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THE MOST DANGEROUS GAME: U.S. OPPOSITION TO THE CULTURAL EXCEPTION

INTRODUCTION

In the 2004 documentary film *Mondovino*, filmmaker Jonathan Lasiter explored a raging conflict in the increasingly globalized wine industry.[1] At the heart of the conflict is the concept of *terroir*, which refers to the distinct tastes and aromas that result from the particular soil, climate, and growing methods of the different regions in which wine is made.[2] These particularized attributes are critical in maintaining the diversity of wines that occur throughout the world.[3] In their absence, wines from Napa will become indistinguishable from those of Bordeaux.[4]

The local growers and wine aficionados interviewed in the film see two major threats to the continued existence of their cherished *terroir*.[5] First, as multinational wine companies have accumulated vineyards throughout the world's wine-growing regions, they have streamlined growing procedures.[6] Second, a handful of figures have come to hold enormous influence in the global wine industry, and their tastes and preferences have increasingly dictated the growing methods of winemakers all around the world.[7] For example, an incredibly influential critic's fondness for oak has led winemakers to store their wine in oak barrels, thus drowning out the local characteristics of wines that developed over the course of centuries.[8]

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1. MONDOVINO (THINKFilm 2004). For a review, see A.O. Scott, *Amid the Globalization of Wine, A Plea for Its Individuality and Expression of History*, N.Y. TIMES, Mar. 23, 2005, at E5.

2. MONDOVINO, *supra* note 1. Writing about the global industry of wine, Sid Perkins noted, "Today's diversity—from Bordeaux to merlot, from champagne to chardonnay—reflects the complex interactions between a region's soil, topography, climate, grape varieties, agricultural practices, and wine-making techniques, all of which can inextricably link particular wines to particular places. Little wonder, then, that wine sometimes is referred to as 'liquid geography.'" Sid Perkins, *Global Vineyard: Can Technology Take On a Warming Climate?*, SCIENCE NEWS, May 29, 2004, at 347.

3. MONDOVINO, *supra* note 1.

4. *Id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *Id.* While the critic in question is American, not all of the divisions fall neatly on an American/rest of the world axis. Another prominent subject of the film, a wine consultant who advises wineries on how to market their wine on the global marketplace, is actually French.

These figures see these trends not just as a threat to local products, but as an assault on their cultural identity.[9] Because cultural identities have become so intertwined with nationalism, any threat to the customs or cultural products by which a nation has come to define itself can actually be seen as a threat to the nation itself.[10] As Neal Rosenthal, a New York wine importer, said of the battle between the forces of globalization, "It's not the traditionalists versus the modernists. It's the collaborators against the resistance."[11] Under this view, when civilization is at stake, all political avenues should be pursued, including the suspension of free trade rules.[12] When threatened with the prospect of an American corporation purchasing a large vineyard in Bordeaux, a French city elected a Communist mayor who successfully thwarted the bid.[13]

However, those at the forefront of the globalization of the wine industry view the ferocious response mainly as a result of jealousy on behalf of growers who are losing out in the competition for the global marketplace.[14] In their view, it is the consumers who are driving the changes in the industry, and they see themselves as democratizing forces in the once-aristocratic world of wine.[15] In dismissing their objections, a Bordeaux executive referred to the local growers and aficionados as the "ayatollahs of *terroir*."[16]

The ferocity of the debate mainly results from the pitting of culture and commerce, two dominant forces of the modern world, in direct opposition to each other.[17] Nations have come to define themselves by their respective cultures, and when culture is threatened, many people feel that the suspension of free trade laws seems like a small price to pay for its

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9. *See id.* Many of the French growers in the film discuss how the growing methods in their locales have remained remarkably constant since the Middle Ages.

10. *See* Judith Beth Prowda, *U.S. Dominance in the "Marketplace of Culture" and the French "Cultural Exception"*, 29 N.Y.U. J. INT'L L. & POL. 193, 199–200 (1997).

11. MONDOVINO, *supra* note 1.

12. *See id.*

13. *Id.* Obviously, with existing free trade agreements between France and the U.S., a corporation would normally have the right to purchase any business it would like.

14. *Id.* The critic, Robert Parker, seems to take particular pride in the idea of French wine families, whose involvement in the industry sometimes dates over centuries, trying to cater to his American tastes.

15. *See id.*

16. *Id.*

17. *See id.* As Judith Beth Prowda noted, "The debate over the 'cultural exception' juxtaposes the European notion of the necessity for some form of cultural protectionism and the profound American belief in freedom of expression, choice, and what Justice Oliver Wendell Holmes termed the 'free trade in ideas.' Justice Holmes' theory is based on the notion that the First Amendment prohibits suppression of ideas. 'The marketplace of ideas' will determine the truth of any competing idea.'" Prowda, *supra* note 10, at 208.

preservation.[18] On the other hand, free traders see anti-protectionist trade laws as the backbone of modern peace and prosperity, and that while lifting tariffs and other restrictive measures may harm domestic industries, allowing exceptions for particular fields could threaten to swallow all international trade law.[19]

The United States has injected itself into this fierce debate by becoming the foremost opponent in the world of the "cultural exception."[20] Generally speaking, the "cultural exception" refers to the exception to the national treatment principle in international trade law, under which states can enact protectionist trade policies to protect domestic cultural products when those protectionist measures would otherwise be held illegal under international trade law.[21]

The U.S. government, with lobbying from the entertainment industry, has adopted the policy of fiercely resisting any recognition of the cultural exception in international law and fighting for the application of free trade principles to all cultural products.[22] It was in response to the push by the U.S. to include cultural products in the free trade provisions of the General Agreement on Trade in Services ("GATS") Agreement, part of the main framework of the World Trade Organization ("WTO"), that the cultural exception was born.[23] Even despite that failure, the U.S. continued to fight cultural protectionist measures through the WTO dispute resolution process.[24] Simultaneously, the U.S. has continued to push for the inclusion of cultural products in the negotiation of bilateral trade

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18. *See* MONDOVINO, *supra* note 1. Some parallels can be made with Michael Walzer's "supreme emergency" doctrine. MICHAEL WALZER, JUST AND UNJUST WARS 251–268 (3d ed. 2000). Essentially, Walzer argues that when the continued existence of nations are truly in peril, those nations can suspend observance of international laws regarding the indiscriminate bombing of cities and targeting of civilians. *See id.*

19. *See* MONDOVINO, *supra* note 1.

20. *See* Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade on Cultural Products*, 40 N.Y.U. J. INT'L L. & POL. 351 (2007).

21. *See* Daisuke Beppu, *When Cultural Value Justifies Protectionism: Interpreting The Language Of The GATT To Find A Limited Cultural Exception To The National Treatment Principle*, 29 CARDOZO L. REV. 1765, 1767 (2008). While many early disputes have focused on film and television, there are many proponents for including products that are inextricably linked with their regions, such as wine and cheese, within the scope of the cultural exception. *Id.*

22. *See* C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1358 (2000).

23. *See* W. Ming Shao, *Is There No Business Like Show Business?: Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 106–07 (1995).

24. *See* Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT'L ECON. L. 515, 529–30 (2007).

agreements with smaller nations.[25] The U.S. also fiercely resisted the adoption of the UNESCO Convention, which loudly proclaims the principles of state sovereignty over all cultural matters.[26]

In line with this policy, the U.S. filed a WTO complaint against China in 2007, alleging that certain Chinese laws placed restrictions on trading and distribution rights of American companies hoping to sell cultural products, such as books, films, and music, and that these restrictions were violations of China's obligations under international law.[27] In *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, the WTO Panel ruled in favor of the U.S., finding that China could not require American businesses to go through a middleman, normally a state-owned company, when seeking to distribute cultural products to the Chinese market.[28] After China appealed the ruling, the WTO Appellate Body upheld the vast majority of the Panel's findings.[29]

Key figures in Washington hailed the decision, seeing it as a major vindication of U.S. policy.[30] Ron Kirk, the U.S. trade representative, claimed the WTO decision as a major victory, saying, "These findings are an important step toward ensuring market access for legitimate U.S. products in the Chinese market, as well as ensuring market access for U.S. exporters and distributors of those products."[31] He then vowed to continue U.S. policy, stating, "We will work tirelessly so that American companies and workers can fully realize the market opening benefits that this decision signals."[32]

Hollywood executives echoed the government's praise of the decision.[33] Dan Glickman of the Motion Picture Association of America expressed his belief that the decision would further open up the Chinese market.[34] When speaking of a Chinese quota of foreign films that was not

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25. *See* Bruner, *supra* note 20, at 376.

26. *Id.* at 397–400.

27. *See* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 1.1, WT/DS363/R (Aug. 12, 2009) [hereinafter China Panel Report].

28. *See id.* ¶¶ 4.4–4.5, 8.1, 8.2.

29. *See* WTO Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 414, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter China Appellate Report].

30. *See* Keith Bradsher, *W.T.O. Rules Against China's Limits on Imports*, N.Y. TIMES, Aug. 12, 2009, at A1.

31. *See id.*

32. *Id.*

33. *See id.*

34. *See id.*

at issue in the WTO panel decision, Glickman stated, "It's hard for me to believe that the import quota, which has been in effect for 10 years, will be there in perpetuity with this decision."[35] Glickman saw the decision as a stepping-stone towards the eventual abolition of film quotas and other regulations placed on cultural products.[36] Proponents of U.S. policy thus see the decision as a major breakthrough, and believe that continued resistance to any recognition of the rights of states to regulate culture will eventually culminate in the total extinction of the cultural exception.[37]

This Note argues that despite the ruling in its favor, the U.S. policy of full-fledged opposition to the cultural exception is misguided. There is an inherent difficulty in both defining and valuating the concept of culture in a legal framework, and these difficulties make further litigation regarding cultural matters incredibly risky. The WTO decision itself suggests that proponents of the cultural exception may have the upper hand in future cases.[38] First, the decision suggests that the UNESCO Convention may actually alter some rights and obligations of WTO members.[39] Second, China's invocation of a "public morals" defense, while unsuccessful in this case, may prove to be an avenue in the future for states to regulate culture consistently with their WTO obligations.[40]

In light of the inherent risk of litigating culture, the U.S. should instead negotiate with the international community to codify a limited version of the cultural exception at the WTO. In exchange for recognizing the exception, the U.S. should push for a medium-based definition of the term, in which the applicability of the exception depends on the medium in which cultural products are displayed to consumers, and not on an analysis of the cultural value of the goods and products. Such an approach would place clear limits on the scope of the cultural exception, and would prevent the more radical provisions of the UNESCO Convention[41] from affecting international trade law.

Part I of this Note explores the origins of the cultural exception, and analyzes a prior WTO decision which displays the body's previous unwillingness to consider the cultural value of products in their legal anal-

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35. *Id.* Glickman did note that he did not think the decision would have a major impact in the immediate future. *Id.*

36. *Id.*

37. *See id.*

38. *See* China Panel Report, *supra* note 27.

39. *See id.* ¶ 7.751.

40. *See id.* ¶ 7.863.

41. *See* Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, UNESCO Doc. No. CLT-2005/Convention Diversite-Cult. Rev., *available at* http://unesdoc.unesco.org/images/0014/001429/142919e.pdf [hereinafter UNESCO Convention].

yses. Part II examines the UNESCO Convention, a 2005 treaty which seeks to counteract the lack of recognition of the cultural exception at the WTO, and discusses its possible effects on WTO rights and obligations. Part III looks at the WTO's *China* decision in detail, with particular emphasis on China's invocation of the UNESCO Convention and its "public morals" defense.

I. PRODUCTS OR CULTURE?: THE WTO AND THE CULTURAL EXCEPTION

A. Culture and the National Treatment Principle

The National Treatment principle is one of two foundational principles that apply across the WTO regime[42] and it is crucial in understanding the cultural exception. The General Agreement on Tariffs and Trade 1947 ("GATT 1947") provides that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."[43] The National Treatment principle prohibits a member from discriminating against other members in favor of its own goods and services.[44] This principle requires that once goods have cleared customs, members must treat foreign goods no less favorably than like domestic goods.[45]

The cultural exception first arose in the attempts of the U.S. to extend the national treatment principle to services as well as products.[46] The GATT 1947 only governs goods, which essentially means products that contain a distinct physical presence.[47] In contrast, GATS governs services, meaning products that lack physical, tangible properties.[48] While neither the GATT nor GATS explicitly contain a cultural exception, the

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42. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 143 (2008). The other core principle is The Most Favored Nation principle, which essentially means that WTO members must give equal treatment concerning trade advantages to all other members. No member of the WTO can discriminate in favor of or against any other member. The Most Favored Nation and National Treatment principles first appeared in GATT 1947, but they are now featured in the WTO through GATT 1994, GATS, and TRIPS. *Id*.

43. General Agreement on Tariffs and Trade art. III(2), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

44. CHOW & SCHOENBAUM, *supra* note 42, at 143.

45. *Id.* at 159.

46. *See* Hahn, *supra* note 24, at 515–16.

47. *Id.* at 525.

48. *Id.*

different natures of the treaties have important consequences.[49] The GATT automatically applies its national treatments principle to all goods, unless there is an express provision explicitly exempting the product from the treaty.[50] GATS, on the other hand, creates obligations much more modest in scope,[51] as its national treatment principles are only granted if and to the extent that states have made specific commitments to liberalize trade in that particular industry.[52]

During the Uruguay Round negotiations that led to the ratification of GATS in the early 1990s, the U.S. pushed hard to include specific commitments to liberalize the entertainment industry as part of the treaty.[53] In response, the French government pushed for the complete exclusion of the industry.[54] Ultimately, in an uneasy compromise, the sides essentially agreed to disagree, not formally excluding the audiovisual sector from GATS, but allowing states to decline to make commitments to liberalize trade in the sector, with the understanding that parties would resume negotiations within five years.[55] However, in the ensuing years, very few Member States have made commitments with regards to cultural products.[56]

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49. *Id*.

50. *Id.* For example, weapons are exempted from the GATT under Article XXI. One of the original exceptions of GATT 1947 also shows that the original drafters of the GATT were aware of the need for sometimes treating cultural products differently. Article IV permitted national screen quotas for foreign films, limiting the quotas to those existing in October 1947. The exception was limited to movie theaters, however, and was subject to further negotiations as to further limitations or their eliminations. The exception was a response to the huge number of American films that were flooding the European market as a result of the disruption of trade caused by the war. Chi Carmody argues that the prominent placement of the exception in the text of GATT displays that the cinema exception was important to the drafters, and that the exception was consistent with the drafters' awareness that one state's domination of the film industry could pose problems for international trade. The recognition of this exception for movie theaters may seem quite limited, but it seems to reflect a recognition of the need to sometimes address culture differently in international trade law, even at a time when the world was much more parochial, before globalization transformed so many cultures. Chi Carmody, *When "Cultural Identity Was Not At Issue": Thinking About Canada—Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 255 (1999).

51. *See* Hahn, *supra* note 24, at 531–33.

52. *See id.* at 526.

53. *See* Shao, *supra* note 23, at 106–08.

54. *Id.*

55. *Id.*

56. Hahn, *supra* note 24, at 526.

The French government celebrated this cultural exception from GATS as a major victory for the preservation of French culture,[57] but the standing of the cultural exception in international trade law remained very tenuous.[58] In ensuing years, the classification of a product as a good or service became integral to the ability of states to enact protectionist measures against cultural products.[59] When a cultural product was recognized as a service, it was likely to fall within the scope of GATS, but when recognized as a good, it would likely be engulfed by the all encompassing nature of GATT.[60]

This situation is further complicated by the fact that products do not fall exclusively under either GATT or GATS.[61] For instance, while the production of a film is considered a service, the physical reel which is projected on screens is actually considered a good.[62] Thus, even though the entertainment industry is not specifically included in GATS, a cultural product may still fall within the scope of GATT even if a party can successfully argue that the product constitutes a service.[63] Under this legal regime, an analysis known as the "like products" test became incredibly important in determining whether states have the right to impose protectionist measures in a given cultural industry.[64]

B. Cultural Valuation in the "Like Products" Analysis

In *Canada—Certain Measures Concerning Periodicals*, the WTO Panel assessed whether Canada violated national treatment principles by imposing a total ban and excise taxes on split-run editions of U.S. magazines.[65] In the 1960s, U.S. publishers began to distribute Canadian edi-

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57. *See* Alan Riding, *The World Trade Agreement: The French Strategy*, N.Y. TIMES, Dec. 15, 1993, at D19. Communications Minister Alain Carignon stated, "This is a great and beautiful victory for Europe and for French culture." *Id.* However, Jack Lang, the former Minister of Culture, phrased the victory in different terms, stating, "It's not a victory of one country over another. It's a victory for art and artists over the commercialization of culture." *Id.* It should be noted that while much of the press coverage at the time focused on the French role in negotiations, the backing of the French by other members of the European Community was crucial in the establishment of the cultural exception. *Id. See also* Julian Nundy, *The GATT Deal: France Sees Itself as Gallant Defender*, THE INDEPENDENT, Dec. 15, 1993, at 7.

58. *See* Bruner, *supra* note 20, at 374–76.

59. *See* Hahn, *supra* note 24, at 531–33.

60. *Id.*

61. *Id.* at 526–27.

62. *Id.* at 527.

63. *See id.*

64. *See id.*

65. *See* Panel Report, *Canada—Certain Measures Concerning Periodicals*, ¶¶ 3.3–3.4, WT/DS31/R (Mar. 14, 1997) [hereinafter Canada Panel Report].

tions of their magazines containing the same editorial content as U.S. editions but with advertisements specifically targeted to the Canadian market.[66] These U.S. editions threatened the advertising revenue of Canadian periodicals, which in turn led to the collapse of several Canadian magazines.[67] Fearing the impact of a collapse of the Canadian publishing industry on national identity,[68] the Canadian government imposed a heavy tariff on imported periodicals that contained advertisements directed specifically to the Canadian market.[69] In response to an attempt by *Sports Illustrated* in 1993 to get around the tariff by printing the split-run editions in Canada, the Canadian government placed an excise tax of eighty percent on magazines with more than twenty percent of the same editorial content as their home editions and with advertising that did not appear in non-Canadian editions of the magazine.[70] In assessing whether

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66. *See id.* ¶ 2.2.

67. *See* Carmody, *supra* note 50, at 279–80. While American publications had been attracting Canadian readers for many years, in the 1960s, U.S. periodicals began to introduce split-run editions in Canada in an attempt to increase their advertising revenue. Advertisers looking to market specifically to Canadian consumers could now buy space in popular American magazines, thus threatening the traditional stream of revenue that was so vital to the continued existence of Canadian periodicals. *Id.*

68. In 1961, a government commission stated, "[T]he communications of a nation are as vital to its life as its defences, and should receive at least as great a measure of national protection." Carmody, *supra* note 50, at 280. Despite close ties with the U.S., Canada has long struggled to maintain its cultural identity in the shadow of its enormous neighbor to the south. Describing this problem, Chi Carmody writes:

> Due to its proximity and sheer size, the United States also looms large in everyday Canadian thinking. A shared border, common language, parallel history, and the largest trading relationship in the world mean that Canadians are well aware of U.S. current events. The same cannot be said for many Americans about Canada. Their ignorance annoys Canadians, who often perceive it as a sign of arrogance and a reason to be suspicious of the United States. Moreover such unidirectional cultural permeability makes it exceedingly difficult for Canadians to assert their own cultural autonomy. Not only must Canadians struggle to define who they are in the face of constant competition from cultural imagery that is not their own, but Canadian culture does not pose any comparable threat to, and hence cannot be leveraged against, the United States. The overwhelming one-way flow of products, ideas, and interest has served at times to sharpen the perception of cultural invasion among Canadians.

Id. at 278–79.

69. *Id.* at 280–81. Tariff Code 9958 effectively implemented a total ban on the importation of periodicals which contained advertisements that targeted Canadian audiences and did not appear in all editions distributed in the periodical's home market. *See id.*

70. *See* Canada Panel Report, *supra* note 65, ¶¶ 2.6–2.7.

the excise tax violated the national treatment principle, the Panel conducted a "like product" analysis.[71]

Canada argued that the intellectual content of a magazine must be considered its prime characteristic, and that the "like product" analysis must be conducted in terms of its intellectual content rather than its physical characteristics.[72] The Canadian government intended for the excise tax to create original content by putting news and events through a uniquely Canadian filter.[73] Canada argued that it was untenable to equate U.S. periodicals, which virtually ignored Canadian topics, with Canadian periodicals, which had a strong focus on Canadian affairs and a distinctly Canadian outlook on international affairs, as "like products."[74]

The U.S. countered that Canada had created artificial distinctions between otherwise like products based on factors such as the location of production, and that these factors were irrelevant in assessing the nature of the good.[75] The U.S. argued that editorial content was just one of many factors that should be assessed when making the "like product" comparison.[76] The U.S. further suggested that Canada imposed the measures mainly to protect its own advertising industry.[77]

In an unusual legal analysis, the Panel examined the case of a hypothetical magazine[78] and reasoned that there could conceivably be a U.S. edition and a Canadian edition of a home and gardening magazine that would share a common end use and similar physical properties, natures, and qualities.[79] In rejecting the Canadian argument, the Panel found that editorial content and advertising content, the factors of the excise tax definition, were external to the Canadian market and did not relate to any inherently Canadian quality of the periodical.[80] In analyzing the decision, one author noted that the Panel insisted on a degree of specificity that culture could simply never provide.[81] The Panel refused to engage in the analysis needed to recognize the inherent value of particular cultures and thus found the different editions of the magazines to be like products.[82]

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71. *See id.* ¶ 3.60.
72. *See id.* ¶ 3.61.
73. *See id.* ¶ 3.59. An analogy can be made here with the concept of *terroir*.
74. *See id.* ¶ 3.62.
75. *See id.* ¶ 3.60.
76. *See id.*
77. *See id.* ¶ 3.72.
78. *Id.* ¶¶ 5.25–5.26. This particular bizarre aspect of the Panel's opinion should be attributed to the difficulty inherent in legally analyzing culture.
79. *See id.* ¶ 5.25.
80. *See id.* ¶ 5.24.
81. Carmody, *supra* note 50, at 295–96.
82. *See id.*

Canada appealed the Panel's findings on the excise tax to the Appellate Body of the WTO.[83] While the Appellate Body also ruled in favor of the U.S., it did so under a completely different analysis, looking at the substitutability of the different editions of magazines.[84] In finding that imported split-run periodicals and domestic split-run periodicals were directly substitutable, the Appellate Body looked to see whether they were in competition with each other in the relevant market. The Appellate Body noted that while certain periodicals may not be directly substitutable because of a difference in topic, whether or not a magazine had Canadian content was not relevant in assessing whether a periodical is substitutable.[85]

Because of the WTO's purely economic focus, its panels refused to take non-economic considerations into account in their legal analyses of whether states were violating national treatment principles.[86] Thus, many measures states traditionally took to protect their local cultural industries might not survive the WTO dispute resolution process.[87] While many ambiguities remained in defining culture, it seemed quite clear that arguments about the cultural values of products under the "like products" analysis were doomed to fail.[88] Because many states felt that the WTO was ignoring the cultural value of products that were so important to their respective national and cultural identities, these states turned to the United Nations in 2005 in an attempt to reassert their sovereignty over cultural matters.[89]

II. THE UNESCO CONVENTION

While France had been inextricably linked with the cultural exception during the Uruguay Rounds negotiations, the ratification process of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was a world-wide phenomenon.[90] With its overwhelming popularity, the world community negotiated and ratified the treaty with remarkable speed.[91] Despite its nearly complete isolation, the

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83. WTO Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, (June 30, 1997), at 2 [hereinafter Canada Appellate Report].

84. *See id.* at 29.

85. *See id.* at 28.

86. *See id.*

87. *See id.*

88. *See id*.

89. *See* Bruner, *supra* note 20, at 357.

90. *See* Alan Riding, *Entr'acte: Next Lone U.S. Dissent: Cultural Diversity Pact*, N.Y. TIMES, Oct. 12, 2005.

91. *See id.*

U.S. still opposed the treaty in its entirety and fought hard against its ratification.[92]

France and Canada, the original sponsors of the convention, aimed to remove all cultural trade disputes from the jurisdiction of the World Trade Organization and to create a dispute resolution process under UNESCO.[93] In a partial victory, the U.S. managed to fend off this movement, successfully pushing for the inclusion of a provision that states that the convention "cannot modify rights and obligations of the parties under any other treaties to which they are parties."[94] While its standing under international law remains unclear, the Convention is clearly an endorsement by states of their sovereignty over cultural matters.[95]

After being adopted by the UNESCO General Conference on October 20, 2005, the Convention provoked a broad array of reactions, ranging from indifference, to over the top excitement,[96] to fierce resistance.[97] These varied reactions can be attributed to the Convention's many substantive and procedural contradictions.[98] The Convention appears at first sight to be nothing more than a litany of vague platitudes about the inherent value of cultural diversity.[99] Yet to others, the Convention represents a treaty fully recognized in international law, and while perhaps having little impact upon clear existing international obligations, contains the potential to transform the recognition of the cultural exception under international law.[100] This Section examines both the provisions of the Convention and its impact upon international law, arguing that despite the provisions limiting its applicability, it still has many implications for the obligations and rights of its parties.

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92. *See id.*

93. *See id.*

94. *See id.*

95. Alison James, *Gaul Wall Won't Stall Hollywood Anytime Soon*, VARIETY, Oct. 31, 2005, at 8.

96. *See* Bruner, *supra* note 20, at 400–02. For example, a Canadian government minister described the Convention as "on an equal footing with other international treaties," and called it "a great day for the cultural community." *Id.*

97. *Id.* at 400–03.

98. *See* UNESCO Convention, *supra* note 41.

99. *See id.* art. 1.

100. One such provision of the Convention states, "Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples, and nations . . . ." *Id.* pmbl.

A. A Proclamation of Sovereignty

Throughout its text, the Convention announces and reaffirms an incredibly broad mandate for state sovereignty over the regulation and subsidization of cultural industries.[101] One of the stated objectives of the Convention is "to reaffirm the sovereign rights of States to maintain, adopt, and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory."[102] The Convention announces "the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory" to be one of its eight guiding principles.[103] This language gives a broad mandate to governments to enact any protectionist measures it deems necessary, as long as the measures relate to the cultural sphere.[104] This assertion of sovereignty, considering the enormous difficulties in defining culture and the seeming authorization of states to define culture themselves, must be seen as a rejection of WTO free trade principles in cultural industries.[105]

B. Defining Culture

The Convention attempts to create an incredibly broad notion of culture based on the inherent cultural value of things,[106] but does not provide a working definition of "culture."[107] The Convention circularly defines "cultural content" as referring "to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities."[108] This definition does not limit cultural content to products traditionally recognized as cultural, such as books, films, or music,[109] and would seem to allow for the inclusion of national and regional food products, such as wine and cheese.[110]

The Convention also seeks to remove the distinction between goods and services that is so important at the WTO.[111] The Convention defines "cultural activities, goods and services" to be

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101. *See id.*
102. *Id.* art. 1(h).
103. *Id.* art. 2(2).
104. *See id.*
105. *See id*.
106. *See id.* art. 4(2).
107. *See id.* art. 4.
108. *Id.* art. 4(2).
109. *See id.*
110. *See id.*
111. *See id.* art 4(4).

> those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.[112]

This language seems to reject any separate legal analysis for the production of cultural products.[113]

C. The Means for Protecting Culture

The Convention provides a broad mandate for states to take measures that they deem important for protecting culture.[114] Included in such measures are "regulatory measures aimed at protecting and promoting diversity of cultural expressions."[115] Because of the Convention's broad definition of culture, almost any measure could conceivably fit into this provision.[116]

The Convention then provides a non-exclusive list of specific measures that are acceptable.[117] The list includes such relatively uncontroversial measures as the creation and funding of public institutions to support culture[118] and public broadcasting.[119] The Convention endorses

> measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services.[120]

The broad language of this provision seems to explicitly endorse the use of quotas and other regulations designed to protect the market for domestic productions, and it does not set any limits upon its use.[121] The Convention further endorses the use of subsidies to promote cultural goods,

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112. *Id.*
113. *See id.*
114. *See id.* art. 6(1).
115. *Id.* art. 6(2)(a).
116. *See id.*
117. *Id.* art. 6(2).
118. *Id.* art. 6(2)(f). Article 6(2)(e) also allows measures to encourage non-profit organizations, which likely would include public subsidies for such organizations. *Id.* art. 6(2)(e).
119. *See id.* art. 6(2)(h).
120. *Id.* art. 6(2)(b).
121. *See id.*

services, and activities.[122] The text of the UNESCO Convention provides incredibly broad powers to states when regulating culture and explicitly authorizes many measures that would likely violate WTO obligations.[123]

D. Rights, Obligations, and Article 20

However, the UNESCO Convention, although binding,[124] imposes very few obligations on its parties.[125] Instead, the Convention formulates an extensive list of measures that parties have the right to take when protecting and promoting cultural diversity.[126] When a right conflicts with an existing obligation arising from another instrument of international law, the obligation will generally take precedence.[127] This aspect of the Convention has made commentators dismiss its importance, finding that its affirmation of state sovereignty over cultural matters, while sounding revolutionary, actually rings hollow.[128]

The Convention also seems to negate any impact it may have on international law with one provision.[129] Article 20(2) states, "Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."[130] This provision seems to validate any previous treaties or trade agreements ratified before the Convention, such as the WTO regime, in which states agreed to cede their sovereign rights to impose protectionist measures.[131] Considering that most states are parties to the WTO, and that most WTO

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122. *Id.* art. 6(2)(d).

123. *See id.* art. 6.

124. Mira Burri-Nenova, *Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, 12 J. INT'L ECON. L. 17, 27. Despite any confusion caused by the use of the word "convention," the UNESCO Convention is a treaty and is binding under international law. *Id.*

125. *Id.* at 22.

126. *Id.* at 23.

127. *See* Bruner, *supra* note 20, at 405.

128. *See* Burri-Nenova, *supra* note 124, at 22–25. Burri-Nenova writes, "Thus, whereas the Parties could do many things, they are not obligated to undertake any concrete and specific action." *Id.* at 22. After noting that the only punishment for non-compliance with the Convention envisaged is a state being criticized by the Intergovernmental Committee or Conference of Parties, Burri-Nenova writes, "[W]hile such reporting exercises have proven advantageous in different settings, they are unlikely to have any value here, since . . . there exist neither any implementation criteria, nor any threat of sanctions." *Id.* at 23.

129. *See* UNESCO Convention, *supra* note 41, art. 20.

130. *Id.* art. 20(2).

131. *See id.* Writing in 2006, Michael Hahn stated, "This article shows that the *Diversity Convention*, while an important step towards the recognition of cultural diversity as an internationally recognized public choice of states, does not affect their rights and obligations as such under WTO law." Hahn, *supra* note 24, at 517.

case law seems to indicate that cultural products will not be treated differently than other products,[132] Article 20(2) seems to completely negate the Convention's bold calls for state sovereignty.[133] While declarations of the inherent value of cultural diversity may sound appealing, domestic cultural industries would be just as vulnerable to international competition as any industry in a WTO jurisdiction.[134]

However, another provision in Article 20 also claims that the Convention should not be subordinated to any other treaty.[135] Article 20(1) states, "[W]hen interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention."[136] How can these two seemingly contradictory provisions of Article 20 be reconciled?

One commentator argues that the Culture Convention is best understood not as altering existing obligations under international trade law, but as enhancing the negotiating positions of states as they enter into future trade agreements.[137] Under his reading of Article 20, with respect to pre-existing international obligations, the Convention requires only that parties to the Convention make a good faith effort to comply with their obligations.[138] When an existing obligation arising under the WTO (or any other trade regime or treaty, for that matter) conflicts directly with obligations under the Convention, the WTO obligation will prevail, and the party will not violate its duty to make a good faith effort to comply with the Convention.[139] However, the importance of the Convention comes into play when states enter into agreements with new international obligations.[140] By asserting their duty to make a good effort to comply

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132. *See* Bruner, *supra* note 20, at 407.

133. *See* UNESCO Convention, *supra* note 41, art. 20(2).

134. *See* Bruner, *supra* note 20, at 376–78. As the author notes, because of the relative ease of negotiating a bilateral agreement, as opposed to a multilateral agreement, the United States has focused on negotiating the liberalization of cultural markets in bilateral treaties, often with smaller nations with little bargaining power. *Id.*

135. UNESCO Convention, *supra* note 41, art. 20(1).

136. *Id.* art. 20(1)(b).

137. Bruner, *supra* note 20, at 405.

138. *Id.* at 405–06.

139. *Id.* at 406–07. In support of his contention, Bruner notes the similarities in wording between Article 20(2) of the Convention and Article 30(2) of the Vienna Convention on the Law of Treaties, which provides that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." *Id.* at 406.

140. *Id.* at 407. Bruner notes that while Article XIX of GATS requires that parties enter into successive rounds of negotiations to achieve a progressively higher level of liberalization, it also contains a limiting provision which recognizes national policy ob-

with the Convention, smaller states can enhance their bargaining position with larger states.[141] Thus, the Convention can be interpreted as being most influential in areas of international trade law where states have not yet made commitments.[142]

This Note argues that the Convention may also prove to be highly influential when the exact scope of states' obligations remains uncertain, particularly with regards to the WTO's rarely used "public morals" defense. While Article 20 does place important limitations on the applicability of the UNESCO Convention, the Convention's broad definition of culture and its bold call for sovereignty over cultural matters can still transform the recognition of state sovereignty over cultural matters in international law.[143]

III. THE UNESCO CONVENTION AND THE PUBLIC MORALS DEFENSE AT THE WTO

Despite its ruling in favor of the U.S., the WTO analysis in *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* strongly suggests that U.S. policy regarding the cultural exception remains extremely risky.[144] In its report, the WTO Panel found that the Chinese government had violated international trade rules by limiting the importation of books, films, and music.[145] China had placed restrictions on foreign companies hoping to distribute these types of cultural products within China, forcing them to distribute their products through a limited number of corporations, many of which were state-owned.[146] The Panel found

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jectives as justifying an exemption from the process of liberalization, and the Convention endorses the recognition of cultural policies as national policy objectives. *Id.* at 407–08.

141. *See id.*

142. *See id.*

143. *See* UNESCO Convention, *supra* note 41.

144. *See* China Panel Report, *supra* note 27, ¶¶ 4.4–4.7, 7.863, 8.1, 8.2. Because the Appellate Body largely upheld the Panel's findings with respect to the application of the public morals exception, this Section focuses mostly on the Panel Report. *See* China Appellate Report, *supra* note 29, ¶¶ 336–37. Reference is made to the Appellate Body's conclusions or analysis whenever they differ in any material respect from the Panel Report.

145. Bradsher, *supra* note 30.

146. *See* China Panel Report, *supra* note 27, ¶¶ 7.751–7.755, 8.2. A film executive claimed that China Film Group Corp. took an enormous cut of box office receipts, and charged film studios high distribution fees, thus limiting the profitability of American studios to a small percentage of the Chinese box office. The film executive hoped this ruling would increase competition in the distribution of films, allowing studios to take a larger percentage of the box office in China. John W. Miller, Peter Fritsch & Lauren A.E.

that these restrictions violated China's obligations under GATT, GATS, and under their Accession Protocol,[147] and may mean that foreign movie studios, publishers, and record companies will have an increased chance to sell more directly to Chinese consumers.[148]

In its response to the allegations, China did not invoke its rights arising under the UNESCO Convention as a direct defense.[149] The language of Article 20 clearly seems to preclude parties from invoking rights under the Convention as a defense against a breach of obligations arising under existing international law,[150] and China's decision not to invoke the Convention as a direct defense seems to indicate that Article 20 will dissuade states from even attempting to argue that the Convention overrides clear and existing obligations when they are in conflict.[151]

However, China's response to the allegations and the Panel's decision suggests that the UNESCO Convention may still alter the rights and obligations of parties to the WTO when the scope of those rights and obligations are unclear.[152] In response to the claims that China violated trade obligations arising under the Accession Protocol, China raised Article XX(a) of the GATT 1994 as a defense.[153] Article XX(a) provides that, "nothing in this Agreement shall be construed to prevent the adoption or endorsement by any contracting party of measures: (a) necessary to protect public morals."[154]

China argued that the regulations being challenged by the U.S. were actually part of a content review system performed on imported cultural products that was designed to prevent the dissemination of products that could have a negative impact on public morals.[155] As part of this system, China only allowed entities which were capable of conducting the con-

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Schuker, *Hollywood Upstages Beijing: WTO Hands China Its Biggest Defeat in Trade Battle Over Movies, Music, Books*, WALL ST. J., Aug. 13, 2009, at A1.

147. *See* China Panel Report, *supra* note 27, ¶ 8.2. In line with earlier decisions, China did not focus on the "like products" analysis when making its arguments. However, this may be because this case focused on the restrictions China placed on foreign companies, and not on restrictions directly placed on the products. *See id.*

148. *See* Bradsher, *supra* note 30.

149. *See* China Panel Report, *supra* note 27, ¶ 7.758 n.538.

150. *Id.* ¶ 4.207. As the Panel noted in a footnote, "We observe in this respect that China has not invoked the *Declaration* as a defence to its breaches of trading rights commitments under the Accession Protocol." *Id.* ¶ 7.758.

151. *See id.* It remains unclear whether other forums of international law, such as the International Court of Justice, would be more receptive to a direct invocation of the UNESCO Convention.

152. *See id.* ¶¶ 4.108–4.112, 4.207, 7.751–7.755.

153. *See id.* ¶¶ 7.708–7.709.

154. *See id.*

155. *See id.* ¶¶ 4.277–4.278.

tent review to import cultural goods, and only a limited number of importation entities had the appropriate organizational structure and geographical coverage, as well as reliable and qualified personnel, necessary to conduct the content review.[156] Despite its codification in GATT 1994, the "public morals" defense had previously been invoked by a state only once at the WTO,[157] and thus, its exact scope remains unclear. In making its arguments, China attempted to invoke the language and spirit of the UNESCO Convention to broaden the scope of the previously dormant defense.[158]

When states invoke the protection of public morals as a defense, they must actually show that there is a link between the policy objective behind the challenged measures and the protection of public morals.[159] In *US—Gambling*, the sole invocation of the public morals defense, the Panel first analyzed whether the policy objectives behind various internet gambling statutes in the U.S. fell within the scope of the protection of public morals.[160] The Panel eventually did accept the U.S.'s arguments that the laws in dispute were actually measures to protect "public morals

156. *See id.* ¶¶ 4.278–4.279. The United States responded, "Restricting trading rights to only a single, or a select few, Chinese state-owned importers is nowhere near 'indispensable' to content review, and thus the restrictions on trading rights are not 'necessary' under Article XX(a)." *Id.* ¶ 4.318.

157. Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT'L ECON. L. 43, 44–45. As Diebold notes, the defense was unsuccessfully invoked by the United States in *US—Gambling*, but writing in March 2008, Diebold accurately predicted that China was likely to invoke the defense in the current case. *Id*.

158. *See* China Panel Report, *supra* note 27, ¶¶ 4.108–4.109.

159. *See id.* ¶¶ 7.762–7.763. Writing before the China Panel Report was issued, Diebold said that WTO dispute settlement practice applied a two tier test to determine whether Article XX (or the similar Article XIV of GATS) is available as a defense. First, states must show that the measure at stake is designed to pursue a policy objective that falls within the scope of one of the public interests set out in Article XX, and the measures are necessary to achieve the policy objective. Second, states must show that they satisfy the good faith requirements set forth by the general exception clause. Diebold, *supra* note 157, at 46–47. However, when analyzing the general exceptions clause, WTO panels sometimes do not even mention some elements, either because different elements can be so closely linked or so obvious that they are not even worth mentioning. *Id*. at 47. This can make analysis of the Panel's decision confusing, to say the least.

160. *See* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S. Gambling Panel Report]. The Panel did find that the concerns which the various statutes sought to address did fall within the scope of public morals, but found that the measures were not necessary to protect public morals. *Id.*

or public order."[161] However, as Antigua wisely noted, because of the wide availability of gambling and the active role of federal and state governments in the promotion of gambling, the U.S. could not credibly argue that gambling itself was contrary to public morals and public order.[162] Instead, in order to make this link, the U.S. had to identify secondary concerns that the various statutes were addressing, such as organized crime, money laundering, fraud, the risks of children gambling, and pathological gambling.[163] They then had the burden of providing evidence, such as legislative history, that showed that these various statutes were actually enacted for the purpose of addressing these specific concerns.[164]

Yet, in its attempt to show that its intended policy objectives fell within scope of the protection of public morals, China mostly ignored any specific concerns it had with the cultural products being reviewed, and instead explicitly invoked the Convention to proclaim that cultural goods necessarily have an effect on public and individual morals.[165] In its oral statement at the First Substantive Meeting of the Panel, China further elaborated

> As vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours. Cultural goods may have a negative impact on public morals, such as the depiction or vindication of violence or pornography, against which minors must be specifically protected.[166]

Although China does not explicitly cite it, the language clearly references another UNESCO instrument, the Universal Declaration of Cultur-

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161. *Id.* ¶ 6.481. The Appellate Body, without much analysis, upheld the Panel's finding that the challenged measures fell within the scope of "public morals" or "public order." Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 296–299, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S. Gambling Appellate Report].

162. U.S. Gambling Panel Report, *supra* note 160, ¶ 3.290.

163. The suppression of these activities would constitute the policy objective.

164. *See id*. Diebold listed various means of proving whether specific policy objectives fall within the scope of public morals, including international practice and consensus, national laws and international agreements, and possibly religious texts. Diebold, *supra* note 157, at 64–66.

165. *See* China Panel Report, *supra* note 27, ¶¶ 4.108–4.109. China argued, "The cultural goods have a major impact on societal and individual morals as emphasized in particular in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions." *Id.*

166. *See id.* ¶ 4.276.

al Diversity ("the UNESCO Declaration").[167] The UNESCO Declaration describes "cultural goods and services" as "vectors of identity, values, and meaning," and that they "must not be treated as mere commodities or consumer goods."[168]

China further argued,

> Considering the potential impact of cultural goods on public morals, China's longstanding policy has been to implement a high level of protection which is reflected in a complete prohibition of cultural goods with inappropriate content and a high level of protection against the possible dissemination of cultural goods with a content that could have a negative impact on public morals.[169]

In declining to elaborate on its specific concerns regarding the content of the cultural goods subject to the challenged measures, failing to describe how this content threatened public morals, and speaking only in an incredibly broad sense about the effect of cultural goods on public morals, China implicitly invoked the themes of sovereignty over cultural matters that permeate throughout the UNESCO Convention.[170]

Both the responses of the U.S. and of the Panel to China's arguments seem to indicate that future WTO panels will not question the link between cultural products and public morals.[171] It is notable that the U.S., unlike Antigua and Barbuda in *US—Gambling*, did not even contest the link between the content of the cultural goods and the protection of public morals.[172] While Antigua and Barbuda were able to make the credible argument that the significant consumption of gambling and betting services within the nation raised the question of whether internet gambling was actually contrary to public morals in the U.S.,[173] the U.S. chose not to dispute whether all of China's content prohibitions actually protected public morals in China.[174]

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167. *See* Universal Declaration of Cultural Diversity, Nov. 2, 2001, UNESCO Doc. 31C/RES/25, *available at* http://unesdoc.unesco.org/images/0012/001271/127160m.pdf.

168. *Id.* art. 8. Although there is language similar to this in the Convention, China may have chosen to cite the UNESCO Declaration because the United States had adopted the Declaration, but not the Convention.

169. China Panel Report, *supra* note 27, ¶ 4.277.

170. *See id.* ¶¶ 4.108–4.109, 4.276–4.277.

171. *See id.* ¶ 7.763.

172. *See id.* ¶¶ 7.756, 7.762. As the Panel noted, "The United States does not specifically argue that the measures at issue are not measures to protect public morals. The United States is challenging the means China has chosen to achieve its objective of protecting public morals." *Id.* ¶ 7.756.

173. *Id.* ¶ 7.762.

174. *Id.*

Yet, some of the types of content prohibited under the Chinese regulations in dispute are incredibly broad.[175] Under the *Publications Regulations*, China's main statute laying forth how it applies content review to reading materials, China did put forth some specific content that its content review system prevented from entering the marketplace that would be unlikely to raise many objections, such as depictions of violence and pornography.[176] However, other provisions strongly suggest that China could apply protectionist measures protecting culture under the guise of the public morals defense.[177] Objectionable content includes content that: "jeopardizes the solidarity, sovereignty and territorial integrity of the nation," "incites hatred or discrimination of the nationalities, undermines the solidarity of the nationalities or infringes upon customs and habits of the nationalities," and "jeopardizes social morality or fine cultural traditions of the nationalities."[178] These provisions define content not by objective measures,[179] but rather by the effect it may have on individuals or the nation as a whole.[180] In defining prohibited content in such a circular manner, China could plausibly argue that any American cultural product that threatened the market share of Chinese cultural products "jeopardizes the solidarity" of the nation, or "threatens the cultural traditions of the nationalities."[181]

Because the Panel found that China's measures did not satisfy the necessity test of Article XX, they chose to proceed with their analysis on the assumption that each of the prohibited types of content could have a negative impact on "public morals" in China.[182] While this decision may be partially based on the strategic decision not to specifically contest the provisions detailing the prohibited content, the Panel also noted that the content and scope of the concept of "public morals" played a role in their decision.[183]

The Panel accepted the interpretation of public morals, laid out in *US—Gambling*, that "the term 'public morals' denotes standards of right and

175. *See* China Panel Report, *supra* note 27, ¶¶ 7.760–7.761.

176. *See id.* ¶ 7.760. However, this is not to suggest that states might not object to discriminatory applications of those provisions against foreign materials.

177. *See id.*

178. *See id.*

179. While there may be some obvious difficulties in demarcating the exact point where depictions of nudity or sexual intercourse become pornographic, any analysis would at least be based on the actual content of the cultural product.

180. *See id.*

181. *See id.*

182. *See id.* ¶ 7.763.

183. *Id.* ¶ 7.763.

wrong conduct maintained by or on behalf of a community or nation,"[184] and that these concepts can vary throughout time and in different places, depending on factors such as prevailing social, cultural, ethical, and religious values.[185] Most importantly, the Panel noted that when applying the public morals concept and other similar societal concepts, member states "should be given some scope to define and apply for themselves the concepts of public morals . . . in their respective territories, according to their own systems and scales of values."[186] The implicit recognition of state sovereignty over matters of public morals echoes the themes of the UNESCO Convention and seems to suggest that future WTO panels would be extremely reluctant to question a state's assessment of its own public morals.[187]

The cultural value of a product may also have an impact on a WTO panel's analysis of the necessity test. Once the panel determines that the challenged measures are designed to protect public morals, the challenged measures must still be determined to be "necessary" to protect public morals.[188] In *US—Gambling*, the Panel looked to three factors to determine whether the challenged measures met this standard: (1) the importance of the interests or values that these Acts are intended to protect; (2) the extent to which these Acts contribute to the realization of the end respectively pursued by these Acts; and (3) the respective trade impact of these Acts.[189]

The idea of state sovereignty over cultural products underlying the UNESCO Convention may have an important impact upon the first of these factors: the importance of the interests or values that the Acts are intended to protect.[190] With only a brief discussion, the panel embraced China's position that the preservation of public morals represents a crucial policy objective for states, and that it forms "a central element of social cohesion and the capacity of communities to live together."[191] The Panel also noted that the U.S. did not indicate any objection to China's position regarding the importance of public morals as a state interest.[192] The Panel concluded,

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184. *See id.* ¶ 7.759.
185. *See id.*
186. *See id.*
187. *See* UNESCO Convention, *supra* note 41.
188. U.S. Gambling Panel Report, *supra* note 160, ¶ 6.479.
189. *See id.* ¶ 6.488.
190. *See* UNESCO Convention, *supra* note 41.
191. China Panel Report, *supra* note 27, ¶¶ 7.815–7.817.
192. *Id.* ¶ 7.817.

> In our view, it is undoubtedly the case that the protections of public morals ranks among the most important values of or interests pursued by Members as a matter of public policy. We do not consider it simply accident that the exception relating to 'public moral' is the first exception identified in the ten sub-paragraphs of Article XX. We therefore concur that the protection of public morals is a highly important value or interest.[193]

Because the WTO approach includes weighing and balancing the assessment of the relative importance of the interests pursued by the state against other factors,[194] the Panel's strong language regarding public morals may be an important factor in future disputes.

Even in rejecting China's particular plan for protecting public morals, the Panel endorsed state sovereignty over cultural matters.[195] When invoking the public morals defense, WTO members are obliged to consider all reasonably available alternatives that are WTO-consistent before imposing a WTO-inconsistent measure.[196] The Panel accepted the U.S. proposal that the Chinese government could perform the content review themselves instead of the import companies.[197] The Panel stated, "We see no reason to believe that the alternative in question would be inherently WTO-inconsistent or that it could not be implemented by China in a WTO-consistent manner."[198] This suggests that it is only China's restrictions on which entities are legally allowed to import cultural goods that are inconsistent with China's WTO obligations.[199] An exhaustive content review performed by the Chinese government would seem to be consistent with WTO law.[200]

Because WTO members are given great latitude in defining and applying the concept of public morals,[201] this decision seems to grant vast powers to states to regulate cultural goods. While the inherent difficulty of analyzing culture worked to the advantage of the U.S. in cases in which panels performed a "like products" analysis, this case suggests that it will work to the advantage of states seeking to invoke the public morals defense of Article XX.[202]

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193. *See id.* ¶ 7.817.
194. China Appellate Report, *supra* note 29, ¶ 240.
195. *See* China Panel Report, *supra* note 27, ¶¶ 7.848–7.849, 7.913–7.7.917, 8.2.
196. U.S. Gambling Panel Report, *supra* note 160, ¶ 6.526.
197. China Panel Report, *supra* note 27, ¶¶ 7.907–7.909.
198. *Id.* ¶ 7.907.
199. *See id.*
200. *See id.* ¶¶ 7.908–7.909.
201. Diebold, *supra* note 157, at 50.
202. *See* China Panel Report, *supra* note 27, ¶¶ 7.907–7.914.

CONCLUSION

The analysis of the interplay between the UNESCO Convention and WTO case law is certainly not meant to suggest that trade obligations have been rendered moot by the UNESCO Convention. WTO case law and interpretation is extraordinarily complex, and each individual case involves so many variables that making specific predictions with regards to the development of trade law is impossible. Rather, this Note argues that the very complexity of WTO case law makes the current U.S. policy of resisting any possible recognition of the cultural exception incredibly risky.

The interests of the U.S. would be better served by dropping its fierce resistance to the cultural exception. The U.S. should engage with the international community to develop a WTO provision that clearly defines when the cultural exception is applicable and, when applicable, what acceptable measures states may take to protect domestic culture. Continuing its quixotic battle would only needlessly antagonize the global community, and in light of the overwhelming worldwide popularity of the cultural exception, any victory the U.S. might win at the WTO could damage the trade regime's legitimacy.

In exchange for supporting the codification of the cultural exception at the WTO, the U.S. should press for a cultural exception with a limited scope, based solely on the medium by which the product is transmitted and without regard to the cultural value of the product. The U.S. should propose that international trade law make a distinction between content that is publicly displayed and content that is consumed individually. Publicly displayed content would be defined as content that is communicated to multiple people simultaneously. This would include films at movie theaters, which are projected to consumers in a public place; television programming, which is broadcast to many viewers simultaneously; radio programming, likewise broadcast over the airwaves; and any live performance. For content that is publicly displayed, states should be allowed both to subsidize production and to place limited quotas on the amount of non-domestic productions. For example, states would be allowed to place a quota on the amount of foreign films that can be shown in theaters, but that quota may not be placed any higher than fifty percent. Such measures would allow states to ensure the continued production of domestic cultural content, but would not exclude foreign productions from the marketplace.

For content that is consumed individually, there should be fewer WTO acceptable restrictions. This would include CDs, DVDs, and content transmitted over the internet. Since the actual content would often overlap within these two categories, states would still be able to subsidize the

production of content for this category. However, the ability to exclude content from the marketplace would be greatly diminished under international law. For instance, while states would be able to place quotas on the amount of foreign films that can be released in theaters, they would not be able to place such a restriction on the availability of foreign films for downloading over the internet or in multimedia stores. This would protect the ability of consumers to seek out particular foreign content.

The U.S. could better achieve its policy objectives of opening the global marketplace for its entertainment industry by engaging with the international community to codify a limited version of the cultural exception in the WTO agreements. Current U.S. policy, while showing some signs of success in WTO litigation, carries far too much risk. When a policy isolates a nation from its friends as well as enemies and fails to achieve its objectives, it may be wise to rethink that policy. The time has come for the U.S. to recognize the cultural exception.

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