1. INTRODUCTION

As the global nature of the economy intensifies, countries must establish a worldwide presence to avoid desperate economic circumstances and compromised sovereignty. To remain viable, nations must carefully balance free trade objectives with other vital goals, such as preserving culture. However, when an economic superpower, like the United States, has co-opted the prevailing international trade dispute system to perpetuate its own economic and cultural advantages, other countries find it very difficult to promote their own interests. These countries should not respond to this difficulty by adopting strategies that are inconsistent with the efficiency rationale that underlies all of international trade. Instead of attacking international multilateral trade arrangements, countries should protect and promote their economic interests and culture within smaller bilateral and regional trade agreements. Ultimately, as they gain market power and build relationships with other members of the General Agreement on Tariffs and Trade1 ("GATT"), countries can redirect international trade dialogue to recognize and support cultural preservation even at the cost of reducing the completely unfettered nature of free trade.

Section 2 of this Comment considers rationales for preserving culture and the difficulties of preserving it when countries' do-

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mestic industries are unable to compete with foreign import products. Section 3 discusses the difficulties of obtaining and the disadvantages of maintaining expansive, protectionist international trade strategies, and suggests bilateral and regional trade agreements as an alternative. Section 4 illustrates the advantages of less protectionist regionalism with a case study of Japan and South Korea’s recent joint efforts to promote their economies. This Comment concludes that countries that hope to successfully promote their cultural industries within international trade arrangements such as the GATT should emulate Japan and South Korea’s example.

2. THE IMPORTANCE OF PRESERVING CULTURE

Completely unfettered free trade is not the only efficient reality, even from an economic perspective. The ultimate efficiency of entirely free trade is lessened when one takes into account the unique nature of cultural products that may be incommensurable. The cultural products may be desired even when producing them is economically inefficient. Further, foreign cultural products that enter a country through open trade may erode the cultural values and identities of those who receive them.

Erosion of cultural values and identities is dangerous. There are many advantages to preserving a country’s culture as well as its ability to profitably market its cultural products. Preserving a

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3 For example, the doctrine of moral rights says that cultural products are not just like any other fungible product because the creator has essential, non-economic rights to control how the product is altered or used in the future. See generally Neil Netanel, Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994); Jeffrey M. Dine, Note, Authors’ Moral Rights in Non-European Nations: International Agreements, Economics, Manu Bhandari, and the Dead Sea Scrolls, 16 MICH. J. INTELL. L. 545, 550 (1995); Jonathan Stuart Pink, Note, Moral Rights: A Copyright Conflict Between the United States and Canada, 1 SW. J. L. & TRADE AM. 171, 186 (1994).


country's culture promotes its sovereign equality and protects human rights by enabling its people to celebrate and maintain their culture.\(^6\) As an important tool of democracy, culture is needed for identity,\(^7\) cohesion, and the ability to express oneself.\(^8\) Similarly, cultural products are "vehicles of meaning and values" and are thus integral to democracy.\(^9\) These products influence citizens by shaping behavior, personality, attitudes, and approaches to the world, and sometimes affect social change.\(^10\) Cultural industries are needed to preserve culture,\(^11\) traditions, and language.\(^12\)

As a result, cultural products are public goods whose protection merits government intervention.\(^13\) At least twenty-one countries have signed treaties expressing their belief that it is sometimes appropriate to treat cultural trade and investments differently than other trade products. The exceptions to the GATT and other trade agreements evidence these countries' reluctance to lose control of the viability of their cultural industries.\(^14\)

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\(^8\) See Dennis Browne, *Introduction to The Culture/Trade Quandary: Canada's Policy Options* 1, 5 (Dennis Browne ed., 1998).


\(^11\) See McAnany & Wilkinson, *supra* note 5 (describing how cultural industries in Quebec have preserved the francophone population's culture).


\(^14\) See Browne, *supra* note 8, at 12.
3. Resorting to Protectionist Measures to Preserve Domestic Cultural Industries Threatened by More Powerful Foreign Importers

Culture is perhaps most vulnerable, and certainly no less valuable, in countries whose domestic cultural products cannot compete with foreign products in the absence of trade barriers. Market forces, in the absence of such barriers, are not sufficient to protect domestic industries. In many cases, small domestic producers simply cannot compete with foreign competitors who have a lower cost per unit, amortized over much larger markets. Producers can only earn the most money domestically, or possibly from places where people speak the same language (if such places exist), and then are forced to give a cultural discount to other countries. This market reality gives the United States, as a huge, nearly uniformly English speaking country, a sufficiently large domestic advantage that it can afford to be an extensive exporter. When domestic demand is spent, or stagnant, the United States can easily look to, and in many cases dominate, overseas markets.

15 See id. at 3 ("Exports will mean nothing if Canadians lose the ability to conduct national conversation within [its] own communication space."); Jacques Attali, Fragile Cease Fire; Hollywood vs. Europe: Setting the Stage for the Next Round, PHOENIX GAZETTE, Dec. 23, 1993, at B7.


17 See Browne, supra note 8, at 6 (noting that sheltered production and distribution companies are essential for new domestic talent to emerge).

18 See id. at 4.

19 See William Pfaff, A Phony Farm War, with 'Cultural' Skirmishing, INT'L HERALD TRIB., Sept. 24, 1993, at 8.

20 See Braun & Parker, supra note 4, at 160 (noting that the common language, geographic proximity, and intertwined economies of Canada and the United States make Canada especially vulnerable to U.S. "cultural" imports).

21 See Colin Hoskins et al., Television and Film in a Freer International Trade Environment: U.S. Dominance and Canadian Responses, in MASS MEDIA AND FREE TRADE, supra note 5, at 63, 69 ("[T]he cultural-discount concept is the key to explaining the competitive advantage conferred by market size. Also, any country that manages to minimize the discount for its exports, or that applies a particularly large discount to imports, has a trade advantage.").

This market advantage has given the United States much freedom and power to maneuver within the global economy. As a result, many small economies have felt threatened by the influx of U.S. imports in their markets. They have responded with protectionist measures that are not only inconsistent with free trade, but are undesirable given the new technology available to producers and consumers, and the global nature of the market.

3.1. Cultural Protectionism Is Ultimately Neither Feasible nor Advantageous

3.1.1. Non-Feasibility of Protectionism

No amount of protectionism will extensively preserve culture or truly promote more viable domestic industries. Technological advances in interpersonal communication and a highly interdependent global market have irreversibly affected culture and sovereignty. Foreign cultural influences inevitably infiltrate domestic culture, whether through the hard-to-regulate Internet, the black market or piracy. A study of the trade of cultural products at the Mexican-American border found that Mexican domestic products remained viable. Furthermore, Mexican cultural identity was retained notwithstanding the influx of outside products. Film,

23 For example, Canada was challenged by the United States each time it attempted to protect its cultural products, and so was forced to "address international trade rules or risk serious damage to the framework of support for cultural industries that Canada had developed over the years." Browne, supra note 8, at 3.

24 See McAnany & Wilkinson, supra note 5, at 4, 13 (noting that new technology may make protectionist strategies impossible); cf. Peter Lyman, Canada's Video Revolution: Pay-TV, Home Video and Beyond 31, 40 (1983) (warning that technological advances in distribution methods of entertainment products will make protectionist measures much less effective).

25 See Byun Eun-mi, Japan's Most Popular Cartoon Coming to Korea, KOREA HERALD, June 17, 1999 (describing how Pokemon's upcoming release in South Korea may lead to Japanese domination of the cartoon character market because illegal Pokemon goods are already available and popular), available at 1999 WL 17750071.

however, was a notable exception. There was such an influx of
U.S. films that consumers favored U.S. films over domestic films.27
This reality is consistent with cultural transmission theory. The
cultural transmission theory predicts that where outside products
will affect culture, they will do so regardless of tariffs,28 and where
there is not much connection between foreign products and do-

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mestic values, foreign products will not affect those values. That
is, protectionism is not always necessary, and where it would be
desirable, consumer preferences will be determinative anyway.29
Instead of fighting unavoidable cultural invasion, small cultural
industries should take advantage of the Internet and the interde-
pendent economy as a way to reach new customer bases.30

3.1.2. Disadvantages of Protectionism

In addition to being unfeasible, protectionism is not advan-
tageous. Comparative advantage theory predicts that protectionism
is only a short-term strategy to "stave off the inevitable" and is ul-

timately costly to society because it protects inefficient producers.31
Cultural industries should be forced to specialize in the absence of
protectionism to increase productivity.32 The U.S. open-market is
not the only successful one. Japan and other Asian countries like
South Korea were very successful in using a much more closed
market system to recover from war.33 However, the U.S. approach is

27 See McAnany & Wilkinson, supra note 5, at 23.
28 See Jamie Portman, Europeans Battle American Cultural Juggernaut in Trade
Talks, GAZETTE (Montreal), Oct. 6, 1993, at B3 ("Surely there is something inher-
ently suspect about any culture which has so alienated its citizens that only a gov-
ernment edict can keep them in touch with it.").
29 See Oliver R. Goodenough, Defending the Imaginary to the Death? Free Trade,
National Identity, and Canada's Cultural Preoccupation, 15 ARIZ. J. INT'L & COMP. L.
203, 241 (1998) (describing the cultural transmission theory which holds that
"truly invasive ideas [are] almost impossible to keep out").
30 See LYMAN, supra note 24, at 51-52; Robin L. Van Harpen, Mamas, Don't Let
Your Babies Grow Up to Be Cowboys: Reconciling Trade and Cultural Independence, 4
MINN. J. GLOBAL TRADE 165, 182-83 n.93 (1995) (citing Jean d'Arcy, Direct Broadcast
Satellites and the Right to Communicate, in RIGHT TO COMMUNICATE 1, 5 (L.S. Harms
et al. eds., 1977)); Jim Carney, Revolution in the Airwaves, VANCOUVER SUN, Dec. 7,
31 MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF
INTERNATIONAL TRADE 2-4 (1995) (explaining the theory of comparative advan-
tage); see Mark F. Grady, A Positive Economic Theory of the Right of Publicity, 1
33 Open markets during a time of recovery can lead to economic dislocation,
likely the most advantageous strategy for economies not in a state of immediate crisis. According to an economist commenting on the Asian economies, "Once a certain level of economic recovery occurred, the very attributes [of the more closed market system] that facilitated growth became counterproductive . . . ." 34 Though some companies may not be successful specializing within an open market, either because the market can only sustain a limited number of specialists, or because foreign importers may specialize too, free trade will benefit those cultural industries that are unique to a country and that the country produces best.35

For example, low cost foreign products may actually allow local cultural products distributors who can only afford to buy mostly cheaper import products to stay in business.36 Similarly, if foreign products are somewhat different from domestic ones in the same industry, the foreign products may not replace or compete with domestic ones.37 Instead, they may actually increase demand for the domestic ones by reminding consumers that such a product exists, but not competing directly with the domestic product.38 Transnational partnerships can help introduce a country's native products into international markets.39 Furthermore, cheap and popular foreign products can be used to cross-subsidize domestic products.40 Consequently, protectionism may actually be unprofitable.

Protectionism is also disadvantageous because it produces undesirable products, products that are not subject to competitive standards. Further, industries may be fighting for protectionism

massive inflation, declines in gross domestic product, and increased social instability. See Interview by Frederic Smoler with Jagdish Bhagwati, Professor, The Poverty of Protectionism, 3 AUDACITY 16-26 (1995), reprinted in A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY 75, 83-84 (1998) (explaining that protectionism worked in Japan due to its focus on international markets and policies that enabled it to progress economically despite its isolation, and noting that in Japan as elsewhere only competition produces positive trade results).

34 Larrea, supra note 26, at 1117-18; see Melissa Dowling, Mexico Group Crafts U.S. Entry, CATALOG AGE, Jan. 1, 1995, at 22.

35 See Larrea, supra note 26, at 1117-18; Dowling, supra note 34, at 22.

36 See Portman, supra note 28.

37 See Guy Stanley, Commentary on Cultural Goods and Services in International Trade Law, in THE CULTURE/TRADE QUANDARY, supra note 8, at 150-54.

38 See id.

39 See id.

40 See id.
while citizens want foreign products.\textsuperscript{41} Protectionism is a form of censorship\textsuperscript{42} and thus reduces citizens' choices.\textsuperscript{43} Theorists and industry protectionists argue that citizens will not support a trade regime that is inconsistent with the things they value, such as cultural products.\textsuperscript{44} However, if protectionism does not actually promote viable cultural industries, or industries that produce desirable products, the GATT and other trade agreements' failure to incorporate cultural protectionism will not affect those agreements' legitimacy. Thus, to participate successfully in global trade, countries should avoid unfeasible, disadvantageous strategies, like protectionism, which are antithetical to the more advantageous strategy of free trade.

4. UNDESIRABLE PROTECTIONIST TRADE STRATEGIES PRECLUDED DUE TO U.S. INFLUENCE AND PREVAILING ECONOMICS

4.1. Protectionist Trade Strategies Precluded by the United States' Ability to Use the GATT/WTO to Adjudicate Trade Disputes

The United States has strategically avoided recognizing the protectionist cultural exemptions in regional trade agreements such as the North American Free Trade Agreement\textsuperscript{45} ("NAFTA") by using the World Trade Organization's ("WTO") Dispute Panels

\textsuperscript{41} See Lyman, supra note 24, at 50 (maintaining that consumers want the latest services and products); McAnany & Wilkinson, supra note 5, at 11 ("[C]ultural protection provided by trade rules must be distinguished from cultural resistance that resides in audiences."); Michael Wallace Gordon, Hamburgers Abroad: Cultural Variations Affecting Franchising Abroad, 9 Conn. J. Int'l L. 165, 180-81, 183 (1994) (noting that it is often local competitors who are interested in protectionism; "the protection of culture is clearly not consumer driven. It is promoted by business and government. Given the opportunity, consumers often choose the foreign product."); see, e.g., Attali, supra note 15; Barnaby J. Feeder, McDonald's Finds There's Still Plenty of Room to Grow, N.Y. Times, Jan. 9, 1994, at 5.

\textsuperscript{42} See Goodenough, supra note 29, at 234-35 (discussing the effects of Canadian protectionism on free speech).

\textsuperscript{43} See Schwanen, supra note 13, at 15-16 (arguing that Canada's goal should be choice). But see Perry, supra note 12 (noting that the European Union has made a different argument regarding choice: protectionist strategies promote choice by preserving the choice of domestic products, even as U.S. exports grow, which will happen regardless of restrictions).

\textsuperscript{44} See Philip M. Nichols, Trade Without Values, 90 Nw. U. L. Rev. 658 (1996).

to address its trade concerns. Adjudicating disputes under the WTO preempts resorting to NAFTA.46 Instead, the GATT rules control, and NAFTA’s cultural exemptions are irrelevant.47

4.1.1. WTO Adjudication Is Not Conducive to Protectionist Measures

In addition to preempting regional protectionist measures, the GATT rules have not been conducive to international protectionist measures. The panels and appellate bodies of the WTO have largely circumscribed any type of cultural protectionist or preservationist argument by restricting their inquiries to certain narrow economic factors.48 The WTO cases under GATT imply that “only the greater good of efficiency matter[s],” not socio-economic factors or cultural values.49

4.1.1.1. WTO Panels’ Narrow Economic Focus

The WTO has avoided looking beyond economic factors to address the lack of specificity50 regarding cultural products51 within international trade.52 Its panels have largely refused to acknowl-

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46 See id. Art. 2005(1), (5)-(6).
48 See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, supra note 1, Annex 2 [hereinafter Understanding]; Panel on Japanese Measures on Imports of Leather, GATT B.I.S.D. 94, 111 (31st Supp.) at 94, 111 (1985); EEC—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, July 12, 1983, GATT B.I.S.D. (30th Supp.) at 129, 138 (1984); Carmody, supra note 6, at 260-61 (describing how WTO dispute resolution panels can only consider “covered agreements or agreements cited by the parties to the dispute” using standard terms of reference, which do not include the “more informal contexts in which cultural concerns arise”) (quoting Understanding, supra note 48, Art. 7.1); Nichols, supra note 44, at 660 (“The World Trade Organization system, as currently envisioned, fails to take into account the fundamental nature of societal values, and creates little or no space in which such laws can exist.”).
49 Carmody, supra note 6, at 266-67.
50 The only international legal definition of cultural industry is in NAFTA: “persons engaged in any of the following activities: (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form.” NAFTA, supra note 45, Art. 2107, 32 I.L.M. 605, 701.
51 See Goodenough, supra note 29, at 237-39 (questioning whether there even is such a thing as a distinctive Canadian culture).
52 See generally Browne, supra note 8, at 11 (discussing how culture/trade con-
edge that culture may have a dual nature—that it often possesses "a quantifiable monetary value," but "simultaneously represents the essence of national sovereignty and thereby must be treated differently than common tradable goods." The panels have also ignored the fact that cultural products may also have a conflicting nature; in some cases the content of a cultural product is a public good, while its easily reproducible form is a private good. This refusal to create specific rules for culture and cultural products reveals the WTO's reluctance to believe that governments that employ protectionist measures are trying to preserve and foster the unique entity of culture, instead of merely trying to protect and support commercial interests.

4.1.1.2. Narrow Focus Has Largely Precluded Protectionist Measures by Members Under the Current System

4.1.1.2.1. National Treatment Obligation

The WTO's decisions directly reflect this reluctance to allow "a Member to use "culture" as an excuse to provide commercial advantages to domestic producers . . . or, . . . to evict foreign products from its market." Under GATT rules, a member must treat goods from another member as similar or "like" domestic goods. Specifically, GATT Article III, the "national treatment obligation," prohibits a country from subjecting imported goods to taxes or charges exceeding those on like domestic products or "directly

53 Braun & Parker, supra note 4, at 170 (discussing the European Community's reasoning that culture is unlike other tradable goods).


55 See Browne, supra note 8, at 11 (discussing the ambivalence related to the reasoning behind the protection of cultural products).


competitive or substitutable" products, even if the taxes or charges have caused no proven material injury.53

4.1.1.2.2. Like Goods or Directly Competitive Rules

Under this rule, the legal issue is thus whether two goods are like goods or directly competitive or substitutable products,59 not whether a product has cultural significance. There is no precise definition for "like products" because the responsibility of defining this term was left to an organization that was never created.69 As a result, when countries disagreed over how to treat their respective products, the WTO, which settles disputes arising under GATT,61 had to develop a way to determine whether the products were like products.62

4.1.1.2.3. Narrow Application

The WTO dispute panels developed a very rigid system to make this determination, which resulted in consistently narrow panel decisions that ultimately precluded decisions based on the cultural context of a product. Factors and issues that the WTO dispute panels may consider are circumscribed by the Rules and Procedures Governing the Settlement of Disputes;63 an individual panel may neither add factors to its determination, nor significantly broaden the scope of its inquiry.64 Initially, to determine whether products were like products, panels used a mechanical approach that focused on end-uses and physical characteristics.65 They could consider the following and similar factors on a case-by-

59 See Matheny, supra note 47, at 250 (discussing the significance of a finding of "likeness").
61 See Understanding, supra note 48, Art. 17.
62 See id. Art. 23.
64 See id.
65 See Matheny, supra note 47, at 251 (quoting James H. Snelson, Can GATT Article III Recover from its Head-on Collision with United States—Taxes on Automobiles?, 5 MINN. J. GLOBAL TRADE 467, 480 (1996)).
case basis: The product's end-uses in a given market; (2) consumers' tastes and habits; and (3) the product's properties, nature, and quality.

The panels briefly used an intent-based, "aims and effect" test that found two products to be like products only when the purpose of the tax was "to afford protection to domestic production." Any legitimate policy objective negated a "bad intent," thus allowing a cultural protectionist rationale to negate the reality that the tax afforded protection to domestic production. This test was abandoned, however, in the Japan—Taxes on Alcoholic Beverages case, which stated that Japan could not use its Liquor Tax Law to impose higher taxes on certain imported alcohol. It is unlikely that this intent-based test will ever be used again.

4.1.1.2.4. Ignoring the Like Products Rule

After restricting the factors considered regarding like products in Japan—Taxes on Alcoholic Beverages, the WTO limited its national treatment obligation inquiry even further, making it even more narrowly focused on only economic considerations. In Canada—Certain Measures Concerning Periodicals, consistent with its sound rejection of the aims-and-effect like products consideration, the WTO Panel entirely ignored the like products analysis. It focused even more narrowly on only the directly competitive or substitutable products analysis.

The Canadian periodicals case was in response to Canadian protectionist measures that imposed taxes on imported magazines. The WTO Appellate Body decided that Canada's tax on certain periodicals was inconsistent with GATT Article I

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67 See Matheny, supra note 47, at 251 (quoting Canada—Certain Measures).
68 Id. at 251-52 (quoting Snelson, supra note 65, at 487, 495).
69 Id. at 252.
70 Japan—Taxes on Alcoholic Beverages, supra note 66.
71 See Matheny, supra note 47, at 267 (stating that the tenor and circumstances of Canada—Certain Measures makes a return to an intent-based analysis unlikely).
72 Japan—Taxes on Alcoholic Beverages, supra note 66.
73 Canada—Certain Measures, supra note 57.
74 Id.
75 Id.
76 GATT 1947, supra note 1.
cause the magazines at issue were "directly competitive." The Appellate Body avoided the like products analysis altogether by finding that the Panel's like products decision was an "inadequate factual analysis."

Instead, the Appellate Body applied the "directly competitive" test. This strictly economic test applies a cross-price elasticity assessment to determine whether the products in question have common end-uses. Compared with the like products clause, the directly competitive clause "more unambiguously embodies the ideal of unfettered global free trade," because it focuses on the competitive relationship of the products and not their underlying characteristics. The Panel thus rejected the content-based and contextual analysis Canada wanted in favor of the broad obligations the United States wanted to use to encourage international competition.

Other panels have similarly indicated that they view consumers solely as "economic creatures", and have shown "distaste" for "anything remotely traditional." In a more recent case about whether the tax treatment of directly competitive products was "so as to afford protection" to domestic products, Chile—Taxes on Alcoholic Beverages, a WTO Panel found that even taxation not based in any way on origin was done "so as to afford protection" if the actual effect of the taxation was to tax imports at a substantially higher rate than directly competitive domestic products. The Panel cited the Japan—Taxes on Alcoholic Beverages decision to reit-

77 Matheny, supra note 47, at 261-62 (outlining GATT 1947 Article III:2).
78 Id.
79 See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 31-32 (5th ed. 2001) (explaining price and demand elasticity); Japan—Taxes on Alcoholic Beverages, supra note 66 (describing cross price elasticity as how demand for one good reacts when the price of the other good is changed; it is used to measure commonality of end-uses or the competitiveness of products).
80 See id. at 247.
81 Matheny, supra note 47, at 265.
82 See id.
83 Carmody, supra note 6, at 273-74 (ascribing to non-economic factors "an indeterminacy that precludes reliance upon them") (quoting Japan—Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 117 (1987)).
85 Id. Taxation was based on alcohol content. See id.
86 See id.
erate that "[a]lthough it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure."\textsuperscript{87} The test adopted by the Panel was essentially whether or not there was de facto discrimination against imported products, a determination based solely on economic factors.\textsuperscript{88} Thus, the substantive precedent established by the panels is far from conducive to protecting domestic cultural products—they will not tolerate even facially neutral\textsuperscript{89} taxes where the ultimate economic effect is to tax non-domestic products at a higher rate.

4.1.2. Process Barriers to Protectionism

In addition to substantive legal barriers to protectionism, there are process barriers that render the WTO adjudicatory system an undesirable forum for negotiating controversial cultural products issues. Although it incorporates the GATT system, the WTO panel system decisions are more final. Panel decisions are almost automatically adopted, which "effectively transform[s] dispute settlement from a diplomatic, mediative process to a binding adjudicatory process."\textsuperscript{90} This less diplomatic, more binding process perpetuates the substantive narrowness of the WTO panel system. Thus, the GATT, as it is presently implemented under the WTO, is not a likely vehicle for protectionist treatment of culture and cultural products.

4.2. Non-Adjudicative Trade Strategies That Are Difficult or Impossible to Achieve and Undesirable Due to Their Protectionist Nature

However, the WTO panels have not entirely ruled out the possibility of preserving culture. Though clearly a strong statement against protectionist measures, the Canada—Certain Measures Concerning Periodicals decision is qualified. The WTO noted that its

\textsuperscript{87} \textit{Id.} at \textsuperscript{*12} (citing \textit{Japan—Taxes on Alcoholic Beverages}).

\textsuperscript{88} \textit{Chile—Taxes on Alcoholic Beverages, supra} note 84, at \textsuperscript{*5}.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} Nichols, supra note 44, at 700 (citing G. Richard Shell, \textit{Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization}, 44 DUKE L.J. 829, 858 (1995)).
ruling was not a general challenge to policies that protect a country’s cultural identity. However, as described above, there are few options to do so under the GATT. Furthermore, WTO adjudication has not provided guidance as to how countries might protect their cultural industries and still conform to the new rules for trade in services. Amendments, waivers, exceptions, and even permitted subsidies under the GATT and the WTO may not be possible, and even if they are possible, they are disadvantageous to the extent that they are inconsistent with free trade principles.

4.2.1. Amendment or Waiver to the GATT Is Unlikely

Unrestricted free trade, which is the purpose of the GATT, is likely to prevail over any protectionist attempts to amend or waive provisions of the agreement. Logistically, the GATT as administered by the WTO is only slightly easier to amend than the GATT itself, and neither is very easy to amend. Many smaller and less powerful members of the agreement would have to gain enough influence within the WTO to subjugate the free trade desires of superpowers like the United States. Substantively, as the WTO panel proceedings have illustrated, protectionist measures are unlikely to be incorporated into the GATT because they are contrary to the agreement’s central purpose of promoting unrestricted trade. Further, this purpose is unlikely to be abandoned since it is consistent with prevailing economic values.

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91 Canada—Certain Measures, supra note 57, at *9.
94 Measures that are contrary to free trade are undesirable because they are inefficient. For example, see the discussion above about protectionist measures.
95 See the WTO Agreement, supra note 1, at 6; GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION 23 (1985); LOUIS HENKIN ET AL., INTERNATIONAL LAW 1164-66 (2nd ed. 1987).
4.3. Prevailing Economic Values

Countries that have a lot of economic power do not feel that culture is threatened by free trade, and thus do not want to use the WTO to "artificially" promote cultural autonomy. They argue that protectionist measures are not meant to protect culture, but are attempts to create unfair advantages for domestic industries. They also point out that protectionism by its nature focuses on ownership of products, but such a focus will not ensure that the content of the products truly represents domestic culture. Free trade rules, on the other hand, do not focus on origin; like products are treated alike regardless of their origin. Further, as discussed above, such rules also encourage viable industries instead of preserving inefficient businesses and forced consumerism, and thus are ultimately more conducive to promoting domestic cultural industries than protectionism. The United States and other free trade proponents do not want to set inefficient, non-free trade precedents that the European Union or Asia may then try to follow and expand.

Additionally, the United States and other free trade proponents do not want the WTO to "micromanage world social policy," given the lack of an international consensus on such issues. Also, there will be non-global issues that are outside the scope of the WTO but that still affect culture. Thus, the likelihood of conflict among members will increase. Often when countries do address and try

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97 See Carmody, supra note 6, at 251-52; Van Harpen, supra note 30, at 177-78.
98 Carmody, supra note 6, at 251-52.
100 See Bernard Ostry, Culture and Trade: One Policy/No Options, in THE CULTURE/TRADE QUANDARY, supra note 8, at 17-24; Schwanen, supra note 13; Peter Passell, Is France's Cultural Protection a Handy-Dandy Trade Excuse?, N.Y. TIMES, Jan. 6, 1994, at D2.
101 See Carmody, supra note 6, at 240 ("The problem with recognizing culture is that recognition is counter to a key premise of free trade, namely, that origin does not matter.").
103 Nichols, supra note 44, at 695-96.
to protect culture, they do so through unwritten law, poorly drafted laws with unclear cultural definitions, or individual domestic laws that the GATT regime is not equipped to address. Thus, the dominating free trade proponents are unlikely to concede to those who favor protectionist amendments or waivers.

U.S. views will also likely be perpetuated because WTO members must "use, among the measures reasonably available to [them], that which entails the least degree of inconsistency with other GATT provisions." Members are directed to favor measures that will result in "efficient non-discrimination." This unfettered trade outcome is most consistent with both the rules of GATT, under which "non-trade concerns are subordinate to trade concerns," and the "pre-eminent value of international trade rules," which is wealth maximization.

4.3.1. Free Trade Justifications

This unequivocal preference for unfettered free trade will endure, not only because it is explicitly perpetuated by GATT rules, but because it is the prevailing, extensively justified orientation of the world's most influential markets. These markets have rejected moral rights arguments about cultural products as leading to a "cultural conservatism" or cultural paternalism dictated by the

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104 See Gordon, supra note 41, at 168 (recalling the account of a Brazilian lawyer: "When you are with a [Brazilian] government official seeking approval of a foreign investment sometimes the official pulls open a drawer and takes out a totally unknown regulation; sometimes the drawer remains shut.").

105 See id. at 170, 181.


108 Carmody, supra note 6, at 304.


110 Carmody, supra note 6, at 233-35 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 21 (3rd ed. 1986)).

government. Instead, they espouse the strictly economic comparative advantage theory. This theory posits that it is most efficient for countries to trade goods they can most efficiently produce, and that the absence of consumer choice is inefficient. Without consumer choice, 

\[ \text{"[c]onsumers must pay higher prices because producers receive something they are not entitled to—} \]

\[ \text{the patronage of consumers who would otherwise choose to buy the products of foreign producers."} \]

Free trade does not only protect consumers, though; it also protects creators and producers. Consistent with individual rights, free trade preserves the right of a creator, who owns the product of his labor, to trade it to others if he so desires. These philosophical justifications underlie both the GATT and international free trade in general.

In addition, countries that practice and scholars who promote free trade also point out the many more concrete advantages of free trade including: (1) greater consumer satisfaction due to an increase in the variety of goods; (2) decreased monopolistic power of domestic firms; (3) increased technical efficiency due to a decrease in average production costs; (4) decreased unemployment due to reduced imperfections in the labor market; (5) augmented economic growth through a release of capital resources from the distorted sector; (6) increased livelihood and satisfaction as the

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113 See MARK VAN DOREN, MAN'S RIGHT TO KNOWLEDGE AND THE FREE USE THEREOF 37 (1953) (“No official yet born on this earth is wise enough or generous enough to separate good ideas from bad ideas, good beliefs from bad beliefs.”).


115 See MCCULLOCH, supra note 114; KLEIN, supra note 114.


117 See id. at 551-52 (regarding the individual rights argument for free trade).

118 See Nichols, supra note 44, at 665-67 (summarizing theorists’ arguments for free trade).

119 See JUNICHI GOTO, LABOR IN INTERNATIONAL TRADE THEORY: A NEW PERSPECTIVE ON JAPANESE-AMERICAN ISSUES 82 (1990); see also McGee, supra note 116, at 550.
wealth from free trade is used to help people live longer, healthier lives;\(^{120}\) (7) better ability to care for the environment through increased wealth;\(^{121}\) (8) increased contact and cooperation between countries and thus fewer wars;\(^{122}\) (9) accelerated technological growth through shared knowledge;\(^{123}\) and (10) more developed economies because free trade allows countries to amass wealth and technology as well as to expand their markets.\(^{124}\) Overall, advocates of free trade point out that a large amount of the wealth acquired in the world since the 1940s is a result of liberalized trade.\(^{125}\) Again, in light of these realities, it is unlikely that the world's wealthiest and most powerful economies will abandon a wealth maximization system that has been so lucrative for them.

Thus, even where preservation of culture is recognized in international law and the theories behind it,\(^{126}\) this recognition is limited to reflect the theory of economic efficiency that underlies U.S. export aspirations and the GATT trade arrangement and dispute settlement rhetoric. For example, although the GATT national treatment obligations generally apply to all products, audiovisual

122 See McGee, supra note 116, at 551.
125 See JAGDISH BHAGWATI, PROTECTIONISM 7-9 (1988) ("Indeed, few phenomena in economics can be explained by reference to single causes. But this does not rule out the possibility and indeed the overwhelming probability, that diminishing trade barriers were a major contributory force in postwar expansion of incomes."); ANNE O. KRUEGER, PERSPECTIVES ON TRADE AND DEVELOPMENT 205-12 (1990); ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM 113 (1991).
126 The global international law framework recognizes the autonomy of its members, as well as perpetuates this myth of equality within its agreements. Similarly, cultural pluralism is inherent in the global legal order. As a result, culture has in the past inspired "specific, non-economic interests protected by international law." Matheny, supra note 47, at 258 ("Culture, though itself a concept of inestimable complexity customarily has given rise to specific, non-economic interests protected by international law."); see also Braun & Parker, supra note 4, at 160 ("Culture and economics are inextricably intertwined, so changes in one will necessarily effect changes in the other."). See generally OFFENHEIM'S INTERNATIONAL LAW, supra note 6, at 87-88.
products have been exempted. However, this exemption was bitterly fought for because it is contrary to unfettered free trade, and is unlikely to be expanded due to staunch U.S. opposition. Thus, further exemption, amendment, or waiver to the GATT is possible, but unlikely.

4.3.2. Amendment or Waiver to the GATT Is Undesirable

4.3.2.1. General Inefficiency

Given the prevailing free trade ethic of international trade and the extensive advantages of free trade, even if protectionist measures were possible, they would still be undesirable. Protectionist amendments, waivers, exceptions, safeguards, and subsidies to promote domestic cultural industries, and culture in general, often impede efficient, profitable trade.

Overarching protectionist measures may impede other advantageous strategies trading countries would like to employ; differentiating between foreign and domestic products based on origin may preclude countries from using the few efficient restrictive measures that must exist so that countries will not abuse each other. For example, if one argues that foreign products are not like products, antidumping measures cannot be applied to the foreign products.

Additionally, protectionist measures are themselves inefficient, or even impossible, means to promote viable industries. As a concept, exceptions are questionable, having no clear definition in in-


129 See Browne, supra note 8, at 12.

130 See id.
ternational law. Further, they are logistically of limited usefulness. Under GATT, exceptions only apply if a substantive provision is breached, each exception is carefully defined, and exceptions are interpreted narrowly. Waivers, on the other hand, are unilateral and flexible. However, waivers also require "exceptional circumstances" and consensus or a three-fourths majority to even be created.

4.3.2.2. Specific Proposals

Thus, specific proposals to amend the GATT or establish a waiver should not be attempted or adopted. For example, Richard L. Matheny proposes amending GATT Article III to read: "Where a dispute concerns a cultural product, however, the complaining Member will be required to establish violations under both the first sentence ("like products" clause) and the second sentence ("directly competitive" clause) of Article III:2 in order to justify a finding in its favor." To complement this framework, he then suggests a like products analysis that considers end-use, intellectual content, subject matter, perspective, and consumer perception, among other factors. This system would be more consistent with the comparative advantage theory on which free trade is based because the United States can compete with foreign cultural products. But this amendment is still undesirable, because it limits the

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132 See, e.g., Canada—Ice Cream and Yoghurt, supra note 131; Carmody, supra note 6, at 309-10 (citing Gatilff Coal Co., 142 F.2d at 309-10 and Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944) and WTO Panel Report, United States—Standards for Reformulated and Conventional Gasoline, (Jan. 29, 1996), 35 I.L.M. 274 at 621-22 (1996)).

133 GATT 1994, supra note 1, Art. IX (4).

134 WTO Agreement, supra note 1, Art. IX (3)(a)-(b).

135 See Matheny, supra note 47 at 273 (defining cultural product as simultaneously public (easily duplicated at little cost) and private (excludable) with content that is "in some minimal sense 'cultural'").

136 Id. at 275.

137 See id.

138 See discussion infra Section 4.3.1.
United States to competing by using foreign content. Otherwise, the United States would still be subject to discriminatory taxes.\textsuperscript{139}

Similarly, other proposals to limit free trade by amending the GATT would not be advantageous. Chi Carmody criticizes two proposals to make new GATT-type rules for cultural products.\textsuperscript{140} She points out that Philip M. Nichols,\textsuperscript{141} who advocates rules that focus on the purpose of trade restrictions,\textsuperscript{142} and Michael Braun and Leigh Parker, who argue for trade arrangements that reflect the unique nature of cultural goods,\textsuperscript{143} fail to define which products would be covered by a GATT amendment or waiver.\textsuperscript{144} Carmody also asserts that Nichols, Braun, and Parker propose language that is as unclear as the concept of cultural products.\textsuperscript{145} The alternate cultural waiver to the GATT that Carmody proposes is similarly complex and protectionist.\textsuperscript{146} None of these alternatives to the present WTO/GATT system is desirable.

\textbf{4.3.3. Subsidies and Selective Safeguards}

Subsidies also have limited utility.\textsuperscript{147} Governments must have money in order to provide subsidies, and even then their efforts will only alter economic conditions. This means that subsidies will only be effective where price alone determines demand.\textsuperscript{148} Also,

\begin{itemize}
\item \textsuperscript{139} See Matheny, \textit{supra} note 47, at 276. See generally Douglas A. Irwin, \textit{Against the Tide: An Intellectual History of Free Trade} (1996).
\item \textsuperscript{140} See Carmody, \textit{supra} note 6, at 307-08.
\item \textsuperscript{141} Nichols' exception to the GATT would preserve some laws that violate the terms of the WTO if the rules impede trade only incidentally, and are "enacted or undertaken for the purpose of reflecting an underlying social value." Nichols, \textit{supra} note 44, at 660.
\item \textsuperscript{142} See \textit{id.} at 714.
\item \textsuperscript{143} See Braun & Parker, \textit{supra} note 4.
\item \textsuperscript{144} See Carmody, \textit{supra} note 6, at 307-08.
\item \textsuperscript{145} See \textit{id.}
\item \textsuperscript{146} See \textit{id.} at 312.
\item \textsuperscript{147} See Tyler Cowen, \textit{Why France Needs Free Trade for Film}, \textit{Asian Wall St. J.}, July 15, 1998, at 6 (arguing that subsidized movie makers can get away with making unpopular products and that subsidy monies sometimes end up subsidizing international companies anyway). \textit{But see} Van Harpen, \textit{supra} note 30, at 191-93 (supporting the use of only the GATT 1947 Art. III:8(b) and no other protectionist measures, or if not subsidies possibly price-based protections equivalent to tariffs; stating that such subsidies "permit the price mechanism to function and thereby reward efficiency and quality" and "are visible and thus easier to negotiate.").
\item \textsuperscript{148} See Carmody, \textit{supra} note 6, at 305.
\end{itemize}
only price elastic goods can be subsidized under the WTO Agreement on Subsidies and Countervailing Measures. Additional, subsidies may limit the freedom and objectivity of products subsidized.

Selective safeguards are similarly not feasible. They inevitably produce inefficient protectionism. Whereas nondiscrimination is economically sound because it restricts imports from inefficient sources, selectivity is detrimentally based on political clout. Selective restrictions encourage protectionism because there are fewer international ramifications when only selected people are discriminated against, so it is easier to be protectionist. Further, selective quotas are detrimental to the industries they are supposed to help. Those importers who are not discriminated against will increase their imports, and thus even if the country selectively excludes more and more supplying countries, the level of imports will ultimately remain equal to a nondiscrimination situation. Also, extensive globalization makes it difficult, if not impractical, to select specific sources of imports to exclude.

Such “managed trade is the antithesis of GATT principles,” and thus is as impractical as it is undesirable. As noted above, even non-selective safeguards, cultural exemptions, or waivers are objectionable. In fact, even bilateral and regional free trade agreements can ultimately be detrimental. They are preferential to their members and thus may lead to protectionism and a burdensome “maze” of trade restrictions. Though it is an oversimplification to wholeheartedly espouse multilateral WTO sanctioned

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149 Agreement on Subsidies and Countervailing Measures, Apr. 14, 1994, WTO Agreement, supra note 1, Annex 1A, Art. 6.1(a). Carmody explains that the numerical qualifications in Section 6.1(a) necessitate that only price elastic goods be subsidized. See Carmody, supra note 6, at 306.

150 See Cowen, supra note 147 (noting that subsidies were first provided as part of a fascist plan to control the content of the movies).


152 See id.

153 See id.

154 See id.

155 See id.

156 Id. at 112.

157 See Browne, supra note 8, at 6.

158 See Baldwin & Bhagwati, supra note 152, at 111.
treaties\textsuperscript{159} as the only alternative,\textsuperscript{160} promotion is ultimately better than protection.\textsuperscript{161}

5. PROMOTION AS AN ALTERNATIVE TO PROTECTIONISM

However, although protectionism is neither practical nor desirable as a long-term or overarching strategy, engaging in unfettered trade at all stages of a country's economic development is inconsistent with preserving culture and cultural products where there are marked inequalities of wealth and power between countries in the global economy. And such preservation remains an important goal. It thus is necessary to identify and use strategies that are most conducive to successful participation in international trade, but that will also afford some long-term viability to cultural industries. A sort of limited, transitory, small-scale, and informal protectionism meant to promote struggling or emerging economies can be used to preserve cultural products even where the ultimate goal is largely unfettered free trade.

Emerging Asian economies are illustrative, as they have found that subsidies and isolationism are not ultimately advantageous, but that a direct transition to full participation in multilateral free trade is equally disastrous. Instead, they have begun to establish regional trade areas similar to the European Union in order to promote their economies and gain influence within international trade.\textsuperscript{162} Within these regional and bilateral trade agreements, the countries are still fighting to preserve their cultures, but on a more informal and autonomous level.\textsuperscript{163} The parties each demand a

\textsuperscript{159} See Jagdish Bhagwati, Preferential Trade Agreements: The Wrong Road, in LAW AND POLICY IN INTERNATIONAL BUSINESS 865-71 (1996), reprinted in A STREAM OF WINDOWS, supra note 33, at 289-97.

\textsuperscript{160} See Jagdish Bhagwati, Japan Must Now Say No, FIN. TIMES, Apr. 16, 1993, reprinted in A STREAM OF WINDOWS, supra note 33, at 190-92 (arguing that Japan should reject U.S. attempts toward negotiating a managed trade agreement, as such an arrangement would ensure that the United States has a part of the Japanese market, and the agreement would restrict U.S. export opportunities as well; multilateral equality is best).

\textsuperscript{161} See Browne, supra note 8, at 7.

\textsuperscript{162} See, e.g., Byun Eun-mi, President Kim's Visit to Moscow to Take Cultural Exchange to a New Height, KOREA HERALD, May 30, 1999 (describing recent South Korean efforts to exchange culture with the Russians and quoting a South Korean citizen, Hong Sa-jong: "The influx of Russian performing arts has helped Koreans to develop a diverse taste in foreign culture, breaking away from their dependency on the United States and Europe."). available at 1999 WL 17749471.

\textsuperscript{163} See, e.g., East Asia Vision Group Talks Stress Regional Cooperation, KOREA
large amount of freedom in trade, but regions or trade partners can simultaneously invest in and support each other, thereby increasing the viability of their own domestic markets. Building from a somewhat selective regional agreement will allow them some time to build up their resources to the point where they can ultimately participate in more unfettered, multilateral free trade without sacrificing their vulnerable domestic cultural industries.

5.1. South Korea and Japan: A Case Study

5.1.1. Efforts to Establish Bilateral and Regional Trade Agreements

South Korea and Japan's recent efforts to establish first a bilateral trade arrangement, and then possibly a regional one that includes China and other East Asian countries, and even a much broader one with the European Union, demonstrate a much less protectionist strategy than isolationism, waivers, or other trade strategies discussed above. Instead of continuing to isolate their economies, or pursuing further large-scale international protection for cultural industries, these two countries are trying to promote their cultural industries by strengthening them within a narrower context, a context in which they may move towards fuller

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Herald, Oct. 22, 1999 (describing South Korea, China, and Japan's plans to launch a regional consultative body), available at 1999 WL 29056011; Insulting Language Games in Japan, Korea Herald, July 14, 1999 (noting that Japan plans to have a free trade agreement with South Korea), available at 1999 WL 17750346; Korea-Japan Panel on Promoting Cultural Exchanges Launched, Korea Herald, June 19, 1999 (describing Japan and South Korea's plans to have a cultural exchange conference, and South Korea's plans to lift its ban on Japanese popular culture), available at 1999 WL 17750151.


166 Europe, Asia to Launch Joint Financial Cooperation Project, Kyodo News, Dec. 26, 2000 (noting that Asian and European countries are working together to develop the "Kobe Research Project" which will explore ways to stabilize currency and foreign exchange markets), available at WL JWIRE 22:57:00.

167 See Rowley, supra note 164.
participation in international free trade without entirely sacrificing their domestic cultural industries.

Though these new trade arrangements will not be easily or quickly achieved, their ramifications are potentially very advantageous. South Korea and Japan have not always had a civil relationship. South Korea was dominated by Japanese imperialism from 1910 until 1945, a subordination for which Japan only recently apologized. After 1945, South Korea prohibited Japanese popular culture altogether. In recent years significant trade barriers between these two countries have persisted. For example, in 1994, Japanese movies were still banned in South Korea to protect both the South Korean movie industry and the traditional cultural values of South Korean youth. As recently as 1999, despite international trends of regionalism, South Korea and Japan remained the only two countries not participating in regional trade arrangements.

However, despite large trade imbalances similar to those experienced by Canada and the United States, South Korea and Japan are now slowly taking advantage of their geographical and cultural

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170 See id.
171 See id.
172 See id.
173 See Chon Shi-yong, Kim Expects ‘Epochal’ Change in S-N Ties, KOREA HERALD, May 8, 1999 (noting that the GATT, the Uruguay Round, and U.S.-Canada agreements allow countries to have some protections for their cultural markets), available at 1999 WL 17748923; Kwon Young-min, Korea-Japan Free Trade Agreement on Track Towards Cooperation, KOREA HERALD, May 31, 1999 (noting that significant trade barriers existed as recently as 1999), available at 1999 WL 17749526.

Domestic producers argue that screen quotas have enabled domestic film producers to establish themselves and to be profitable, while others argue that “artificial protection has not motivated movie makers to pursue creative ideas, technical innovation, or originality.” Lee So-Yon, Movie Trade Dispute Draws on Many Characters, BUS. KOREA, Jan. 1, 1999, at 24 (“In spite of thirty-three years under the screen quota, the Korean film industry still hasn’t narrowed the gap with other countries.”) (quoting Professor Sang-han Wang).

175 See Young-min, supra note 173 (noting that sixty percent of world trade is influenced by regional trade arrangements).
proximity and their shared history. When faced with financial crises, the countries' officials77 decided to work together to improve both countries' economies. South Korea's financial crisis in 1997 "presented the incoming administration... with a vastly changed set of priorities... [and] the need to boost foreign direct investment as the only means to restore economic health." South Korea asked Japan to invest more in its economy and ended its fifty-three year ban on Japanese popular culture. Japan officially apologized for its prior imperialism and expressed its desire to work with South Korea. Japan hopes to use a free trade area with South Korea to "redress its country's trade imbalances." Both countries no longer plan to avoid preferential trading or investment arrangements, and had set as their goal to finish reports on a free trade and investment plan by the end of 1999.

5.1.2. Domestic Industries Within Bilateral Agreements

Despite these clear movements towards a bilateral free trade agreement, and the countries' eagerness to gain access to each other's markets, the two have moved slowly and cautiously so they would not compromise their own domestic industries. Initially,

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177 See Andrew Cornell, Neighbors Put Old Scores Aside in Quest for Agreement, AUSTRALIAN FIN. REV., Feb. 10, 1999, at 8 ("Japan's growing sense of isolation and economic vulnerability has added impetus to the ideological shift.").

178 See Courting Japan, supra note 169 ("In spite of the unfortunate history of Korea and Japan, new economic realities and a need to compete globally are positioned to make these closest of neighbors, the closest of partners.").

179 Id. ("Their goal: to examine ways of forming a strategic alliance to aid the recovery of both economies and cooperate closely on trade and investment.").

180 See id.

181 See id.

182 Id.; see Lee Joon-seung, Korea, Japan Designate 2002 as 'Year for Exchange,' KOREA HERALD, Oct. 25, 1999 (noting that South Korea and Japan pledged in 1999 to cooperate closely within multilateral trade negotiations, including the WTO's round of talks in November 1999 and that South Korea promised to continue with its "third-phase" of lowering trade barriers to Japanese cultural items), available at 1999 WL 29056105.

183 See Rowley, supra note 164 (noting that Japan is also considering entering a similar arrangement with Mexico); cf. Ignacio Gonzalez, Chilean-Korean Partnerships Ready to Blossom, BUS. KOREA, Sept. 1, 1999, at 58 (describing South Korea's possible plans to develop a free trade agreement).
South Korea attempted to compete internationally by focusing on niche markets, including cultural exports, to "bolster foreign shipments." Japan also made "discrete, niche-oriented" investments in South Korea. In late 1998, Japanese pop culture was allowed into South Korea, but only gradually to protect South Korean industries. To further facilitate the mutual opening of South Korean and Japanese markets, the two countries have created a joint consultative body, although South Korea was careful to point out that South Korean consumers and traders will determine what products they wish to acquire from Japan. The Japanese similarly qualify their desire for economic cooperation, transfer of technology, and building alliances with the recognition that South Korean people should retain a large amount of control over what and when Japanese products enter the South Korean market. Both are willing to concede some of their free trade autonomy in order to further secure their respective economies, especially their cultural industries.

5.1.3. Benefits of Regional Agreements

This decision to work together, while at the same time recognizing cultural autonomy and the need to promote culture, has enabled many beneficial trade arrangements as well as laid a foundation for advantageous collaboration between the countries in the future. The two countries have been able to help each other recover from their respective economic crises by supporting the In-

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184 Exporters Advised to Aim for Niche Marts; KOTRA Draws up a List of 100 Most Promising Items to Market, KOREA HERALD, Aug. 25, 1998 ("Niche markets exist[sic] throughout all the world, even at this times[sic] of economic downturn.") (quoting KOTRA President, Kin Eun-sang), available at 1998 WL 12274851.

185 See Courting Japan, supra note 169.


187 See Editorial: Import of Japanese Films, KOREA HERALD, Oct. 21, 1998, available at 1998 WL 20205493. [I]t is wholly the decision of Korean consumers or traders to choose what to buy from the vast array of Japanese cultural market[sic].... Meanwhile, the local film industry should consider meeting the challenge by developing its resources and the quality of its productions with the introduction of Japanese technology, and possibly Japanese capital, through joint productions. Id.

ternational Monetary Fund, which then helped cultivate their economies. Also, by focusing on bilateral rather than multilateral trading, Japan and South Korea's strategy became more consistent with, and thus more competitive with, the bilateral approaches of other countries. This cooperative strategy is also a step towards a more formal South Korean and Japanese free trade pact, under which South Korean exports would be further able to replace U.S. and European products in Japan. A free trade agreement could eventually include China, and trade imbalances between South Korea, Japan, and China would cancel each other out.

Further, even though Asian countries may be considered by potential outside investors to be high-risk, South Korea and Japan could work together to raise capital in the international market so they can encourage further outside investment. If they continue to reduce even non-tariff investment barriers they would not only set a good free trade, open market precedent for other countries to follow, but would greatly enhance the "actual trade creation effect" of a free trade area, thereby producing a surge in foreign direct investment amongst Japan, South Korea, and others.

Together the two countries could demonstrate to outsiders that they are able to deal with crises and stabilize their economies—especially if the problems they face stem from domestic structural difficulties, and not foreign exchange or liquidity. This will in turn enable them to avoid excessive dependence on the dollar,

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189 Japan has helped the IMF assist South Korea with liquidity problems. See Common Interests, supra note 188.

190 See Rowley, supra note 164 (pointing out that twenty-six other countries benefit from both WTO membership and regional, bilateral agreements).


192 See Young-min, supra note 173.

193 See Common Interests, supra note 188, at 2-3.


196 Young-min, supra note 173, at *2175 (stating that lowering tariff barriers under a Japan-South Korea free trade agreement would not produce great effects because these countries already have low tariffs under the WTO, but that reducing non-tariff barriers would have a large effect).

197 See Common Interests, supra note 188.
which is desirable because, "[i]n order to avoid the systemic mis-
conduct of all the financial markets in the world, it is desirable that
two or three different kinds of currency play the key roles." 198
Similarly, a strong Asian economy would allow the countries to
implement projects such as an "Asian Monetary Fund" 199 to im-
prove Asian countries, and thereby to promote their own values. 200

5.1.4. Regionalism as a Move Towards Multilateralism

Although a comprehensive traditional free trade agreement is
not immediately possible between South Korea and Japan, 201 sev-
eral components of such an agreement have been considered, 202
and continue to be pursued, 203 as "fierce competition and over-
capacity problems around the world" as well as financial crisis
make such arrangements more and more crucial. 204 Within this
context, Japan, though it is Asia's largest economy and a powerful,
key player in international trade agreements, 205 must be careful to
support international free trade agreements so that Asia's econo-
mies are not isolated. 206 By working regionally to improve their
economies, South Korea and Japan will be strong enough to suc-
cessfully assert themselves within a more international free trade
regime. As the world's second and eleventh largest economies, 207
accounting for seventy percent of Asian gross domestic product

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198 Id.
199 Barry Wain, Asia-Pacific Body Loses Its Way, ASIAN WALL ST. J., Nov. 10,
200 See Yoo Cheong-mo, FKI Foreign Advisors Call for Chaebol Groups to Focus on
201 See Young-min, supra note 173 (noting that "Korea and Japan are the only
[East Asian] nations not involved in a regional trading arrangement").
202 See Common Interests, supra note 188.
203 See Cornell, supra note 177 (noting that South Korea's president "put for-
ward the concept of an FTA [free trade agreement]"). For some of the most recent
proposals and goals, see Korea, China, Japan Agree on Joint Projects, KOREA HERALD,
Nov. 25, 2000, available at 2000 WL 27395527; Uniting for Financial Stability, BUS.
204 Young-min, supra note 173.
205 See Marc Selinger, Japan May Foil Free-Trade Agreement for Asia, WASH.
206 See id. (suggesting that Japan's refusal to participate in such agreements
could cause other countries to follow suit: "[T]he entire process [could] fall apart,
which could rattle world financial markets and worsen Asia's economic trou-
bles . . . .").
207 See Cornell, supra note 177, at 1.
and most regional trading.\textsuperscript{203} they may be able to form “a major trading block capable of voicing its concerns against European and American ones”\textsuperscript{209} and thus be capable of holding sway with the European Union and U.S. economies.\textsuperscript{210}

5.2. Applying the Asian Example

Thus, instead of focusing on amending the GATT, an enormously difficult task, countries such as Japan and South Korea that cannot compete with U.S. exports even in their own domestic markets should continue to pursue and expand bilateral or regional trade agreements.\textsuperscript{211} Within these agreements countries will have more power to preserve and promote their own culture\textsuperscript{212} vis à vis each other, and, eventually, relative to other GATT members. The WTO cannot force compliance, since its legitimacy relies on its perceived credibility\textsuperscript{213} among the member parties. If countries build consensus on measures to promote culture, they will eventually be able to influence cultural industries’ trade issues and hopefully stabilize their economies and popularize their products. This shorter-term use of selective measures will ultimately provide leverage\textsuperscript{214} to further assert their economic and cultural goals.\textsuperscript{215} Once their products and economies are more established, instead of

\textsuperscript{203} See Young-min, supra note 173.

\textsuperscript{209} Id.

\textsuperscript{210} Cornell, supra note 177.

\textsuperscript{211} For some of the benefits of foreign countries working together to foster industries, see Meredith A. Harper, Comment, International Protection of Intellectual Property Rights in the 1990’s: Will Trade Barriers and Pirating Practices in the Audiovisual Industry Continue?, 25 CAL. W. INT’L L.J. 153, 183 (1994) (noting that through cooperation both sides may benefit from increased creativity and diversity; they can “share risks, gain tax breaks, participate in subsidies, avoid quotas, and establish long-term relationships with foreign partners”); Larrea, supra note 26, at 1147.

\textsuperscript{212} The mere existence of multilateral trade regimes will not promote or preserve culture, but their existence may enable domestic decisions of what culture is and how it should be treated. See Browne, supra note 8, at 15.

\textsuperscript{213} See Guy de Jonquieres, Dreams Behind the Scenes, FIN. TIMES, Jan. 5, 1995, at 11.

\textsuperscript{214} See Browne, supra note 8, at 14 (suggesting that countries form international alliances to shape future trade negotiations) (citing Liss Jeffrey, The Impact of Globalization and Technological Change on Culture and National Identity: A Call for Visionary Pragmatism, in THE CULTURE/TRADE QUANDARY, supra note 8, at 155-96).

\textsuperscript{215} See id. at 13 (suggesting that Canada should start to build a consensus consistent with its goals for foreign trade agreements) (citing Ivan Bernier, Cultural Goods and Services in International Trade Law, in THE CULTURE/TRADE QUANDARY, supra note 8, at 108-48).
endlessly perpetuating or creating economically inefficient situations, they will be in a position to participate in the global economy in an non-protectionist, economically advantageous way. Their resulting economic strength will then enable them to reduce protectionist measures even further so that they can take full advantage of the free trade values inherent in our international trade systems.

6. CONCLUSION

This Comment describes the importance of preserving and promoting culture, as well as the difficulties of doing so where an economy is relatively weak. After establishing the scarcity of opportunities to promote culture within the current WTO/GATT system, it considers and rejects overarching, internationally oriented protectionist measures as both logistically impractical and undesirably inconsistent with the values underlying international trade. Less protectionist, intermediate use of regional and bilateral trade agreements as a means of ultimately achieving efficient multilateral trade is presented as a more advantageous alternative. Ideally, countries should use protectionism only to rebuild their economies in times of crisis. Otherwise they should use bilateral and regional cooperation to build a powerful economy. As their regional trading blocs become more powerful, countries will be able to decide for themselves how to run their cultural industries, while at the same time promoting those industries abroad. The resulting stability of their products and increase in their profits will ultimately enable them to become efficient, competitive, non-protectionist, multilateral traders.

216 See Stanley, supra note 37, at 152 (proposing that Canada use market forces to its advantage: "(1) forget about cultural exemptions and buy some time with some carefully worded derogations; (2) recognize the need to increase [her] intellectual capital about the way cultural industries actually work in a global economy; and [ ] (3) reformulate our policies in that light"); see also Hwang Jang-jin, Film Industry's Plea for Screen Quota Turns Emotional, KOREA HERALD, June 18, 1999 (questioning whether the quota system would preserve the local film industry: "Rather than relying on protectionist measures, the industry must make efforts to elevate the quality of local productions;" easing its forty percent local quota system for films would enable South Korea to obtain a bilateral investment treaty with the United States, as well as U.S. investment in South Korean film) (internal quotations omitted), available at 1999 WL 17750087.