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# 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

Clint N. Smith†

*The European Community adopted a directive which requires that at least fifty percent of all Community broadcast time be devoted to programs of European origin. The stated purpose of the program quotas is the protection of European culture. As a key supplier of television programs in the international market, the United States is particularly affected by this restriction. The author argues that the United States should challenge the European Community program quota on the grounds that it is a violation of the General Agreement on Tariffs and Trade.*

*The author describes the basis of a U.S. challenge to the restriction, and anticipates the European Community's response. First, the author establishes that trade in television is within the scope of GATT because television programs take the form of goods in international transactions. The European Community directive specifically violates the national treatment requirement of GATT, he argues, because the quota affects sales and distribution opportunities for U.S. programs. The author then responds to the argument that the restriction is justified by the cinema exception contained in Article IV of GATT. The author takes an historical view of the cinema exception, and shows that the Contracting Parties to GATT have refused to apply the cinema exception to television in prior negotiations. He also rejects the argument that the directive is justified by the security exception of GATT Article XXI. The author concludes that the European Community can achieve its cultural protection objective without violating GATT by directly subsidizing European television producers.*

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## I. INTRODUCTION

The European Council's<sup>1</sup> directive of October 3, 1989 requires that Member States devote more than half of their television broadcast time to entertainment programs produced in Europe.<sup>2</sup> The European Community's<sup>3</sup> stated reason for the requirement is to preserve European culture. Hollywood producers and United States trade officials have complained, however, that the requirement is instead a protectionist measure intended to benefit the European film and television production industry. The United States alleges that the Directive violates the General Agreement on Tariffs and Trade ("General Agreement"),<sup>4</sup> while the European Community maintains that there is no violation.

The GATT dispute over the legality of the European Community's local program quota exposes the broader tension between the international goal of free exchange of information and the national need for sovereignty over mass communications policy. International treaties and agreements signed by both the United States and the European Community provide for free communica-

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1. The European Council, in which each Member State is represented by one minister from its national government, is the legislative authority of the European Community. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 145, 146. The European Parliament, unlike the Council, does not pass legislation but merely reviews and comments on draft legislation. *Id.* art. 137. The European Commission formulates and recommends legislation, and also takes legal action to ensure that Community institutions, Member States, and individuals comply with European Community law. *Id.* art. 155. For discussions of the institutions in theory and practice, see DAVID FREESTONE & SCOTT DAVIDSON, *THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN COMMUNITIES* (1988); TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (1981); ERIC STEIN ET AL., *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* (1976).

2. Council Directive 89/552 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities 89552, 1989 O.J. (L 298) 23 [hereinafter Directive]. For thorough overviews of the Directive's legislative history and the United States' response, see Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495 (1990). See also Kelly L. Wilkins, Comment, *Television Without Frontiers: An EEC Broadcast Premiere*, 14 B.C. INT'L & COMP. L. REV. 195 (1991).

3. "European Community," composed of the European Economic Community ("EEC"), the coal and steel community, and the atomic energy community, refers to the rules and institutions established by the EEC Treaty and its subsequent revisions. The term "European Community" now commonly refers to all three specific communities, and reflects the impact of the Single European Act, which extended the European Community's authority beyond economic and energy policy, to issues of foreign and social policy. See Single European Act 1987 O.J. (L 169) 1, 9, 13.

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61(5) Stat. A1, 55 U.N.T.S. 194 [hereinafter General Agreement]. "General Agreement" will refer to the original treaty and the subsequent series of multilateral agreements amending it which set out rules for international trade. "GATT" will refer to the organization which applies the General Agreement rules in the settlement of international trade disputes. "Contracting Party" will refer to a state or trading bloc that is a party to the General Agreement. "GATT panel" will refer to a dispute resolution panel established by request of a Contracting Party to determine whether there has been a violation of the General Agreement.

tion across borders<sup>5</sup> and encourage unrestricted trade of non-commercial educational, scientific, and cultural films.<sup>6</sup> At the same time, however, states have frequently used varied means to control the information their citizens receive from foreign sources. Examples include officials from Nazi Germany distributing radios that only received government stations<sup>7</sup> and Communist states in Eastern Europe prohibiting the sale of magazines and books from the West.<sup>8</sup>

The General Agreement itself reflects this tension between the free exchange of information and the need for national sovereignty over information content. Article III of the General Agreement, the national treatment clause, requires that once a foreign good enters a country, that country must treat the good no less favorably than it would treat a similar locally produced good.<sup>9</sup> While the European television program quota appears to violate the national treatment obligation, the violation is arguably justifiable under the cinema exception of Article IV of the General Agreement. Article IV allows countries to set quotas requiring local theaters to devote a percentage of cinema screen time each year to the screening of domestically produced films.<sup>10</sup> GATT has never decided whether Article IV applies *mutatis mutandi* to television programs.

Presented with the United States' complaint against the European Community television program quota, a GATT dispute resolution panel has the authority to address and resolve the tension between the desirability of the free exchange of information contained in television programs and the need for national sovereignty over the content of programs broadcast locally. This paper argues that the GATT panel should resolve the dispute by determining first, that the General Agreement applies to trade in television programs, second, that the European Community Directive violates the General Agreement's national treatment requirement, and finally, that the narrow terms of Article IV's cinema exception do not justify the television quota. Confronted with such a decision, the European Community could employ an alternative means to achieve its cultural goals which is both consistent with GATT obli-

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5. The broadest expression of this freedom is in Article 19 of the Universal Declaration of Human Rights, which states "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 74-75, U.N. Doc. A/810 (1948).

6. See Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character, July 15, 1949, 17 U.S.T. 1578, 197 U.N.T.S. 3; Agreement on the Importation of Educational, Scientific, and Cultural Materials, Nov. 20, 1950, 17 U.S.T. 1835, 131 U.N.T.S. 25.

7. See Keith Acheson & Christopher Maule, *Trade Policy Responses to New Technology in the Film and Television Industry*, 23 J. WORLD TRADE 35, 47 (1989).

8. See ROBERT R. PALMER & JOEL G. COLTON, *A HISTORY OF THE MODERN WORLD* 791 (6th ed. 1983).

9. General Agreement, *supra* note 4, art. 3, 61(5) Stat. at A18, 55 U.N.T.S. at 204.

10. *Id.* art. 4, 61(5) Stat. at A20, 55 U.N.T.S. at 208.

gations and less distortive of trade: granting reasonable subsidies to domestic television and film producers in order to encourage the production of programs reflecting and promoting European culture.

In determining whether the European Community television quota violates the General Agreement, the GATT panel must also answer the broader question of whether the General Agreement applies to television programs. This determination would have important implications for all states which export entertainment.<sup>11</sup> In addition, a GATT panel decision on television programs could provide guidance for the solution of future trade disputes over restrictions on movies, recorded music, books, and other forms of entertainment.

Part II of this paper provides an overview of the television market in the European Community and describes the European Council's Directive. Part III begins with a discussion of the General Agreement's history and its major provisions, then focuses specifically on Article III's national treatment requirement and Article IV's cinema exception.

Part IV addresses the conclusions that should be reached by a GATT dispute resolution panel: 1) the television directive is a binding law; 2) the General Agreement governs trade in goods, and since television programs take the form of goods when traded, the General Agreement is applicable; 3) the Directive discriminates against foreign programs by forcing stations to give preferential treatment to European produced television programs; and 4) the discrimination is not justified by Article IV's cinema exception, which must be interpreted narrowly in light of the drafters' intent and the subsequent interpretation of the exception by the Contracting Parties.

After noting that the objective of cultural protection is not met by local program quotas, Part V concludes with an argument that European Community Member States seeking to preserve or promote their cultures should instead consider granting direct subsidies to television and cinema producers. Such an approach would be consistent with the General Agreement, less costly to local economies, and less distortive of international trade.

## II. TELEVISION IN EUROPE

### *A. The Growing European Television Market*

While government ownership and management of European television stations is still common, the liberalization of laws which once restricted private ownership of cable channels and television stations has sparked a dra-

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11. See e.g. *Harper's Index*, HARPER'S, Nov. 1992, at 15 (citing Ostankino Television Network, Moscow which reported that *The Rich Also Cry*, a soap opera produced in Mexico, is currently the most popular program in Russia).

matic increase in the number of European television stations.<sup>12</sup> Between 1983 and 1995 it is estimated that the number of European television stations will have increased from 40 to 120.<sup>13</sup> Some stations will broadcast to large audiences spanning several Member States.<sup>14</sup>

The growth in the number of stations has generated proportionate growth in the program hours televised each year.<sup>15</sup> While just 250,000 program hours were shown in 1987, the amount should surpass 440,000 program hours in 1992<sup>16</sup> and 560,000 program hours by the late 1990s.<sup>17</sup>

Four sources produce the programs shown on European television. "In-house" production by the broadcasting station itself currently accounts for a great proportion of locally produced programs.<sup>18</sup> In-house programs are most often broadcast by government owned and well-established private stations; expenditures by this source of production will increase only slightly in the next decade.<sup>19</sup> Independent productions are a second, much less common source. Co-production between stations and either independent local producers or foreign producers is a third source.<sup>20</sup> The fourth, and fastest growing, source is production outside of Europe. Purchases of foreign programs are expected to double in the next decade.<sup>21</sup>

### *B. The Sale of U.S.-Produced Programming in Europe*

The United States is benefitting from Europe's increased acquisition of television programs.<sup>22</sup> U.S. producers sold \$330 million of television programs to Europe in 1984, and \$1 billion of programs in 1989.<sup>23</sup> The Euro-

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12. See, e.g., BROADCASTING ACT, 1990, Ch.2 (Eng.) (requiring the auction of existing television franchises and the creation of new private channels). For a general discussion of the recent dramatic growth of the European television industry, see Tom Kerver, *European Programming: A Boom But for Whom?*, 14 SATELLITE COMM. 14A (1990).

13. See *Buddy Can You Spare a Reel?*, THE ECONOMIST, Aug. 19, 1989, at 56 [hereinafter *Buddy*].

14. See, e.g., Kerver, *supra* note 12, at 14A.

15. See Edward Buscomb, *Coca-Cola Satellites: Hollywood and the Deregulation of European Television*, in HOLLYWOOD IN THE AGE OF TELEVISION 404 (Tino Balio ed., 1990).

16. See Ann Moebes, *Structuring Media Joint Ventures in the European Community*, 14 HASTINGS COMM. & ENT. L.J. 1, 4 (1991).

17. See Kerver, *supra* note 12, at 14A (London research group predicts that European stations will broadcast 535,000 program hours in 1998).

18. See *id.* (discussing a 1989 report on the European television industry published by Communications and Information Technology Research Limited in London).

19. *Id.* (predicting that expenditures on in-house programs will rise from \$7 billion in 1988 to only \$8.5 billion in 1998).

20. One commentator has argued that the European Community Directive provides an opportunity for increased co-production between foreigners and Europeans. See Moebes, *supra* note 16, at 7-9.

21. Kerver, *supra* note 12, at 14A (predicting that program acquisition will rise from \$2.15 billion in 1988 to \$4 billion in 1998).

22. See generally Suzanne M. Schwarz, *Television Without Frontiers?*, 16 N.C.J. INT'L L. & COMM. REG. 351, 358 (1991) (stating that in 1989 the U.S. broadcasting industry returned a \$2.5 billion trade surplus, and that half of its worldwide revenue was due to sales in Europe).

23. Steven Greenhouse, *The Media Business: For Europe, U.S. May Spell TV*, N.Y. TIMES, July 31, 1989, at D1; *Buddy*, *supra* note 13, at 56.

pean market accounts for roughly half of U.S. television exports.<sup>24</sup> Income from the European and other foreign markets has become increasingly important to U.S. producers because sales of television programs in the United States have been very weak in the early 1990s.<sup>25</sup>

Economic factors are the primary reason for increased television sales to Europe. It is economically efficient for producers in a large entertainment market to sell to smaller markets. While the initial production cost of a television program is quite high, and accounts for most of a program's total cost, the marginal cost of selling a program to an additional broadcaster is quite low.<sup>26</sup> The low marginal cost to a U.S. producer, which is merely the cost of taping an already-produced program and delivering the tape to a European purchaser, allows U.S. producers to sell programs in Europe at prices much lower than the cost a European company would incur producing a similar quality program on its own.<sup>27</sup>

The cost of producing a one-hour television drama in the United States is approximately \$1 million.<sup>28</sup> Half-hour comedy episodes of comparable quality typically cost \$450,000 to produce.<sup>29</sup> Most of this production cost can be recouped by selling the program to a major national broadcast network in the United States.<sup>30</sup> The production cost of a half-hour program in Europe is comparable to the production cost in the United States.<sup>31</sup> However, a European producer broadcasting to a small national or common-language audience cannot recover its costs as easily as the U.S. producer can. The smaller audience results in less advertising revenue, and therefore less revenue for the producer.

Since U.S. producers recoup their costs after the initial domestic broadcast, U.S. producers are willing to export programs inexpensively.<sup>32</sup> U.S. producers' export profits derive from multiple sales, not from limited sales at prices approaching the original production cost of the program. U.S. pro-

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24. See Tapio Varis, *The International Flow of Television Programs*, 34 J. COMM. 143, 146 (1984). See also Jeannine Johnson, *In Search of . . . the European T.V. Show*, EUROPE, Nov. 1989, at 22, 47.

25. See Bill Carter, *The Market for Reruns Is Slumping*, N.Y. TIMES, Aug. 12, 1991, at C1; Kim Masters, *Panic Time in Hollywood: The Boom Is Off the Movie Business and No One Knows What to Do*, WASH. POST, Oct. 6, 1991, at G1.

26. See Robert E. Herzstein, *Applying Traditional Trade Principles to the International Flow of Information*, in TOWARD A LAW OF GLOBAL COMMUNICATIONS NETWORKS 313, 319 (A. Branscomb ed., 1986).

27. See, e.g., Buscombe, *supra* note 15, at 406 (producing a program in Norway is fifteen times more expensive than purchasing a foreign program).

28. See John Marcom Jr., *Empty Threat?*, FORBES, Nov. 13, 1989, at 43.

29. See Greenhouse, *supra* note 23, at D1.

30. See Marcom, *supra* note 28, at 43. See, e.g., Buscombe, *supra* note 15, at 406 (while the production cost of a Miami Vice episode is \$1.5 million, the producers recoup \$1.2 million selling the episode to NBC).

31. See Greenhouse, *supra* note 23, at D1 (it costs over \$400,000 to produce one half hour of Danish programming).

32. For discussion of whether the sales may constitute a dumping action by U.S. producers, see *infra* note 170.

grams have sold in Europe for as little as \$430 per programming hour in 1985 to \$50,000 per programming hour in 1990—in both cases far less than production costs in Europe.<sup>33</sup>

The cost-effectiveness of buying U.S. programs is more important to new television stations in Europe than to established or government-funded stations, which are experienced producers and/or can afford higher production costs. New stations need programs but do not have the capital to produce much of their own programming.<sup>34</sup> According to an executive at a new French station, “A young station needs to buy programs until it develops the riches to be able to afford to produce a lot of programs on its own.”<sup>35</sup> Until they have the necessary production funds, new stations will buy programs from the United States.

Viewer taste may also contribute to the increased sales of U.S. television programming to Europe.<sup>36</sup> Programs from the United States are frequently among European stations’ more popular programs.<sup>37</sup> Perhaps it is the quality of the acting, sets, and costumes. Perhaps it is America’s cultural mystique. While exact reasons are impossible to identify, European television viewers often prefer U.S. programs.

### C. *The European Community and Television Programming*

#### 1. *Television Broadcasting is Subject to European Community Authority*

Early European integration agreements did not address whether television broadcasting would be regulated by the European Community or by its Member States. But from the outset, integrationists intended to transform not only the European economic order, but also its political and cultural order.<sup>38</sup> As stated in its preamble, the EEC Treaty seeks to “establish the foundations of an even closer union among the peoples of Europe.”<sup>39</sup> The regulation of television is one indication of the European Community’s desire to foster European identity among its citizens.

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33. See Colin Hoskins et al., *U.S. Television Programs in the International Market: Unfair Pricing?*, 39 J. COMM. 55, 56 (1989) (in 1985 the lowest average price paid by an European Community member for an hour of U.S. programs was \$430 in Portugal; the highest price paid was \$28,000 in the U.K.). For more recent pricing figures see Greenhouse, *supra* note 23, at D1 (U.S. programs sold in the U.K. for \$15,000 to \$50,000 per episode).

34. See Buscombe, *supra* note 15, at 404-07.

35. See Greenhouse, *supra* note 23, at D1.

36. Social scientists have suggested that American television programs are popular around the world because the programs are easily interpreted by viewers of different cultures. See TAMAR LIEBES & ELIHU KATZ, *THE EXPORT OF MEANING: CROSS CULTURAL READINGS OF DALLAS* 4 (1990).

37. See generally Schwarz, *supra* note 22, app. 1 (listing U.S. programs receiving high audience ratings in the United Kingdom, Italy, and France).

38. See generally FREESTONE & DAVIDSON, *supra* note 1, at 6-9; Ivo E. Schwartz, *Broadcasting and the EEC Treaty*, 11 EUR. L. REV. 7, 17 (1986).

39. EEC TREATY, *supra* note 1, pmb1.

A 1974 judicial decision indicated that television was subject to European Community regulation and cleared the way for subsequent European Community television policy proposals. In that case the Court of Justice of the European Communities held that television was properly regulated by the European Community and not by individual Member States.<sup>40</sup> The German government had argued that its television industry was a public utility subject only to German regulation and not to European Community regulation, but the Court rejected this argument.<sup>41</sup>

## 2. *The European Commission's Green Paper*

In a 1984 Green Paper<sup>42</sup> entitled "Television Without Frontiers," the European Commission set out a framework for the integration and harmonization of Member States' television industries.<sup>43</sup> Before addressing specific policy proposals, the Green Paper noted that television in the European Community could be "a source of cultural enrichment" and that "the dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas."<sup>44</sup> The Green Paper noted that an integrated European television market, with free movement of broadcasts between Member States, could limit the "dominance of the big American media corporations."<sup>45</sup> The Green Paper also proposed European Community-wide advertising standards, content limits to protect children, and limited rights of reply to station editorials.<sup>46</sup>

The Green Paper did not mention the need for quotas to limit the number of foreign television programs broadcast in Europe.<sup>47</sup> However, the European Commission's Economic and Social Committee, in its "Opinion on the Green Paper," urged the fostering of an efficient European television industry so that European television producers could compete with their American counterparts.<sup>48</sup> The opinion also stressed that the production of more European television programs would help create a "European consciousness" that would weaken individuals' allegiances to single Member States and facilitate the political integration of the European Community.<sup>49</sup>

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40. Case 155/73, *Ex parte* Giuseppe Sacchi 1974 E.C.R. 409, 417-18, [1974 Transfer Binder] Common Mkt Rep. (CCH) ¶ 8267 (1974).

41. *Id.*

42. Green Papers are the European Commission's lengthy policy recommendations drafted in advance of formal legislative proposals and action.

43. Television Without Frontiers: Green Paper on the Establishment of the Common Market in Broadcasting, Especially Broadcasting By Satellite and Cable, COM(84)300 final/2 [hereinafter Green Paper].

44. *Id.* at 28, 30.

45. *Id.* at 33.

46. *Id.* For further discussion of the Green Paper see Gillian Davies, *EEC Green Paper - Television Without Frontiers*, 3 INT'L MEDIA L., Feb. 1985, at 14, 15.

47. See generally Green Paper, *supra* note 43.

48. 1985 O.J. (C303) 13, 14.

49. *Id.* at 16.

### 3. *The Council's Directive*

While television legislation was debated by European Community Member States, the French government, encouraged by the French television and film production industry, proposed quotas requiring 60% of programs to be of European origin to limit the amount of non-European programming broadcast in the European Community.<sup>50</sup>

Smaller Member States, such as Belgium and Denmark,<sup>51</sup> initially opposed a quota, presumably because the small size of their national audiences made it difficult for stations to recover the cost of locally-produced programs.<sup>52</sup> Because low television production capacity forces it to buy most of its programs from Brazil, Portugal also initially opposed the quota, though it ultimately voted in favor of the Directive.<sup>53</sup> Germany also opposed the quotas,<sup>54</sup> perhaps due to general interests in free trade and smooth relations between the United States and the European Community, but Germany also ultimately voted in favor of the Directive.

The European Council passed the Directive on October 3, 1989 by a vote of ten to two.<sup>55</sup> The Directive required Member States to comply with its terms no later than October 3, 1991.<sup>56</sup> The Directive was considered a compromise between strict quotas and no quotas at all because of its ambiguous wording.<sup>57</sup> Article 4 of the Directive requires that:

Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works . . . a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services.<sup>58</sup>

The quota applies only to hours of entertainment series and feature films, the programming most commonly imported into Europe from the United States. The programming to which the quota does not apply, news, sports

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50. Rone Tempest, *France Wants to Slam Europe's Open Door to U.S. TV*, L.A. TIMES, Apr. 12, 1989, pt. VI, at 1.

51. Belgium imported 29% and Denmark 46% of total program hours broadcast in their countries in 1983. See Varis, *supra* note 24, at 144-45. As is the case with Portugal, the percentage of imported entertainment programs is considerably higher than the overall percentage of imported programs. See *id.* at 148.

52. See Steven Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1, D20.

53. See Buddy, *supra* note 13, at 57.

54. See William Dawkins, *EC Agrees To Rules For Cross-Border Television*, FINANCIAL TIMES, Apr. 14, 1989, at 2, col. 3, discussed in Schwarz, *supra* note 22, at 353.

55. Belgium and Denmark were the two Member States opposing the directive.

56. Directive, *supra* note 2, art. 25, at 30.

57. Directive, *supra* note 2, at 26-27. The Directive also requires free re-transmission rights, freedom of reception, minimum advertising standards, and a basic right to reply. See generally Rebecca Wallace & David Goldberg, *Television Broadcasting: The Community Response*, 26 COMMON MKT. L. REV. 717 (1989). For a detailed discussion of the Directive's definition of what constitutes a European program, see Moebes, *supra* note 16, at 8-13.

58. Directive, *supra* note 2, art. 4(1), at 26. Article 4(2) provides that "[w]here the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned." *Id.*

events, and games, is the programming most commonly produced locally.<sup>59</sup> A quota on total airtime would have posed less of a threat to U.S. television sales in Europe than does the directives' quota on entertainment and feature film programs.

#### 4. *The U.S. Response to the Directive*

The U.S. government was quick to criticize the European program quota in Article 4 of the Council's Directive. Ambassador Carla Hills, the United States Trade Representative, issued a press release calling the Directive "an obviously protectionist initiative."<sup>60</sup> Hills added that the directive was "inconsistent with the Community's obligations not to discriminate against foreign products . . . under the GATT."<sup>61</sup>

The U.S. House of Representatives passed a resolution on October 23, 1989, decrying the local content quota as a violation of the General Agreement.<sup>62</sup> Congressman Richardson claimed that "the European Community voted to limit one of our fastest growing and most successful exports."<sup>63</sup> Congressman Gibbons, in urging the European Community to withdraw the Directive, stated that "local content requirements are thinly disguised protectionist actions which the U.S. Congress will not stand for."<sup>64</sup>

In response to the Directive and an earlier European television agreement,<sup>65</sup> the U.S. Trade Representative filed a formal complaint with the GATT requesting consultations with the European Community<sup>66</sup> and threatened to take retaliatory action against European Community exports if quotas were adopted.<sup>67</sup> The European Council was uncooperative in schedul-

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59. Popular news programs cater to local interest. Sports programs feature local teams and athletes, and game shows test the cultural knowledge specific to the contestant and viewer. Therefore, these programs are particularly unlikely to be acquired from foreign producers. See Tempest, *supra* note 50, pt. VI, at 1. According to a United Nations study done in 1983, 53% of European entertainment programming was imported. Varis, *supra* note 24, at 150.

60. No. 56, OFFICE OF THE U.S. TRADE REPRESENTATIVE, PRESS RELEASE STATEMENT BY AMBASSADOR CARLA A. HILLS, at 2 (Oct. 10, 1989) (photocopy on file with INT'L TAX & BUS. L.).

61. *Id.* at 3.

62. 135 CONG. REC. H7326-27 (daily ed. Oct. 23, 1989) ("Resolved, that the House of Representatives denounces the action taken October 3, 1989, by the European Community Council of Ministers in adopting a broadcasting directive that is trade restrictive and in violation of the GATT").

63. *Id.* at H7326.

64. *Id.* at H7327.

65. Convention on Transfrontier Television, May 5, 1989, art. XXII, Europ. T.S. No. 132 (1989). (The Convention, which was signed by several states not in the European Community, also included a local content requirement).

66. See *U.S. Requests Consultations on EC TV Broadcast Directive*, GATT FOCUS, Nov. 1989, at 3; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1992 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 71 (1991) [hereinafter 1992 NATIONAL TRADE ESTIMATE REPORT].

67. See 1992 NATIONAL TRADE ESTIMATE REPORT, *supra* note 66, at 71. See also *Hub-bub Intensifies; Congress Lashes Out At European TV Content Restrictions*, COMM. DAILY, Oct. 13, 1989, at 1 (discussing the recommendation of the House of Representatives' Trade Subcom-

ing initial GATT consultations, claiming that since television broadcasting was a service and not a good, it was not covered under the General Agreement.<sup>68</sup> Many European politicians argued that limiting the importation of U.S. programs was necessary to protect European "cultural identity."<sup>69</sup> The president of the European Commission posed the rhetorical question, "Have we a right to exist, to perpetuate our traditions?"<sup>70</sup>

The first consultation failed to settle the dispute. Accepted GATT procedure allows the United States or the European Community to request a second consultation or demand the formation of a GATT panel to decide the dispute.<sup>71</sup>

### 5. Member State Legislation

Under the Directive, Member States were required to enact national legislation reflecting the Directive's European program quota by October 3, 1991.<sup>72</sup>

In response to the Directive, France strictly interpreted its existing European program requirement.<sup>73</sup> Reflecting a judicial interpretation of France's prior European content law,<sup>74</sup> a 1990 government decree required that sixty percent of all programs broadcast between six p.m. and eleven p.m. be produced in a European Community state.<sup>75</sup> Indicating the government's intent to enforce the quota, the Ministry of Culture and Communication fined a station \$10 million in 1989 for broadcasting too many foreign programs.<sup>76</sup>

In the United Kingdom, the 1990 Broadcasting Act, which privatized ownership of broadcast stations, mandated that a "proper proportion" of programs broadcast by licensees be of European origin.<sup>77</sup> The Independent Television Commission, which governs regional television licensing, has issued

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mittee to the Bush Administration to take retaliatory action against the European Community under Section 301 of the 1974 Trade Act).

68. See *U.S. Requests Consultations*, *supra* note 66, at 3 ("[The Council] expressed serious doubts about the relevance of the U.S. complaint to the General Agreement as, in its view, broadcasting is essentially a service.") For a discussion of the difference between a good and a service under the General Agreement see text accompanying notes 179-85.

69. See Greenhouse, *supra* note 52, at D20.

70. See *id.* at D20, (quoting Jacques Delors, President of the European Commission).

71. General Agreement, *supra* note 4, arts. 22, 23, 61(5) Stat. at A64-A65, 55 U.N.T.S. 266-67. See generally JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 171-87 (1969).

72. Directive, *supra* note 2, at 30.

73. Loi no. 86-1067 du 30 Septembre 1986 relative à la liberté de communication [Freedom of Communication Act], 1986 A.L.D. 492.

74. The French court ruled that although there is no provision on when European-produced programs must be broadcast during a given day, their broadcast cannot be restricted to early morning hours when the audience is negligible. Judgment of Jan 20, 1989 (CNCL v. S.A. TFI), 1989 D.S. Jur., at 104.

75. See *USTR Hills Blasts France For 'Restrictive' Implementation of EC Television Directive*, 7 INT'L TRADE REP. 303 (1990).

76. See *Buddy*, *supra* note 13, at 57.

77. The Broadcasting Act of 1990 does not define "proper proportion" or "European origin." Definition of terms and specific policy issues was left to subsequent legislation. See 1992 NATIONAL TRADE ESTIMATE REPORT, *supra* note 66, at 250. The Broadcasting Act of 1990

guidelines that define proper proportion as not less than seventy-five percent of all programming.<sup>78</sup> The British Broadcasting Corporation, though not regulated by the Independent Television Commission, follows similar though less specific "proper proportion" guidelines.<sup>79</sup>

Italy made its existing local program requirement slightly more restrictive in order to comply with the Directive. Pursuant to a 1984 law, the government had previously required television stations to broadcast forty percent European programs.<sup>80</sup> The new law, which became effective in 1991, provides that for three years, forty percent of the broadcast time for feature films on television must be reserved for European works.<sup>81</sup> By 1994, the percentage for European works must rise to fifty-one percent. In 1988, Spain adopted a television law which requires that fifty-five percent of programs and forty percent of feature films broadcast locally be of European origin.<sup>82</sup>

Portugal has no specific local content requirement but has a quota requiring the broadcast of "cultural" programs which have educational value, improve the public's knowledge of Portugal, and promote progress toward a democratic society.<sup>83</sup> A U.S. industry report states that the quota is not enforced because there is not sufficient local programming to fill the quota.<sup>84</sup> Brazil, the source of most of Portugal's programs, would be harmed by a strictly defined European-content quota, while it has not necessarily been affected by Portugal's current "cultural" quota.

To comply with the Directive, other Member States will be required to enact legislation which conflicts with existing domestic law. The Netherlands currently grants broad freedom to stations in determining the origin and content of programs.<sup>85</sup> Germany's broadcasting law does not limit the broadcast of foreign programs.<sup>86</sup> Since both the Netherlands and Germany voted in favor of the directive, they either support the European content requirement and will pass the requisite legislation in the future or believe that the phrase

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only applies to British broadcasters, and therefore, may not apply to cable systems and satellite signals transmitted to British viewers from outside the U.K.

78. See MOTION PICTURE EXPORT ASSOCIATION OF AMERICA, INC., TRADE BARRIERS TO EXPORTS OF U.S. FILMED ENTERTAINMENT: A REPORT TO THE UNITED STATES TRADE REPRESENTATIVE 109 (1991) [hereinafter MPEAA, TRADE BARRIERS]. The section of the MPEAA's report on the United Kingdom concludes that "the British are moving to enshrine the most severe TV quota in Europe, if not the world, in these new regulations." *Id.* at 110.

79. *Id.*

80. See Broadcasting Decree-Law 807 of Dec. 6, 1984 (entered into force Feb. 8, 1985), 34 Gazz. Uff. 986.

81. See MPEAA, TRADE BARRIERS, *supra* note 78, at 63.

82. See *id.* at 95 (Spanish law regulating television passed in April, 1988).

83. See Broadcasting Act (Law 75/79) of Nov. 29, 1979 (entered into force Jan. 28, 1980), 291 Bol. Min. Iust. (Leg. Suppl.) 7, §§ 2-3.

84. See MPEAA, TRADE BARRIERS, *supra* note 78, at 89.

85. See The Broadcasting Act (Amendment) Acts Commencement Decree, Jan. 22, 1980, reprinted in 8 Eur. L. Dig. 396 (1980).

86. See Interprovincial Broadcasting Treaty of Apr. 3, 1987 (entered into force Dec. 1, 1987), ARD Jahrbuch, Dokumente 403.

“where practicable” in Article 4 of the Directive will not require their governments to impose a quota on local stations.

As noted, the Directive required Member States to have European program quotas in place by October 3, 1991.<sup>87</sup> States that have not yet done so could be forced to comply if the European Community, another Member State, or a private party successfully sued the government for failing to comply with the Directive.<sup>88</sup>

### III.

#### GENERAL AGREEMENT ON TARIFFS AND TRADE

The original General Agreement and its subsequent periodic amendments and modifications<sup>89</sup> set out rules for conducting international trade. The GATT serves as a forum for trade negotiations and the settlement of trade disputes.<sup>90</sup> The GATT's 105 Contracting Parties conduct the vast majority of all world trade.<sup>91</sup>

To preserve its rights under the General Agreement, the United States could allege before a GATT dispute resolution panel that the European Community Directive's local program quota violates the General Agreement. Although the issue of trade in television programs has been raised in the Uruguay Round,<sup>92</sup> the United States would be well advised to raise the issue before a GATT panel rather than negotiate the issue in the Uruguay Round. First, it is unclear whether the present talks will be completed in the near future.<sup>93</sup> A dispute panel would resolve the issue more quickly.<sup>94</sup> Second, the Uruguay Round is unlikely to liberalize trade in television programs, as proposed drafts of the services agreement have allowed a broad cultural exception or have included an annex on audio-visual products which allows discrimination in that sector.<sup>95</sup> Third, as seen by the U.S. acquiescence to a cultural exception in the U.S.-Canada Free Trade Agreement, U.S. negotiators are willing to accept agreements allowing restrictions on trade in televi-

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87. Directive, *supra* note 2, at 30.

88. See *infra* text accompanying notes 182-84.

89. The original treaty has been amended through agreements reached in periodic negotiating rounds, the latest being the Uruguay Round, commenced in 1988.

90. See SIDNEY GOLT, *THE GATT NEGOTIATIONS 1986-1990: ORIGINS, ISSUES, AND PROSPECTS* 2 (1988).

91. See John Eckhouse, *Clinton Expected to Be Tough on Trade*, *S.F. CHRON.*, Nov. 6, 1992, at B1, B3.

92. See 1992 NATIONAL TRADE ESTIMATE REPORT, *supra* note 66, at 71. See also *Negotiations Intensify As Groups Get Down to Detailed Drafting*, in *NEWS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS*, (GATT Information and Media Relations Division) (Oct. 9, 1990) NUR 041, 11-12 [hereinafter *NEWS OF THE URUGUAY ROUND*].

93. See Keith Bradshaw, *Talks Fail: Trade War is Feared*, *N.Y. TIMES*, Nov. 4, 1992, at C1 (the election of Bill Clinton will likely delay world trade talks as Clinton appoints new trade officials and reviews negotiating positions held by the Bush Administration). See also Keith Bradshaw, *U.S. Hope Dashed On Global Trade*, *N.Y. TIMES*, Oct. 22, 1992, at A1.

94. But see Eckhouse, *supra* note 91, at B1 (Clinton will encourage concluding GATT's current round of negotiations).

95. *NEWS OF THE URUGUAY ROUND*, *supra* note 92, at 11-12.

sion programs.<sup>96</sup> Fourth, as indicated below, the United States has a strong case to present to a GATT dispute resolution panel.

### A. The History of the GATT Agreement

#### 1. Rationale for Free Trade

The original signatories to the General Agreement were united in their belief that restricting free trade was harmful and that liberal trade rules facilitated the productive and efficient use of global resources.<sup>97</sup>

Free trade policies reduce the price local consumers pay for goods.<sup>98</sup> While consumers will continue to purchase efficiently produced, inexpensive local goods, they will not be forced to purchase inefficiently produced, expensive local goods. With free trade, rather than paying too much for inefficiently produced local goods, consumers can instead purchase cheaper goods imported from a country which produces them efficiently.<sup>99</sup>

The loss of sales in the inefficient local industry eventually benefits the local economy. When the inefficient industry fails, resources are reallocated from the failed industry to more efficient and productive industries.<sup>100</sup> Certain local industries lose in the short term, but over time, the local economy benefits from this resource reallocation through increased efficiency.<sup>101</sup>

One argument for limiting free trade is the concern about potential unemployment.<sup>102</sup> In the case of television programs, free trade has been opposed by those people threatened by lower demand for local programs: local television producers, directors and actors. However, unemployment caused by free trade is typically temporary and new jobs are created when the failed industry's resources are reallocated to a different industry. Also, providing an industry protection to avoid the loss of jobs establishes incentives for the

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96. UNITED STATES-CANADA FREE-TRADE AGREEMENT, H.R. DOC. NO. 216, 100th Cong., 2d Sess., arts. 2005, 2012 at 533-34, 538 (1988). For discussion, see Schwarz *supra* note 22, at 360-61.

97. See ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 5-6 (1975). See also UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON ARRANGEMENTS FOR CONSULTATION WITH NON-GOVERNMENTAL ORGANIZATIONS, A CHARTER FOR WORLD TRADE; REPORT OF THE COUNCIL OF THE INTERNATIONAL CHAMBER OF COMMERCE TO THE HAVANA TRADE AND EMPLOYMENT CONFERENCE 5, U.N. Doc. E/C.2/66 (1947).

98. See PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 214-15 (2d ed. 1991). See also RICHARD BLACKHURST, ET AL., TRADE LIBERALIZATION PROTECTIONISM AND INTERDEPENDENCE 24 (1977).

99. BLACKHURST ET AL., *supra* note 98, at 24-25.

100. *Id.* at 25.

101. *Id.*

102. See *id.* at 30-31 (employees of import-competing sectors of the economy may oppose trade liberalism). See generally WARNER M. CORDEN, TRADE POLICY AND ECONOMIC WELFARE 119-21 (1974).

industry to remain inefficient and uncompetitive. The costs of unemployment are likely to be much lower than the costs of long term industry protection.<sup>103</sup>

A second argument against free trade is that a free-trading state can become dependent on imported goods as it loses its domestic capacity to produce certain important goods.<sup>104</sup> In the case of television programs, states might oppose free trade if they fear that increased importation of foreign programs, and the concurrent loss of local production capacity would weaken the country. Dependence on foreign goods is considered most threatening when the import is a necessity, such as food staples or defensive weapons, and in turbulent times, when a state's security is uncertain and foreign supplies may not be available.<sup>105</sup> When free trade is consistently practiced, as it has been in large part since the end of World War II, and military threats are limited, resources are easily exchanged and the threat of dependence is minimal.

A corollary to the dependency argument is that free trade can destroy a national way of life.<sup>106</sup> Governments might want to preserve this national way of life when the market does not accurately take into account its actual value. Some culturally desirable economic activities are economically inefficient. Since without government protection imported substitutes will replace the culturally desirable activity or product,<sup>107</sup> governments may protect a culturally beneficial activity, such as television production, if the market fails to recognize the activity's benefit.<sup>108</sup>

## 2. History of GATT

Since protectionist trade policies had restricted trade and contributed to the world economic system's collapse in the 1920s and 1930s, major countries met in Havana to draft the charter of the International Trade Organization ("ITO").<sup>109</sup> As the assembled states could not quickly agree upon an ITO

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103. See Doreen Brown, *Trade Relations and the Interests of Consumers*, in CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS 129 (Seymour Rubin & Mark Jones eds., 1989). See also KRUGMAN & OBSTFELD, *supra* note 98, at 221 (for example, direct subsidies to retain employment levels in auto industry would be less costly than a quota on auto imports, but harder to achieve in the domestic political environment).

104. BLACKHURST ET AL., *supra* note 98, at 38.

105. See *id.* at 38, 40.

106. *Id.* at 40.

107. See *id.* (suggesting that protection is justified if there is national consensus for preserving the cultural activity and accepting the loss in national income it creates).

108. See KRUGMAN & OBSTFELD, *supra* note 98, at 218 (if the production of a good yields a social benefit that firms cannot capture and therefore do not take into account when deciding how much to produce, this marginal social benefit can justify a government's protective trade policy).

109. See ARTHUR DUNKEL, TRADE POLICIES FOR A BETTER FUTURE: THE LEUTWILER REPORT, THE GATT AND THE URUGUAY ROUND 157 (1987); John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207 (1989). The Havana meetings followed the 1944 discussions between the U.S. and Great Britain at Bretton Woods, New Hampshire. The Bretton Woods talks addressed post-war international trade cooperation. Two institutions to promote free trade and economic growth were proposed: the International Mone-

Charter, they instead signed the General Agreement on Tariffs and Trade as a temporary expression of free trade principles and established the GATT as a temporary, informal body for resolving trade disputes.<sup>110</sup> The General Agreement, which was to be absorbed by the ITO once the ITO charter was ratified,<sup>111</sup> was signed on October 30, 1947.<sup>112</sup> Support for the ITO quickly disintegrated when the United States chose not to ratify the ITO,<sup>113</sup> but the General Agreement and GATT survive as the legacy of the ITO's broad structure for world trade.

### B. GATT Dispute Resolution

Since GATT was originally viewed as a temporary organization to exist only until the ITO was established,<sup>114</sup> dispute resolution procedures were designed primarily to minimize ill-will between Contracting Parties and were not well thought out.<sup>115</sup> In response to increasing dissatisfaction with these procedures, GATT Member States have committed themselves to strengthening enforcement of GATT dispute panel decisions.<sup>116</sup>

Under the General Agreement, a Contracting Party which alleges a discriminatory practice by another country must first request either bilateral general consultations<sup>117</sup> or other, more advanced consultations<sup>118</sup> with the discriminating party. If the consultations are unsuccessful, either party to the dispute can request a panel of independent experts to review the matter and report its findings to the GATT's Council of Representatives.<sup>119</sup> If the Council unanimously decides to adopt the report, the complaining party can "sus-

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tary Fund ("IMF") and the International Trade Organization ("ITO"). See HUDEC, *supra* note 97, at 10, 19.

110. HUDEC, *supra* note 97, at 46.

111. *Id.* at 44.

112. DUNKEL, *supra* note 109, at 158; HUDEC, *supra* note 97, at 45 (twenty-three governments signed the Agreement on October 30, 1947).

113. The drafters intended the ITO to govern international investment rules, fair labor standards, commodity arrangements, and modernization policy for less-developed states. But disagreement over details of the comprehensive agreement plagued subsequent drafting sessions. The drafters suggested 602 amendments, leaving all signing parties dissatisfied with some aspect of its final form. See DUNKEL, *supra* note 109, at 158-60. See also HUDEC, *supra* note 97, at 53.

114. ITO dispute settlement included provisions on binding arbitration and appeal to the International Court of Justice, which were not included in the General Agreement. CALIFORNIA COUNCIL FOR INTERNATIONAL TRADE AND THE CALIFORNIA STATE WORLD TRADE COMMISSION, THE GATT AND THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 1, 18 (1987).

115. HUDEC, *supra* note 97, at 46. See also GOLT, *supra* note 90, at 2 (dispute resolution occurs primarily through negotiation); DUNKEL, *supra* note 109, at 169 (early GATT dispute settlement was done flexibly and pragmatically).

116. See Gary N. Horlick et al., *Institutional Structure for Dispute Resolution in the GATT, in CONFLICT AND RESOLUTION IN US-EC TRADE REGULATIONS*, *supra* note 103, at 97.

117. General Agreement, *supra* note 4, art. 22, (61)5 Stat. at A64, 55 U.N.T.S. 266.

118. General Agreement, *supra* note 4, art. 23(2), 61(5) Stat. at A64-A65, 55 U.N.T.S. at 268. (Article XXIII consultations can include participation of other Contracting Parties).

119. General Agreement, *supra* note 4, art. 23(2), 61(5) Stat. A64-A65, 55 U.N.T.S. at 268.

pend concessions to," or retaliate against, the discriminating country until the discriminatory practice is stopped.<sup>120</sup>

In practice, GATT dispute resolution has not always operated smoothly. The consensual nature of dispute resolution under the General Agreement allows uncooperative parties to delay and obstruct proceedings that challenge their trade policies,<sup>121</sup> resulting in disputes which take many years to settle.<sup>122</sup>

In response to these problems, the Contracting Parties proposed objectives for dispute resolution reform at the outset of the Uruguay Round<sup>123</sup> and soon thereafter adopted interim rules for dispute resolution.<sup>124</sup> To limit delays in deciding disputes, the interim rules require formal GATT panel decisions to be completed in fifteen months. However, no interim rules were adopted on the veto of panel decisions by the losing party.<sup>125</sup> Further rules could be adopted when the Uruguay Round negotiations conclude.

When analyzing disputes arising under the General Agreement, it is critical to remember that in addition to GATT's legal character, created by the specificity of its rules and the obligations they impose, GATT is also a forum for negotiating solutions to trade disputes which satisfy Contracting Parties' political goals.<sup>126</sup> Political considerations rather than legal ones may dictate a Contracting Party's decision to raise the complaint and may influence whether or not the party complies with a GATT dispute panel's finding.<sup>127</sup> As a leading commentator noted, "It is very difficult to ascertain where dispute settlement [in GATT] leaves off and either trade bargaining or policy formulation begins."<sup>128</sup> Therefore, in the legal analysis that follows it is important to acknowledge that other trade disputes or political tensions may have an impact on the outcome of the present dispute.

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120. *Id.*

121. See Kevin M. Harris, Note, *The Post-Tokyo Round GATT Role in International Trade Dispute Settlement*, 1 INT'L TAX & BUS. L. 142, 149 (1983).

122. *Id.* at 151 (EEC complaint that U.S. tax incentives to exporters violated the General Agreement was initiated in 1973 and decided in 1981).

123. *Ministerial Declaration on the Uruguay Round*, reprinted in GATT BISD, 33d Supp., at 19 (1986).

124. See *Record of Mid-Term Report of the Trade Negotiations Committee*, at 24-31, GATT Doc. MTN.TNC/11 (Apr. 21, 1989).

125. See THE ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS (ACTPN), A REPORT TO THE U.S. CONGRESS CONCERNING THE PRESIDENT'S REQUEST FOR THE EXTENSION OF FAST-TRACK PROCEDURES IMPLEMENTING LEGISLATION FOR TRADE AGREEMENTS 52 (1991).

126. See JACKSON, *supra* note 71, at 760-63.

127. For a general discussion of both the legal and the political nature of GATT, see Meinhard Hilf, *Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 285, 299-301 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 2d ed. 1991).

128. JACKSON, *supra* note 71, at 166.

### C. The General Agreement

The General Agreement reflects its drafters' basic belief that free world trade will benefit national economies, but that individual nations should not surrender the right to implement some protective measures to temporarily protect domestic industries.<sup>129</sup> The General Agreement only applies to government action<sup>130</sup> and primarily governs trade in goods, since efforts to extend its applicability to all trade including services have not yet been successful.<sup>131</sup>

The two General Agreement provisions most relevant to a GATT dispute panel's determination of a U.S. complaint against the European Community's Directive are Article III, the national treatment requirement, and Article IV, the exception to national treatment granted to governments imposing quotas on the proportion of foreign films shown in local movie theaters.

#### 1. National Treatment

The national treatment provision in Article III requires that a Contracting Party's internal taxes and regulations cannot discriminate against foreign products once they enter local commerce.<sup>132</sup> The national treatment principle can be traced to treaties entered into centuries ago,<sup>133</sup> and was in-

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129. See Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397, 421 (1983) ("GATT rules should be considered as a legal definition of the national long-term interests of contracting parties in increasing their national welfare through the gains from trade yet without giving up their freedom to maintain trade protection.").

130. Actions by private parties, though discriminatory, are not addressed by the General Agreement and complaints of a private party's acts will not be heard by GATT dispute panels. See JACKSON, *supra* note 71, at 289-90.

131. When the Havana Charter was drafted, trade in services represented only a small portion of total international trade. Now that services represent approximately 25% of international trade, and discriminatory policies limit free trade in services, service-exporting countries have pressed for an agreement on free trade in services. See generally Richard R. Rivers et al., *Putting Services on the Table: The New GATT Round*, 23 STAN. J. INT'L L. 13, 14 (1987). The United States first formally introduced the idea through a proposal to the Tokyo Round of multilateral agreements. See Marianna Maffucci, Note, *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 FORDHAM INT'L L. J. 371, 394 (1982).

132. Article III(2) requires that, "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use." General Agreement, *supra* note 4, art. 3(2), 61(5) Stat. at A18, 55 U.N.T.S. at 206.

133. See PIETER VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 16-21 (1981).

cluded in the original draft of the ITO Charter in Havana.<sup>134</sup> GATT Contracting Parties have frequently alleged national treatment violations.<sup>135</sup>

National treatment is distinguishable from the most-favored-nation requirement of General Agreement, because most-favored-nation treatment requires equal treatment of all foreign goods but allows protection of local goods, while national treatment requires equal treatment of local and foreign goods.<sup>136</sup> A second distinction between the two is that most-favored-nation treatment prohibits discrimination at the border, limiting larger customs tariffs on certain countries than on others, while national treatment prohibits discrimination inside the border, limiting taxes or regulations which favor local goods over imported goods.<sup>137</sup>

The United Kingdom made the first national treatment challenge in GATT, alleging that an Italian regulation requiring banks to make more favorable loans to farmers purchasing Italian-made tractors resulted in discrimination against foreign-made tractors.<sup>138</sup> A GATT panel decided that the Italian policy unfairly encouraged purchases of Italian tractors while discouraging purchases of foreign tractors. The decision illustrated GATT's broad view of national treatment: even though the Italian regulation was not directed at foreign products, since it indirectly favored Italian tractors, it violated the national treatment provision.<sup>139</sup>

Other national treatment decisions have established that the national treatment provision can be violated even when the foreign producer has not been harmed by the discriminatory regulation.<sup>140</sup> This is illustrated by a GATT dispute panel's decision regarding an European Community regulation which discriminated against animal feed imports from outside the Community. In response to U.S. complaints of national treatment violations, the European Community argued that after implementing the regulation, U.S. animal feed exports had not declined.<sup>141</sup> This argument was rejected by a

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134. See JACKSON, *supra* note 71, at 273; EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES, AND THE EUROPEAN COMMUNITY* 242 (2d ed. 1986).

135. Thirty-one of 233 GATT disputes have been over national treatment. MCGOVERN, *supra* note 134, at 208 n.8. For a thorough discussion of early national treatment disputes, see HUDEC, *supra* note 97.

136. See JACKSON, *supra* note 71, at 273; MCGOVERN, *supra* note 134, at 242.

137. See MCGOVERN, *supra* note 134, at 246 (distinguishing between border and internal discrimination).

138. *Italian Discrimination Against Imported Agricultural Machinery*, GATT Doc. L/833 (Oct. 23, 1958), reprinted in GATT BISD, 7th Supp., at 60 (1959). See MCGOVERN, *supra* note 134, at 250.

139. *Italian Discrimination Against Imported Agricultural Machinery*, *supra* note 138, at 67. One author points to the word "affecting" in Art. III as a symbol of the broad variety of government action that might violate the principle of national treatment. JACKSON, *supra* note 71, at 288.

140. *EEC-Measures on Animal Feed Proteins*, GATT Doc. L/4599 (March 14, 1978), reprinted in GATT BISD, 25th Supp., at 49 (1979).

141. See MCGOVERN, *supra* note 134, at 247.

GATT dispute panel, which held that because the regulation discriminated on its face, discrimination in fact need not be proven.<sup>142</sup>

The General Agreement specifies certain exceptions to the national treatment obligation. A Contracting Party need not accord a foreign good national treatment if this would threaten national security.<sup>143</sup> Governments need not observe national treatment requirements when engaged in procurement.<sup>144</sup> Finally, most relevant to trade in television programs, Contracting Parties will not have violated the national treatment provision when they adopt quotas requiring that theaters show locally produced films.<sup>145</sup>

## 2. The Cinema Exception

Article IV stands in contrast to Article III's national treatment requirement by allowing governments to enforce "screen quotas" which restrict the percentage of foreign-made cinema shown by domestic movie theaters in a given year.<sup>146</sup> Under Article IV, the only permissible method of regulating foreign films is through screen quotas.<sup>147</sup> The General Agreement does not specifically address trade in television programs, perhaps because the industry was insignificant at the time the Agreement was signed.

Cinema quotas have not been challenged in GATT since the early 1960s,<sup>148</sup> when GATT allowed a New Zealand quota on the percentage of foreign-produced films that could be rented by New Zealand movie theaters.<sup>149</sup> Though Article IV's text referred to quotas on the showing of films, the GATT panel considered the New Zealand quota to be equivalent in effect. This is the only GATT panel decision interpreting Article IV.

In 1961, the United States questioned whether the cinema exception applied to television programs. While the United States did not believe that

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142. A 1981 GATT decision revisited the issue when reviewing a Spanish quota on the sale of foreign soyabean oil which protected domestic olive oil producers. Although the regulation was discriminatory on its face, it was permitted since it had not reduced U.S. exports. *Report of Panel on Spanish Measures Concerning Domestic Sale of Soyabean Oil*, GATT Doc. L/5142 (1981). But after GATT Contracting Parties criticized the result, the Council merely "noted" the decision rather than adopting it. GATT Doc. L/5245 (1981). Given that the soyabean oil decision was not adopted, the Animal Feed decision apparently reflects GATT law regarding national treatment more accurately than the soyabean oil decision. See also MCGOVERN, *supra* note 134, at 247.

143. General Agreement, *supra* note 4, art. 11, 61(5) Stat. at A32-A34, 55 U.N.T.S. at 224-28.

144. General Agreement, *supra* note 4, art. 17(2), 61(5) Stat. at A53, 55 U.N.T.S. at 252.

145. General Agreement, *supra* note 4, art. 4, 61(5) Stat. at A20, 55 U.N.T.S. at 208.

146. Art. IV(a) provides that "screen quotas may require the exhibition of cinematographic films of national origin during a specified minimum proportion of the minimum screen time actually utilized," and that "screen quotas shall be subject to negotiation for their limitation, liberalization, or elimination." General Agreement, *supra* note 4, art. 4(a), 61(5) Stat. at A20, 55 U.N.T.S. at 208.

147. See Honore M. Catudal, *The General Agreement on Tariffs and Trade: An Article in Layman's Language*, 44 U.S. DEPT. OF ST. BULL. 1010, 1015 (June 26, 1961).

148. See JACKSON, *supra* note 71, at 294.

149. *Id.* at 293-94 n.2.

Article IV's exception should be extended to television programs,<sup>150</sup> it proposed a vague resolution that "a reasonable proportion of favourable viewing time" on domestic television stations be reserved for foreign programs.<sup>151</sup> The resolution was not adopted.

At the request of the United States, a GATT working party was formed in 1962 to determine whether the General Agreement's provisions applied to trade in television programs. The French and other delegations argued that television bore more of a resemblance to a service than to a good, and doubted whether the General Agreement applied to trade disputes over television programs.<sup>152</sup> Other members of the working party argued that because television programs were so similar to films, Article IV should be applied to television programs.<sup>153</sup> The working party reached no conclusion and the Contracting Parties took no final action.<sup>154</sup> Though the U.S. representatives to GATT raised the issue two more times, later in 1962 and again in 1964, a second working group was never formed nor was any further action taken.<sup>155</sup>

Since GATT has so rarely addressed the cinema exception, especially in recent years, it is helpful to review the intent of the drafters of the General Agreement with respect to Article IV. Why did the drafters single out films as a good countries could discriminate against, while not providing similar exceptions for analogous goods of cultural importance?<sup>156</sup>

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150. *Application of GATT to International Trade in Television Programmes: Statement made by the United States Representative on 21 November 1961*, at 3, GATT Doc. L/1646 (Nov. 21, 1961) (The United States stated that "[w]e do not think, for example, that it would be adequate simply to interpret Article IV as covering television programmes.") (photocopy on file with INT'L TAX & BUS. L.).

151. "The United States feels that, whether the solution should be an adaptation of Article IV, whether it should take the form of a resolution of the Contracting Parties, or some other form, it should provide a reasonable proportion of favourable viewing time during which imported programmes would be permitted to compete with programmes produced by the domestic television industry." *Id.* at 3.

152. "It was contended by some delegations that in many respects television bore more resemblance to a service than to a trade in physical commodities. The representative of France considered that it seemed somewhat arbitrary to distinguish between live programmes and certain programmes which had been recorded for technical convenience." *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, at 2, GATT Doc. L/1646 (Nov. 21, 1961) (photocopy on file with INT'L TAX & BUS. L.).

153. "Any recommendation [of the working party] should take into account the obvious analogy between films which were covered by the provisions of Article IV and recorded television material. [Some working party members] considered that the problem should be solved by recognizing this analogy and by stating that the provisions of Article IV should be applied *mutatis mutandis*." *Id.* at 4.

154. "The Working Party felt that the importance and the number of questions involved were such that they could reach no final conclusion at this meeting." *Id.* at 5.

155. *See Revised United States Draft Recommendation*, GATT Doc. L/1908 (Nov. 10, 1962); *Proposal by the Government of the United States*, GATT Doc. L/2120 (Mar. 18, 1964).

156. At the time of the drafting of the General Agreement, television was not widespread enough to be considered a threat to the culture of individual Contracting Parties. Books, magazines, musical recordings, and radio programs were considered influential cultural media, but were not included in Article IV. Nearly half a century of technological improvement in the dissemination of cultural media is represented in the language of the 1988 U.S.-Canada Free

Movie theaters around the world, though primarily privately owned, have often been subject to strict government regulation. Governments have always recognized an interest in what their citizens watch.<sup>157</sup> At the time the General Agreement was drafted, it was commonly believed that films changed political attitudes and influenced individual behavior.<sup>158</sup> Propaganda films were used extensively in World War I and World War II to motivate soldiers and civilians to contribute to their country's war effort. On the other hand, feature films were thought to encourage viewers' reckless behavior.<sup>159</sup>

Hollywood began to corner the international film market in the 1920s by producing unsophisticated feature films with broad appeal, capturing the market share from European film-makers who saw film as an art form and paid less attention to popular taste and commercial success than did their California counterparts.<sup>160</sup>

Foreign governments, uncertain of the effects of U.S. films on their citizens and fearing that Hollywood's dominance of the world cinema market would soon make it all but impossible to develop local film industries, erected trade barriers against U.S. films. Typically, these restrictions did not prohibit the entry of films into the country, but instead restricted the percentage of U.S.-made films local movie theaters could show or required that theaters show a minimum percentage of local films.

In the 1940s France required theaters to show French films for five weeks during each three month period and allowed the government's film distribution agency to distribute no more than 121 U.S.-made films each year.<sup>161</sup> In a similar vein, a side letter to a 1938 trade agreement between the United States and Czechoslovakia exempted from the agreement's general

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Trade Agreement, in which cultural industries were defined as books, magazines, periodicals, newspapers, film, music, and video recordings, music in print or machine-readable form, and radio, television, cable, and satellite programs. UNITED STATES-CANADA FREE-TRADE AGREEMENT, H.R. DOC. NO. 216, art. 2005 at 533-34, art. 2012 at 538.

157. See Frank J. Coppa, *The Explosion of the Eye? An Introduction to the Promise and Problems of Television*, in SCREEN AND SOCIETY: THE IMPACT OF TELEVISION UPON ASPECTS OF CONTEMPORARY CIVILIZATION xiv-xv (Frank J. Coppa ed., 1979) (discussing state use of media content for political and ideological reasons).

158. See GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 102 (1986).

159. See generally GARTH S. JOWETT & JAMES M. LINTON, MOVIES AS MASS COMMUNICATION 73-75, 87-89 (1980). But see PAUL F. LAZARSFELD ET AL., THE PEOPLE'S CHOICE 166 (1948) (arguing that political propaganda merely reinforces pre-existing beliefs and is incapable of creating or changing beliefs).

160. See ANTHONY SMITH, THE GEOPOLITICS OF INFORMATION: HOW WESTERN CULTURE DOMINATES THE WORLD 41-42 (1980) (discussing the historical dominance of the American film industry in the international market).

161. Joint Declaration on Motion Pictures, Sept. 16, 1948, U.S.-Fr., 62 Stat. 3001. See also Office of the U.S. Trade Representative, Press Release No. 746 (Sept. 16, 1948) (photocopy on file with INT'L TAX & BUS. L.).

non-discrimination rules "the compulsory showing of films of Czechoslovak origin in Czechoslovak theaters."<sup>162</sup>

The cinema exception was included in early drafts of the ITO<sup>163</sup> reflecting that countries other than France and Czechoslovakia enforced, or at least contemplated, similar restrictive policies. One commentator claimed that protection of the cinema industry was included in the ITO drafts to avoid any radical or immediate change in established policy.<sup>164</sup> The United Kingdom, Norway, and Czechoslovakia vigorously advocated protection, arguing that the need to discriminate in the film market arose from the cultural importance of film.<sup>165</sup>

Despite the United States' arguments that the provision would allow governments to ration art and information and restrict viewer choice,<sup>166</sup> the cinema exception was included in all drafts of the Havana Charter. However, several commentators have argued that the narrowness of the exception represented a victory of sorts for the United States. While protection of other domestic cultural industries took many forms, Contracting Parties' discrimination against U.S. cultural products could only take the form of screen quotas.<sup>167</sup>

Governments that advocated including the cinema exception in the General Agreement were, to a limited extent, concerned with the health of their local film-making industries.<sup>168</sup> However, given Hollywood's economies of scale and dominance of the world market, it is unlikely that most countries seriously believed that their local film industries, once protected, would grow into important revenue producers and capture a lucrative share of the world motion picture market.

As the preceding historical analysis has argued, the root concern of advocates of Article IV was not to promote small local industries with limited growth potential, but was rather to curb the harmful effects of American cultural imperialism by limiting the quantity of American-made films that the citizens of Contracting Parties could watch in local theaters.<sup>169</sup>

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162. See Agreement on Motion Picture Films, May 18, 1938, U.S.-Czech., 52 Stat. 1517.

163. See WILLIAM A. BROWN, *THE UNITED STATES RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 443 (1950).

164. *Id.* at 189.

165. *Id.* at 110.

166. *Id.*

167. *Id.*

168. Both the French and the English, in establishing quotas in the 1940s, gave protection of infant industries and improvement of balance of payments as their reasons for film quotas. See Joint Declaration on Motion Pictures, *supra* note 161; See also John Webb, *British Attitude Toward Film Quotas*, 20 U.S. DEPT. OF ST. BULL. 825 (1949) (discussing reasons for quota requiring that British films make up 40% of screen-time).

169. Cf. SMITH, *supra* note 160, at 26, 41-43, 175-76 (discussing film and information-service imperialism in a global context).

#### IV.

#### THE TELEVISION DIRECTIVE AND GATT

The European Community, as a Contracting Party to GATT, has an obligation to follow the General Agreement. However, Community officials have put forth several reasons why the Directive's quota does not violate the GATT treaty: 1) the Directive is not a binding measure; 2) the General Agreement applies only to goods, and since exported television programs are services and not goods, the General Agreement does not apply; 3) the Directive does not violate the General Agreement's national treatment requirement; 4) the Directive is justified under Article IV of the General Agreement, the cinema exception; and 5) the Directive is justified by the General Agreement's national security exception.<sup>170</sup>

While the political atmosphere of GATT would affect whether the Contracting Parties would adopt a report that favored the United States, the political considerations would not affect a neutral GATT panel in analyzing the applicable law.<sup>171</sup> The following is an analysis of how a GATT dispute panel, comprised of independent expert panelists, should apply the General Agreement's rules to the United States' complaint.

##### *A. The European Community Must Abide by the General Agreement*

Since both the European Community and its Member States are bound by the General Agreement, the United States complaint against the quota could either challenge the European Community's Directive or challenge a single Member State's particularly restrictive and harmful national legislation. Since a single challenge of the European Community Directive would be more efficient and a favorable judgment would have a broader effect on all Member States, the United States would be advised to follow this avenue. However, if the United States sought to preserve better relations with the European Community as a whole, it could bring the case only against the States with the most restrictive national laws.

GATT law clearly establishes that the European Community is bound by the General Agreement. Article XXIV of the General Agreement allows customs unions of several states to be represented as a single GATT mem-

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170. Although the European Community has also alleged that the United States may be guilty of "dumping" programs in Europe, a determination of this would require the European Community to file a separate complaint alleging a violation of the Antidumping Code. However, even if the United States is violating the Antidumping Code, this would not justify the European quota since the only valid response to product dumping under the General Agreement is to apply a countervailing duty on the offending country's goods at the border. Resolution of a European dumping complaint would require resolution of many of the same issues discussed in this paper, including whether trade in television programs is governed by the General Agreement. For an explanation of why the United States has not violated the General Agreement's anti-dumping rules, see Colin Hoskins et al., *supra* note 33.

171. See Roy Denman, *Television Without Frontiers*, WASH. POST, Nov. 24, 1989, at A23 ("the prospect of a finding in the GATT in favor of the United States is about as likely as an outbreak of carnival spirit in Peoria on a rainy Sunday morning").

ber.<sup>172</sup> In 1969, when foreign trade decision-making power in Western Europe shifted from the individual states to the European Economic Community,<sup>173</sup> GATT ruled that the EEC was a customs union, and the EEC began acting as a single entity in GATT.<sup>174</sup>

The General Agreement is considered part of the European Community's law hierarchy,<sup>175</sup> ranking above such secondary Community rules as the European Council's regulations and directives and above national legislation of the individual Member States.<sup>176</sup> Therefore, while the European Community has an obligation not to violate GATT rules, the Community makes the initial determination of whether a law violates the General Agreement.<sup>177</sup> If a GATT dispute panel later decides the issue differently, the European Community would be bound by the GATT determination and not by its own earlier decision.

*B. The Binding Nature of the Television Directive is Irrelevant to its Validity under the General Agreement*

A European Community official, arguing that the European Community had not violated the General Agreement, said of the Directive, "[i]t's not a

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172. The customs unions' internal trade policies need not follow GATT principles, but their external policies must. Since the European Community is now a single contracting party in GATT, if one Member State discriminates against another Member State, the Community's internal policies apply, rather than the General Agreement. This is analogous to application of U.S. law rather than the General Agreement to a claim that Florida is discriminating against a New York product.

173. This does not imply that Member States do not influence European Community trade policy. Through representation in European Community institutions, Member States convey their interests. For a discussion of West German influence on European Community trade policy, see Frank D. Weiss, *Domestic Dimensions of the Uruguay Round: The Case of West Germany in the European Communities*, in *DOMESTIC TRADE POLITICS AND THE URUGUAY ROUND* 69 (Henry Nau ed., 1989).

174. The EEC participated in GATT administrative decisions, and negotiated specific GATT proposals. GATT formalized the EEC's membership after the EEC Member States presented their treaty to GATT, and GATT recognized the EEC as a customs union under Article XXIV of the General Agreement. See Petersmann, *supra* note 129, at 399. See *supra* note 3 for explanation of the consolidation of the three "communities" of Europe into the European Community.

175. Joined Cases 51-54/71, *International Fruit v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8158 (1971). Joined Cases 41-44/70, *International Fruit Co. v. Commission*, 1971 E.C.R. 421, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8142 (1971).

176. Cf. Petersmann, *supra* note 129, at 402. The European Community may be less willing to enforce an international rule when it would prefer to follow an immediate and substantial European Community interest.

177. *Id.* at 397-98. To ensure that the General Agreement is interpreted uniformly in each Member State, the Court of Justice of the European Communities decides GATT issues. When a case in national court requires GATT interpretation, the national court must request a "preliminary ruling" from the Court of Justice of the European Communities on the GATT issue before it can enter a final judgment. See Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA*, 1983 E.C.R. 801, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14002 (1983).

legal obligation. It's a political commitment."<sup>178</sup> A spokesperson for the Motion Picture Association of America responded, "if it is not binding, why was it passed in the first place?"<sup>179</sup> The European Community Directive is binding under European Community law. Furthermore, the binding nature of a Contracting Party's act is not a prerequisite to a GATT violation, since even a non-binding measure can violate the national treatment clause if it has a discriminatory effect.

The European Council may exercise its authority using any of four different types of actions: regulations, directives, opinions, and recommendations.<sup>180</sup> Regulations establish precisely uniform rules directly applicable to every Member State, and are supreme over existing or subsequent national law.<sup>181</sup> Directives are binding only as to their overall objectives.<sup>182</sup> Unlike regulations, directives allow for variation among the laws of Member States. Each Member State is required to enact legislation meeting the Directive's expressed goal and deadline for compliance. The European Council also approves Commission recommendations and issues informal opinions providing non-binding advice on issues of national policy.

The Court of Justice of the European Community has held that a directive is binding to the extent it requires a complete and precise legal obligation.<sup>183</sup> Another indication of the Directive's binding effect is that Member States or private parties can challenge whether any Member State's laws meet a directive's goals as soon as the stipulated date for compliance has passed.<sup>184</sup> A European producer or other interested party could sue a Member State in either a national court or the Court of Justice of the European Community for failure to comply with the Directive by its deadline.

Even if the European Community Directive is found to be non-binding, there are still sufficient grounds to find that the TV quota Directive violates the General Agreement. A GATT panel has held that violations of the national treatment clause require only a discriminatory effect caused by a GATT Contracting Party's regulation or requirement.<sup>185</sup> The same GATT

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178. Greenhouse, *supra* note 52, at D20 (quoting Commissioner of the European Commission). See also Fred Hift, *TV Trade War Heats Up*, CHRISTIAN SCI. MONITOR, Nov. 2, 1989, at 10. ("none of this is legally binding on the EEC members").

179. Jack Valenti, *Television With Manacles*, WASH. POST, Dec. 1, 1989, at A27.

180. EEC TREATY, *supra* note 1, art. 189.

181. FREESTONE & DAVIDSON, *supra* note 1, at 38.

182. *Id.* at 39-42.

183. See Case 33/70, SACE v. Italian Ministry of Fin., 1970 E.C.R. 1213, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8117 (1970) (In deciding a case involving an individual who sued the Italian government for failing to pass legislation adopting a European Community directive abolishing a customs duty, the Court of Justice of the European Communities determined that imprecise elements of directives do not bind a Member State.)

184. See Case 148/78, Public Prosecutor v. Ratti, 1979 E.C.R. 1629, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8569 (1979).

185. See *Canada: Administration of the Foreign Investment Review Act*, at para. 5.5, GATT Panel Report 30S/140 (1984) ("[T]he word requirements in Article III:4 should be interpreted as mandatory rules").

panel held that there need be no indication of injury to a foreign party, merely that the party's product received differential treatment from that accorded local products.<sup>186</sup>

Applying this precedent, a GATT dispute panel should hold that the National Treatment Clause has been violated where any GATT Contracting Party's regulation or requirement discriminates against other GATT Contracting Parties. Since France, the United Kingdom, Italy, and Spain have enacted television quotas in response to the Directive, discrimination is likely to be found, and therefore, the National Treatment Clause of the General Agreement has been violated.

### C. *Television Programs, When Traded, Are Goods*

When the United States filed its complaint with GATT alleging that the European television directive discriminated against American programs, one of the European Community's responses was that the General Agreement did not apply to the dispute because television was a service and not a good.<sup>187</sup>

While the European Community's argument that the GATT treaty only governs trade in goods is true as a general rule,<sup>188</sup> it is not without exception.<sup>189</sup> In 1982, the United States formally proposed expanding the General Agreement to govern trade in services.<sup>190</sup> After several GATT working groups considered the issue, it became apparent that developing countries largely opposed the change, making the change unlikely in the near future.<sup>191</sup> The limited progress in the Uruguay Round of negotiations makes consensus on a services agreement appear doubtful.<sup>192</sup>

The General Agreement's failure to define goods adequately and to distinguish them from services precludes a simple determination of whether a GATT panel would consider television programs as goods.<sup>193</sup> An understanding of the goods and services distinction must begin outside the language

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186. *Id.* at para. 5.9 (whether or not the discrimination affected a specific transaction is not an issue; the issue is whether the treatment was different).

187. Johnson, *supra* note 24, at 47.

188. See Shirley A. Coffield, *International Service - Trade Issues and the GATT*, in *MANAGING TRADE RELATIONS IN THE 1980s* 97 (Seymour J. Rubin & Thomas R. Graham eds., 1984) ("Historically, GATT has not considered services issues within its rubric.").

189. See Raymond J. Krommenacker, *Trade Related Services and GATT*, 13 J. OF WORLD TRADE L. 510, 510-15 (1979) (discussing the application of General Agreement rules to services such as transportation and transport insurance).

190. See GATT BISD, 29th Supp., at 21 (1983). For a discussion of major issues in a services agreement, see generally Symposium, *Prospects for a Multilateral Agreement on Services and Intellectual Property in the GATT Multilateral Trade Negotiations*, 19 GA. J. INT'L. COMP. L. 287 (1989).

191. See Christopher Bail, *Conceptual Problems and Possible Elements of a Multilateral Framework for International Trade In Services*, in *LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT* 42-43 (Giorgio Sacerdoti ed., 1990)

192. NEWS OF THE URUGUAY ROUND, *supra* note 92 (discussing divergent views on treatment of audio-visual services in a services agreement).

193. Having no clear definition of services has made discussion of adding services in the GATT Uruguay Round difficult. See Bail, *supra* note 191, at 44.

of the General Agreement. Three methods of distinguishing between goods and services are: 1) the traditional distinction used by economists; 2) the distinction based on the real value of the transaction; and 3) the distinction based on the form the item must take in a given transaction.

The following section will argue that only the third conception is appropriate in the instant case. To reflect the true character of transactions for the sale of television programs, and to remain consistent with prior GATT panel reports and the GATT-sponsored harmonized tariff scheme, a GATT panel should apply the necessary form test and find that television programs are goods.

### 1. Economists' Traditional Distinction

Economists typically distinguish goods from services on two grounds. First, goods are tangible products,<sup>194</sup> while services are intangible products.<sup>195</sup> Second, goods are storable, while services must be consumed as they are produced.<sup>196</sup>

These traditional definitions fail to distinguish a good from a service when the item traded combines elements of both goods and services, as in the case of a television program. A live theatrical performance is a service provided by the actor to the viewer. The performance is not a tangible product, nor is it storable; rather, it is consumed by the viewer as it is produced. A blank videocassette is a good since it is tangible and storable. However, a television program contains elements of both a service and a good. Does a theatrical performance become a good once it is recorded on videotape? Does a blank videotape become a service once it contains a performance? Economists' definitions of services and goods cannot clarify this ambiguity.

### 2. The Real Value Test

In the United States, courts asked to distinguish between services and goods for taxation purposes have based their determinations on the real value of the underlying transaction. Courts characterize transactions as sales of services when the real object sought by the buyer is a service.<sup>197</sup> A magnetic tape containing a mailing list was deemed a service,<sup>198</sup> as was magnetic tape

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194. Michael Cohen & Thomas Morante, *Elimination of Non-tariff Barriers to Trade: Recommendations for Future Negotiations*, 13 LAW & POL'Y INT'L BUS. 495, 498 (1981); Maffucci, *supra* note 131, at 377 n.38.

195. Cohen & Morante, *supra* note 194, at 498.

196. Jagdish Bhagwati, *Services*, in THE URUGUAY ROUND 207, 208 (J. Michael Finger & Andrzej Olechowski eds., 1987).

197. See *Accountants Computer Services, Inc. v. Kosydar*, 298 N.E.2d 519 (Ohio 1973) (discussing development of the real object test). See also *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1971) (applying an "essence of the transaction" test).

198. *Spencer Gifts v. Taxation Div. Dir.*, 440 A.2d 104, 118 (N.J. 1981) (court considered the tapes "only incidental" to the underlying transaction).

containing "intangible knowledge."<sup>199</sup> The printed copy of a cartoon purchased by a newspaper was also a service and not a good.<sup>200</sup>

This concept is reflected in broad descriptions of the service industry, such as that made by the Organization for Economic Cooperation and Development ("OECD") in its list of service businesses.<sup>201</sup> The valued output of service industries is considered a service. Since entertainment is considered a service industry, the valued output of those industries, such as television programs, would therefore be considered a service. When foreign television stations purchase a U.S. program, they typically purchase a license to broadcast the program a certain number of times in a specified territory over a specified length of time.<sup>202</sup> Applying real value analysis, a GATT panel would find programs a service, since what European broadcasters pay for is not the magnetic tape in a plastic case, but the right to broadcast the producer's performance.

Both the General Agreement and two GATT panels have rejected this approach. While the real value of a cinema film is the intangible information it contains, not the celluloid on which images are printed, Article IV considers film a good. Similarly, two GATT dispute panels have treated newspapers,<sup>203</sup> magazines,<sup>204</sup> and books as goods,<sup>205</sup> even though those items' real value is arguably the information they contain, not the tangible paper through which that information is by necessity conveyed. If a GATT dispute panel were to apply a real object test and concur with the European Community's argument that television programs are a service, the panel would hold contrary to GATT precedent.

### 3. *The Necessary Form in the Transaction*

Under the third conception of the goods and services distinction, the characterization of a particular item depends on the form of the property in the underlying transaction. The sale of intangible property often requires a tangible carrier medium to provide the purchaser with the intangible property

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199. *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408 (Tenn. 1976)(court contrasted the value of the tangible good to the value of the entire transaction).

200. *Washington Times-Herald Inc. v. District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954).

201. The OECD, a trade group whose membership includes twenty-four developed countries, defines services as: insurance, transportation, banking, construction and engineering, accounting, equipment leasing, hotel and management services, data banks and data transfer, licensing and franchising of technology, advertising, computer services, professional services (education, law, and health), and motion pictures. Krommenacker, *supra* note 189, at 510-11 (citing OECD, *National Accounts and Statistics of Foreign Trade*).

202. The license is typically for five showings during a period of five years. See Hoskins et al., *supra* note 33, at 60.

203. GATT Doc. L/5359 (1982) (U.S. request for consultations to address U.S. complaint about Canadian postal rates for periodicals).

204. *Id.*

205. A GATT panel found that U.S. legislation unfairly restricted sales of foreign-printed literary material in the United States. *United States Manufacturing Clause*, GATT Doc. L/5609 (May 15-16, 1984), *reprinted in* GATT BISD, 31st Supp., at 74 (1983-84).

in a usable form. In transactions between television producers and broadcasters, the bargain could not be completed without the buyer receiving the tangible version of the program.

This approach acknowledges that different transactions involving the same intangible property can result in different characterizations. When the transaction is a broadcaster's transmission of a television program to a viewer's television set, the form of the property is that of an intangible service. When the transaction is the sale of a television program from a Hollywood producer to a French station, the form of the property is that of a good. The French TV station cannot receive, store, or periodically broadcast the program without first obtaining the program in a tangible form.

Unlike the real value test, this necessary form approach is consistent with prior GATT dispute panel decisions. The General Agreement adopted this approach by implication in Article IV, when it treated cinema films as goods. Trade in television programs is closely analogous to trade in cinema films. Both are filmed performances, recorded in a tangible form, and ultimately shown to a mass audience. Since the General Agreement considers "exposed cinematograph film" a good, it is consistent for a GATT panel to also consider television programs as goods.

In addition, the General Agreement's provisions previously have been applied to a trade dispute over restrictions on the sale of books, which presents an analogous case of the importance of the property's necessary form to its characterization as a service or a good.<sup>206</sup> In the sale of a book, the real value is the intangible information presented by the author. However, the carrier media, paper and ink, are essential to both the publisher's and the buyer's acquisition of the author's information. Were the author to read from the book to a paying audience, the transaction would not require tangible carrier media, and therefore, the form of the transaction would be characterized as a service.

This approach has apparently been adopted in national customs lists, which, pursuant to the international customs regime, identify the items considered goods for the purpose of each country's tariff schedule. Services are not subject to tariffs, and therefore are not included on a country's tariff schedule. Both the United States<sup>207</sup> and the European Community<sup>208</sup> apply tariffs to videotapes containing programming when the videotaped programs cross their borders. In each country, the tariff is slightly higher for a videotape containing a performance than for blank videotape. For customs pur-

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206. *Id.*

207. UNITED STATES INTERNATIONAL TRADE COMMISSION, PUB. NO. 2232, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 8523.12.00; 8523.13.00; 8524.22.10; 8524.23.10 (1990).

208. COMMISSION OF THE EUROPEAN COMMUNITIES, INTEGRATED TARIFF OF THE EUROPEAN COMMUNITIES, Vol. 3, 8523.12.00; 8523.13.00; 8524.22.90; 8524.23.90 (1991).

poses, a videotape containing intangible intellectual property is distinct from a blank videotape, but still considered a good and not a service.<sup>209</sup>

In dicta, the Court of Justice of the European Community, addressing the question of whether a television broadcast was a service, appeared to adopt the same approach. While holding that "a television signal must, by reason of its nature, be regarded as provision of services,"<sup>210</sup> the court stated that "trade in material, sound recordings, films, apparatus, and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods."<sup>211</sup> Though no reasoning was given for this distinction, it was presumably because videotaped programs took the essential form of a good when sold from a producer to a broadcaster while the same program took the form of a service when broadcast from a broadcaster to a viewer.

The Commerce Department and the International Trade Commission also seemed to apply the necessary form approach to a dumping dispute over computer software.<sup>212</sup> Noting that software on a floppy disk exhibits characteristics of both "concrete property and abstract knowledge," the Commerce Department determined that the programmer's ideas were transformed into a good the moment they were stored on the disk, and would be considered a service only when the ideas took no tangible form.<sup>213</sup>

Given the essential function played by the tangible carrier medium in international sales of television programs, a GATT panel should classify television programs as goods since in most transactions the ideas must necessarily take the form of goods in order to travel in the stream of commerce.

#### D. The Directive Violates the National Treatment Clause

After the European Council passed the Directive, the United States alleged that the Directive violated several provisions of the General Agree-

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209. Films, records, and computer software stored on a floppy disk, all analogous to television programs stored on a videocassette, also appear on the customs valuation list.

210. Case 155/73, *Ex parte* Giuseppe Sacchi, 1974 E.C.R. 409, 428, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8267 (1974). Since a television transmission is intangible, and must be consumed as it is produced, this statement by the Court of Justice of the European Communities also appears to follow economists' traditional distinctions. But perhaps it is inaccurate to characterize a broadcast as intangible. The directional particle beams, which upon arrival at a television set become an image, could be considered a good. Defining electromagnetic material as a good would necessitate defining traditional services such as satellite transmissions and telephone calls as goods, as well. This possibility of minuscule matter being considered goods further explains the difficulty of distinguishing between services and goods.

211. *Id.* at 432.

212. See Initiation of Countervailing Duty Investigation: Certain Computer Aided Software Engineering Products From Singapore, 54 Fed. Reg. 37013 (1989); Preliminary Affirmative Countervailing Duty Determination: Certain Computer Aided Software Engineering Products from Singapore, 55 Fed. Reg. 1596 (1990) (initial investigation and preliminary determination of the Department of Commerce on whether manufacturers, producers, or exporters in Singapore of certain computer aided software engineering products received bounties or grants).

213. Preliminary Affirmative Countervailing Duty Determination, *supra* note 212, at 1597.

ment.<sup>214</sup> It is most likely that the European Community's Directive violated Article III's national treatment requirement.<sup>215</sup>

National treatment requires that once a foreign good has entered a state, that state must treat the foreign product no less favorably than the state treats its own products: no law, regulation, or requirement can discriminate against the sale, purchase, distribution, or use of a foreign product. The Directive, in requiring stations to broadcast a majority of European works or in no instance a lower percentage of European programming than they did in 1988,<sup>216</sup> violates the National Treatment Clause in three ways. First, the Directive affects the "sale, offering for sale, and purchase" of U.S. programs because U.S. programs will not be bought by a European station if the station has filled its quota of non-European programs. Second, the Directive affects the "distribution" of U.S. programs because the programs cannot be distributed as widely or as easily as European programs since the quota will limit the number of foreign programs every public and private station in the European Community is allowed to broadcast. Third, the Directive will affect the "use" of U.S. programs in Europe since U.S. programs cannot be used, or broadcast, by the station as often as European programs.

The closely analogous GATT panel decision in the Italian tractor case is helpful authority. When Britain challenged the Italian regulation requiring banks to make favorable loans to farmers purchasing Italian-made tractors, the GATT panel found that the regulation violated the National Treatment Clause because it affected the sale of foreign tractors.<sup>217</sup> This decision also indicates that although the state's regulation was of a service industry, banking, it constituted a GATT violation because it had the effect of discriminating against goods.

The European Community has suggested that the Directive does not violate the General Agreement because it would not decrease the total amount of

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214. The United States Trade Representative alleged that the Directive violated the General Agreement's most-favored-nation requirement and the national treatment requirement. See NO. 56, OFFICE OF THE U.S. TRADE REPRESENTATIVE, PRESS RELEASE: STATEMENT BY AMBASSADOR CARLA A. HILLS, *supra* note 60, at 3 ("The United States government believes that the local content requirement in the broadcast directive is inconsistent with the Community's obligations not to discriminate against foreign products . . . to give equal treatment . . . under the GATT.")

215. Contrary to the U.S. trade officials' claims, the European program quota does not gravely violate Article I's most-favored-nation requirement. The European Community has a duty to treat all other GATT parties equally. Some states qualify as "European" under the Directive's definition of "European made" but are not Member States of the European Community. While the Directive perhaps favors programs produced in these European states which do not belong to the European Community, this preferential treatment seems slight.

Also, the local content requirement does not constitute an unfair "quantitative restriction" under Article XI because Article XI applies only to quotas restricting the entry of goods into a country. The Directive did not limit the entrance of foreign programs into the European Community; it limited the quantity of programs which, once inside the Community, could be broadcast.

216. Directive, *supra* note 2, at 26.

217. See *Italian Discrimination Against Imported Agricultural Machinery*, GATT Doc. L/833 (Oct. 23, 1958), reprinted in GATT BISD, 7th Supp., at 64 (1959).

U.S. programming sold to Europe, citing the growing number of stations and proportionate growth in demand for programs. This claim is unpersuasive, since GATT panel decisions have clearly established that the national treatment requirement can be violated even when the foreign producer has not actually been harmed by the regulation.<sup>218</sup> Moreover, even if national treatment required a showing of harm,<sup>219</sup> this could be easily shown. The increased demand for programming caused by the large number of new stations in Europe presents the possibility of greatly increased sales of U.S. programs. Since European producers do not have the resources to provide all the programming needed by the new stations at a reasonable price, the percentage of U.S. programming broadcast would soon exceed its current level if the European market were open to U.S. exports.

GATT's low threshold for finding that government regulations "affect" trade will require a GATT panel to determine that the Directive's quota is discriminatory. Even if, on average, across the Community, only ten percent of the programming broadcast is from the United States, if even one station would prefer to show more U.S. shows and cannot because of the Directive, U.S. products will be affected.

*E. The Directive Is Not Justified By the Cinema Exception  
in Article IV of the General Agreement*

While the European Community may argue to a GATT panel that Article IV allows quotas limiting the percentage of foreign television programs broadcast each year,<sup>220</sup> a GATT panel should reject this argument because Article IV does not expressly refer to television programs and because Contracting Parties have in the past refused to expand the scope of Article IV to allow quotas against foreign television programs.

Article IV should be interpreted narrowly. The General Agreement contains a broad prohibition against violations of the national treatment principle, but allows a narrow exception for cinema films. Article IV reflects a compromise in which the United States accepted a narrow exception for national treatment in an industry it dominated, and, in return, the scope of the exception was limited to one medium, film, and one type of discrimination, screen quotas.

First, Article IV did not include other goods which have an impact on culture and are exported in substantial quantities by the United States, such

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218. For a discussion of the Animal Feed decision, see *supra* text accompanying notes 140-42.

219. The soyabean oil decision seemed to require a harmful effect. But the GATT Council merely noted the much-criticized decision rather than adopting it, so proof of a harmful effect is probably not a requirement for a national treatment violation. See *supra* note 142.

220. The European Community has yet to publicly state this argument. Perhaps they have not done so because of the infrequent application of Article IV by GATT. More likely this omission is due to the European Community's unwillingness to acknowledge that the General Agreement applies to this dispute.

as radio programs, musical recordings, magazines, and books. Second, while previous protection of domestic film industries had taken many forms, under Article IV, GATT Contracting Parties could now discriminate against U.S. films in only one way, a screen quota.<sup>221</sup> Since the Contracting Parties did not agree to an exception for other media of cultural importance or for other types of barriers to trade, a GATT panel should not imply such a provision into the General Agreement.

Since there is no mention of television programs in the General Agreement, the European Community's argument would necessarily focus on the intent of the drafters of the General Agreement and the principles embodied in Article IV. This argument might be effective because in interpreting provisions of the General Agreement, panels often look beyond the express provisions of the Agreement and rule according to its general principles.

The original Contracting Parties adopted the cinema exception because they considered film a powerful influence on their societies, and gave governments specific rights to limit the number of foreign films shown in their countries. The framers were also concerned that foreign films might put local film producers out of business, thereby cutting off an important cultural resource. Both concerns apply by analogy to the European Community's concerns for its culture and its television industry.

After forming a working party on the issue in 1961, the Contracting Parties refused to adopt a proposed resolution stating that Article IV applied to television programs.<sup>222</sup> The working party considered the impact of television, the necessity of having domestic production, and the desirability of promoting free trade between countries. The failure of the Contracting Parties to treat television programs as goods, first when the General Agreement was drafted and subsequently when the issue was revisited in the 1960's, should preclude a panel from amending the General Agreement in a manner the parties rejected. Article IV applies only to "cinematograph films," and its scope should be expanded to television programs only by the Contracting Parties should they choose to amend the General Agreement.

Despite the continued relevance of the European Community's cultural concerns, a GATT panel should not negate the Contracting Parties' bargain by revising the GATT treaty to allow quotas against foreign television programs in addition to quotas against foreign films. Extending the scope of Article IV to television programs would not only allow a restriction on trade the original GATT drafters prohibited, it would also allow a restriction on trade the Contracting Parties refused to allow in 1962.

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221. See BROWN, *supra* note 163, at 110.

222. *Application of GATT to International Trade in Television Programmes*, GATT Doc. L/1741 (Mar. 13, 1962) (Alternative C, which was rejected, provided: "[W]hen contracting parties find it necessary to impose internal quantitative regulations governing the amount of domestically produced material which shall be used in television programmes, these regulations should take the form of quotas conforming to the same requirements as those established in Article IV for cinematographic films.")

*F. The Directive Is Not Justified by the Security Exception*

Some commentators have argued that because of the cultural nature of television programs the quota may be justified by Article XXI, the national security exception, which allows trade restrictions "necessary to protect public morals" and "national treasures."<sup>223</sup> The exception has rarely been interpreted by GATT, however, so it is difficult to determine its scope.<sup>224</sup> Past invocations of Article XXI have been limited to national security issues and have not addressed the necessity to protect morals or national treasures. Examples include European states' suspension of obligations to Argentina during the Falklands War<sup>225</sup> and the U.S. reduction of sugar quotas on Sandinista-ruled Nicaragua.<sup>226</sup>

Since the emphasis has been narrowly interpreted in the past, a GATT panel should find that Article XXI's national treasures and morals exception does not justify the Directive's European program requirement.

A measure taken under Article XXI must not be a "disguised restriction on international trade."<sup>227</sup> Realizing this, Sweden never pursued a measure it placed for a short time before GATT in which it argued that quotas on footwear were necessary for security reasons to ensure that local shoe production would be possible in time of war.<sup>228</sup> This implies a common-sense limit which would allow a GATT panel to look behind a country's pretext to determine a measure's true purpose. A panel might view the Directive as a disguised restriction on trade rather than a legitimate attempt to protect national treasures or morals.

A GATT panel should reject a claim that imported television programs threaten European morals. A leading commentator has noted that Article XXI should not justify restrictions against countries where similar conditions prevail.<sup>229</sup> Since societies on both sides of the Atlantic generally share the conditions of developed democracies, a GATT panel of impartial experts should rule that European moral standards are not so distinct from American standards as to be threatened by U.S. television programs.

A GATT panel should also reject a claim that certain European television actors or directors are "national treasures" which must be preserved. The European Community Directive does not require the broadcast of television programs featuring award-winning actors or directors of European de-

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223. See WILKINS, *supra* note 2, at 206-07 ("the EEC may well have this right of exception"). See also Acheson & Maule, *supra* note 7, at 47-48 (some countries think films are so important that quotas are justified by this exception).

224. See JACKSON, *supra* note 71, at 748-52.

225. See *Report of Council of Representatives* GATT Doc. L/5414, discussed in MCGOVERN, *supra* note 134, at 423.

226. See *Report of Panel on United States Imports of Sugar from Nicaragua*, GATT Doc. L/5909, at 90 (1985), discussed in MCGOVERN, *supra* note 134, at 424.

227. JACKSON, *supra* note 71, at 743.

228. See GATT Doc. L/4250 (1975).

229. JACKSON, *supra* note 71, at 743.

scent. The European Community Directive requires only the showing of programs produced by European companies, irrespective of whether legendary figures or amateurs directed, filmed, or acted in them.

## V.

### FREE TRADE AND CULTURAL SOVEREIGNTY

GATT dispute panels only decide whether the General Agreement has been violated, they do not prescribe how a Contracting Party should amend its laws to make them consistent with the General Agreement. If the European Community or one of its Member States wished to adopt an economically efficient program consistent with the General Agreement to promote its culture, it could replace the broadcast quota with a subsidy program providing direct subsidies to groups producing programs which the government believes have cultural value.

#### A. *Europe Seeks to Protect and Promote Its Culture*

Europeans have lived in separate sovereign states, practiced different religions, and spoken different languages since the fall of the Roman Empire. There is no single European culture that the European Community can protect.<sup>230</sup> However, the European Community considers building the European identity of Member States' citizens central to the process of integration. The EEC Treaty states that it seeks "to establish the foundations of an ever closer union among the European peoples."<sup>231</sup>

The European Commission's "Television Without Frontiers" Green Paper stated that "the dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas."<sup>232</sup> The European Community has even taken a step toward using television as a means to achieve the goal of a single European identity by considering the creation of a European television channel.<sup>233</sup>

Individual Member States also have a cultural interest based on identity preservation which stands in contrast to the European Community's interest in identity creation. Based on language and ethnicity, Member State culture is distinct from an integrated Pan-European culture. As indicated by the legislative history of the Directive, different Member States have different degrees of interest in promoting their cultures through the regulation of television content, with France being perhaps the most concerned Member State, and Germany being perhaps the least concerned.

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230. The European Parliament has noted that "European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity." Green Paper, *supra* note 43, at 28 n.1.

231. See EEC TREATY, *supra* note 1, pmbl.

232. Green Paper, *supra* note 43, at 28.

233. Davies, *supra* note 46, at 28.

Forty years after the General Agreement was drafted, the root concern of the European Community and its Member States remains cultural, rather than economic, protection.<sup>234</sup> Why does the European Community wish to protect television producers? Since trained producers could certainly find comparable jobs in other sectors of the European economy, the rationale must be more than keeping the producers employed in the television industry.<sup>235</sup> Europe wants to protect the industry because of the perceived impact its programs have on viewers. The European Community wishes to retain some control over program content and realizes that it cannot influence the content of programs imported from the United States.<sup>236</sup>

### B. *Television Programs Affect Culture*

Communication and entertainment are important vehicles for culture.<sup>237</sup> Mass media are more important cultural vehicles than traditional media because, by definition, they reach larger audiences. Where total population is as great as in the European Community, mass media dispense more information to more people than traditional cultural vehicles such as live entertainment.<sup>238</sup>

While the specific impact of television viewing on individuals is actively debated, social scientists agree that in many circumstances, the messages of mass media can accelerate social change, promote viewers' adoption of new and different attitudes, and influence viewers' behavior.<sup>239</sup> Since the European Community is concerned with the attitudes and behavior of its citizens,

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234. As a former legal advisor to the United States Mission to the United Nations commented, "Economic activity may be the most effective conveyor of cultural influences, and motives for protecting local cultural values will often shade imperceptibly into arguments for protecting economic ones." John L. Hargrove, *International Law and the Case for Cultural Protectionism*, in *CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT* 85, 92 (Aspen Institute for Humanistic Studies Series on Communication ed., 1974).

235. BLACKHURST, ET AL., *supra* note 98, at 30-31.

236. In Europe the television industry is viewed as a community service rather than as a private industry. See Frits W. Hondius, *International Control of Broadcasting Programs in Western Europe*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 69 (M. McWhinney ed., 1971). This difference in attitude might account for each side's different perceptions on whether the quota's protection is justifiable.

237. Some trade analysts refer to film and television as "cultural industries." Acheson & Maule, *supra* note 7, at 36. See also INTERNATIONAL COMMISSION FOR THE STUDY OF COMMUNICATION PROBLEMS, *MANY VOICES, ONE WORLD* 30 (1980) (discussion of mass media as carriers for cultural information).

238. Two thousand people can see a Wagner opera in Paris on a given night. Millions of Europeans can watch Miami Vice, in French, German, Dutch, Spanish, Portuguese, Danish, Italian, and Greek on the same night. See, e.g., Coppa, *supra* note 157, at 19 (the TV audience for Puccini's *La Bohème* broadcast live from the Metropolitan Opera House in New York City in 1977 was greater than the combined audiences that had attended the opera since it was first performed in 1896).

239. See CONRAD P. KOTTAČ, *PRIME-TIME SOCIETY: AN ANTHROPOLOGICAL ANALYSIS OF TELEVISION AND CULTURE* 10-12 (1990). See generally NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* (1985); GEORGE COMSTOCK, ET AL., *TELEVISION AND HUMAN BEHAVIOR* (1978).

it follows that the Community would be concerned with the content of television programs its citizens watch.

Health care and education are industries considered so important to national welfare that trade in these industries is not governed solely by market forces.<sup>240</sup> Given the social impact of television programs, governments may likewise feel justified in not allowing television content to be dictated solely by market forces, such as price and consumer taste. As the drafters of Article IV of the General Agreement refused to treat film as a purely economic commodity, the European Community is entitled to do the same with respect to television, and can do so without resorting to restrictive quotas that violate the General Agreement.

### C. *Quotas Are Ineffective at Encouraging Production of Programs Promoting European Culture*

Trade theorists argue that the costs of domestic industry protection can be minimized by narrowly focusing government protection on achieving the result sought.<sup>241</sup> This principle, in addition to the European Community's GATT obligations, should influence the route it chooses for cultural promotion.

The European Community's local program quota, in its current form, is not closely related to its end: promoting European culture and protecting it from American domination. The definition of a "European work" in the Directive, based on the nationality of the citizens and the geographic location of the production and producers, will not guarantee that European programs will reflect the aspects of European culture that the European Community and Member State governments consider valuable.<sup>242</sup> Eurocop, a police show filmed in Spain with Spanish actors,<sup>243</sup> may not promote European culture any more than an American documentary on Vincent van Gogh. The European Community should retract the Directive's European program requirement and adopt a television policy which promotes programs reflecting European culture, not merely programs with a "Made in Europe" label.

Not only is the Directive's quota ineffective at achieving the cultural objective at the present time, the Directive will become even less effective at securing its ends as European entertainment consumers obtain greater choice among forms of entertainment. With increased access to cable and direct

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240. See INTERNATIONAL COMMISSION FOR THE STUDY OF COMMUNICATION PROBLEMS, *supra* note 237.

241. KRUGMAN & OBSTFELD, *supra* note 98, at 220 (noting general principle that when faced with market failure, direct policy responses are preferable to indirect policy responses which can bring about unintended economic distortions).

242. Some viewers have suggested that if television comedian Benny Hill is representative of British culture, then the sooner U.S. culture replaces British culture the better. See Buscombe, *supra* note 15, at 408.

243. Eurocop's frequent car-chases and shoot-outs make it virtually indistinguishable from similar American-produced programs. See Diana L. Dougan, 'Fortress Europe' of the Airways, L.A. TIMES, Oct. 11, 1989, at B7.

broadcast transmissions, and with increased ownership of videocassette recorders and laser and compact disc players, European consumers will have greater access to foreign entertainment than they have had in the past.<sup>244</sup> The resources of the European Community are inefficiently spent on limiting access to U.S. programs on one medium, television. Resources will be more efficiently used by increasing European cultural productions, which can be viewed by Europeans not only on television, but also on other mass media which successfully carry cultural messages to consumers.

*D. Subsidies Would Effectively Achieve the European Community's Goals*

European interference in the market for television production should be limited to government regulation consistent with the General Agreement which efficiently achieves a state's need for sovereignty without distorting the national market for films and television programs. A direct production subsidy to chosen European television producers would be the least costly form of protection, and the most likely to result in an increase in television programs and films promoting European culture. Subsidies would allow European producers to sell their programs in the domestic market at prices more competitive than those charged in Europe by U.S. producers.<sup>245</sup>

Production subsidies of this type are consistent with the General Agreement's substantive provisions regarding subsidies. The General Agreement has implicitly allowed certain government subsidies.<sup>246</sup> However, as subsidies became more prevalent in the 1970s, GATT limited the allowable types. In an agreement from the Tokyo Round of GATT negotiations, begun in 1973 and concluded in 1979, the Contracting Parties prohibited government subsidies of export industries, but did not prohibit direct government subsidies of industries producing goods only for local use.<sup>247</sup> But since European television producers do not export their product in meaningful quantities,<sup>248</sup> GATT would not characterize the European Community's television industry as an export industry, and therefore would allow the European Community or its Member States to subsidize local entertainment producers if they chose to do so.

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244. See Acheson & Maule, *supra* note 7, at 41 (discussing new media and its contribution to the loss of state control over media content).

245. JACKSON, *supra* note 71, at 331.

246. See General Agreement, *supra* note 4, art. 6, 61(5) Stat. at A23-A25, 55 U.N.T.S. at 212.

247. *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, in THE TEXTS OF THE TOKYO ROUND AGREEMENTS 51 (1986) (reflecting concern for "export subsidies" intended to aid production of goods for export).

248. The U.S. imports only 2% of its programming from abroad. See Buscombe, *supra* note 15, at 410. However, if subsidies increased European television exports to the United States, the United States, under the General Agreement, could adopt countervailing customs duties to offset a subsidized program's lower price. See General Agreement, *supra* note 4, art. 6(3), 61(5) Stat. at A23-A25, 55 U.N.T.S. at 212.

Subsidies, in general, are less distortive of trade patterns than are quotas, and are therefore less costly to an economic system than quotas.<sup>249</sup> Since quotas restrict television imports to a fixed level, some producers may exploit a monopoly in a small language market, such as Flemish or Romansch, by charging high prices to stations which have already bought their allowed quantity of less expensive U.S. programs.<sup>250</sup> Not only would non-European programs become more expensive under a quota system, the costs of these locally-produced programs in small language markets would also be prohibitive. Even for broadcasters in larger markets, the costs of European programs which they must purchase in order to comply with the Directive could be substantially higher than the cost of U.S. programs.

Unlike a quota, a subsidy would lower, not raise, the prices paid for programs by "consumers"—the television stations.<sup>251</sup> Subsidies lower the production costs of domestic producers, but unlike quotas they do not force consumers to purchase the good. If after receiving a subsidy, European programs are less expensive than U.S. programs, U.S. producers will be forced to lower their prices in order to remain competitive with the European producers marketing their films to the same television stations.

While subsidies to European producers may cause financial losses for U.S. producers, the losses will not be as great as those caused by a quota. Under a quota, while stations might pay slightly more for the U.S. programs they were allowed to purchase, the total number of U.S. programs sold would decrease. Under a subsidy program, stations would pay slightly less for U.S. programs, but the volume of sales would be less likely to decrease. Since the marginal cost of U.S. programs sold in Europe is low (merely the cost of delivering and dubbing a videotape) profits are linked more closely to volume of sales than to price. Therefore, a restriction affecting the volume of U.S. sales, such as a quota, will cause more harm to U.S. producers than a restriction affecting the sales price alone, such as a subsidy.

Subsidies would also more effectively protect the European Community's cultural interest in television programming. Member States' governments could direct subsidies to producers considered the most likely to create works of cultural value.<sup>252</sup> Several Member States already have the institu-

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249. See WARREN M. CORDEN, *TRADE POLICY AND ECONOMIC WELFARE* 28-30, 121-22 (1974).

250. NEIL VOUSDEN, *THE ECONOMICS OF TRADE PROTECTION* 125 (1990).

251. WARNER M. CORDEN, *THE THEORY OF PROTECTION* 204 (1971). See, e.g., KRUGMAN & OBSTFELD, *supra* note 98, at 221 (the cost of an auto import quota is paid by the consumer in the form of higher automobile prices, whereas the cost of a subsidy for domestic auto production is paid by the government's direct outlay).

252. Subsidies could take various forms, including direct grants to producers, below-market rate loans, and grants for the education and training of directors, performers, and technical professionals. For discussion of the various forms of subsidies, see Acheson & Maule, *supra* note 7, at 45. For a proposal that the U.S. should also subsidize producers of quality film and television, see William Fadiman, *Should American Films be Subsidized?*, in *SIGHT, SOUND AND SOCIETY: MOTION PICTURES AND TELEVISION* 344 (David Manning White & Richard Averson eds., 1968).

tions prepared for granting such subsidies, with Germany currently making grants to producers through the Film Aid Institute<sup>253</sup> and Belgium through its Ministry of Culture and Ministry of Education and Science.<sup>254</sup> Subsidies would also accommodate Member States' divergent degrees of concern for preserving European culture. Subsidy amounts would depend on each Member State's concern for cultural preservation. A country that is concerned with the preservation of culture could pay generous subsidies, while a country which emphasizes free trade could offer local producers limited or no support.

## VI.

### CONCLUSION

A GATT panel, when presented with the dispute over the European Community's Directive, should find that the General Agreement applies to television programs and that quotas limiting the broadcast of foreign programs violate the Agreement's national treatment clause. To reflect their collective commitment to abolishing restrictions on trade, the Contracting Parties should adopt the panel report.

In recognition of the nexus between international communications and national culture, the GATT Council could adopt a memorandum of understanding concurrent with the adoption of the panel's report which expressly recognizes that government subsidies to producers of films and television programs intended for local broadcast are justifiable under GATT's subsidy regime.

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253. See MPEAA, *TRADE BARRIERS*, *supra* note 78, at 43-44.

254. See *id.* at 10.