



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 19 | Number 3

Article 6

Summer 1994

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Recommended Citation

Lisa L. Garrett, *Commerce Versus Culture: The Battle between the United States and the European Union over Audiovisual Trade Policies*, 19 N.C. J. INT'L L. & COM. REG. 553 (1993).

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Cover Page Footnote

International Law; Commercial Law; Law

Commerce versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies

I. Introduction

After seven long years, the Uruguay Round of the General Agreement on Tariffs and Trade¹ (GATT) came to a close on December 15, 1993. For the first time in trade history, there is an agreement between member countries to deregulate trade in services and to incorporate services into the globally-managed framework of the GATT.² The Uruguay Round negotiations, named for their beginning in Punta del Este, Uruguay, were on the verge of collapse, however, until the United States and the European Union³ agreed to sideline their long, bitter dispute over audiovisuals.⁴

The "agreement to disagree" between the United States and the European Union forcibly removed the audiovisual sector from the Uruguay Round negotiations.⁵ On December 13, 1993, Mickey Kantor, the United States Trade Representative, contacted President Bill Clinton to obtain permission to remove audiovisuals from the negotiating table.⁶ President Clinton stated that removing audiovisuals from the GATT negotiations was "certainly better than leaving a weak agreement intact or catering the whole round over it, because there's just too much aggregate economic benefit to the United States from the

¹ This agreement was originally created in 1948 as an interim agreement to regulate trade relations until a proposed international trade organization could be established. The agreement has accomplished its original purpose and has gone on to serve as the principle multilateral instrument governing international trade. The primary goal of the agreement is to liberalize international commerce by establishing rules to reduce national trade barriers and other measures that distort competition between nations. Jon Filipek, "Culture Quotas": *The Trade Controversy over the European Community's Broadcasting Directive*, 28 STAN. J. INT'L L. 323, 337 (1992).

² Edward Luce, *High Price of Accord in Services Package - GATT Agreement*, GUARDIAN, Dec. 15, 1993, at 12.

³ The Maastricht Treaty, which became effective on November 1, 1993, provides that the European Community be renamed the European Union. See Maastricht Treaty on Political Union, Feb. 7, 1992, 31 I.L.M. 247, 255 (entered into force Nov. 1, 1993) [hereinafter Maastricht Treaty].

⁴ Robert Dodge, *Victory Within Sight for Global Trade Treaty Deadline Today for GATT Completion*, DALLAS MORNING NEWS, Dec. 15, 1993, at A1.

⁵ See Luce, *supra* note 2.

⁶ *Clinton Says Emerging Uruguay Round Pact is in U.S. Interest Despite Shortcomings*, INT'L TRADE DAILY (BNA), at D5 (Dec. 16, 1993).

overall tariff reductions to not try to keep the round intact."⁷ Seven years of negotiations on audiovisuals had failed miserably.

Although it appeared better to remove audiovisuals from the Uruguay Round negotiations than to not finalize an agreement before the December 15, 1993 deadline,⁸ the implications of the withdrawal are grave. The withdrawal enables the European Union's protectionist audiovisual trade policies to remain intact and presents the United States with the decision of whether to resort to measures to resolve its audiovisuals dispute with the European Union.

After a statement of the issue in Part II, this Comment will detail applicable European Union law and trade policies and highlight important developments in the Uruguay Round negotiations in Part III. Part IV of the Comment will discuss and evaluate the European Union's classification of audiovisual products as "cultural products," the European Union's motive in enacting its audiovisual trade policies, the European Union's legal authority to enact trade policies in the name of cultural protection, and the measures that the United States could employ to end its audiovisuals dispute with the European Union. In light of the discussion and evaluations, the Comment will assert in Part V that: 1) the European Union's classification of audiovisual products can be maintained; 2) the European Union enacted its audiovisual trade policies to protect its market from American domination; 3) the European Union has no authority to enact trade initiatives in the name of cultural protection; and 4) the United States should settle the audiovisuals dispute by pursuing unresolved bilateral negotiations regarding the Television Without Frontiers Directive⁹ and pursuing a definitive resolution of the scope of Article IV of the GATT.¹⁰

II. Statement of the Issue

During the Uruguay Round negotiations, the audiovisuals dispute between the United States and the European Union centered around both the proper classification of the audiovisual sector and the legitimacy of one of the European Union's most controversial audiovisual policies.

The United States and the European Union classify the audiovisual sector differently. The United States defines audiovisual products

⁷ *Id.*

⁸ December 15, 1993 was the deadline by which President Clinton had to secure a final agreement. President Clinton's congressionally granted authority to negotiate was set to expire on that date. Dodge, *supra* note 4.

⁹ The Directive was adopted by the Council of European Communities on October 3, 1989 and became effective on October 3, 1991. Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23. See Peter Goodwin, *The Indefinite Article - Countries Interpret EC Rules on Foreign TV in Different Ways*, BROADCAST, Feb. 5, 1993, at 24.

¹⁰ See *infra* note 131 and accompanying text.

in economic terms; the audiovisual industry is a commercial venture. Additionally, the United States asserts that films and television are commercial products sold on the market. Therefore, the audiovisual sector should be fully covered by the GATT and subject to the free trade principles covering services which were being incorporated into the final agreement.¹¹

Conversely, the European Union classifies audiovisual products as "cultural products." Therefore, trade in audiovisual products cannot be treated the same as trade in other products or services.¹² Specifically, the European Union envisions television programs and films as "art of their culture."¹³ Unlike "grain or olives, programs and films are intrinsic to the culture of nations or continents"¹⁴ and cannot be left to market forces.

The dispute between the United States and the European Union also centered around the legitimacy of one of the European Union's most controversial audiovisual trade policies: the Television Without Frontiers Directive. The United States formally challenged the legitimacy of the Directive by requesting bilateral consultations under Article XXII¹⁵ of the GATT with nations that had signed the Television Convention,¹⁶ and also by lodging a complaint under Article XXII of the GATT requesting bilateral consultations with the European Union.¹⁷ The United States simultaneously threatened to take retaliatory action against Union exports if quotas were adopted under the Directive.¹⁸ The United States asserted that attempts to distort the market with quotas and rules were unacceptable.¹⁹

Despite efforts to resolve the disagreement over the legitimacy of

¹¹ EC, *U.S. Agreement on Audiovisuals Said Limited; More Negotiations Needed*, Int'l Trade Daily (BNA) (Oct. 15, 1993).

¹² *Id.*

¹³ Marta Wohrle, *Battle of the Barriers—Trade in TV Programs Between USA and Europe*, BROADCAST, Feb. 5, 1993, at 23.

¹⁴ *Id.*

¹⁵ See U.S. INT'L TRADE COMM'N 1992: THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FIRST FOLLOW-UP REPORT 6-114 (1990) (describing the United States' challenge to the Television Without Frontiers Directive under the GATT in October of 1989). Article XXII of the GATT provides:

Each contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to the operation of customs regulations and formalities, anti-dumping, and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of the Agreement.

General Agreement on Tariffs and Trade, 55 U.N.T.S. 187, 266, art. XXII (1950).

¹⁶ See *supra* note 9 and accompanying text.

¹⁷ Clint Smith, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT'L TAX & BUS. LAW. 97, 106 (1993).

¹⁸ *Id.*; see *infra* note 47 and text accompanying notes 47-48.

¹⁹ Wohrle, *supra* note 13.

the Directive, the first consultation failed.²⁰ Instead of requesting more consultations or taking retaliatory actions, the United States chose to resolve the disagreement through the Uruguay Round negotiations.

Unfortunately, the Uruguay Round negotiations did not resolve the bitter audiovisuals dispute between the United States and the European Union. The only agreement reached on audiovisuals was an "agreement to disagree." This agreement forced the removal of the audiovisual sector from the Uruguay Round negotiations²¹ and kept the European Union's protectionist audiovisual trade policies intact. This result is significant for four reasons. First, the European Union's classification of its audiovisual products as "cultural products" is questionable. Second, even if audiovisual products could be considered "cultural products," it is questionable whether the European Union enacted its audiovisual trade policies to protect its "culture" or to protect its markets from further United States domination. Third, the European Union apparently has no legal authority to implement trade initiatives in the name of cultural protection. Finally, the United States must now determine what measures it should pursue in order to bring about a resolution to the audiovisuals dispute.

III. Background Law & Negotiations

A. European Union Law

The European Union functions according to the rules established by the Treaty of Paris signed on April 18, 1951, the two Treaties of Rome signed on March 25, 1957, and the Treaty on European Union signed in Maastricht on February 7, 1992.²² The Treaty of Rome created the European Economic Community²³ and enumerated the various powers of that body. The Treaty of Rome does not give European Union institutions the authority to foster cultural initiatives in any area.²⁴ The Treaty of Rome does contain, however, a generic necessary powers provision. Article 235 of the Treaty of Rome affords the European Union necessary powers that were not explicitly mentioned in the Treaty.²⁵ Because the Treaty of Rome does not give Union insti-

²⁰ Smith, *supra* note 17, at 107.

²¹ See Luce, *supra* note 2.

²² *EC Institutions and the Decision Making Process*, COOPERS & LYBRAND EC COMMENTARIES, Dec. 16, 1993.

²³ TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

²⁴ Richard Collins, *The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community*, 11 CARDOZO ARTS & ENT. L.J., 361, 370 (1993).

²⁵ *Id.* at n.40. Article 235 of the Treaty of Rome states:

[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

tutions the authority to foster cultural initiatives, any "pure" cultural initiative would have to take place under the generic necessary powers of Article 235.²⁶

The absence of a true cultural provision in the Treaty of Rome caused some member states to push for a revision of the Treaty.²⁷ Such efforts culminated in the inclusion of a culture article in the Maastricht Treaty on Political Union.²⁸ The Maastricht Treaty acknowledges that culture is an integral part of the European Union and creates a new advisory body to effectuate cultural initiatives. Specifically, Article 198a of the Maastricht Treaty provides for the creation of the Committee of Regions.²⁹ This committee will consist of representatives from regional and local bodies and will have an advisory status within the European Union's decision-making process.³⁰ It will issue advice on culture as well as other areas such as health and trans-European transport networks.³¹ Because the Maastricht Treaty came into effect on November 1, 1993, it had no impact upon the Uruguay Round negotiations.³²

The fact that the European Union does not have any express authority to effectuate cultural initiatives under the Treaty of Rome has not prevented it from erecting a comprehensive audiovisual policy framework that embraces cultural preservation as one of its underlying precepts.³³

B. *European Union Trade Policies*

Over time, the European Union has erected a comprehensive audiovisual policy framework. A Commission Communication dated May 1986 outlined the need for an action program for the European Union's audiovisual products industry.³⁴ The action program would encompass film and television production, distribution, and funding.³⁵ The action program, entitled Measures to Encourage the Development of Industry of Audiovisual Production ("MEDIA 92"), was launched in November 1986, and was based on some of the priorities outlined in

Treaty of Rome, *supra* note 23, art. 235.

²⁶ See Collins, *supra* note 24, at 370. This statement is accurate until cultural initiatives can be rightfully enacted under the Maastricht Treaty. See also *infra* text accompanying note 28.

²⁷ See Collins, *supra* note 24, at 370-71.

²⁸ *Id.* at 371. The Maastricht Treaty was signed on February 7, 1992 and became effective on November 1, 1993. Maastricht Treaty, *supra* note 3.

²⁹ See Maastricht Treaty, *supra* note 3, at 300.

³⁰ *EC Institutions and the Decision Making Process*, *supra* note 22.

³¹ *Id.*

³² See *infra* text accompanying notes 128-30.

³³ *Audiovisual/Broadcasting*, EUROPEAN UPDATE, available in EUROPDATE, 1990 WL 259690 (D.R.T.).

³⁴ *Id.*

³⁵ *Id.*

the 1986 Commission Communication.³⁶

Through three phases, the MEDIA 92 program was to find ways of providing economic support to the Union's film and television industries with the goal of making them more competitive in the international market.³⁷ Phase I, which occurred in 1987, involved the consultation of industry, accompanied by in-depth market studies in the production and distribution sectors.³⁸ Phase II, which lasted from 1988-90, consisted of a pilot experimental phase based on the consultations and studies undertaken during phase I.³⁹

In December 1990, the third phase of the MEDIA 92 action program was adopted and renamed MEDIA 95.⁴⁰ MEDIA 95, which covers the years 1991-95, is the product of the initiatives pursued during phases I and II of MEDIA 92.⁴¹ Its purpose is to ensure that the achievements and guidelines that emerged during phase II are realized on a significant scale and are supplemented where necessary by collaboration with the audiovisual EUREKA initiative, which encourages the development of a strong European audiovisual market and the formation of common policies for the purchase and production of programs among public and private-sector television channels.⁴²

MEDIA 95's first priority is distribution, given that "eighty percent of [EU] films never cross the border of the country in which they are produced [and] . . . an average of sixty percent of films distributed in the [EU] come from the United States."⁴³ MEDIA 95 has tried to improve distribution through several projects.⁴⁴ In terms of production,

³⁶ *Id.* The priorities that were outlined in the 1986 Commission Communication focused on three areas: distribution, production, and funding. In terms of distribution, the priorities included:

the development of multilingualism in programs and in films in order to overcome the language barriers which pose serious practical impediments to the free movement of creative works [and] the improvement of distribution systems in order to ensure that European productions obtain a larger share of film and television showings in the new media.

Id. In terms of production, the priorities included:

an increased collaboration between countries in order to generate the production of European works; the rationalization of methods of creation and production so as to produce more, and under better conditions; the exploitation of the film and television heritage through co-productions or using archive material [and] the development of new forms of creation using avant garde techniques.

Id. In terms of funding, the priorities included extending transfrontier risk capital for innovative industrial projects to cultural industries and harmonizing the financial and tax incentives made available to the film and television industry in some member states. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Collins, *supra* note 24, at 382-83.

⁴¹ *Audiovisual/Broadcasting*, EUROPEAN UPDATE, available in EUROUPDATE, 1990 WL 259690 (D.R.T.).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* The following projects have emerged to boost distribution. The European Film Distribution Office (EFDO) "sponsor[s] mainly low budget European films." *Id.* European

MEDIA 95 has essentially focused on improving production conditions in order to "facilitate research and development of audiovisual activities."⁴⁵ Additionally, MEDIA 95 has promoted innovative funding methods to create new transnational investment mechanisms and new networks of European suppliers of risk capital.⁴⁶

Clearly the most controversial European Union audiovisual policy is the Television Without Frontiers Directive.⁴⁷ The Directive essentially requires member states to ensure, where practicable, that broadcasters reserve a majority proportion of their programming for European works.⁴⁸ This majority proportion requirement excludes time apportioned to news, sporting events, games, advertising, and teletext services. The Directive also tries to stimulate European independent producers' production by requiring all broadcasters to reserve at least ten percent of their air time or programming budgets for such works.⁴⁹ Finally, the Directive prohibits the broadcasting of cin-

Video Area (EVE) "has devised a scheme of advances against receipts to promote the cross [border] issue and circulation of European works." *Id.* The Broadcasting Across the Barrier of European Language (BABEL) project "encourage[s] and promote[s] a multi-lingual approach to production, post-production, and distribution of European audiovisual works." *Id.*

⁴⁵ *Id.* The following projects have emerged to boost production. "The European Support for Creative Independent Production Talent (SCRIPT) fund aims to improve the quality of screen and musical writing in the [Union] by providing support to the development of fiction script in both television and film production." *Id.* The European Association of Animation Film, sometimes called CARTOON, promote[s] the development of animation techniques and studios in Europe. *Id.* The Memory-Archives-Program project (MAP-TV) "has created a network between the archive services of European [television] companies [and] film libraries . . . in order to re-use archive films, either in new productions or in rebroadcasts." *Id.*

⁴⁶ *Id.* Although MEDIA Venture, a risk capital fund, and MEDIA Guarantee, a guarantee fund, were created during phase II, the plan is not to renew these forms of assistance. *Id.*

⁴⁷ See *U.S. Requests Consultation on EC TV Broadcast Directive*, 66 GATT Focus 3 (1989). The Television Convention is a European agreement that covers television broadcasting and likewise contains a local content requirement. The Convention was signed by Union as well as non-Union European nations.

⁴⁸ Chapter III, Article 4 of the Television Without Frontiers Directive provides:

[M]ember States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Directive, *supra* note 9, art. 4.

The term "European works" in Article 4 is defined in Article 6.1 which provides:

[w]ithin the meaning of this chapter, 'European works' means the following: (a) works originating from Member States of the Community and, as regards television broadcasters falling within the jurisdiction of the Federal Republic of Germany, works from German territories where the Basic Law does not apply and fulfilling the conditions of paragraph 2; (b) works originating from European third states party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2; (c) works originating from other European third countries and fulfilling the conditions of paragraph 3.

Id. at art. 6.1.

⁴⁹ *Id.* at art. 5.

ema film until two years after the film's first exhibition, unless the rights holders and the broadcaster agree otherwise.⁵⁰

Around the same time that steps were being taken toward creating the European Union's comprehensive audiovisual policy framework, the Uruguay Round negotiations began in Punta del Este, Uruguay. One of the main goals of the Uruguay Round negotiations was to incorporate audiovisuals into the GATT framework.

C. *Uruguay Round Negotiations*

Shortly after the Uruguay Round negotiations began, the United States and the European Union started to disagree on the proper classification of audiovisuals and the proper incorporation of audiovisuals into the GATT framework. Tensions heightened on September 1, 1989, when the United States, in response to the Television Without Frontiers Directive, requested bilateral consultations under Article XXII⁵¹ of the GATT with nations that had signed the Television Convention.⁵² On October 23, 1989, the U.S. House of Representatives passed a resolution denouncing the Directive's content quota as a violation of the GATT.⁵³ The United States also lodged a complaint under Article XXII of the GATT requesting bilateral consultations with the European Union and threatened to take retaliatory action against Union exports if quotas were adopted under the Directive.⁵⁴

In its defense, the European Union voiced three contentions. First, the European Union contended that television broadcasting is a service not covered by the GATT.⁵⁵ Second, the European Union asserted that the GATT and general principles of international law recognized a "cultural exception" that exempted television programming from the GATT.⁵⁶ This defense was based on the notion that certain cultural products shape a nation's values and traditions.⁵⁷ Given the influence of television programming in people's lives, the unregulated importation of such foreign television programs would risk the erosion of national traditions and values.⁵⁸ Finally, the European Union argued that the Directive's quota requirement was only politically binding.⁵⁹ Therefore, even if the GATT encompassed television

⁵⁰ *Id.* at art. 7.

⁵¹ See Directive, *supra* note 9.

⁵² See *U.S. Requests Consultation on EC TV Broadcast Directive*, 66 GATT FOCUS 3 (1989); *supra* note 9 and text accompanying.

⁵³ Smith, *supra* note 17, at 106; see 135 CONG. REC. H7326-27 (daily ed. Oct. 23, 1989).

⁵⁴ See Smith, *supra* note 17, at 106.

⁵⁵ See Filipek, *supra* note 1, at 350 (quoting Reply to Questions Put Forward by the American Delegation on the Television Without Frontiers Directive and on the Convention of the Council of Europe at 4-5 (undated)). At that time, the GATT did not include a service provision. See *supra* note 2.

⁵⁶ See Filipek, *supra* note 1, at 351.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 352.

programming, the quota was merely a goal and was not legally enforceable under Union law.⁶⁰

Despite efforts to resolve the disagreement between the United States and the European Union over the legitimacy of the Directive, the first consultation failed to settle the dispute.⁶¹ Instead of requesting further consultations, the United States chose to resolve the disagreement through the Uruguay Round negotiations.

Meanwhile, the Uruguay Round negotiations continued. In 1990, the Group of Negotiations on Services created a separate audiovisual sector working group to examine issues surrounding the audiovisual sector, specifically those relating to broadcasting and films.⁶² The draft agreement, produced by the Group of Negotiations on Services, included a "cultural values exception" that allowed parties to use the exception to justify a departure from any general trade disciplines.⁶³ The European Union supported a "cultural exception" since "the protection or promotion of indigenous languages, history, and heritage depended heavily on national audiovisual output."⁶⁴ The United States opposed a "cultural exception" and asserted that cultural identity was difficult to define given the prevailing tendency toward multinational film productions and television programming.⁶⁵ Each party's position on the "cultural values exception" was reflected in its respective draft proposal for a services agreement.⁶⁶

The general dispute between the United States and the European Union over audiovisuals escalated on October 5, 1993, when a majority of European Culture Ministers issued a statement known as the Mons

⁶⁰ Filipek, *supra* note 1, at 352.

⁶¹ Smith, *supra* note 17, at 107.

⁶² See Filipek, *supra* note 1, at 343; *Trade in Services GATT*, 73 GATT Focus 10, 10-11 (1990). The issue of television programming and the GATT had been addressed previously without resolution approximately twenty-five years earlier. The GATT included a series of provisions aimed at trade in motion pictures. The provisions, which were contained in Article IV, permitted contracting nations to establish national "screen quotas" as a way to give preference to foreign-produced films over domestically-produced films. Article IV constituted an exception to the basic rule of national treatment set forth in Article III. The GATT was drafted in a series of conferences from 1946 to 1948, before the widespread use of television. In 1961, during the Nineteenth Session of the Contracting Parties, the United States raised the issue of GATT's applicability to restrictions on television programming. A working party was established in that year to examine whether the provisions of the GATT dealt with the problem of market access for television programs and to recommend any action. Although the working party prepared a number of draft recommendations on this issue, it was unable to reach a consensus. The matter was eventually dropped. Filipek, *supra* note 1, at 343.

⁶³ See *Draft: Multilateral Framework For Trade in Services*, GATT Doc. MTN.GNS/35, art. XIV (July 23, 1990).

⁶⁴ Filipek, *supra* note 1, at 343-44 (quoting *Services-Audio-Video Sector Working Group*, 75 GATT Focus 10 (1990)).

⁶⁵ See Filipek, *supra* note 1, at 344.

⁶⁶ The European Union's draft proposal explicitly contained a "cultural exception" for audiovisuals. *Id.* The United States draft proposal, while acknowledging the principle of exceptions and reservations, made no provision for an audiovisuals "cultural exception." *Id.* at 345.

Statement. A majority of ministers favored excluding audiovisuals from any efforts to apply the GATT principle of nondiscrimination and most-favored-nation status to trade in all services.⁶⁷ Although they preferred an exclusion, they reasoned that the Union could be forced to maintain its negotiating commitment of seeking special treatment for the audiovisual sector.⁶⁸ Therefore, the ministers outlined six minimum objectives⁶⁹ that would be necessary to ensure that the European Union would adopt an agreement and that the Union could continue to assist its audiovisual industry.⁷⁰ Ultimately, the long battle between the United States and the European Union over audiovisuals and the resulting "agreement to disagree" forcibly removed audiovisuals from the Uruguay Round negotiations thereby preventing the integration of audiovisuals into the GATT.⁷¹ This result is significant for several reasons discussed below.

IV. Significance of the Issue

A. Audiovisuals as Cultural Products

The main thrust of the disagreement between the United States

⁶⁷ *EC Culture Ministers Back French Stance on Excluding Films, TV from Trade Talks*, Int'l Trade Daily (BNA) (Oct. 6, 1993) [hereinafter *EC Culture*]. The GATT principle of nondiscrimination and most-favored-nation status generally requires that any advantage or privilege granted by a contracting party to another contracting party with respect to import or export customs duties, import or export charges, the international transfer of payments for imports or exports, the means of attaching such charges, all import and export rules, and all matters referred to in paragraphs 1 and 2 of Article III of the GATT, must be granted to all other contracting parties. See General Agreement on Tariffs and Trade, 55 U.N.T.S. 187, art. I (Oct. 30, 1950). For a discussion of nondiscrimination and most-favored-nation status, see Lupinacci, *infra* note 97, at 132.

⁶⁸ *EC Culture, supra* note 67.

⁶⁹ The minimum objectives had no legal force. They were created to guide the European Union's trade and foreign ministers and the European Commission by spelling out a specific GATT objective for the audiovisual sector. Suzanne Perry, *EC Ministers Outline Trade Goals for Cinema and TV*, REUTERS EUR. COMMUNITY REP., Oct. 5, 1993. The six minimum objectives are as follows:

1. Exemption from the "most favoured nation" clause for programmes to support the audiovisual sector so that the EC could reserve such programmes for its own producers.
2. Preservation and development of public finance and operational subsidies.
3. Preservation of the ability to regulate existing and new technology and transmission methods.
4. Preservation of the freedom to develop all policies and measures designed to assist the audiovisual sector—funding, production, televising, broadcasting, distribution, and operation.
5. No requirement for the audiovisual sector to be subject to the principle of the progressive advancement of liberalisation [as defined in Article 19 of the draft agreement on services].
6. Preservation of existing EC rules, without priority on the "effective implementation of the television without frontiers" directive which allows broadcasters to reserve a majority of air time for European works.

Belgian Minister Pushes GATT Audiovisual Compromise, REUTERS, Oct. 15, 1993.

⁷⁰ See *EC Culture, supra* note 67. The announcement represented a compromise between a majority of the European countries who wanted a "cultural exception" in the GATT and the minority who wanted a more flexible approach.

⁷¹ See *supra* text accompanying notes 5-7.

and the European Union is whether audiovisuals are commercial products or cultural products that deserve special consideration. The European Union has classified audiovisual products as cultural products which require special treatment.⁷² Conversely, the United States has defined audiovisual products in economic terms and views the audiovisual industry as a commercial venture, pure and simple.⁷³ Essentially, the European conviction of having some form of cultural protectionism has been pitted against the American conviction that the customer knows best.⁷⁴

The European classification of audiovisuals as cultural products has some basis in fact. Richard Collins, a scholar in the communications field, has noted that "[t]he audiovisual sector is of great importance to the cultural identity of peoples, regions and nations."⁷⁵ Social scientists agree that mass communications and entertainment serve as important carriers for cultural information.⁷⁶ In many circumstances, the mass media's messages can accelerate social change, promote the adoption of new and different attitudes, and influence behavior.⁷⁷

Collins observes that it is easy to "deny the validity of intervention in markets for cultural productions and to argue that 'culture' simply provides a convenient and mendacious frosting that conceals protec-

⁷² The European Parliament noted that culture is not just another commodity. *Uruguay Round - Parliament Calls for a Cultural Specificity Clause for the Audiovisual Sector*, AGENCY EUR., July 17, 1993. Jacques Toubon, the French Minister of Culture explained that broadcasting cannot be considered merely a commercial service, but rather, a public service. *Culture Council: Weimar and Stockholm to be European Cities of Culture in 1998-1999*, EUR. REP. SECT. IV INTERNAL REL., NO. 1900, Nov. 6, 1993. Toubon noted that Europe must choose between mind and matter, between art and merchandise. *France: No to Coca-Cola Culture, French Minister Says of GATT Round*, REUTERS, Aug. 6, 1993. Such statements embody a number of pervasive assumptions that have supported the regulation of audiovisuals: "[S]ocieties are held together solely through a shared culture; free trade and the market do not provide the cultural order necessary to maintain social cohesion; political authorities must redress market failure; the mass media, particularly television, are vital agencies in maintaining and reproducing social cohesion." Collins, *supra* note 24, at 362.

⁷³ Tom Walker, *Hollywood Takes Exception to French Block on the Box*, THE TIMES (London), May 3, 1993. The market and the consumers should be able to operate freely and determine which audiovisual products should predominate. This conceptualization is evidenced in a statement by Jack Valenti, President of the Motion Picture Export Association of America: "I think the people of Europe, who have the right to choose their own leaders, should have the right to choose their own television. The audience is king Let the market forces collide and something better" will result. *Id.*

⁷⁴ *Id.*

⁷⁵ Collins, *supra* note 24, at 361 (citation omitted). Richard Collins is a member of the Department of Communication Studies at the Royal Melbourne Institute of Technology. He is the author of several books on television, including *SATELLITE TELEVISION IN WESTERN EUROPE; TELEVISION, POLICY AND CULTURE; CULTURE, COMMUNICATION, AND NATIONAL IDENTITY: THE CASE OF CANADIAN TELEVISION*; and, with Nicholas Garnham and Gareth Locksley, *THE ECONOMICS OF TELEVISION: THE UK CASE*.

⁷⁶ See Smith, *supra* note 17, at 133; INTERNATIONAL COMMISSION FOR THE STUDY OF COMMUNICATION PROBLEMS, *MANY VOICES*, ONE WORLD 30 (1980).

⁷⁷ See Smith, *supra* note 17, at 133; CONRAD P. KOTTAK, *PRIME-TIME SOCIETY: AN ANTHROPOLOGICAL ANALYSIS OF TELEVISION AND CULTURE* 10-12 (1990).

tionist industrial policies,"⁷⁸ because culture is hard to define. Despite this observation, Collins emphasizes that "cultural arguments cannot be dismissed, not least because of the intensity and pervasiveness" with which they are held by various entities.⁷⁹

Although the European Union's classification of audiovisuals has some basis in fact, the Union's audiovisual trade policies were not enacted primarily to protect European culture. Rather, the European Union's trade policies were enacted primarily to protect the European audiovisual market from further American domination.

B. The Motive Underlying European Union Audiovisual Trade Policies

It is somewhat difficult to ascertain the motive underlying European Union audiovisual trade policies. Two factors indicate that the motive was cultural protection. Four observations indicate that the motive was trade protection. When the former observations are weighed against the latter observations, the scale tips in favor of the latter.

1. Cultural Protection

Two factors indicate that the European Union erected audiovisual trade barriers and quotas in order to protect its culture. First, cultural protection is one of the underlying thrusts of the Television Without Frontiers Directive. In the 1984 Green Paper on the Directive,⁸⁰ the European Union Commission asserted that "[c]ross-frontier radio and television broadcasting would make a significant contribution to European unification."⁸¹ The European Union assumed that a single broadcasting market would unify the Union culturally and politically, thereby assisting in the development of the Union's audiovisual hardware and software industries.⁸² At that time, a majority of the European Union members accepted the classic nationalist formulation that "political institutions survive only when they are congruent with cultural communities."⁸³ The Directive was the "most important embodiment of these Community goals."⁸⁴ If the Union was to survive, it needed a common culture and a shared identity.

⁷⁸ Collins, *supra* note 24, at 363.

⁷⁹ *Id.*; see Jacques Delors, *Address to the Opening of the European Parliament: Commission Program for 1985*, 1985 O.J. (2-324) 64 (Mar. 12, 1985) (Debates of the European Parliament).

⁸⁰ The European Union Commission, which initiates the harmonization of broadcasting law, presented its position on broadcasting in the 1984 Green Paper entitled *Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*, COM(84)300 final at 1 [hereinafter *Green Paper*].

⁸¹ Collins, *supra* note 24, at 375 (quoting *Green Paper*, *supra* note 80, at 28).

⁸² *Id.* at 379.

⁸³ *Id.* at 376.

⁸⁴ *Id.*

The European Union is not the only body that has invoked culture as a basis for public policy. Culture has served as a basis for broadcasting policy in Australia. The Australian Minister of Communications stated that "[b]roadcasting plays a central role in sustaining and developing Australian cultural life. It is a powerful force in shaping a nation's identity and maintaining a democratic and pluralist society. Television and radio are an important part of people's lives."⁸⁵ The Canadian government has similarly invoked culture as a basis for public policy.

The Canadian government has been committed to increasing the amount of Canadian television drama that its citizenry watches.⁸⁶ This commitment rests on the notion that citizen viewing of American television drama threatens its continued existence as a "separate and independent" state.⁸⁷ The core assumption is that polity and culture must be congruent; there can be no political sovereignty without cultural sovereignty.⁸⁸ In Canada there is a pervasive belief that the key to the existence of the Canadian nation lies in the leisure habits of its citizenry.⁸⁹ Therefore, the viewing of non-Canadian television drama is a destabilizing political force.⁹⁰ These findings indicate that the European Union erected its audiovisual trade policies to protect its culture.

Second, the protectionist audiovisual measures have not worked: the continued existence of such protectionist measures, in light of their essential failure, indicates that something else besides economics may be fueling such measures. That something else may be cultural protectionism.

Members of the European Union have not responded to the Television Without Frontiers Directive with similar amounts of enthusiasm. Released figures suggest that the Directive has failed and that the number of American programs shown in Europe has actually increased since the Directive was drafted in 1984. In 1991, U.S. programs accounted for fifty-four percent of television drama transmitted by European broadcasters, and American subsidiaries generated fifty-one percent of the video revenues in Europe.⁹¹ Anica, the Italian independent producers' organization, published a report releasing some

⁸⁵ *Id.* at 361-62 (quoting Kim Beazley, Address at the Annual Convention of the Federation of Australian Radio Broadcasters 6 (1990) (transcript produced by the Dep't of Transport and Communications, Canberra, Australia)).

⁸⁶ Flora MacDonald, a former Canadian minister of communications stated that "a nation's fictional repertoire is the life blood of its culture." RICHARD COLLINS, *CULTURE, COMMUNICATION AND NATIONAL IDENTITY: THE CASE OF CANADIAN TELEVISION* 226 (1990) (citing *Globe and Mail*, Feb. 10, 1987, at 12).

⁸⁷ *Id.* (citing *Globe and Mail* at 13).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (citing *Globe and Mail* at 42-43).

⁹¹ See Perry, *supra* note 69.

telling figures. The report stated that the European audiovisual trade deficit with the United States was \$2.5 billion in 1992.⁹² In the first half of the 1980's, approximately twenty-two percent of Europe's television programs originated in the United States.⁹³ By 1992, the total number of hours broadcast had quadrupled and the share of the U.S. product had increased to thirty-five percent.⁹⁴

A statement made by Jacques Toubon, the French Minister of Culture, also supports this observation: "[t]he Americans . . . want so-called European protectionism to be dismantled although their trade surplus since 1988 in the field of film and audiovisual products has tripled from 1.8 to 4 billion dollars. This proves our system of support [for the industry] guarantees continued creativity without halting competition."⁹⁵ If economics were primarily fueling such measures then the European Union could have altered its audiovisual policies to better protect its audiovisual market.

Although the above two factors are persuasive, they are outweighed by the following four observations: European Union cultural considerations only take rhetorical precedence over economic considerations; the European Union does not have a collective culture to which audiovisuals can be of great importance; the European Union has recently stressed cultural diversity; and European leaders' statements suggest that trade policies were not culturally motivated.

2. *Protection of Trade*

Four observations indicate that the European Union's "protection of culture" is a facade for audiovisual trade barriers that primarily serve to protect its audiovisual market from further American dominance.

First, the European Union's cultural considerations only take rhetorical precedence over economic and industrial considerations. The creation of a competitive single market has been the most important goal of the Union's policies for the audiovisual sector.⁹⁶ This observation is evidenced by the European Union's justifications for its audiovisual trade policies. The European Union has not solely or predominantly justified its audiovisual trade policies in terms of cultural protection. For instance, although some of the discussion regarding the Television Without Frontiers Directive focused on the desire to preserve a European cultural identity through "the promotion and support of a trans-European television industry composed of Community-produced programming,"⁹⁷ the 1984 Green Paper itself and sur-

⁹² See Wohrle, *supra* note 13.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Perry, *supra* note 69.

⁹⁶ See Collins, *supra* note 24, at 370.

⁹⁷ Timothy M. Lupinacci, *The Pursuit of Television Broadcasting Activities in the European*

rounding discussions indicate that economic protection was the true rationale for the Directive.

The Green Paper revealed the European Union's justification for the Television Without Frontiers Directive. The Union's justification for the Directive has been the free movement of services provided for in the Treaty of Rome, because it has no authority to regulate broadcasting.⁹⁸ The Commission justified the Directive in economic terms by citing various freedoms that are set out in Articles 55 through 66 of the Treaty of Rome, including the freedom to provide services.⁹⁹ The Commission characterized broadcasting as "the provision of a service for remuneration" within the scope of Article 60, thereby entitling broadcasting to the protection and benefits of the Treaty of Rome.¹⁰⁰ For instance, one benefit of the Treaty of Rome is that a person supplying a broadcasting service could temporarily broadcast in a state under the same conditions that are imposed by that state on its own broadcasters.¹⁰¹

The Commission drew upon case law of the European Court of Justice to support its characterization.¹⁰² In part, the Commission relied upon the *Sacchi* case. In *Sacchi*, the European Court of Justice concluded that a television signal must be regarded as a provision of services under the Treaty of Rome, in absence of an express provision to the contrary.¹⁰³ The court concluded that "trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods" under the Treaty.¹⁰⁴ Because a television signal

Community: Cultural Preservation or Economic Protectionism?, 24 VAND. J. TRANSNAT'L L. 113, 120 (1991).

⁹⁸ See Wolfgang Hoffman-Riem, *The Broadcasting Activities of the European Community and Their Implications for National Broadcasting Systems in Europe*, 16 HASTINGS INT'L & COMP. L. REV. 599, 606-07 (1993).

⁹⁹ See Filipek, *supra* note 1, at 327; Treaty of Rome, *supra* note 25, at arts. 55-66.

¹⁰⁰ Filipek, *supra* note 1, at 327; see Green Paper, *supra* note 80, at 105-09. Article 60 of the Treaty of Rome provides:

Services within the meaning of this Treaty shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons.

Services shall include in particular:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) artisan activities; and
- (d) activities of the liberal professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the state where the service is supplied, under the same conditions as are imposed by that State on its own nationals.

Treaty of Rome, *supra* note 25, at art. 60.

¹⁰¹ See *supra* note 100.

¹⁰² Green Paper, *supra* note 80, at 105-09 (citing Case 155/73, *Sacchi*, 1974 E.C.R. 409 (1974)).

¹⁰³ *Sacchi*, 1974 E.C.R. at 427.

¹⁰⁴ *Id.*

was a provision of a service under the Treaty, the Directive fell within the European Union's regulatory powers.

Discussions surrounding the Green Paper also indicate that economic protectionism was the true rationale for the Directive. In its "Opinion on the Green Paper," the European Commission's Economic Social Committee urged the creation of an efficient European television industry so that European producers could compete with American producers.¹⁰⁵ Moreover, subsequent Parliamentary discussions display resentment toward American dominance in the audiovisual field.¹⁰⁶ For instance, Parliamentary Representative De Vries stated: "there are four things we want—to guarantee the diversity of cultures and their identity, to guarantee pluralism of expression, to protect copyright and to avoid an influx of cheap productions, primarily from the USA—and I have no hesitation in talking about American cast-offs here."¹⁰⁷ This statement perfectly embodies such resentment.

Second, because the European Union does not have a "collective culture," its audiovisual sector cannot be of great importance to its cultural identity. Rather, the audiovisual sector is of great importance to the individual identity of each member nation respectively. This observation tends to undermine the Union's position that its audiovisual policies were created to protect "its" culture. The MEDIA 92 program¹⁰⁸ itself shows this.

The MEDIA 92 Directive looked toward the formation of the single market in 1992. The program was passed in response to the perceived threat of a single market dominated by English speaking countries.¹⁰⁹ Therefore, the MEDIA program promotes cultural pluralism by encouraging circulation of community productions (especially those in minority languages).¹¹⁰ Although the MEDIA program promotes cultural pluralism, that fact does not mandate that a "collective culture" exists in the European Union. In fact, prior to the MEDIA program, around eighty percent of each members' audiovisual products did not leave its respective border.¹¹¹ This observation indicates that the European Union does not have a "collective culture." Rather, each member state has its own distinct culture.

Third, the Union has recently stressed cultural diversity, rather than cultural unity, in the context of the Television Without Frontiers Directive. In response to criticism of its stance in the 1984 Green Pa-

¹⁰⁵ *Id.*

¹⁰⁶ See Lupinacci, *supra* note 97, at 121-22.

¹⁰⁷ *Id.* at 121 n.41 (quoting *Debates of the European Parliament, Pursuit of Broadcasting Activities*, 1989 O.J. (C 378) 2, 119).

¹⁰⁸ See *supra* text accompanying note 36.

¹⁰⁹ See Collins, *supra* note 24, at 382.

¹¹⁰ *Id.* at 383.

¹¹¹ *Audiovisual/Broadcasting*, EUROPEAN UPDATE, available in EUROUPDATE, 1990 WL 259690 (D.R.T.).

per, the European Union Commission now emphasizes the importance of cultural independence and diversity among member nations, although this concern is not listed in the specific regulations.¹¹²

Fourth, the protectionist statements of European leaders also indicate that the true motive underlying the European Union's audiovisual trade policies is economic protection. Several statements, some made in conjunction with the preamble to the Green Paper, suggest that the Directive was not solely culturally motivated.¹¹³ European Union policy-makers stated that they had been swamped by U.S. exports and that what was left of the European audiovisual sector was an endangered species in need of protection.¹¹⁴ Audiovisual Commissioner Joao de Deus Pinheiro stated: "we must have assurances that we can give the audiovisual sector in Europe the possibility to breathe—not to dominate, unfortunately, but to breathe."¹¹⁵ Jacques Delors, the current President of the European Commission, stated: "the culture industry will tomorrow be one of the biggest industries, a creator of wealth and jobs. . . . We have to build a powerful European culture industry that will enable us to be in control of both the medium and its content."¹¹⁶ Similar utterances can be found elsewhere, making it clear that the roots of some national regulations lie in economic protectionism.

In sum, the European Union uses the rhetoric of cultural protection as a facade for audiovisual trade barriers that primarily serve to protect its audiovisual market from further American dominance. Even if the European Union had actually enacted such audiovisual trade barriers in the name of "cultural protection," it has no legal authority to do so.

C. *The European Union's Legal Authority to Enact Trade Policies in the Name of Culture*

The European Union does not have the jurisdiction nor the authority to determine the scope of its regulatory powers¹¹⁷ because the Union's regulatory powers are limited to those enumerated in the Treaty of Rome.¹¹⁸ The Treaty of Rome does not contain a section that specifically gives the Union powers to address cultural issues or powers to regulate in the name of culture.¹¹⁹ However, the Treaty of Rome does contain a generic necessary powers provision.

Article 235 of the Treaty of Rome affords the European Union

¹¹² Hoffman-Riem, *supra* note 98, at 611-12.

¹¹³ *Id.* at 612; The Green Paper preamble states: "whereas coordination is nevertheless needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities." Green Paper, *supra* note 80.

¹¹⁴ See Wohrle, *supra* note 13.

¹¹⁵ See Perry, *supra* note 69.

¹¹⁶ See Collins, *supra* note 24, at 363.

¹¹⁷ Hoffman-Riem, *supra* note 98, at 604.

¹¹⁸ *Id.*

¹¹⁹ See Treaty of Rome, *supra* note 23.

generic necessary powers to effectuate objectives if such powers were not explicitly mentioned in the Treaty.¹²⁰ If such a situation arises, article 235 provides that the "Council shall, acting unanimously on a proposal from the Commission and after consulting the assembly, take the appropriate measures" to create such powers.¹²¹

On its face, article 235 seems to enable the European Union to attain the necessary powers to effectuate cultural objectives because such powers are not explicitly mentioned in the Treaty. But, the European Union is predominantly an economic community (even though its activities are not restricted solely to the economy)¹²² and culture is an "activity" that is only partly, if at all, determined by economics.¹²³ Therefore, culture lies in a borderline area of the European Union's regulatory jurisdiction.¹²⁴

Some member states, within the European Union, pushed for the revision of the Treaty of Rome in order to avoid such inhibiting effects and to act effectively in the cultural sphere.¹²⁵ The Union had to give itself "the appropriate means to carry through an ambitious cultural policy, capable of stimulating cinematographic creation and the propagation of European films throughout Europe."¹²⁶ Such efforts culminated in the inclusion of a Culture Article in the Maastricht Treaty on Political Union.¹²⁷

Although the Maastricht Treaty's culture provision would legitimize the creation of cultural initiatives in the audiovisual sector, the Treaty did not come into effect until November 1, 1993, a long time after many of the Union's current audiovisual trade policies had been enacted.¹²⁸ Therefore, the Maastricht Treaty cannot serve as a justification for the current audiovisual trade policies which are defended in the name of cultural protection. Moreover, the recent Treaty cannot justify any of the European Union's positions during the Uruguay Round negotiations because no action has been taken by the Committee of Regions under Article 198a.¹²⁹ The Committee membership was selected only recently and the first inaugural meeting of the Commit-

¹²⁰ *Id.*

¹²¹ *Id.* at art. 235.

¹²² Hoffman-Riem, *supra* note 98, at 605. This is true because "economic integration is impossible without consideration of the economic aspects of social fields, including culture." *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Collins, *supra* note 24, at 370-71.

¹²⁶ *Scriptwriters, Directors and Producers of Cinematographic Works Call for Enquiry into U.S. Trade Practices*, AGENCY EUR., Nov. 18, 1992.

¹²⁷ See Collins, *supra* note 24, at 371.

¹²⁸ For example, the Television Without Frontiers Directive became effective in 1991. See *supra* note 9. The MEDIA program became effective in 1986. See *supra* note 36 and accompanying text.

¹²⁹ See *infra* note 130 and accompanying text.

tee opened on March 9, 1994.¹³⁰

Even if the European Union had actually enacted audiovisual trade barriers in the name of "cultural protection," the policies would be void since the Union has no legal authority to enact such initiatives. This fact affects the measures that the United States could employ to resolve its audiovisuals dispute with the European Union.

D. Measures to End the Audiovisuals Dispute

The United States could employ several measures to finally resolve its audiovisuals dispute with the European Union.¹³¹ First, the United States could further pursue unresolved bilateral negotiations regarding the Television Without Frontiers Directive. Second, the United States could push for a definitive resolution of whether television programming falls within the scope of Article IV under the GATT. Finally, the United States could take action under section 301 of the Omnibus Trade and Competitiveness Act of 1988 against the European Union. If faced with the above three choices, the United States should settle the unresolved bilateral negotiations regarding the Television Without Frontiers Directive and pursue a definitive resolution of the scope of

¹³⁰ *Committee of the Regions Opens Inaugural Meeting*, AGENCY EUR., Mar. 10, 1994.

¹³¹ The following measures and analysis are suggested if the United States decides to take action before the new GATT becomes effective. The new GATT agreement, which is comprised of a World Trade Organization and Multilateral Trade Agreements attached thereto, was formally signed by each participant in Marrakech, Morocco, on April 15, 1994. James K. Glassman, *Silliness About Sovereignty Threatens a Good Trade Deal*, THE WASHINGTON POST, May 4, 1994, at D1. The new agreement will not become effective until and only after each participant approves the Uruguay Round results and a Ministerial Conference on Implementation determines the date on which the agreement will enter into effect. Multilateral Trade Negotiations (The Uruguay Round) Document MTN/FA, of December 15, 1993 and Add.1 of December 15, 1993, reprinted in 33 I.L.M. 1, 3 (1994).

If the United States does not act before the implementation of the new GATT then the measures that it could employ become less exact. Article II:4 of the World Trade Agreement provides that the GATT in Annex 1A is legally distinct from the GATT dated October 30, 1947 as amended. *Id.* at 3-4. Noting this provision, Director-General Sutherland has stated that the World Trade Organization "will not be a successor agreement to GATT, as defined in the Vienna Convention"; insofar as nations that accept the World Trade Organization Agreement and do not simultaneously withdraw their application of GATT 1947 under the Protocol of Provisional Application, they will be bound by two separate most-favored-nation clauses applying to two different commitments and countries. *Id.* The United States, European Union and other nations have already expressed that their intention is to discontinue provisional application of GATT 1947 under the World Trade Organization system. *Id.*

Despite not knowing the outcome of this ambiguity, the United States could pursue three avenues for certain, if it chooses to act after the new agreement becomes effective. First, the United States could enter into bilateral negotiations with the European Union under the framework of the Understanding on Rules and Procedures Governing the Settlement of Disputes in the new agreement. *Id.* at 114. Second, the United States could still recognize the factual existence of the Directive and attempt to gain concessions on some of its more flexible provisions. *See infra* notes 140-45 and accompanying text. Third, the United States could still pursue a section 301 action under the Omnibus Trade and Competitiveness Act of 1988 as described below. *See infra* notes 154-62 and accompanying text. Faced with these three choices, the United States should pursue the first and second but not the third for the same reasons outlined below.

Article IV under the GATT.¹³²1. *Bilateral Negotiations*

The United States could reopen unresolved bilateral negotiations regarding the Television Without Frontiers Directive.¹³³ To accomplish this, the United States could take one of two approaches. The United States could lodge another complaint under Article XXII¹³⁴ of the GATT requesting bilateral consultations with the European Union.¹³⁵ Alternatively, the United States could recognize the factual existence of the Directive and attempt to gain concessions on some of its more flexible provisions.¹³⁶

The United States has unsuccessfully pursued the first approach in the past. In 1989, the United States lodged a complaint under Article XXII¹³⁷ of the GATT requesting bilateral consultations with the European Union.¹³⁸ Despite efforts to resolve the disagreement between the United States and the European Union over the legitimacy of the Television Without Frontiers Directive, the first consultation failed.¹³⁹ Instead of requesting further consultations, the United States chose to resolve the disagreement through the Uruguay Round negotiations. Since the disagreement was not resolved in the Uruguay Round negotiations, the United States could reassert its prior contentions and have the GATT framework determine if the Directive is legitimate.

Given its past experience with negotiations, the United States may prefer to take a new approach by working within the framework of the Directive. For instance, the majority proportion requirement, ensuring that broadcasters reserve a majority proportion of their programming for European works,¹⁴⁰ is susceptible to a flexible interpretation.¹⁴¹ The United States could push for an interpretation requiring that the majority proportion quota be administered on a nationwide basis.¹⁴² The adoption of such a flexible interpretation would mean that some channels could have a minority proportion of European programming so long as others had more than a majority propor-

¹³² See Filipek, *supra* note 1, at 368.

¹³³ See *supra* text accompanying notes 15-19.

¹³⁴ See *supra* note 15 and accompanying text.

¹³⁵ See Smith, *supra* note 17, at 106.

¹³⁶ See Filipek, *supra* note 1, at 368.

¹³⁷ See *supra* note 15 and accompanying text.

¹³⁸ See Smith, *supra* note 17, at 106.

¹³⁹ *Id.* at 107.

¹⁴⁰ See *supra* note 48 and accompanying text.

¹⁴¹ See Filipek, *supra* note 1, at 368. Another flexible aspect of the Directive is that the majority proportion rule must be used "where practicable and by appropriate means." *Id.* This language can be interpreted broadly in contexts where it is not practicable to devote a majority of programming to European works. *Id.* This is especially true because the "where practicable" language was only adopted in order to gain the support of a majority of Union members. *Id.*

¹⁴² *Id.*

tion of European programming.¹⁴³ Although the Commission has given the provision the most restrictive interpretation by stating that the majority proportion quota should be applied to each broadcaster and "[w]here an organization has several different channels, these will be considered individually,"¹⁴⁴ the Commission cannot adopt binding acts relating to the interpretation of the Directive since the Directive is not legally binding.¹⁴⁵

Using either approach, the United States should further pursue the unresolved bilateral negotiations regarding the Television Without Frontiers Directive.¹⁴⁶ The United States should pursue this avenue because the issue has been partially addressed and left unresolved; the United States would not be starting from scratch. Moreover, pursuing this avenue under either approach is only a mildly confrontational response to the failure to include audiovisuals in the GATT. The European Union would be less likely to react negatively since the issue has been partially addressed before.

2. *Resolution of the Scope of Article IV of the GATT*

In addition to pursuing unresolved bilateral negotiations regarding the Directive, the United States could push for a definitive resolution of whether television programming falls within the scope of Article IV of the GATT and its cinema exception.

The United States raised this issue during the Nineteenth Session of the Contracting Parties.¹⁴⁷ A working party was established to examine whether the provisions of the GATT dealt with the problem of market access for television programs and to recommend any action.¹⁴⁸ Although the working party prepared a number of draft recommendations on this issue, it was unable to reach a consensus.¹⁴⁹ The matter was eventually dropped.

The United States could reassert the position that contracting parties to the GATT should be allowed to use screen quotas for domestic television programs, provided that the quotas do not "preclude access to a reasonable proportion of viewing time for recorded programs imported from other contracting parties"¹⁵⁰ However, the premises

¹⁴³ *Id.*

¹⁴⁴ Filipek, *supra* note 1, at 332 (quoting Reply to Questions Put Forward by the American Delegation on the Television Without Frontiers Directive and on the Convention of the Council of Europe at 4 (undated) (on file at the Directorate General for External Relations of the EC Commission)).

¹⁴⁵ See Filipek, *supra* note 1, at 368.

¹⁴⁶ See *supra* notes 51-61 and accompanying text.

¹⁴⁷ See *supra* note 62.

¹⁴⁸ Filipek, *supra* note 1.

¹⁴⁹ *Id.*

¹⁵⁰ See Filipek, *supra* note 1, at 364 (quoting *Application of GATT to International Trade in Television Programmes: Revised United States Draft Recommendation*, GATT Doc. L/1908, 2 (Nov. 10, 1962) (unpublished document on file at the GATT Information and Media Relations Division in Geneva)).

underlying a reassertion would have to be revised due to the changes in the television programming market since 1961. For instance, the United States could no longer contend that market pressures would be insufficient to prevent contracting parties from restricting imports and would be insufficient until there were more competitive television stations available to the viewer.¹⁵¹

Despite having to change its premises, the United States should raise the issue of whether television programming falls within the scope of the Article IV and request a working party to definitively resolve the issue.¹⁵² The United States should pursue this course of action because a positive determination would provide the means to shoehorn television programming into the GATT framework. Moreover, the European Union's former objection, that the guarantee of access would establish unacceptable GATT obligations upon contracting parties, could no longer be maintained due to the drastic changes in the audiovisual market.¹⁵³

In addition to seeking a definitive resolution of the scope of Article IV of the GATT, the United States could initiate a section 301 action against the European Union.

3. Section 301 Action

The United States could challenge European Union audiovisual policies, specifically the Television Without Frontiers Directive, by taking action under section 301 of the Omnibus Trade and Competitiveness Act of 1988.¹⁵⁴ This section authorizes the President to

¹⁵¹ See Filipek, *supra* note 1, at 364; *Application of GATT to International Trade in Television Programmes: Statement Made by the United States Representative on 21 November 1961*, GATT Doc. L/1646, 4 (Nov. 26, 1961) (unpublished document on file at the GATT Information and Media Relations Division in Geneva).

¹⁵² See Filipek, *supra* note 1, at 363.

¹⁵³ See *Working Party on Application of GATT to International Trade in Television Programmes*, GATT Doc. L/1686, 4 (Mar. 13, 1962) (unpublished document on file at the GATT Information and Media Relations Division in Geneva).

¹⁵⁴ Section 301 of the Omnibus Trade and Competitiveness Act of 1988 provides in part:

(a) Mandatory action

- (1) If the United States Trade Representative determines . . . that
 - (A) the rights of the United States under any trade agreement are being denied; or
 - (B) an act, policy, or practice of a foreign country
 - (i) violates, or is inconsistent with, the provision of, or otherwise denies benefits to the United States under, any trade agreement, or
 - (ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representatives shall take action authorized in subsection (c) of this section subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.

implement action against other nations that engage in unfair trade practices adversely affecting U.S. trade in goods or services.¹⁵⁵ This provision also gives the United States Trade Representative the discretionary authority to take action when "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce."¹⁵⁶ Under this section, the United States could place quantitative restrictions on European Union imports or increase duties levied against the European Union.¹⁵⁷

If the United States were to initiate a section 301 challenge, an economic study would have to be completed first. That study would quantify the burden placed upon the United States by the European Union's unfair trade practices by comparing the "competitiveness of the United States industry effected to similar export performances in other markets, the extent of the effect on trade by the alleged unfair practice, and the historical presence of the effected industry in the market concerned."¹⁵⁸ Once the study was done, a public hearing would be held before a section 301 committee where the European Union could present its views and the United States could ascertain the potential harm any retaliatory measures would have on the audiovisual industry.¹⁵⁹

Thereafter, the United States Trade Representative would outline the products and services exported by the European Union to the United States in order to determine where retaliatory measures would be most effective.¹⁶⁰ When the section 301 committee agreed on the course of trade retaliation, a proclamation would be drafted which the White House would review.¹⁶¹ Under section 301, the United States Trade Representative could then take action directly.

The United States should not pursue a section 301 challenge against any of the European Union's audiovisual trade policies. The European Union has expressed resentment toward section 301 challenges and has warned that any unilateral action by the United States under this section could "easily be mirrored by equivalent action against United States exports."¹⁶² Although the European Union audiovisual trade policies are protectionist, they do not hurt United States audiovisual exports so much that it would be worth risking a

Omnibus Trade and Competitiveness Act of 1988 § 301 (codified at 19 U.S.C. § 2411(a) (1988 & Supp. IV 1992)).

¹⁵⁵ Lupinacci, *supra* note 97, at 143.

¹⁵⁶ *Id.* at 144 (quoting 19 U.S.C. § 2411(b)(1) (1988 & Supp. IV 1992)).

¹⁵⁷ See Lupinacci, *supra* note 97, at 145.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 146.

¹⁶² *Id.* (quoting Philips, *The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets?*, 22 VAND. J. TRANSNAT'L L. 491, 526 (1989) (citing 133 CONG. REC. H2760 (daily ed. Apr. 29, 1987) (statement of Rep. Crane))).

trade war. The outcome of a trade war may be potentially more damaging than the effects of the current audiovisual policies.

V. Conclusion

Now that dust is beginning to settle on the Uruguay Round negotiations table, the significance of excluding audiovisuals from the final GATT agreement has become clear: Non-authorized, protectionist European Union audiovisual trade policies remain intact to the disadvantage of all non-Union member countries.

Further negotiations must ensue to resolve the audiovisuals dispute between the United States and the European Union, thereby enabling audiovisuals to be incorporated into a globally-managed framework. As outlined above, the United States could employ several measures to accomplish these goals. First, the United States could further pursue unresolved bilateral negotiations regarding the legitimacy of the Television Without Frontiers Directive. Second, the United States could push for a definitive resolution of whether television programming falls within the scope of Article IV under the GATT. Finally, the United States could pursue a section 301 challenge under the Omnibus Trade and Competitiveness Act of 1988 against European Union audiovisual trade policies.

The most effective and least risky path for the United States to follow is to settle the unresolved bilateral negotiations regarding the Television Without Frontiers Directive and to reach a definitive resolution of whether television programming falls within the scope of Article IV under the GATT. This path is desirable for two reasons.

First, negotiations would be less confrontational than initiating a section 301 challenge. A section 301 challenge would be met with European resentment and could lead to an audiovisuals trade war. As discussed above, the European Union has expressed resentment toward section 301 challenges and has warned that any unilateral action by the United States under this section could be mirrored by equal action against United States exports.¹⁶³ Due to its potentially volatile nature, a section 301 challenge should only be initiated as a last resort.

Second, negotiations are especially desirable because the European Union audiovisual trade policies, although they are protectionist, do not paralyze United States audiovisual exports. As discussed above, European Union audiovisual trade policies have generally been unsuccessful. In the early 1980's, approximately twenty-two percent of Europe's television programs originated in the United States.¹⁶⁴ By 1992, when the entire number of hours broadcast had quadrupled compared to ten years earlier, the proportion of the United States product

¹⁶³ Lupinacci, *supra* note 97, at 146.

¹⁶⁴ See Wohrlé, *supra* note 13.

had increased to thirty-five percent.¹⁶⁵ The outcome of a trade war may be potentially more damaging than the effects of the current European Union audiovisual policies.

However, if bilateral negotiations regarding the Television Without Frontiers Directive and attempts to reach a definitive resolution of the scope of Article IV fail, the United States may have no other alternative but to pursue a section 301 challenge. Lodging a section 301 challenge would forcefully assert that protectionist trade barriers will no longer be tolerated.

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¹⁶⁵ *Id.*

