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TELECOMMUNICATIONS AND CULTURE: TRANSBORDER FREEDOM OF INFORMATION OR CULTURAL IDENTITY?

*Hamilton Loeb**

I am Hamilton Loeb. I am here from Washington D.C., which means I am from the *current* home of Elian Gonzalez, the *former* home of the world's most famous White House intern,¹ and the *future* home of this year's Stanley Cup Champions, the Washington Capitals.

I first need to make a demand: I want my official apology from Henry King for scheduling us last in the program, on a Saturday night after dinner. I told Henry – when I woke up and talked to him on Monday about the schedule – did I do something to offend you that I am speaking on Saturday night after dinner?

By way of introduction: I grew up in the northern-most outpost of the Caribbean – New Orleans, Louisiana. If you are from New Orleans, then you really know what it is like to have a unique culture and to know that it is hurting. It is a phenomenon that is painful to watch when you go back and spend time there. New Orleans has a culture which has no border to protect it, no buffer against a Gap, Borders Books, Blockbuster, or Starbucks. However, there is an awful lot of what used to be a vibrant culture that has just drained away. It is therefore easy for me to identify with the emotions that underlie the Canadian cultural policy, as well as some of the other national cultural policies I will mention.

Nonetheless, I have spent the last twenty years being an American lawyer. I have been very involved in the American Bar Association responses to culture and trade issues. I have an assigned role here today, which is to voice the American view on these cultural concerns. It is a new role with which I agree to some degree.

TRADE RULES, CULTURE, AND SKEPTICISM

One of the two great achievements during the last twenty years of the 20th Century, when history looks back at it, will be the role that (primarily American) lawyers played in the elaboration, development, and promulgation

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¹ Monica Lewinsky.

of a global system of rules that govern the way business and culture unfolds. We see it in competition law. The panel you saw earlier today had Debra Valentine, who is the latest in a series of officers from the American antitrust agencies who have played a major role in development of competition law.

You also see it in corruption law, a field where America stood alone for many, many years, but now everybody is on board. In fact, one of the great mysteries is the objections of protesters who have descended upon Washington, saying the World Bank and the International Monetary Fund (IMF) are the problem. The World Bank and the IMF are the *only* agencies that stood with the United States in backing anti-corruption rules over the years before a number of others in the Organization of American States (OAS) or Organization for Economic Cooperation and Development (OECD), which only recently joined that parade. The problem, of course, is not with the World Bank or IMF; it is with those companies engaging in conduct running afoul of anticorruption principles.

The largest area where American lawyers have been particularly influential is the area of trade law. An American trade lawyer looks at cultural issues with necessary suspicion, because “culture” seems like an excuse for derogation from the rules. It reminds me of the period when the rice disputes occurred – the Japanese would not allow American or world rice to be forced down Japanese throats because, they claimed, Japanese intestines are different from intestines in other places; therefore, they could not participate in global rules relating to rice. Similarly, when the Soviet Union fell apart, there was a flow of aluminum, potash, and steel from Russia, Ukraine, and other CIS states, and there was a huge battle over this. Of course, the Russians said the rules did not apply to them. Americans, rightly, were skeptical about that.

So there is no surprise that there is some skepticism about Canadian cultural claims; and it is historically appropriate and justified. With that beginning, I thought I would turn first to what does not quite seem like a significant product of great cultural importance: pork.

ISRAELI MEAT IMPORT RESTRICTIONS: RELIGION OR CULTURE?

Let us use meat imports into Israel as an illustration. This is a big issue in a country where the government has controlled the whole process of meat importation for many years. The government required all imports to be kosher – not surprising in Israel. The Israeli government also followed other governments around the globe and privatized the meat industry in the early 1990s. A religious group considered this to be a problem: they were concerned that Israel was going to be flooded by foreign non-kosher meats. There was litigation over this. It went to the Israeli High Court, which

ordered the government to permit imports of kosher and non-kosher meats, yet the government in Israel imposed, and I understand it is still in place today, a ban on imports of non-kosher meat.

The interesting piece of this is that the United States and Israel negotiated a free trade agreement in the 1980s, before the Canadians did so. That agreement contains derogation from the basic providing that it is appropriate to depart from free trade rules because of religious rituals or prohibitions. (Incidentally, I think the Canadians got a worse deal. I think they did not even get Most Favored Nation (MFN) status on that.)

So I ask, are religious justifications different from cultural justifications for departing from free trade orthodoxy? We in the United States are used to thinking, with our First Amendment perspective, about things like free exercise of religion. It is easy to understand why it would be okay for Israel to say you cannot import non-kosher meat. It seems like part of the free exercise rights, which we in the United States view as part of the First Amendment of our Constitution. I am wondering whether there is also a free exercise principle of culture.

To contrast, Israel also imposes a set of rules requiring that the playlist on Israeli radio stations have a certain percent of all Hebrew-language music. It used to be fifty percent. An interesting question: are the Hebrew playlist rules more objectionable from a trade perspective than the kosher meat import restrictions? They are more culturally driven, more language driven, than rules that are based on religion. This is a good way to separate ourselves from the immediate emotion of the Canadian cultural policy issues that we will be talking about.

Of course, Israel is not alone in this area. There are other practitioners that have culturally driven trade restrictions. There are French rules that relate to film screens and film distribution. Mexico has its own rules on direct satellite broadcasting and domestic content rules that for cable programs. There are some people with whom you may not like to be associated, such as China, Cuba, and Iran, who apply cultural rules with a great deal of vigor – though, of course, most of them are not World Trade Organization (WTO) countries, so we are not too worried about their compliance with the trade rules.

CANADIAN CULTURAL INITIATIVES

Then there is Canada. The three most recent, interesting disputes in this area – and I know these have been talked about in these programs over the previous two or three years – are the *Country Music Television* dispute, the

Sports Illustrated Canada split-run edition dispute,² and the dispute that came up during the period the WTO telecom agreement was being negotiated over the use of Canadian slot satellites to relay cable signals up to a Canadian satellite and back down to U.S. cable head-ends. That ran into the buzzsaw of the U.S. trade and antitrust agencies in 1986.

Is this tendency toward Canadian-U.S. conflict in trade a spreading phenomenon? It seems so. But one of the interesting features to me is that if we look at the distribution of these major disputes between the United States and Canada, we have not seen in the last two to three years any large number of disputes. Nonetheless, it is the commonly held view, and the correct view, that culture is an area that is going to become significant on the platter of the trade negotiators for the major powers around the globe.

I used to say that I thought Charlene Barshefsky would break her sword on the trade and cultural issue by the end of the Clinton Administration. It now looks like that is not going to happen. Yet, I still see enough happening to suggest that this is a spreading phenomenon.

Why is it spreading? Globalization. This is why we have tens of thousands of people mobilizing in Washington this week. This is why we had the problems in Seattle at the WTO Ministerial. The core reason is that development of the global economy, something we all appreciate, has occurred significantly more rapidly than the development of global trade law. More importantly, this has occurred more rapidly than the development of the social and cultural reaction. So what you have is a very developed global economy; you have trade law, which is running to catch up with it, and has developed a premium on economic efficiency and the rules of comparative advantage; and in this process, economic integration has moved considerably faster than cultural integration. That is what creates this tension, and it is one that you can see particularly in the Canadian role.

Canada has historically played a leading role in the field of trade law. It is unsurprising that Canada would play a lead role in the development or focus on these issues of culture and trade, but a more important reason is the sense of urgency that arises from Canada's neighbor to the south, with a common border, a common language, and with a concentration of populations within easy range of the cultural resources of the United States.

THE LEGAL FRAMEWORK

With that laid out, I want to run through the legal framework. I want to focus on the things that are new and interesting; I am not going to spend

² *Canada – Certain Measured Concerning Periodicals*, Panel Report, (WT/DS31/R), Mar. 14, 1997; Report of the Appellate Body, (WT/DS31/AB/R), June 30, 1997.

time, for example, on the cultural exemption and the North American Free Trade Agreement (NAFTA). But there are a couple of interesting points about the legal framework that are worth mentioning.

First, the original trade lawyers' Holy Grail, the General Agreement on Tariffs and Trade (GATT), was developed from 1947-48, during a period when there was not anything of the mix of technologies that now drive this culture and trade intersection. This was a period when cultures were effectively isolated. I analogize it to growing up in a culture like New Orleans, which was a culture totally apart from the rest of the surrounding area and the rest of the United States. It is not anymore.

There was, however, one area back during the GATT days where this distance between culture and trade law was not the case. It had to do with Hollywood and films. Not surprisingly, the GATT drafters ended up dealing with this issue by developing a cinema exception. The cinema exception sits right in the middle of the GATT, derogates from national treatment, derogates from the Most Favored Nation (MFN) principle, to permit screen quotas for foreign films. The GATT agreement also provided that this cinema exception should be negotiated away over time. But what is interesting for us today is that these issues of cultural rules that are designed to deal with the intersection of trade and culture are not new; they were there at the very beginning of the GATT negotiations. The implications are, first, that cultural considerations are *not* illegitimate issues to be discussing; and, second, that films, in this case, were viewed as "goods" under the early GATT regime. This becomes important, for reasons I will mention in a moment. It was established at the very beginning of the GATT regime, because the GATT covered only goods, that films brought in across the border were considered to be goods.

This created an interesting development in the early 1960s when American television programming began to develop global power. The U.S. position in the early 1960s was that television programming was a good, and was subject to the GATT agreement. That meant that Canada had to open its markets to U.S. programming, just as all of the U.S. trading partners had to do. GATT working groups were set up on television programming in 1961, and the United States tried to get working groups going again in 1962 and 1964. The U.S. position at that time, interestingly enough, was that even if television programs were covered, it was permissible for a foreign country to impose programming requirements that would include proportionate domestically-produced material so as to reflect the tradition and culture of that country. In other words, the U.S. position when this first came up was that cultural considerations *were* a legitimate factor to be included.

So the history here, which most people do not focus on, is that these kinds of cultural issues are not new; they are not foreign; and they are not being introduced as some sort of poison into trade discussions. They are legitimate and have always been a legitimate part of the trade framework.

The Canada/U.S. Free Trade Agreement has a cultural industries exemption, which has been talked about frequently at this podium. It is really *not* an exemption. It is a codification of the standard U.S. trade rules that were in place in 1988. The U.S. trade practice then essentially stated that, under Section 301, the United States could retaliate against any foreign practice it found to be unreasonable, and the retaliation could take the form of a penalty on the imports of the offending country equal in commercial value to the amount of trade the United States lost – a non-controversial principle of international trade law. The United States also took the position this retaliation could happen in any sector. All that transpired in the Canada/U.S. Free Trade Agreement was that the retaliation principle was codified as an exemption, which confirmed the U.S. view of trade dispute resolution.

At the time the Canadian agreement was being negotiated, the United States had only recently completed a bundle of Section 301 cases against Japan over semi-conductors and telecoms. I remember one case when we were asked to represent the Japanese power tool folks. It happened that the volume of trade in power tools coming from Japan fit perfectly into the retaliation framework for telecommunication products. The power tools had no connection to telecommunications at all, but none was needed under U.S. trade law.

So the United States rightfully recognized that the way to deal with tricky cultural issues was to threaten to retaliate against another, *non*-cultural, industry. That industry would then go running to the offending foreign government to say: Look, I do not have any stake in the dispute, whether it is telecommunications or culture or whatever. All I know is I am being told that I am not going to ship my product to the United States because they are going to retaliate against my widgets (e.g., power tools) under their trade laws. So the Free Trade Agreement exemption on cultural properties, in my view, has always had considerably less impact than meets the eye.

Following the Canada/U.S. Free Trade Agreement, which was essentially incorporated into the NAFTA without change, came the WTO agreements. There is no cultural exemption there.

The point I want to make about the WTO agreement focuses on the *Sports Illustrated* decision. This case is particularly interesting, because it taught us that economic factors drive the WTO analysis. The WTO panel found, by focusing on end-use distribution channels, that what Canada was

doing with respect to content requirements in the *Sports Illustrated Canada* editions was not what was at stake in the dispute. The appellate body of the WTO, in one of its very early decisions, codified this approach: that the WTO is foremost a commercial agreement. The WTO is concerned with markets. This was a signal that in the cultural arena, the prism will be focused on economic values only, and is the direction that WTO law will go.

GOODS, SERVICES, INTERNET, AND CULTURE

The other interesting thing about the *Sports Illustrated* decision had to do with the difference between goods and services. The United States took the position that magazines were goods; therefore, the GATT controlled them. The Canadian position was that what was at stake were electronic communications across the border. The content of the magazine was delivered by satellite to a printing plant in Canada. Nothing physical went across the border. Therefore, Canada argued, what was happening was a transfer of a service, not of a good. The reason that is significant, of course, is that the applicable rules at this time covered trade in goods, not services. The GATT rules applied to goods, but there was no applicable WTO regime covering trade in services. The panel ruled that *Sports Illustrated* magazines were a good, even though they were electronically transmitted. The appellate body focused on the fact that when the excise tax was drafted in Canada, it was drafted as a tax on split-run periodicals, not on the advertising content. The appellate body found that this fell into the goods area.

This is worth mentioning because we have now entered a universe in which the Internet and electronic commerce has become extremely significant. In this area there is an interesting irony. The Internet is a borderless global phenomenon that has its own culture. But, when you look at what is going to happen in a very short period of time, you realize that the question of where these cultural items fall is a critical question for the trade laws. Before very long, going to Blockbuster Video to get a video will be obsolete. If one wants to get a video, one will reserve time with a cable operator, which will have a chunk of memory on some server (which could be located anywhere), and you will choose the movies you want stored on your little space, which you will then be able to access with a couple clicks of the mouse of your computer. There will be no need to obtain a videocassette or otherwise obtain a fresh transmission of the cultural content. The question is: in this environment, which is coming very fast, would the current Canadian content rules even apply? Should they?

Here is the point: goods are disappearing in the cultural sectors. You now have *Sports Illustrated* linked with CNN, and their material is accessed through the Internet. The Internet as an advertising vehicle is still in

development. The result is that you have an irony. The Internet erodes borders, but this development adds leverage to the Canadians' position on cultural issues. It moves the cultural debate into the area of services that are not covered by existing provisions of the WTO services agreement. The first consequence of that is to limit the implications of the *Sports Illustrated* decision, but it also focuses attention on the issue of the governing rules and what they are going to be when they apply to these kinds of services where there are no rules currently in place. Part of the program for the WTO Ministerial conference in Seattle was the continuation of a moratorium on taxation on electronic transmissions. That issue focused principally on whether we are going to treat these kinds of electronic transactions as services or goods.

THE SAGIT REPORT

I would like to comment on the Sectoral Advisory Group on International Trade (SAGIT) Report.³ The report reflects a couple of interesting approaches: one – which it entertains and dismisses – is a broad cultural exemption. The critical point that I find interesting in the SAGIT Report is its suggestion that whichever way you go, it is essential that the measures that are chosen to vindicate cultural objectives not be subject to any form of retaliation – for example, the way the United States codified its standard retaliatory procedures in dealing with the cultural exemption in the 1988 agreement with Canada.

Why *not* subject these cultural measures to retaliation, exactly in the way provided for in the Canada /U.S. Free Trade Agreement?

First, it is an established international law approach that if you violate one of these international trade principles, the country offended has the right to retaliate against the quantum of goods or services the country is preventing from coming into the offending country. This is an established principle of international law. It would be easy to apply in the cultural sector.

Second, there are well-known disciplines in this area, particularly the notion of proportionality.

Third, this is an issue where retaliation is easy to review. This gets to the heart of the problem with special rules for culture.

The main difference between my initial example – non-kosher meat imports into Israel for religious reasons – and cultural factors is that the cross-sectoral retaliation that you permit is a real gut check on the

³ See *Consultations on FTAA and WTO Negotiations, Sectoral Consultations – Culture* (visited July 13, 2000) <<http://www.dfait-maeci.gc.ca/tha-nac/discussion/culture-e.asp>> (stating the purpose behind the SAGIT Report).

justification. If it is important enough to Canada, France, or Israel that its culture requires that a certain policy be pursued, then what is wrong with paying the price in terms of some other countervailing, offsetting penalty or special trade provision that would affect unrelated goods in a different sector? If it is that important from a *cultural* standpoint, then from a *political* standpoint within the country that is asserting this cultural concern, the retaliatory consequences should be acceptable. It should be subject to being withstood.

The same kind of political and business complications would arise as occurred in the Japanese case discussed a moment ago. The power tool industry went screaming to the Japanese Ministry of International Trade and Industry, saying they know nothing about telecommunications, they had nothing to do with this, why are our power tools being shut out of the U.S. market?

It is great that Ken Stein's committee is trying to find something we can agree on; cultural diversity as opposed to cultural nationalism. But, if you look at the nature of the language in the SAGIT report, it is either at a level of generality that it is hard to dispute – such as setting up a blueprint for cultural diversity in the global world – or it is laying out a future task. Anybody who is engaged in the process of trade negotiations knows it is extremely difficult to identify which measures should be covered and which should not be covered by these cultural exemptions. Similarly, the committee would have trade policies acknowledge significant differences in cultural products, and acknowledge significant differences in the measures that are used with respect to cultural products. We all know that in some cases, those differences are significant and in some cases they are minimal. Sometimes the minimal differences are as important to cultural integrity as the big differences. Similarly, some of the measures that might be used may be special to cultural issues, but many of them are just the same old measures that are always used for protectionism.

I draw three conclusions from looking at the SAGIT Report. One, it is proposing a really large project. I ask myself, is this like the project that faces New Orleans, which is almost impossible, given what has happened there, or is it like Cleveland – where we are today, a city that has been successfully rehabilitated. It is a big project no matter how you look at it, but whether it stands a chance of success or not is unclear.

The second conclusion I draw about these cultural issues is that it is easy to be skeptical – and also it is *correct* to be skeptical about them. Particularly when you look at the language in the SAGIT Report in terms of the level of generality. Anybody that has watched the ongoing negotiations over

environmental and labor issues in connection with WTO knows how difficult it is to put these issues into any kind of reasonable trade rule framework.

My last conclusion – and I will step back from the official American view on this – is that it *is* really worthwhile to make the effort. On this the SAGIT Committee should be commended. The new economy is going to create huge pressure on coverage within the WTO's services agreement. What you saw in Seattle, what you see in Washington this week, suggests to me that ultimately support for the WTO regime may require efforts to develop some recognition of the cultural values to compensate for the approach you saw in the *Sports Illustrated* case, which focuses purely on economic and market values in the application of these trade rules to these complex cultural phenomena.