuperscript{37} GATT 1994, art. VI:1 reflects the alleged unfairness of dumping, stating that WTO Members ‘recognize that dumping ... is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry’. GATT 1994, art. XVI:2 provides an example of WTO Members’ recognition of the alleged unfairness of certain subsidies, stating that WTO Members ‘recognize that the granting by a Member of a subsidy on the export of any product may have harmful effects for other contracting parties, both
acceding to the WTO after the Uruguay Round were required to make these commitments). In part, this failure to reach consensus was caused by negotiating mistakes (e.g., the late submission of the EC’s final position, and the lack of preparation by both sides). However, it can also be attributed to the intractable nature of this problem and the wide gap in the perspectives of different Members.

Of the 135 WTO Panel Reports and 80 Appellate Body Reports circulated at the time of writing, the most significant in reflecting the problem of trade and culture is the 1997 case of Canada – Periodicals. In that case, although the Panel was at pains to point out that ‘the ability of any Member to take measures to protect its cultural identity was not at issue’, Canada argued that magazines should ‘receive unique treatment’ under GATT 1994 because of their ‘intellectual or cultural content’. The Appellate Body took note of the Canadian Government’s


Panel Report, Canada – Periodicals, [5.45].


Panel Report, Canada – Periodicals, [5.45].
great concern over efforts by some key participants in the negotiations to create an a priori exclusion for such an important sector'.

1.3.4 Significance in other international contexts

Canada’s initial negotiating proposal for trade in services in the WTO raises another aspect of the trade and culture problem. Canada has indicated that it will ‘not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established’. As discussed in Chapter 5, several organisations have been developing new instruments to promote cultural diversity in the face of international trade. In particular, UNESCO recently concluded the UNESCO Convention, which purports to deal with the problem of trade and culture. These steps demonstrate that the awkward relationship between trade and culture is not exclusively the concern of the WTO. They also highlight the importance of this issue for many WTO Members and raise the possibility that such a tool could be taken out of the hands of the WTO.

Certain other international agreements confirm the importance for many countries of the cultural qualities of the audiovisual, printing, and publishing industries, as well as the surrounding controversy. For example, in the EC, as part of its role in contributing to ‘the flowering of the cultures of the Member States’, the Community is to support action by and encourage co-operation between Members in areas such as artistic and literary creation, including in the audiovisual sector; the European Constitution, not in force at the time of writing, contains

167 WTO, Council for Trade in Services, Communication from Hong Kong China, Japan, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and United States: Joint Statement on the Negotiations on Audiovisual Services, TN/S/W/49 (30 June 2005) [4]. See also WTO, Council for Trade in Services, Report of the Meeting Held on 27 and 30 June and 1 July 2005: Note by the Secretariat, TN/S/M/15 (15 September 2005) [206] (Hong Kong), [231], [309] (Chinese Taipei), [260]–[261] (Japan), [284] (US).


170 EC Treaty, art. 151(1) (see also art. 3(1)(q)).

171 Ibid., art. 151(2). See also EC Treaty, art. 151(4), and Collette Cunningham, ‘In Defense of Member State Culture: The Unrealized Potential of Article 151(4) of the EC Treaty and the Consequences for EC Cultural Policy’ (2001) 34 Cornell International Law Journal 119.
trade agreement with the USA. In the free trade agreement between Australia and the USA that came into effect on 1 January 2005, Australia retains the right to impose minimum local content quotas on television at a specific level, which corresponds to the level existing when the agreement was concluded. Similarly, in the free trade agreement between Chile and the USA that entered into force on 1 January 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. 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.’

1.4 Towards a solution

The above overview of controversies both within and outside the WTO demonstrates the importance of cultural products as an embodiment of the trade and culture problem. Finding an answer to the cultural products conundrum may shed light on possible solutions to other aspects of the conflict between trade and culture.

This book contains my reflections on cultural products and the WTO, having listened to and understood the interests and concerns of Members and others on both sides of the debate. Although the cultural industry is a business like any other, cultural products do have cultural, non-commercial features that distinguish them from other tradable goods and services. And sales of local cultural products in the marketplace may not adequately reflect the cultural value of those products to the wider community. This ‘market failure’ explains why some Members may wish to intervene in support of these products. Moreover, if Members

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197 Jeffrey Schott, Scott Bradford, and Thomas Moll, Negotiating the Korea–United States Free Trade Agreement, Institute for International Economics, Policy Briefs in International Economics No. PB06-4 (June 2006) 2; Choi, Culture and Trade in APEC, 43.
199 Chile United States Free Trade Agreement (signed 6 June 2003) annex I (Chile) 3.
200 Letter from María Soledad Alvear Valenzuela (Chilean Minister of Foreign Relations) to Robert Zoellick (United States Trade Representative), ‘Side letter on television’ (6 June 2003).
enforcing their WTO rights and progressively opening their markets to cultural products.

No doubt the WTO provisions will evolve somewhat through WTO dispute settlement, taking into account international laws, and the UNESCO Convention is scheduled to enter into force shortly. Yet more is needed. Through negotiation, Members could begin to take steps towards a better deal on cultural products – one that addresses more closely the reasons for treating cultural products differently and the appropriate limits to this special treatment. Putting aside Members’ unwavering positions of 1994, one can conceive of new ways of thinking about cultural products under GATT 1994 and GATS, keeping in mind the objectives of trade liberalisation and the cultural sovereignty of Members. Article IV of GATT 1994 is anachronistic and could be removed or at least modified, while the existing exceptions under Article XX could be retained without addition. Under GATS, perhaps cultural products can be treated differently from other services, not as an exception, but as an aspect of the potential for liberalising trade in services. Instead of allowing MFN exemptions, allowing Members to negotiate the content of their service schedules, national treatment, MFN, and market access could apply more widely, subject to a correspondingly wide exception for discriminatory subsidies for cultural products. These are neither predictions nor prescriptions for negotiating Members, but they are ideas to demonstrate the possibility of finding a solution at last.

The core of this book is divided into two main parts. Part I explains how Members’ conflicting views about trade and culture led to the current stalemate, with cultural products benefiting from limited exceptions to the WTO rules on international trade in goods and services. One problem in addressing cultural products in the WTO is in separating the current treatment of these products from the normative question of how they should be treated. Part I of this book deals with both these issues. Chapter 2 examines the arguments for and against cultural policy measures, taking into account the objectives of trade liberalisation and cultural preservation or promotion. From this analysis I identify certain guidelines for the treatment of cultural products in the WTO. In Chapter 3, I assess the extent to which these guidelines are satisfied, and I explain my misgivings regarding the current treatment of cultural products in the WTO – that is, the WTO provisions as negotiated at the end of the Uruguay Round and as subject to negotiation in the current Doha Round. I also highlight the aspects of these provisions