

ii) *The FTA, the NAFTA and the Exemption*

The NAFTA includes a cultural exemption which includes a definition of cultural industries. This approach was established under the FTA where Canadian negotiators were able to exempt cultural industries from most substantive disciplines. Under Article 2005(1), however, the US may take measures of equivalent commercial effect in response to actions that would have been inconsistent with the Agreement but for the cultural exemption. Annex 2106 of the NAFTA provides that any measure adopted or maintained with respect to cultural industries would be governed exclusively in accordance with the provisions of the FTA. This Annex applies to Canada and to any other country. With respect to film, Canada and Mexico maintained their co-production treaties and their ability not to extend the rights granted under these treaties to the United States.²⁰ In order to understand the NAFTA obligations with regard to culture, one has to go back to the FTA to determine the quality of the culture exemption, and whether or not there is latitude for the United States to retaliate.

The exemption has not been exercised to date by Canada or the United States. This fact is used by some to demonstrate how well the exemption has protected Canadian policy and by others to reveal how little the exemption protects Canadian domestic policy choices. The problem is that if the exemption is exercised it is unclear what exactly "equivalent commercial effect" will mean. Another concern for Canada is that although Canada may have provided itself protection in the NAFTA, the United States can and has used the WTO or United States domestic trade remedy law to pursue its objectives. It is not clear how much an agreement for "no rules" will continue to help Canada. The problem for Canada is that the alternative to an exemption, new rules, could give Canada less flexibility. The question of whether to pursue rules or exemptions is a central one for the trade and culture debate in Canada.

Both rules and exemptions have advantages and disadvantages. Although the NAFTA exemption has been effective in that it is yet to be invoked, alternatives to it mean that Canada's flexibility is still limited. Rules are perceived to reduce flexibility; however, this fact is yet to be proven. A clear benefit of rules is that they increase certainty. The alternative to rules, exemptions, allow for more policy flexibility, but results in uncertainty. Acheson and Maule are correct to say that attempts to insulate the cultural industries from international trade and investment rules have not fully succeeded.²¹ It therefore seems that Canada may move to a rules-based approach. These rules could be negotiated in existing forums such as the GATS or in a separate agreement on culture. Given that negotiations in services will occur in 2000 within the multilateral WTO context, Canada may desire to focus its negotiating energy on the WTO.

²⁰ Keith Acheson and Christopher Maule, "Copyright and Related Rights: The International Dimension," *Cultural Developments in an Open Economy- Canadian Journal of Communication*, 19(3/4 Special Issue), 1994.

²¹ Keith Acheson and Christopher Maule, *The Culture of Protection and the Protection of a Culture- A Canadian Perspective in 1998*, Ottawa: Carleton University, Department of Economics, 21.