



LAWYERS

DIGITAL IS DIFFERENT:

**How Australian Audiovisual
Services Were Transformed From
Culture into Commerce**

by

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Digital is Different: How Australian Audiovisual Services Were Transformed From Culture into Commerce

ABSTRACT

Historically, there has been significant Australian Government support for the audiovisual services sector in Australia and this support was motivated by policies of cultural diversity. This paper argues that there has been a crucial, unheralded and starkly effective policy shift from support of the audiovisual sector to one of regarding that sector as just another aspect of electronic commerce. The paper demonstrates that this change occurred from the year 2000 and was heavily influenced by both the United States and major transnational corporations with their primary financial reporting place in the United States.

The paper attempts to demonstrate that Australian cultural policy has been driven by forces from both within and outside of Australia. It contrasts the function of bilateral diplomatic relations on the one hand and the role of intense lobbying in Australia on the other.

The external pressure to settle the Australia United States Free Trade Agreement lead to agreement by Australia to the view posited by the United States that there are “new” audiovisual services which should be regarded in the same terms as electronic commerce. Trade in electronic commerce is based on minimal regulatory intervention and an expectation of commitments in both bilateral and multilateral trade agreements.

INTRODUCTION

Most people will spend more time watching television over their lives than they do in paid work (Hargreaves Heap 2005).

In this paper, I argue that Australia has undergone a significant policy change with respect to trade in audiovisual services. These services (as defined by World Trade Organization (**WTO**) (WTO 1991)) include radio and television services, motion picture production and distribution services (cinema and video store) and sound recording. That is, audiovisual services are the means by which people receive news, information and entertainment on a daily basis. These services are pervasive with all people over 15 spending more than four hours per day using audio visual services as set out in Figure 1 (ABS 1997). That is, audiovisual services have a significant social impact and any change in their regulation is likely to result in social change.

Activity	Minutes per day
Watching television	158
Watching video	7
Listening to radio/CD/records/tapes	79
Other audio/visual media	13
Audiovisual TOTAL	257

Figure 1 – Use by residents of Australia over 15 of audiovisual services

This paper uses broadcasting services as a focus for audiovisual services. However, the approaches applied could also be used in respect of film services.

The significant change that the treatment of audiovisual services in Australia has undergone reflects the Australian Government's policy shift on the treatment of such services and I show that this shift is a change in the state's view of those services from cultural services to digital commerce.

The paper commences with two reviews. The first is a review of the use of the “cultural exception” and consideration of cultural protection. The second examines trade in services and that trade’s interconnectedness with domestic regulation using the regulation of broadcasting services as an example.

I then analyse what I argue is a reduction in the scope of domestic regulation by considering three Australian government decisions made in the period from 2000 to 2005 in the context of a US government policy statement made in 2000 arguing that “digital is different”. The Australian government decisions are the Ministerial determination on audiovisual services delivered using the “Internet” (2000), the Australia – USA Free Trade Agreement (2004) and the Australian government’s rejection of a widely agreed UNESCO view on cultural exception.

I conclude with an analysis of the power and influence structures which have caused the Australian government policy shift in terms of governments, firms and civil society.

TWO REVIEWS

Cultural exception

Cultural protectionism requires audiovisual services to be treated differently from other services in international trade. This form of protectionism is widely practised (OECD 1999) despite calls for convergence of trade in services by realist political science scholars (Marsden 2001) as well as legal scholars (Luff 2004) and arguments that consumer demand is opposed to such protectionism by educationalists (Waisbord 2004). The principle underlying cultural exception was first invoked by the USA in negotiations on the Florence Agreement of 1950 and its related “Protocol of Nairobi” (1974) which is a multilateral treaty freeing trade flows of educational, scientific and cultural materials (Chartrand 1992). In this case the USA sought to limit the scope of cultural goods and Senate ratification for the Agreement did not take

place until 1960 and implementing legislation was only passed on the request of Lyndon Johnson six years later (Johnson 1966).

Australian governments have traditionally used the “cultural exception” argument as a basis to decline to make trade commitments in multilateral trade agreements including the establishment and subsequent rounds of WTO negotiations on trade in services. Until the negotiation of the Australia-US Free Trade Agreement, Australia had not made specific audiovisual services trade commitments in any bilateral trade agreements.

The original call for a “cultural exception” for trade in audiovisual services (along with other cultural services) was made by France during the pre-WTO negotiations on the General Agreement on Tariffs and Trade (**GATT**) (Frau-Meigs 2002; Delacroix and Bornon 2005). Indeed, Delacroix at page 354 describes the French position as:

France has special interest because it has adopted the most active and most vocal policy of cultural protectionism

Importantly, the French government was influenced by other stakeholders in coming to this decision. This included civil society expressing concerns for French culture (or, at least, the French way of life) and the firms which deliver audiovisual services. Major firms in the media sector have significant influence on governments (Given 2003) and this leads to structural changes (Bardoel and d'Haenens 2004). Further, the civil society actors associated with the audiovisual sector (for example, UNESCO and the Viewers and Listeners Association) are influential (Flew and McElhinney 2001; Wagner 2001). However, not all firms or elements of civil society seek cultural protectionism and the interaction between these stakeholders will have a crucial influence on government decisions on domestic regulation and international trade agreements.

The literature highlights a number of live debates in this area from the perspective of sociology, cultural studies, economics, law and international relations. For example, Sophie Meunier (2000) argues that, from a French perspective at least, the decision not to trade in audiovisual services is one taken in the context of a decision on agricultural goods and services and the preservation of a “rural way-of-life”. The same scholar also points out that the European Court of Justice requires a majority to rule on matters of agricultural trade but unanimity on cultural trade (Meunier 2003 p79). The role of the United States as a leading exporter of audiovisual services is identified as being largely *immune to cultural imports* (Swann 2000). The literature also addresses the motivation of the United States in introducing the concept of “virtual” services (Wheeler 2000) which were incorporated into the USFTA. This shift in the analysis from one of cultural services to ecommerce is one which has not been addressed in depth in the case of Australian bilateral (or multilateral) trade agreements. A rather more favourable view of United States’ opposition to the cultural exception was taken by neoliberal commentators (Pryce-Jones, Greenfeld et al. 2002) in a specifically partisan analysis. Some scholars consider that the legal protection of the cultural exception may need to be extended (Broude 2004) if agreement on the role of cultural services in WTO is to be achieved.

There is also a significant body of literature on trade in audiovisual services (Mas-Colell 1999; Footer and Graber 2000; Feigenbaum 2002; Lieber and Weisberg 2002). These include the analysis of an absence of free markets (Pauwels and Loisen 2003) and the application of the “cultural exception” in other cultural services such as fixed price agreements for books (van der Ploeg 2004), the issues arising from the internet (Tian and Emery 2002) and aspects of cinematic co-production (Hoefert de Turegano 2004). There are also arguments made for specific regional cultural identity to be recognised and acted upon (Janeba 2004; Pace, Stavridis et al. 2004) and an analysis of the potential that the cultural exception will lead to negotiating blocs in

multilateral trade discussions (Acheson and Maule 2004). However, although the analytical techniques used by these scholars could be applied to an analysis of Australian trade in audiovisual services, none of this analysis has considered that country.

The role of the European Union in establishing a potential cultural bloc is examined by some authors (Meunier 2003; Neill 2005). The European Union maintains a rigid stand in the exclusion of audiovisual services from the WTO. However, its internal market requires the free flow of trade in such services. This dichotomy is emphasised by the recent changes in EU legislation as part of “Television without Frontiers” and has attracted a range of analysis (CEC 1989; Mazzoleni 2000; Esser 2002; Chalaby 2003; Kerrigan and Özbilgin 2004; Wheeler 2004; Chalaby 2005). However European trade policy has not been the subject of extensive review. Indeed, the publication of “Trading Voices” (Meunier 2005) has led to reviews suggesting that it is the major text in the field. From the perspective of this thesis, the Meunier’s emphasis on the collective negotiation of the EU in multilateral trade has limited application.

The approach of the European Union can be contrasted with the issues facing Canada (Mulcahy 2002b). For geographic reasons, Canada as a state is concerned with maintenance of its culture apart from that of the USA. There is extensive literature on the subject (Acheson and Maule 1994; Galperin 1999; McFadyen, Hoskins et al. 2000; Mulcahy 2002a). Canada is also a comparable power to Australia (Ravenhill 1998b). Canada has the specific experience of excluding cultural services from the US/Canada free trade agreement and maintaining this cultural exception in the negotiations for the North American Free Trade Agreement. This is analysed either favourably (Lie 2001) or otherwise (Barfield 1998). However, Canada found that its cultural exception was the subject of an appeal by the USA to the WTO when it tried to limit US magazines on news stands (Magder 1998).

The literature here also addresses the United States' use of protection in the formation of its audiovisual sector (Kerrigan and Özbilgin 2004) and arguments on the demise of cultural imperialism (Elteren 2003). There is also a body of work on the political economy of cultural identity (Burgi-Golub 2000; O'Regan 2001; Dabbous-Sensenig 2002; Cuddy-Keane 2003). In "Paradise & Power", Robert Kagan used the expression "America is from Mars, Europe is from Venus" (Kagan 2003). Whereas this is a major oversimplification, there is scope to use the US approach to free trade agreements as well as the WTO to indicate the likely outcomes from trade negotiations. This can also be viewed in the context of internal pressure to limit imports of cultural services to the USA (Chase 2000 p3; Curtin 2003).

Trade in services

Trade in services cannot be restricted by tariff barriers as services (particularly financial and audiovisual services) have limited physical form before their consumption. This means that the global political economy of trade in services is integrally linked to domestic regulatory policy.

The global political economy of international trade is an area with a rich literature (particularly in respect to multilateral trade agreements). The focus on the various rounds of the World Trade Organization negotiations and the increasing use of bilateral trade agreements by the United States (Porter 2005) has been well reported. There has also been critical analysis of the USFTA from the perspective of an Australian deviation from the successful multilateral trade policy (Capling 2005) or as a pre-election trade policy manifesto (Weiss, Thurbon et al. 2004).

A recent collection of works on the global political economy of international trade analyses trade in the context of actors, issues and regional dynamics (Kelly and Grant 2005). The actors analysed include the WTO (Wilkinson 2005), civil society (Williams 2005) and the relationship between business and government (Coen and Grant 2005). The issues which are relevant to my

thesis that are raised in the volume include trade, security and globalization (Kelly 2005), trade and the environment (Newell 2005), trade in services (Wiener 2005) and intellectual property rights (May 2005).

There is a significant body of literature on the role of firms in multilateral trade agreements (particularly with respect to WTO) as well as the role of civil society in such agreements (Williams 2003; Williams 2005). The role and considerations of non-state stakeholders in bilateral trade agreements has a sparser literature especially in respect of Australian policy.

Australian trade policy

There is also a significant body of literature on Australia's trade in commodities and manufactures, including the role of protectionism (Anderson and Garnaut 1987; Ravenhill 1998a; Ravenhill 1999; Beeson 2001; Griffiths and Dunphy 2002; Parker 2002; Leigh 2003; Tcha and Kuriyama 2003). The role of Australia in current trade and both bilateral and multilateral trade agreements is also well understood (Meredith and Dyster 1999; Capling 2001; Capling 2005).

However, there is little analysis available on the role of Australia in international trade in services generally and audiovisual services in particular. Nevertheless, the analytical frameworks used by others in respect of manufacturing and primary industries (Capling and Galligan 1993; Catley 1996) and agriculture (Catley 2005) could be applied to the services sector.

Complexity of services

Trade in services presents a complex set of problems for both permission and prohibition of trade. Indeed, there was a view that services were untradeable and this view was only changed with the introduction of implementing technologies (Hoekman and Kostecki 2001 p238). Constraining trade in goods is technically not a difficult problem for a government as set out in Figure 2.

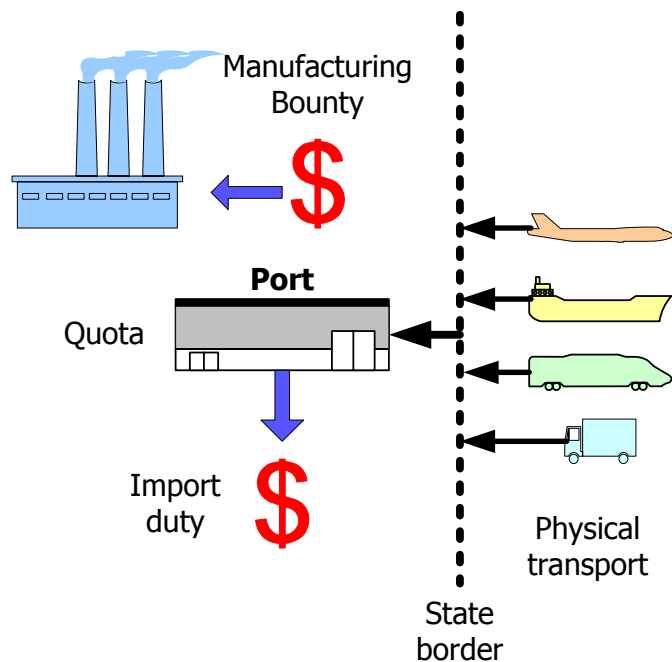


Figure 2 – Trade in goods

In this diagram, goods are required to pass through a port as they are imported into a country. At the port, relevant duty can be levied and the number of goods imported can be compared to a quota and be required to remain in the port in the event that a quota has been exceeded. It is also possible for the state to create non-tariff barriers such as manufacturing bounties (in Australia, examples were the book bounty, shipbuilding bounty (Beeson 1997) and the computer bounty). Bounties are payments by the customs service which are calculated as a percentage of the manufacturing process cost of the manufacture of bountiable goods.

The situation is different in the case of services. Here the ability to constrain the importation of services is implemented by restricting the use of those services within a country. Specifically, the delivery and use of services are regulated within a state. For example, limitations on foreign control of a commercial broadcasting licensee combined with minimum quotas for

domestic television content (perhaps by genre) would restrict the importation of television programs. That is, state control of trade in services is conducted by means of domestic regulation of that service. However, the rationale for that regulation is unlikely to have been driven by trade policy. Instead, regulation is more often driven by market failure (Findlay and Kim 2002) in a situation where there is a natural monopoly, lack of information or some other externality.

This point is emphasised in the four modes of trade in services set out in the General Agreement on Trade in Services (Krajewski 2003 p66). These are the supply of a service: from one state to another state; to a consumer from one state in the territory of another state; by a supplier from one state through a commercial presence in another state; and by a supplier from one state through a natural person of that state in another state. Krajewski's analysis of GATS and the obligations that the agreement imposes is one of a number of legal analytical texts. These interpret these obligations on states and the implications for the behaviour of both regulators and firms.

However, the analysis of the role of domestic state power in the implementation of trade policy in respect of trade in services tends to be limited to either an economic analysis or a legal one. There is limited literature from a global political economy perspective. Perhaps Anne Capling's lament in this regard in respect of trade analysis generally that it is:

perhaps a bit stodgy, arcane and unexciting compared to ... war and peace (Capling 2001 p10)

is even more relevant to the political analysis of the Australian government's policies on trade in services and their interaction with domestic regulation.

Australian scholarship is important from the economic analysis perspective with Christopher Findlay featuring prominently and with significant

contributions from Productivity Commission staff. Aaditya Mattoo from the World Bank has also made a significant contribution to the body of literature. However, the economic rationalist approach fails to recognise that states may need to choose to exclude cultural services from trade agreements as a political decision. Patrick Messerlin provides a typical analysis:

Economists are well versed in the best disciplines to impose on industries, and there is no reason to exempt 'industrial audiovisuals' from these disciplines (Messerlin 2000 p288).

Further, there is a strong focus by economists on the need for domestic regulation to address “market failure” issues without a concurrent analysis of the impact on international trade in those services. Although Findlay cautions that international trade must be taken into account in the process of regulation to maximise social welfare, he goes on to advise that:

Avoiding protectionist outcomes will lead to significant gains from regulatory reform. These gains include not only the gains to the importing economy as a whole, but also the gains to foreign service providers from the removal of discriminatory burdens associated with bad regulatory choices (Findlay 2000 p22).

That is, the Findlay’s social welfare maximisation is a global one, rather than domestic one. This economic rationalist perspective is reinforced by the justification that liberalised trade in services does not restrict regulations that are *in place to protect the public* (OECD 2002 p66). The economists’ approach is rather to question why states wait until there is a multilateral or bilateral trade agreement before liberalising trade in services when a unilateral decision is so logical (Stephenson, Findlay et al. 2002 p6). Indeed, the economic debate seems more concerned with establishing “credits” in multilateral agreements for those states which have liberalised on a unilateral basis (Choi 2002) and this position has also been raised in relation to the Doha round (Stephenson and Yi 2002). This position is supported by economic modelling that suggests that full liberalisation of all trade is welfare maximising (Dee and Hanslow

2000). Again, this welfare maximisation is not constrained to a domestic sphere (Dee, Hanslow et al. 2002).

There is an unwritten assumption in this body of work that liberalised trade in services is required to be cost based (Mattoo 2002 p63), despite a similar expression being absent from GATS and negotiated out of such associated documents as the telecommunications reference paper (Krajewski 2003 p168). Where cost cannot be reduced to a monetary amount, a frustration arises in the economic literature so that cultural objectives are deemed ephemeral and compared with love and beauty (Snape 2000 p88) and the difficulties in market definition for markets in audiovisual services are bemoaned (Sidorenko and Findlay 2003 p179).

Example - Regulation of Australian broadcasting content

The Australian domestic regulations that provide for a high level of protection in broadcasting are established under the *Broadcasting Services Act 1992*. Some of the features of that regulatory regime are set out in Figure 3. Broadly, the regime requires high levels of Australian content and restricts foreign and cross-media ownership and control. This cultural protection, although implemented as a domestic policy, has been used as a caveat in bilateral and multilateral trade agreements.

In Australia, all commercial free-to-air television licensees must broadcast an annual minimum transmission quota of 55 per cent Australian programming and 80% Australian produced advertising time between 6am and midnight plus specific minimum annual sub-quotas for Australian (adult) drama, documentary and children’s programs. Pay TV drama channels must spend 10 per cent of their total program expenditure on new eligible (Australian and New Zealand) drama programs.

If you own, control or are a director of a commercial television broadcasting licensee then you may not own, control or be a director of:

- a commercial radio broadcasting licensee in the same licence area; or
- a newspaper associated with the licence area of such a licensee; or
- another commercial television licence in the same licence area.

A person must not be in a position to exercise control of commercial television licences whose total licence area population exceeds 75 per cent of the population of Australia.

A foreign person must not be in a position to exercise control of a commercial television licence; two or more foreign persons must not have company interests in a commercial television licence exceeding 20 per cent; and not more than 20 per cent of the directors of a commercial television licensee may be foreign persons. Foreign ownership (but not control) restrictions apply to subscription television broadcasting licences

Figure 3 – Elements of the Australian domestic broadcasting regulatory regime

The domestic regulation of broadcasting services restricts (at the date of this paper) foreign direct investment by limiting ownership and from a foreign person from exercising control. It also limits supply from overseas by requiring Australian content. That is, the domestic regulation restricts three of the four modes of trade in services set out above.

The regulation of Australian content has meant that major deliverers of television and radio services to Australian consumers have had to balance their commercial needs (based on the sale of advertising properties to a large television audience) with the regulatory requirements that both television programming and advertising content be it specific levels of Australian produced material. Although this is often characterised as a “social contract” (Flew 2000) for the use of scarce resource (argued by some to be spectrum and others to be a regulated oligopoly) the major commercial broadcasters have an incentive to see regulation reduced as those areas which are most highly regulated are those with the highest programming costs. At the same time, other prospective entrants into the field of television broadcasting argue

that the incumbents experience an unacceptably high level of protectionism that is built into their licence terms and conditions.

THREE DECISIONS AND A UNITED STATES' POLICY

Introduction

The regulatory regime set out in Figure 3 is currently under review by the Minister for Communications, Information Technology and the Arts (DCITA 2006). The draft legislation indicates that Australian government policy will lift the foreign and cross-media ownership and control restrictions to a significant extent. Since September 2000, audiovisual services which are delivered using the Internet have been excluded from the broadcasting regulatory regime. This evolving shift in domestic policy is likely to have a significant impact on Australian trade policy in audiovisual services. The decision not to invoke the cultural exception in the negotiations of the USFTA and Australia's abstention in the vote on the "UNESCO Convention on the Diversity of Cultural Expressions" is evidence of this impact. These issues, in the context of the US policy position are discussed in this section of the paper.

The Ministerial Determination

On 12 September 2000, Richard Alston the then Minister for Communications, Information Technology and the Arts, made a determination under the *Broadcasting Services Act*. He determined that:

"A service that makes available television programmes or radio programmes using the Internet, other than a service that delivers television programmes or radio programmes using the Broadcasting Services bands"

is not a broadcasting service.

This represents the significant change from the regulatory environment that had, hitherto, pertains to broadcasting services. For the first time, certain

services which might be made available using one delivery technology and the broadcasting services could, if delivered, using the “Internet” fall out of the regulatory environment which controls broadcasting services.

One of the key characteristics of the determination is that the term “Internet” is not defined (Nicholls and Lidgerwood 2000). Indeed, in the past year this has led to significant issues for the current Minister with the regulator, the Australian Communications and Media Authority, in submissions to the Senate being unable to define the Internet to the Senate and the Minister being unable to control the content of “Big Brother” when it is streamed over the Internet.

From a trade perspective, the determination reflects the essential futility of trying to regulate streaming video and streaming audio over the Internet which can be delivered from outside of the jurisdiction in which the regulation would otherwise hope to apply. This could be addressed with a solution other than exclusion from the regulatory regime. For example, the services could have been described as “narrowcasting services” and be subject to regulatory forbearance or to be a newly defined class of broadcasting service which would be subject to little regulatory intervention. At the time, further amendments to the balance of domestic broadcasting regulation had little attraction in an environment where the Productivity Commission was arguing for significant liberalisation of the sector (Productivity Commission 2000) and the profound changes in the digital television environment had just been made (as comprehensively described by Given 2003).

However, it was not a trade or regulatory issue that led to the determination. Rather, it was the effects of lobbying by predominately transnational corporations during the time of the Internet “bubble” that led to the determination initially. The determination reflects the intent of one of the Microsoft “technical essays” which argued that regulation of Internet content should be limited (Microsoft 1999). Indeed, perhaps the lobbying led to the

Ministerial determination could be paralleled with the current debate as to “net neutrality” being conducted in the United States and which will have inevitable consequences on a global basis.

US policy changes

The United States changed its position on trade in audio visual services between 1998 and the year 2000. Arguably, this change reflects a similar analysis to the one taken by the Minister in the determination regarding internet services. The basis thrust of the argument is that audio visual services are now being delivered by a variety of different means and that the “old world” audio visual services that use analogue delivery mechanism are entirely different from the “new world” audio visual services delivered by digital transmission mechanisms. This is exemplified in the United States mission to the World Trade Organisations which argues (USTR 2000):

The audio visual sector today includes an international array of content producers and programme packages utilising not just traditional single channel broadcasting, but new media, such as cable direct to home satellite and digital networks to distribute content locally and also internationally.

It is this policy that the USA has adopted in its negotiations in respect of bilateral trade agreements. Arguably, the emphasis on bilateral trade has arisen from the US government’s inability to convince multilateral bodies such as the WTO to adopt its preferred trade positions (Bernier 2004).

USFTA – change or confirmation

Australia was prepared to make commitments in respect of audiovisual services in the Australia – United State Free Trade Agreement (**USFTA**) which it has not done under any multilateral trade agreement. Further, Australia did not make such a commitment to Singapore despite having a favourable balance of trade in audiovisual services with that state. The behaviour in respect of the United States and the paradoxical approach to

Singapore indicates a policy shift which in both unannounced and significant. It is also not explained by the literature on the globalisation of cultural services (Bielby and Harrington 2002 218; Denning 2004). A crucial issue is to determine why Australia would make a commitment in a bilateral trade agreement to trade in audiovisual services given that the United States has a favourable trade balance with Australia. This issue is particularly apposite as Australia has not yet given specific commitments in respect of audiovisual services in other bilateral trade agreements. I note that the High Court finding in respect of New Zealand produced television programming (153 ALR 490 1998; 1998) does not weaken the importance of an analysis of this paradox.

It might be argued that the Australia-United States Free Trade Agreement is an exceptional policy response to an opportunity to create closer ties to the United States. That is, the decision to drop the “cultural exception” in negotiations of this bilateral trade agreement is not reflective of a change in Australian trade policy. However, the impact is already being felt with an extension to multichanneling being restricted to on which Australian content can still be regulated.

UNESCO

On 20 October 2005, when 148 nations signed the “UNESCO Convention on the Diversity of Cultural Expressions”, Australia, Honduras, Liberia and Nicaragua abstained with Israel and the United States voting against. This convention protects the rights of countries to continue using possible cultural exceptions to protect their own cultural industries – including the potential for cultural protectionism. In the context of an absence of an Australian cultural policy, Throsby argues that the failure of the Australian government to understand the issues in the convention could lead the country to become a “cultural pariah” (Throsby 2006 p32). However, the analysis could be simply that the Australian policy position was not a unique move in response to the political needs of the USA or of the flaws in the wording of the

convention. Rather, it is part of a consistent change to abandonment of the use of the “cultural exception”.

ANALYSIS

Establishing an analytical framework

If, as I argue, there has been a policy shift, we need to consider why it has occurred. One approach would be to analyse what has happened solely in terms of the role of the Australian governments in trade negotiations and domestic policy setting. A theoretical framework which uses the state as a core actor seems to be a logical choice if the state is considered the primary actor. However, in trade (particularly trade in services) there are firms which potentially have important roles and the interaction between firms may also provide an insight. The importance of transnational corporations in the Australian landscape and particularly in the field of trade in services (Meredith and Dyster 1999 p337) indicates that a state-centric approach may not be appropriate. Whereas it would be possible to analyse trade actions using a critical theory lens in terms of transnational historical materialism (Overbeek 2000), an appropriate paradigm is more likely to come from theory that is based on an institutional analysis.

One option is realism or neo-realism which would examine state preferences on trade. However, using realism as a paradigm is also limited by the lack of weight that would be placed on international government organisations (or institutions) such as the WTO. It is hard to use a realist paradigm to describe multilateral trade agreements and a bilateral trade agreement would logically be a zero sum game. That is not to say that certain schools of neo-realism might not be able to be predictive. For example, Robert Gilpin argues that *the debate over free trade is inconclusive* (Gilpin 2001 p202) and continues to argue that trade itself is a zero sum game (2001 p206). However, as set out in “Is Anybody Still a Realist?” (Legro and Moravcsik 1999), there are issues in the approach and realism is being “stretched beyond recognition or utility”.

An alternative would be to use the global political economy lens of neoliberal institutionalism. However, as Ann Capling shows, neither a realist or neoliberal institutionalist approach can be used successfully to analyse the influence of Australia in trade negotiations (Capling 2001 p5), in particular in respect of multilateral trade. Capling's empirical analysis demonstrates the role played by Australia in multilateral trade structures but she does not present a theoretical alternative.

Further, it is not clear that governments and firms are the only actors as there is a role for civil society. In effect, this type of analysis develops the analysis of civil society's influence on the WTO (Williams 2005) to Australian bilateral trade agreements. Indeed, there is some evidence that there is an expectation by states of a role being taken by both firms (Aidan, Daniel et al. 2005) and civil society (Woolcock 2005) in all forms of trade negotiation, both bilateral and multilateral.

Multiplicity of actors

The analysis needs to deal with a multiplicity of actors where governments are responsible for both regulation of trade and the negotiation of trade agreements, firms act as producers and civil society as consumers and suppliers of labour as set out in Figure 4.

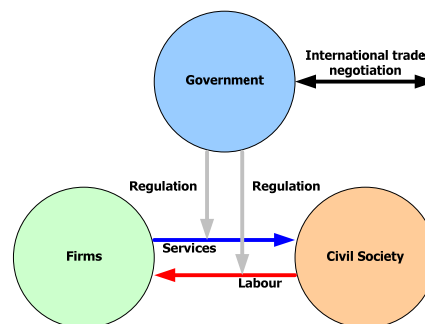


Figure 4 – Roles of actors

However, Figure 4 is an over-simplification as each of the groups engages in lobbying or negotiation. That is, members of each group either exercise power or use access to power to promote their respective interests as set out in Figure 5.

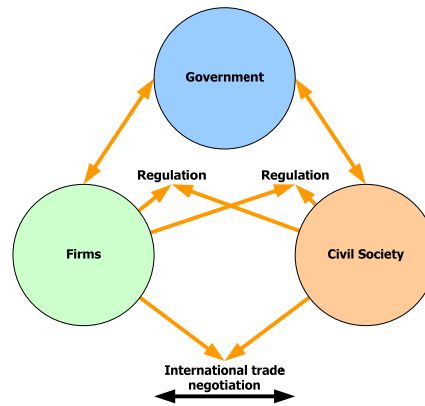


Figure 5 – Power relationships

Theoretical framework

Having identified the need to analyse power and bargaining relationships of multiple actors, I need to use a theoretical framework which will assist in the analysis of the processes of negotiating and lobbying. One option is to use the analytical tools of Susan Strange as part of the analysis. Her consideration of trade as a secondary power structure (Strange 1994 [1988] Chapter 8) may be useful as is her analysis that *firms trade, not governments* (Strange 1994 p178). In respect of international trade, Strange argues that it is a result of:

Complex and interlocking network of bargains that are partly economic and partly political (Strange 1994 [1988] p165).

Strange postulates that Gilpin was too limited when he argued that political economy was a function of states and markets (Gilpin 1987). Instead, Strange argues that basic values (*security, wealth, justice and freedom*) allocated in a broadly defined “society” can be analysed in terms of multiple authorities and multiple

markets. That is, Strange proposes a theoretical approach that extends both the realist and liberal lenses to a *more comprehensive analytical framework*. There are issues with using Strange's analytical methods as it is not easy to define the epistemology of Susan Strange. As set out O'Brien and Williams:

her theoretical approach is difficult to characterise neatly (O'Brien and Williams 2004 p27).

Perhaps this is not surprising because her theoretical analysis is of power. As she notes, there is little academic (or other) consensus on the epistemology or semantics of power despite the vast literature (Strange 1996 p17).

Strange also provides a potential methodological approach which synthesises an examination of markets with economic institutionalism and a functional analysis of authorities in a political economy. Whereas Strange saw the authorities as being (in the main) states and transnational corporations, I propose to extend the analysis to include civil society.

The next task is to choose an appropriate analytical tool for the analysis of the relevant institutions and their roles. For this, I reject a rational choice analysis, partly on the basis that I recognise the problematic links between rationality and culture (Bleiker 2004 p140). The principle of rational choice (Frey 1997; Olson and Zeckhauser 1997) combined with the concept of transaction costs and an understanding of their impact on firms (Coase 1937) has been influential in the liberal and neoliberal schools of international relations. However, when applied to power, rational choice theory (at least, as described by Keohane (1984) and analysed by Guzzini (2000 p58-59)) tends to be associated with a purely state based analysis. It is not clear that an institution (as opposed to an individual) is capable of rational choice unless the choice generates one of two outcomes and that one of these will result in loss of something material to the chooser. In this, I am supported by the views of Strange. She argues that rationality is narrowly defined in the *pursuit of material*

gain or the avoidance of material loss (Strange 1996 p20). She criticises the “blindness” of economists in their search for transaction costs where technological change is the driver (Strange 1995 p60). She also criticises rationality as a static, rather than dynamic analytical tool and therefore should be used with caution, if used at all.

Use of power

Strange also provides useful tools in respect of an analysis of the exercise of power. Strange argues that power can be observed by its effects and structural power can be demonstrated by example (Strange 1994 [1988] p32). Strange proposes two forms of power. The first is “relational power” and is the traditional, realist power which enables *A to get B to do something that they would not otherwise do* (Strange 1994 [1988] p24). Strange argued that there is a second form of power, structural power which is:

more important to an understanding of the international system than relational power (Strange 1989 p144).

Strange proposes four power structures which have equal weight and which interact with each other. They are the security, production, finance and knowledge structures.

In order to develop and understanding of the relative relationships between governments, firms and civil society, I need to find a potential model for those relationships. In *Rival States Rival Firms* (Stopford and Strange 1991), Strange and John Stopford propose that there is a requirement for *triangular diplomacy* (Stopford and Strange 1991 p21) which includes governments and companies. Whereas Sorensen argues that this is a critical theory approach (Sorensen 2004 p168), Strange herself argues that this effect arises from structural changes. She developed this concept further to describe three forms of diplomacy which arise from the structural changes which arise from competitive pressures on firms to operate in global (rather than domestic)

markets (Strange 1992). In turn, these changes arise from changes in the production, finance and knowledge structures (Strange 1992 p3). Strange argues that, in addition to state-state diplomacy, there are two new forms of diplomacy: state-firm; and firm-firm.

However, this set of relationships does not encompass civil society. There is a need to develop this diplomacy analysis to encompass stakeholders that are neither governments nor firms. Instead of a triangular arrangement, I propose to represent the position in bilateral trade negotiations as shown in Figure 6 below.

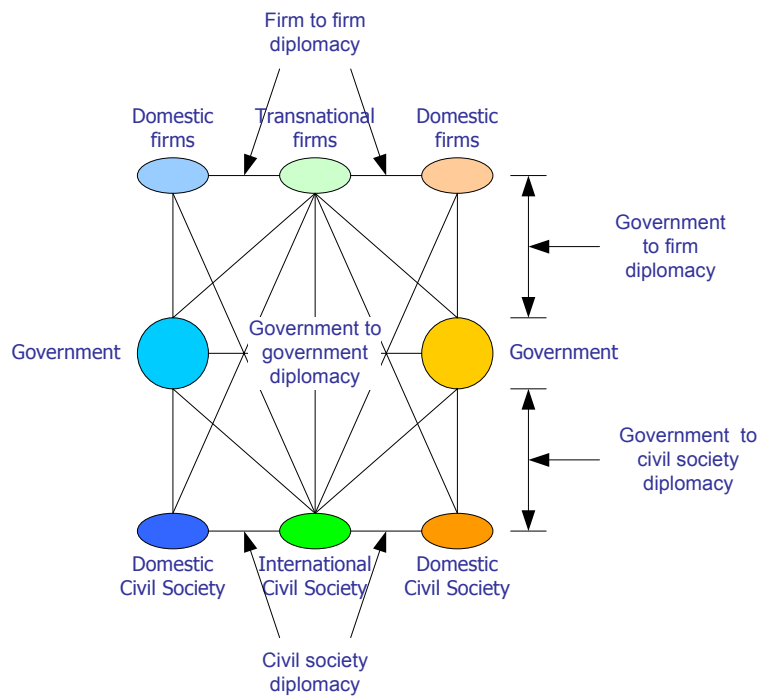


Figure 6 – Complexity of discourses

That is, in addition to the diplomacies addressed by Stopford and Strange, a complexity that arises from the role of transnational corporations and civil society at both a domestic and global level.

Is digital different?

The Australian government policy shift on audiovisual services has arisen out of the complex discourses set out in Figure 6. The structural power that is available to transnational corporations in the audiovisual sector (particularly in respect of the finance, production and knowledge structures) mean that they have a significant influence on Australian government policy making. In a similar context, the importance of the US government in the security and finance structures cannot be overstated. In contrast, the production industry in Australia has access to the Australian government but its structural power is limited.

It may be that the change of audiovisual services from culture to commerce will have some positive effects. If the effect is that there is increased government interest in the cultural sector as a facet of commerce then there may be some benefits. The positive outcome would, as Stuart Cunningham argues in the context of creative industries and the creative economy:

Move culture into mainstream policy calculation by connecting culture to the most trenchant current rationale for active government involvement in industry shaping (Cunningham 2006 p42).

However, there is a significant risk that culture as commerce and digital being different will not enhance the audiovisual sector in Australia.

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