

7 June 2000

Submission

TO: Foreign Affairs, Defence and Trade Committee

ON THE: Inquiry Into New Zealand's Economic And Trade Relationship With Australia

Introduction

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).
2. We wish to appear before the committee to speak to our submission. We can be contacted at (04) 802 4577. Those who wish to appear are Karen Soich, President of SPADA and Jane Wrightson, Chief Executive of SPADA.
3. SPADA is the foremost industry organisation representing film and television producers and directors in New Zealand. We have 250 members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand*. An operating arm of SPADA is Film New Zealand, which markets New Zealand offshore as a filming location for foreign producers.
4. This submission has been approved by SPADA's Executive, a board annually elected by its members.

General Summary

5. The particular issues that the Select Committee has indicated it will consider which are of specific interest to SPADA include:
 - The future directions and role of CER as a platform for other trade agreements and also in relation to television programme quotas and cultural exceptions
 - The economic value of the cultural relationship with respect to music, television, films and art
 - Industry assistance from Government
6. Most particularly, SPADA urges the Select Committee to:
 - recommend that a side agreement be negotiated to the Trade In Services Protocol for CER to allow for a specific cultural exception for a quota system when both countries operate such a mechanism, and also to
 - recommend that the concept of cultural exceptions to trade negotiations be incorporated into trade policy

Background

7. The New Zealand film, television and commercials production industry is a significant emerging industry. In 1998/99 nearly 8000 people were employed and production expenditure exceeded \$300 million with considerable further growth expected.¹
8. In 1998 the High Court of Australia found that the Australian Content Standard (the quota system) was unlawfully made and inconsistent with Australia's obligations under the Trade In Services Protocol of CER. This was as a result of the challenge by New Zealand originated by Project Blue Sky, a film and television industry group comprising many television producers, TVNZ, TV3, NZ On Air, the NZ Film Commission, Avalon Studios and HIT Entertainment Plc.
9. This case was taken because it was clear that the Australian quota system breached the long-standing CER agreement and that this system was operating as a trade barrier. New Zealand programmes sell successfully all over the world but are rarely seen on Australian screens. In essence the then-requirement that 50% (now 55%) of Australian commercial television schedules (between 5am and midnight) should comprise Australian programmes meant that New Zealand was competing against the rest of the world for the remaining 50%. This did not accord with the special relationship created between Australia and New Zealand by CER. Indeed Australia's Broadcasting Services Act 1992 specifically states in its Explanatory Memorandum that the ABA (the broadcasting regulatory body which governs the quota system) is required to *perform its functions in a manner consistent with various matters including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand*.
10. New Zealand began considering a challenge to the Australian system in the early 1990s. At that time the introduction of a quota system into New Zealand, which would have created a balance, was not thought possible. The strong quota lobby of the late 1980s had been ultimately defeated by the deregulation of the broadcasting structures. Indeed the Government of the day was so hostile to the notion of quotas that it expressly excluded a quota reservation in its GATS undertakings, against the cautionary advice of its own officials.
11. When the case in Australia was won, New Zealand made several offers to negotiate a position which did not make a complete inroad into the Australian system, acknowledging the cultural implications of the judgment. Australia declined to consider the matter further, on the basis that the court's judgment was clear regarding the status of CER. At that time there was no political will by either country to address the CER issue itself.
12. Now that the New Zealand Government is committed to introducing a quota system, a review of CER obligations in this area is timely. We may finally be approaching a level playing field.

¹ Source: *Survey of Screen Production in New Zealand 1999*. Colmar Brunton. p27

The further development of CER: In Relation to Local Content Television Quotas

13. The Protocol to CER signed in August 1988 requires that

Each Member State shall grant to persons of the other Member State and services provided by them access rights in its markets no less favourable than those allowed to its own persons and services provided by them (Article 4)

Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them (Article 5)

14. This means that New Zealanders and New Zealand programmes must be treated no less favourably than Australians and Australian programmes in any quota system.

15. As and when a quota system is introduced into New Zealand, the inclusion of Australian programmes, (which of course the current law requires) raises a special concern. Due to New Zealand's deregulation and lack of protection for its own local content, the balance of programmes screened is seriously skewed in favour of Australian product. SPADA estimates that the five main free to air channels screen over 2000 hours of Australian programmes per annum.² This probably means that New Zealand is the largest foreign market for Australian programmes.

16. By contrast, on the Australian commercial channels (public channels ABC and SBS are not subject to quota), two hours of New Zealand programmes screened in Australia in 1998 (a broadcast of *Once Were Warriors*).

17. Clearly, what needs to be negotiated now is a specific side agreement or codicil to CER, which retains the special trading relationship (assuming this remains a priority for Government) while at the same time protecting the cultural intentions of a quota system. We believe that the Australian television production industry is supportive of such a move and is in the process of approaching their government in this regard.

18. The proposed model for a New Zealand quota system³ is loosely based on the Australian model, in that each country has a transmission quota and a genre sub-quota.

18.1 The transmission quota credits all local programmes of any genre and also includes repeats (especially beneficial for programmes designed for a longer shelf life, such as children's programmes). This quota recognises that in all cases it is 'easier' for a broadcaster to screen an imported programme purchased at marginal cost than to commission and fund a local programme.

² This has risen significantly in the past two years. Throughout its submissions during the 1990s, Project Blue Sky consistently estimated the annual hours of Australian programmes screened in New Zealand as 500-600 hours.

³ *Television Programme Quotas: A Blueprint for New Zealand*. SPADA. April 2000.

- 18.2 The genre sub-quota gives extra credit for first-run ‘at-risk’ programmes: those which are comparatively expensive to make, such as drama and documentary, and/or those which are less commercial, such as children’s programmes and Maori programmes.
19. A side agreement can recognise the special nature of the New Zealand and Australian relationship, allowing each other preferential access compared with other countries, but reserving certain areas within each country’s quota system for country-specific arrangements. One option is for a sub-set of the quota system in each country (probably related to the genre sub-quotas and their special cultural importance) not to be accessible to both countries simultaneously, which is currently the case. This would be a matter of negotiation between the two countries.
20. This type of renegotiation is not addressed in the CER Protocol. However the improvement of New Zealand opportunities to make and screen its own programmes (which helps redress the trade imbalance referred to in paragraph 15 above, in any case) seems consistent with:
- 20.1 Article 1, Objective (c): to improve the efficiency *and effectiveness* of their service industry sectors and expand trade in services; and
- 20.2 Article 5, paragraph 2(a): which allows differential treatment for*consumer protection* reasons. A New Zealand quota in effect protects access by New Zealand audiences (consumers) to their own programmes in a situation where around 75% of programming on the main free-to-air channels comes from overseas.
21. The European Union provides a precedent for such an approach. The EU “Television Without Frontiers” directive is the foundation for free trade in programmes within the EU. Nevertheless the European-wide quota requires 50% of all programming to be European in origin. *‘The existence of intra-European free trade in television programmes has not prevented several member states – notable France – from taking the lead in multilateral trade negotiations by calling for an exemption for cultural policies from the provisions of international treaties such as the WTO’*.⁴
22. This approach has implications for New Zealand’s GATS undertakings and adds further weight to the need for cultural exceptions to trade agreements as discussed below. If cultural exceptions were to be introduced, a CER amendment might not be required. However the need for a local quota is so pressing, and the time needed to make such a fundamental change to trade policy so lengthy, that we urge that such a side agreement to be negotiated in the interim.

Recommendation: That the Select Committee endorses the approach suggested by both the New Zealand and Australian production industries, and recommends that the Government urgently commences discussions with the Australian Government to conclude a side agreement to CER which allows for preferential treatment of domestic quota systems.

⁴ SPADA submission to the Australian Environment, Recreation, Communications and the Arts Legislation Committee. September 1998

The further development of CER: In Relation to Cultural Exceptions in Trade Agreements

The economic value of the cultural relationship with respect to music, television, films and art

23. The reason New Zealand and Australia might now consider a new approach is the changed environment since CER was negotiated over a decade ago. As global trade liberalisation negotiations continued apace during the 1990s, a better understanding has developed of the importance of making a distinction between cultural industries, on the one hand, and those which produce the general goods, services and investments which are typically included in trade negotiations on the other.
24. Cultural or creative industries tend to combine the creation, production and commercialisation of goods or services which are intangible and cultural in nature. They are normally protected by copyright. Examples are printing, publishing and multi-media, audio-visual, phonographic and cinematographic production, art, crafts, performance and design. Cultural industries have, of course, been targeted especially by this Government as key generators of employment and foreign exchange.
25. It seems a logical conclusion that many (but not all) countries have tended to focus on their manufacturing, agricultural and general exporting activities when determining their trade policies and have rarely chosen to consider cultural industries (also known as creative industries) in a different light. Often cultural issues have simply been a victim of trade-offs.
26. The following is a useful encapsulation of the trends over the last decade:

“First, culture has moved to the forefront. The past few years have seen the emergence of a powerful interest in culture resulting from a combination of diverse phenomena such as globalisation, regional integration processes and cultures claiming their right to express themselves; all this in a context where cultural industries are progressively taking over traditional forms of creation and dissemination and bringing about changes in cultural practices.

Second, the issue of “culture and trade” has now acquired prime strategic significance. Cultural goods and services convey and construct cultural values, produce and reproduce cultural identity and contribute to social cohesion; at the same time they constitute a key free factor of production in the new knowledge economy. This makes negotiations in the cultural field extremely controversial and difficult. As several experts point out, no other industry has generated so much debate on the political economic and institutional limits of the regional and global integration processes or their legitimacy. When culture is put on the table, it often prompts complex discussions on the relationship between the economic and non-economic value of things, that is, the value attributed to those things that do not have a price assigned (such as identity, beauty or the meaning of life).

Third, some governments understand that international trade law is exercising growing pressure on their ability to influence the production and distribution of cultural goods and services within their borders. This has increasingly polarised positions in trade negotiations whenever they deal directly or indirectly with cultural issues. This mounting tension was revealed in the final discussions of the Uruguay Round in 1994, acquired momentum during the negotiations on the Multilateral Agreement on Investments (OCDE 1995-1998), and crystallised in the preparations for the WTO Ministerial Meeting in Seattle (USA) in 1999.

Fourth, and as stated in the 1999 Human Development Report, two-thirds of humanity do not benefit from the new model of economic growth based on the expansion of international trade and the development of new technologies, and are excluded from the making of the information society. This situation reveals gaps in terms of individual countries' capacities and resources to produce cultural goods and services. In many developing or small countries, these capabilities are actually shrinking. As a consequence, trade flows of cultural goods are unbalanced, heavily weighted in one direction, and cultural industries show great disparities in their structures both within and between the various regional trade blocks".⁵

27. As cultural industries have undergone a process of internationalisation, many have seen the formation of global conglomerates. In film production, for example, Hollywood now earns half its revenues from overseas markets, compared to just 30% in 1980. Around 85% of world-wide screened films today are made in Hollywood.⁶
28. By contrast, smaller English-speaking countries (language provides a natural barrier) have struggled to provide adequate levels of local content in the face of American global dominance without complex regulation and subsidy mechanisms. New Zealand imports around 75% of its television programmes, at prices which are a fraction of the cost of production. Its exports are largely confined to drama and documentary programmes.
29. The notion of cultural exceptions to trade agreements is becoming increasingly discussed in international fora. It is perhaps Canada which has the most advanced thinking (and indeed Canada has a cultural exception which incorporates broadcasting in its bilateral NAFTA with America). As its Cultural Industries Sectoral Advisory Group (SAGIT) explains:

“It is time for Canada to make some crucial decisions. Do we define ourselves simply as the producers and consumers of tradeable goods and services? Or are we prepared to step forward and reaffirm the importance of cultural diversity and the ability of each country to

⁵ *Culture, Trade And Globalisation* pp4-5. Unesco. April 2000.
<http://www.unesco.org/culture/industries/trade/index.html>

⁶ Unesco. *Ibid* p9

ensure that its own stories and experiences are available both to its own citizens and to the rest of the world?”⁷

30. CER was born in a time when recognition of the importance of New Zealand culture was poorly recognised at Government level. It is perfectly sensible for a small country to seek liberalised trade agreements for commodities and business services. But in the audio-visual sector, in particular, films, television programmes and music are a vital expression of our culture and our voices. As this sector becomes more globalised, fiercer protections are necessary so we can reserve a small space in our country for the expression of our unique stories and songs.

Recommendation

We urge the Select Committee to recommend that the concept of cultural exceptions be examined with a view to this approach forming part of New Zealand’s trade policy in all future trade negotiations including CER

The future directions and role of CER as a platform for other free trade agreements

31. We can only assume that the reason this is being considered by the Committee is the failure of the WTO Seattle meeting, the stalling of progress on the MAI and the obvious problems now being revealed from New Zealand’s wholesale adoption of the GATS requirements. Perhaps bilateral and smaller multilateral agreements seem more achievable? This is certainly signalled in a recent speech to the Institute of Policy Studies:

“The two parallel initiatives of greatest interest – the Singapore/ NZ FTA and the Task Force are looking at merging the CER Free Trade Area with the emerging ASEAN Free Trade Area..... Stated bluntly, the Singapore/ NZ FTA is a trojan horse for the real negotiating end-game: a possible new trade bloc encompassing all of South East Asia and Australia and New Zealand”.⁸

32. It is SPADA’s view that CER is not without significant problems and that these problems need to be addressed before any such notion of CER being a template for future agreements is considered.
33. Even with our comparatively small neighbour Australia, it is clear that the balance of trade is manifestly uneven. We agree with the Export Institute that the balance of trade is badly tilted and that Australia seems unlikely to reduce its entry barriers further.⁹

⁷ *Canadian Culture in a Global World* p3 <http://www.dfait-maeci.gc.ca/tna-nac/canculture-e.asp>

⁸ *Beyond CER: New Trade Options For New Zealand*. Tim Groser, Executive Director, Asia 2000 Foundation of NZ. March 2000

⁹ *Before Rushing Into New Bilateral Deals, Let’s Sort Out CER With Australia*. The Independent, 17 May 2000 p18

34. We reiterate that any negotiations must include as of right the same types of cultural exceptions which most other countries require. In the process of implementing trade liberalisation policies which are extreme by world standards, New Zealand has spent most of the last decade taking off its clothes and shivering alone in the middle of the road. This Committee has the opportunity at least of throwing a warm overcoat around the shoulders.

Industry Assistance From Government

35. Funding for film and television production from state and federal sources in Australia is largely unavailable to New Zealand producers. On the very rare occasion such funding has been secured, it has normally been through a co-production mechanism with an Australian producer. This barrier to offshore funding sources is normal in the film and television industry throughout the world.
36. However NZ On Air funding may be gained by any foreign producer. At least three Australian production companies have secured such funding since NZ On Air's inception,¹⁰ but no New Zealand producers have secured Australian funding without a co-production arrangement.
37. This is yet another example of the care Australia and many other countries have taken to protect their cultural industries in the recognition that cultural authenticity should act as a limitation on trade policy in audio-visual industries.

Recommendation:

We recommend that the Committee consider that domestic funding arrangements be included in a general cultural exception to CER.

Conclusion

38. Most in the film and television production industry have no objection in principle to small countries striving for access to larger trading markets. Our objection is that cultural industries are considered using the same trade policy rationale as for a can of beans. Our audio-visual sector is an infinitesimal part of a global industry dominated by America. Countries such as France, Canada, Australia and the United Kingdom have recognised this for many years and have strongly protected their cultural industries because of their recognition of the contribution made to their local culture and national identity.
39. New Zealand has not. New Zealand has removed all its restrictions and waited for the world to follow. It has not and it will not. It is time for this country to recognise the importance of its own culture and to protect it accordingly.

Jane Wrightson
Chief Executive
Screen Producers and Directors Association

¹⁰ Beyond Productions for *The Problem With Men*; Families Television for *Families*; Pro Television for *Quantum* (two series)