THE CULTURAL EXCEPTION: DOES IT EXIST IN GATT AND GATS FRAMEWORKS? HOW DOES IT AFFECT OR IS IT AFFECTED BY THE AGREEMENT ON TRIPS?

SANDRINE CAHN*
DANIEL SCHIMMEL**

This Article will determine whether cultural exclusion provisions exist or whether they can be read into the General Agreement on Tariffs and Trade ("GATT"),[1] the General Agreement on Trade in Services ("GATS"),[2] the North American Free Trade Agreement ("NAFTA"),[3] and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[4] In addition, this Article will examine the cultural exclusion provisions' potential and real impact on trade.[5]

Over the last fifty years, trade between states has developed exponentially.[6] International exchanges in copyrighted goods and services—in particular, exchanges in audiovisual goods and services—have similarly developed, and the United States is the primary beneficiary of that expansion. U.S. films today represent eighty percent of the films distributed in European movie theaters, and over fifty-five percent of the films shown on European television networks.[7] The U.S. audiovisual industry is the country's sec-

* *Avocat* with the Paris Bar, Associate Kimbrough & Associates, Paris, L.L.M. Columbia University, 1995, D.E.A. Université d'Aix-Marseille III, 1994.

** Associate Shearman & Sterling, New York; Law Clerk to Hon. Jed S. Rakoff, United States District Court, Southern District of New York; L.L.M., J.D. Columbia University, New York; Maitrise en Droit Université de Paris II; ESSEC Paris.

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[1] The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT].

[2] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 44 (1994) [hereinafter GATS].

[3] North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

[4] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

[5] GATS and the TRIPS Agreement were ratified as part of the Uruguay Round on December 13, 1995.

[6] *See generally Anticipating the 21st Century: Competition Policy in the New Hightech Global Marketplace*, 70 Antitrust & Trade Reg. Rep. (BNA) No. 1765, at S-1 (June 6, 1996).

[7] *See* Elio Di Rupo, *Ouverture des Travaux*, *in* L'EUROPE ET LES ENJEUX DU GATT DANS LE DOMAINE DE L'AUDIOVISUEL 21 (1994).

ond largest export industry, following the aerospace industry.[8]

In light of the above, the debate over the liberalization of cultural goods and services has focused on the audiovisual industry. Many trade partners of the United States, such as the European Union, Canada, and developing countries with strong movie industries, such as India and Egypt, claim that cultural industries should not be treated like other industries.[9] Culture, they contend, involves notions of identity and sovereignty, as a country's values are often embodied in its cultural works.[10] Accordingly, these countries see the might of the U.S. audiovisual industry as a vehicle disseminating American values and as a threat to their countries' domestic values. For these countries, "the protection or promotion of indigenous languages, history, and heritage depend heavily on national audio-visual output."[11]

On the one hand, trade partners of the United States, such as the European Union and Canada, were eager to sign trade agreements with the United States. Prior to the Uruguay Round, European countries had actively participated in seven rounds of negotiations on customs, tariffs, and related matters, including the Dillon Round (1960-61), the Kennedy Round (1964-67), and the Tokyo Round (1973-79).[12] On the other hand, Europe and Canada wanted to make sure that such trade agreements would not result in a loss of their cultural sovereignty. The Prime Minister of Canada, in a declaration to the House of Commons in September 1985, said that negotiations on NAFTA would not, in any way, involve bargaining over the identity and cultural sovereignty of Canada.[13] Similarly, the Prime Minister of France was given a standing

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8 *See* Franklin Dehousse & Françoise Havelange, *Aspects Audiovisuels Des Accords du GATT Exception ou Spécificité Culturelle?*, *in* L'EUROPE ET LES ENJEUX DU GATT DANS LE DOMAINE DE L'AUDIOVISUEL 99 (1994).

9 *Id.* at 101 (quoting *inter alia*, Jacques Delors, former President of the European Commission).

10 *Id.*; *see also* Thomas L. Friedman, *Parlez-Vous U.S.A.?*, N.Y. TIMES, Feb. 26, 1997, at A23 (movies and television export the American way of life).

11 *Services-Audio-Visual Sector Working Group*, GATT FOCUS, Oct. 1990, at 10.

12 *See Anticipating the 21st Century*, *supra* note 6, at S-9 (these three rounds of negotiations under GATT "have reduced tariffs on goods among member nations from an average of 40% to around 6% and will have cut these down to 4-6% once the most recent reductions . . . are implemented."); *see* Seymour J. Rubin, *The GATT and the Uruguay Round of Multilateral Trade Negotiations: Introductory Remarks*, *in* CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 1, 5 (1989) (arguing that trade has assumed "an enormous and major role" in the economies of the worlds as a result of the success of the GATT's successive trade rounds).

13 *See* Ivan Bernier & Anne Malépart, *Les Dispositions de l'Accord de Libre-Echange Nord-Américain Relatives à la Propriété Intellectuelle et la Clause d'Exemption Culturelle*, 6 LES CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 139, 142 (1994) (citing Gouvernement du Canada, Ministère des affaires extérieures, Négociations commerciales canadiennes- Introduction, documents de base, bibliographie, 15 décembre 1985).

ovation in the French National Assembly when he declared, following the conclusion of the Uruguay Round, that "the cultural identity of Europe is protected."[14] The former French Minister of Culture later added that the inclusion of culture in a global trade treaty would lead to "the mental colonization of Europe and the progressive destruction of its imagination."[15]

The debate on exemptions of cultural goods and services from free trade arose from the prospect of Europe's and Canada's "mental colonization" by the United States.[16] Most European countries and Canada viewed cultural exemptions as a means of stabilizing their current output of cultural goods and services by exempting cultural industries from free trade. For example, Europe's position during the Uruguay Round was that at least fifty percent of all audiovisual works broadcasted on any given European television network must be produced in Europe.[17] The United States, however, viewed the cultural debate very differently. The United States saw the loss of identity argument as a sham and a pretext to establishing trade barriers against U.S. goods in a crucial area of trade.[18]

The first section of this Article examines the treatment of culture in GATT prior to the Uruguay Round, GATS, and NAFTA. The second section addresses the relationship between the TRIPS Agreement and the resolution on culture reached in the Uruguay Round. The second section also examines the relationship between the intellectual property provisions of NAFTA and NAFTA's cultural exclusion clause. The Article concludes that the agreements on culture reached in the Uruguay Round, along with the NAFTA's cultural exclusion clause, have so far had a limited impact on trade.

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14 James Gerstenzang, *Trade Accord Wins Approval of 117 Nations*, L.A. TIMES, Dec. 16, 1993, at A1.

15 William Drozdiak, *With Deadline Looming Before Trade Talks, U.S., France Trade Blame*, WASH. POST, Oct. 16, 1993, at A14.

16 *Id.*

17 *See* Dehousse & Havelange, *supra* note 8, at 100, 124. The position is embodied in the European Directive defining the audiovisual policy of the European Union. The Directive was adopted on October 3, 1989 and became effective on October 3, 1991. Council Directive 89/552/EEC of Oct. 3, 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 [hereinafter 1989 Directive].

18 *See* Stacie I. Strong, *Banning the Cultural Exclusion: Free Trade and Copyrighted Goods*, 4 DUKE J. COMP. & INT'L L. 93 (1993).

I. CULTURAL EXEMPTIONS IN INTERNATIONAL TRADE AGREEMENTS: GATT, GATS, AND NAFTA

A. *Cultural Exclusion in GATT Prior to the Uruguay Round*

Before the conclusion of the Uruguay Round, the language of several provisions of GATT was broad enough to provide a basis for a cultural exclusion. These provisions, however, had almost never been used to exclude cultural goods from free trade. Only article IV of GATT sets forth an express limitation to the diffusion of U.S. motion pictures in Europe. This section will examine these provisions and then focus on the treatment of cultural goods under NAFTA and under GATT after the Uruguay Round.

1. Article XX(f) of GATT: The protection of national treasures of artistic value[19]

Article XX(f) allows measures to be "imposed for the protection of national treasures of artistic . . . value."[20] Read literally, this article allows a state to exclude certain goods from free trade, and in particular from "National Treatment," because of the significance of these goods to that state's culture. National Treatment, defined in article III, is one of GATT's fundamental principles.[21] National Treatment means, that internal laws and regulations should not be applied to imported goods or to domestic products to protect domestic production: once custom duties and tariffs are paid, the importing state must treat imported and domestic goods alike.[22]

A definition of national treasures of artistic value or of cultural goods cannot be found in GATT. These goods, however, include copyrightable goods, as they are defined in the U.S. Copyright Act.[23] The Copyright Act lists seven categories of goods and services that enjoy copyright protection. These categories are literary, musical, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, and sound recordings.[24] Similarly, the Berne

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19 GATT, *supra* note 1, art. XX(f).

20 *Id.*

21 *Id.* art. III.

22 *Id.*

23 17 U.S.C. §§ 101-1101 (1994). *See* Dehousse & Havelange, *supra* note 8, at 119 (stating that the cultural exception finds its source in article XX of GATT); *see also* Leon Ingber, *Accueil, in* L'EUROPE ET LES ENJEUX DU GATT DANS LE DOMAINE DE L'AUDIOVISUEL 1, 15 (1994) (citing Andre Malraux (cinematographic films have acquired the status of an art)).

24 17 U.S.C. § 102(a) (1994).

Convention for the Protection of Literary and Artistic Works,[25] an agreement ratified by more than ninety countries, extends copyright protection to like categories of works.[26] The categories of goods that enjoy copyright protection can probably be construed to fall within the scope of article XX(f) of GATT,[27] which allows GATT members to put restrictions on their exchanges.

2. Article XIX of GATT: "Emergency Action on Imports of Particular Products"[28]

Under article XIX, cultural goods could benefit from a temporary exclusion from GATT's free trade obligations.[29] Article XIX applies when international competition threatens the survival of a domestic industry. This article could conceivably be read to permit a particular country to establish, for a limited period of time, a cultural exclusion designed to protect its own cultural industry. Under section 1(a),

> [i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement . . . any product is being imported into the territory of that contracting party in such increased quantities . . . as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part . . . .[30]

Article XIX allows temporary protection of domestic industries that can no longer resist international competition. Article XIX, therefore would seem to cover cultural goods.

This protection of cultural goods is, however, extremely limited. Section 1(a) is subject to the language of sections 2 and 3. Article XIX(2) imposes on the country suspending its free trade obligations a requirement of prior notice to all GATT members.[31] Article XIX(2) also imposes an obligation to consult with such countries that have, as exporters of the protected goods, a substantial interest in the measures taken.[32] However, the section does not

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[25] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last amended* Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

[26] *Id.* art. II.

[27] GATT, *supra* note 1, art. XX(f). *See generally* Ingber, *supra* note 23.

[28] GATT, *supra* note 1, art. XIX.

[29] *Id.*

[30] *Id.* art. XIX(1)(a).

[31] *Id.* art. XIX(2).

[32] *Id.* Under XIX(2), in critical circumstances where delay would cause damage that

impose an obligation to negotiate or to reach an agreement regarding the measures that should be taken. Article XIX(3) imposes a more drastic burden on the country suspending its obligations under GATT by providing that the "[a]ffected contracting parties shall then be free . . . to suspend . . . the application to the trade of the contracting party taking such action . . . of substantially equivalent obligations or concessions under this Agreement."[33] The affected party's retaliation power considerably limits the use of this article as a cultural exemption.

3. Article IV of GATT: "Special Provisions Relating to Cinematograph Films"[34]

Article IV establishes an exclusion for motion pictures, a specific category of cultural goods. The article provides that any contracting party may establish or maintain internal quantitative regulations of exposed motion pictures, and that such regulations shall take the form of screen quotas.[35]

Article IV allows countries to set quotas devoting a percentage of screen time each year to domestically produced motion pictures. Once a minimum quota for domestic work has been established, the country imposing the quota cannot apportion the remaining market by imposing quotas for each of the other countries.[36]

Two important issues should be addressed at this point. First, we must examine why the exclusion covers only motion pictures and not other goods, such as books or magazines. Second, we must determine whether the exclusion is broad enough to encompass television screening of motion pictures.

There are two possible answers to the first question. First, films can constitute an excellent medium for propaganda and influence on the personal attitudes and political choices of the audience.[37] In 1947, the drafters of GATT strongly believed that,

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would be difficult to repair, measures could be taken by the country suspending its obligations provisionally without prior consultation, but on the condition that the consultation starts immediately after the implementation of the measures. *Id.*

33 *Id.* art. XIX(3)(a).

34 *Id.* art. IV.

35 *Id.*

36 Actually, article IV(c) allows for such a further allocation depending on the origin of the foreign works, but specifies that the proportion of screen time allocated to a particular country shall not be increased above the level in effect on April 10, 1947. *Id.* The European Economic Community was established by the Treaty of Rome 10 years later. In 1947, no preferential treatment was granted to European countries under article IV. Therefore, this article cannot be used by the European Union today to give a preference to European works.

37 *See* Clint N. Smith, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on*

because of their unique capacity to diffuse political values, cinematographic films should be treated specifically.[38] Second, at that time, non-U.S. governments were concerned with Hollywood's growing domination of the world motion picture market. Hollywood began to dominate the world cinema market in the 1920s by producing films with broad appeal.[39] Non-U.S. governments wanted to limit the harmful effects of "American cultural imperialism" by limiting the quantity of exported U.S.-made films.[40]

With respect to the second issue, article IV probably fails to govern trade in television programs. First, whether trade in television programs constitutes trade in goods or trade in services is unclear. Second, even if trade in television programs constitutes trade in goods, article IV is probably too narrowly written to cover such trade.

Whether trade in television programs constitutes trade in goods or trade in services under GATT is unclear: while courts and other authorities in the United States believe that trade in television programs constitutes trade in goods,[41] the European Directive defining the audiovisual policy of the European Union appears to provide that such trade constitutes trade in services.[42] In the United States, state courts have almost uniformly concluded that transactions between distributors of motion pictures and movie theaters or television networks, in which distributors license the right to exhibit and broadcast films, constitute trade in goods.[43]

Applying a "real purpose of the transaction" test, these courts concluded that the real purpose of a film exhibitor was to obtain an item of tangible personal property, such as a tape, that an exhib-

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Tariffs and Trade, 10 INT'L TAX & BUS. L. 97, 118 (1993); *see also* Friedman, *supra* note 10, at A23; Francisco Henriques Da Silva, *Les Six Points de Mons et Leur Suite*, *in* L'EUROPE ET LES ENJEUX DU GATT DANS LE DOMAINE DE L'AUDIOVISUEL 131, 138 (1994).

38 *See* Marc Maindrault, *Sécurité Juridique de la Spécificité Culturelle de L'Audivisuel dans les Négociations du Cycle D'Uruguay*, *in* L'AUDIOVISUEL ET LE GATT 107 (Presses Universitaires De France 1995) (from its inception, GATT recognized the specificity of the movie industry); *see also* Smith, *supra* note 37, at 119 ("[T]he root concern of advocates of Article IV was . . . 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 theatres.").

39 Smith, *supra* note 37, at 118.

40 *Id.*

41 *See, e.g.*, American Multi-Cinema, Inc. v. City of Westminster, 910 P.2d 64, 65-66 (Colo. Ct. App. 1995) (with isolated exceptions, the appellate courts of the various states have uniformly concluded that "the exhibition of films containing copyrighted materials constitutes the use of 'tangible personal property.'"); *see also* May Broad. Co. v. Boehm, 490 N.W.2d 203, 207-9 (Neb. 1992); CompuServe, Inc. v. Lindley, 535 N.E.2d 360, 364-65 (Ohio Ct. App. 1987).

42 1989 Directive, *supra* note 17, at 23.

43 *See, e.g.*, *American Multi-Cinema*, 910 P.2d at 66.

itor can exhibit to the public.[44] Courts found the same purpose, regardless of whether distributors had transmitted the films to exhibitors in videotapes or by satellite.[45]

Courts have also rejected the argument that, while distributors provide a copy of copyrighted material for its use, the valuable right for which the exhibitor pays is the incorporeal right to exhibit the material.[46] The possession of most items of personal property is admittedly "of little value unless such possession is accompanied by the intangible right to use that item for a useful purpose;"[47] the grant of that right, however, does not transform the transaction into the sale of an intangible service.[48]

In the United States, other authorities, such as the customs administration, are also of the view that trade in television programs constitutes trade in goods: the U.S. Customs administration applies tariffs to the international sale of videotapes embodying television programs, but not to the international sale of services.[49]

Whether the European Union construes trade in television programs as trade in goods or as trade in services is partially unclear. On the one hand, the European Court of Justice implicitly found that rules governing trade in goods would apply to trade in television programs.[50] Customs administrations in the European Union have reached the same conclusion and apply tariffs to the international sale of videotapes embodying television programs.[51] On the other hand, the European Directive defining the audiovisual policy of the European Union addresses "the free movement of [audiovisual] services" in the Eurpoean Union,[52] leaving some

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[44] *See, e.g., id.* at 66 (purpose of motion picture exhibitor is to obtain a finished product, such as a cassette of a film, which distributor can exhibit to the public); *see also* K&A Litho Process, Inc. v. Director of Revenue, 653 S.W.2d 195, 197 (Mo. 1983) (distinguishing Universal Images, Inc. v. Department of Revenue, 608 S.W.2d 417 (Mo. 1980) (trade in motion picture film is trade in tangible personal property as film is an "end product of a final and lasting nature")).

[45] *See, e.g., May Broadcasting*, 490 N.W.2d at 207-09 ("[T]he value of the agreements between television stations and distributors is based on the physical possession by the station of a copy of the original film or videotape." Where a distributor transmits a film to a television station by satellite and the station then stores that film on a tape, the transaction between the distributor and the station is a transfer of tangible property.).

[46] *See, e.g., American Multi-Cinema*, 910 P.2d at 66.

[47] *Id.*

[48] *Id.*

[49] *See, e.g.*, Smith, *supra* note 37, at 126-27.

[50] *See id.* at 127 (citing Case 155/173, Ex Parte Giuseppe Sacchi, 1974 E.C.R. 409, 426 (1974)) ("While 'a television signal must . . . be regarded as provisions of services, 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.'").

[51] *See id.* at 126.

[52] 1989 Directive, *supra*, note 17, pmbl. ("the Commission . . . underlined the importance of a regulatory framework applying to the content of audiovisual services which

doubt as to the European position on the nature of the trade in television programs.

Regardless of whether or not trade in television programs can be construed as trade in goods, article IV probably does not govern the showing of films on television because this article probably applies only to screenings in movie theaters. That conclusion follows both from the plain meaning of the word "screening" in article IV and from the narrow scope of that article.[53] Article IV contains a narrow exception for motion pictures shown in movie theaters; the article does not address other goods that may have an impact on culture such as radio programs, musical recordings, and books. Article IV reflects a compromise by which the United States accepted a narrow exception to free trade because foreign governments expressed concern about Hollywood's growing domination of the market, and because motion pictures have an impact on audiences that other kinds of goods do not have.[54] Accordingly, article IV of GATT probably does not apply to television screening of motion pictures.

B. *The Cultural Exclusion in NAFTA*

Unlike GATT, NAFTA contains an explicit cultural exclusion.[55] NAFTA incorporates by reference the provisions relating to cultural industries set forth in the Free Trade Agreement signed by the United States and Canada ("CFTA").[56] These provisions include a clause excluding cultural industries from the free trade obligations of CFTA[57] and a clause exhaustively defining cultural industries.[58] NAFTA provides that cultural industries, as defined in CFTA, are excluded from the obligations set forth in NAFTA.[59]

Article 2005 of CFTA creates a broad cultural exclusion.[60]

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would help to safeguard *the free movement of such services in the community . . . .*") (emphasis added).

53 The French version of article IV provides that this article applies to "projections à l'écran." The word "écran," in French, applies both to a television screen (petit écran), and to a theater screen (grand écran). In English, however, the word appears to apply to theater screens.

54 *See supra* notes 10-11.

55 NAFTA, *supra* note 3, annex 2106.

56 Canada-United States Free Trade Agreement, Jan. 2, 1988, H.R. Doc. No. 216, 100th Cong. (1988), *reprinted in* 27 I.L.M. 281 (1988) [hereinafter CFTA].

57 *Id.* art. 2005(1).

58 *Id.* art. 2012.

59 Annex 2106 of NAFTA states that the rights and obligations of the United States and Canada with respect to cultural industries, contained in article 2005 of the CFTA will be similarly enforced under NAFTA between the two countries. In addition, NAFTA expressly provides that the cultural clause will apply to the relations between Mexico and Canada. *See* NAFTA, *supra* note 3, annex 2106.

60 CFTA, *supra* note 56, art. 2005.

Cultural industries are excluded from the requirements of the Free Trade Agreement, subject only to four limited exceptions.[61] That broad language, however, must be read in light of the narrow and specific language of article 2012 of CFTA, the article defining cultural industries. Under article 2012, the cultural industries are defined in narrow and pragmatic language. They include any enterprise engaged in:

> a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,
> b) the production, distribution, sale or exhibition of film or video recordings,
> c) the production, distribution, sale or exhibition of audio or video music recordings,
> d) the publication, distribution or sale of music in print or machine readable form, or
> e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.[62]

The main purpose of NAFTA's cultural exclusion clause is to protect Canada from losing its cultural identity from a massive influx of U.S. works, which the Canadian public eagerly consumes.[63] The language of article 2012 is pragmatic because it focuses only on industries that are likely to affect the cultural identity of Canada. For instance, dance and opera are not covered by the definition of cultural industries in CFTA.[64] The object of article 2012 is not to define culture arbitrarily, but to focus on such cultural in-

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61 The first exception deals with tariffs and states that the remaining tariffs on cultural goods will be eliminated by 1998. The second exception addresses the issue of a forced sale (pursuant to a statute and at the initiative of the Canadian Government) of a company operating in the cultural industry, following its acquisition by foreign investors. The Free Trade Agreement states that in accordance with international customs regarding expropriation, a fair and reasonable price should be paid to a foreign investor. *See* Bernier & Malépart, *supra* note 13, at 144-46. The third exception concerns fiscal deduction for advertisements in Canadian magazines. The fourth and probably most important exception to the cultural exclusion purports to secure the copyrights of U.S. copyright holders whose television programs were received by Canadian antennas and retransmitted in Canada without remunerating the U.S. copyright holders.

62 CFTA, *supra* note 56, art. 2012.

63 *See* Ivan Bernier, How the Idea of Cultural Exception is Viewed Around the World—Canadian Report, Paper presented at the annual meeting of the Institut du droit et des pratiques des Affaires Internationales (December 6, 1996) (on file with the *Cardozo Arts & Entertainment Law Journal*).

64 *See supra* note 62.

dustries that, because of their public appeal, may affect the cultural identity of Canada.

Accordingly, the cultural exclusion clause seems ill-suited to cover new technologies. For instance, in the area of CD-ROM technology, a CD embodying a painting or a literary work might not come easily under the definition of article 2012. The CD is not a book, a magazine, or a periodical. It is neither a video recording nor a musical composition; its content should not primarily be transmitted by broadcasting or cable.

More important, technological breakthroughs in the fields of telecommunications and audiovisual industries will lead to troublesome problems of classification of products.[65] For instance, it is unclear whether audiovisual programs on individual demand, such as pay-per-view services and video-on-demand are covered by the cultural exclusion. Because of rapid changes in the telecommunications field and the increased public demand for new telecommunication services, the language of the cultural exclusion will probably quickly become obsolete.[66]

C. *The Status of Culture in the Uruguay Round*

This section examines whether the Uruguay Round confers a particular status to cultural industries, and if so, determines the nature of that status. This section will demonstrate that beyond the plain language of the General Agreement on Trade in Services, the Uruguay Round created de facto a temporary specific status for cultural services. First we will briefly examine the purpose of GATS. Then, we will examine the *nature* of the agreement on audiovisual industries that the United States and the European Union reached in the Uruguay Round and the *scope* of that agreement.

The purpose of GATS, one of the agreements signed in the course of the Uruguay Round, is to extend the general principles of GATT to international trade in services.[67] The preamble of GATS states that its purpose is to "establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries."[68]

The agreement does not specifically address the issue of trade

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65 *See* Bernier & Malépart, *supra* note 13, at 148.
66 *Id.*
67 GATS, *supra* note 2, pmbl.
68 *Id.*

in cultural services, but it applies generally to international trade in services. As stated in article I(3)(b), "services includes any service in any sector except services supplied in the exercise of governmental authority."[69] The plain meaning of this article is that exchanges of cultural services are covered by the scope of GATS.

As noted earlier, the purpose of GATS is to extend general principles governing GATT to trade in services.[70] Hence, GATS applies the three fundamental principles governing GATT: the principles of Most-Favored-Nation Treatment, National Treatment, and Free Market Access.[71] The Most-Favored Nation principle is defined in article II of GATS.[72] Article II provides that "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country."[73] In GATT, Most-Favored-Nation Treatment is defined as a contracting party's right to enjoy, with respect to custom duties and charges of any kind, the same treatment as any other contracting party.[74] In other words, a contracting party cannot extend a trade benefit to another contracting party without extending that benefit to all other contracting parties.[75]

National Treatment, defined in article XVII(1) of GATS, provides that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."[76] The National Treatment provision of GATS, however, will not be enforced simultaneously in all sectors. GATS limits a Member's obligation to provide National Treatment to the sectors that that Member inscribed in its schedule.[77] The inscription of a particular service in a Member's schedule means that the Member has undertaken to negotiate the liberalization of trade in that service industry with other Members, and that the Member is ready to make commitments with respect to that particular service. Pursuant to article XIX, Members of GATS have five years to inscribe all services in their schedule and to begin negotiations with respect to these services.[78]

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69 *Id.* art. I(3)(b).
70 *Id.* pmbl.
71 *Id.* art. XVI.
72 *Id.* art. II(1).
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.* art. XVII(1).
77 *Id.*
78 Article XIX provides that: "Members shall enter into successive rounds of negotia-

We now turn to the nature and the scope of the agreement on the audiovisual industry that the United States and the European Union reached in the Uruguay Round.

1. The Nature of the Cultural Exception: the "Agreement to Disagree"

In order to understand the actual outcome of the Uruguay Round on the cultural issue, one must first turn to the different strategies that the European Union considered during the negotiations. The European Union considered three main strategies in order to protect the audiovisual industry: an exclusion of the audiovisual sector from the scope of the agreement, a cultural specificity, and a cultural exception.[79]

a. The strategies:

i. *The cultural exclusion:* An exclusion of the audiovisual sector from the Uruguay Round would have given the European Union total freedom with respect to that sector, provided that any protectionist action taken remained within the bounderies of the E.U. Treaty. European negotiators, however, never suggested such a radical solution, because they feared the impact of such a demand on the liberalization of other sectors.[80] As the audiovisual industry represents the United States' second largest export industry,[81] European negotiators were concerned that no agreement would be reached should they insist on excluding the audiovisual sector from the Uruguay Round.[82] Moreover, Member States of the European Union believed that the inclusion of the audiovisual sector into the scope of the Uruguay Round would offer Europe protection against unilateral retaliatory measures taken by the United States.[83] Such protection includes the dispute resolution mechanism instituted in the Uruguay Round.[84]

ii. *The cultural specificity:* The first strategy adopted by the European Union in the Uruguay Round, under the influence of Sir

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tions, begining not later than five years from the date of entry into force of the Agreement establishing the WTO and periodically thereafter, with a view to achieving progressively higher levels of liberalization." *Id.* art. XIX(1).

79 *See* Da Silva, *supra* note 37, at 134-35.

80 *See* Dehousse & Havelange, *supra* note 8, at 116-17.

81 *Id.* at 99.

82 *See* Jack Valenti & Claudine Mulard, *Les Industries de l'Image a l'Heure des Négociations Commerciales Internationales*, LE MONDE, Mar. 11, 1993.

83 *See* Dehousse & Havelange, *supra* note 8, at 117.

84 *Id.* at 111.

Leon Brittan, was to seek a special or specific treatment of the audiovisual sector under GATS.[85] The concept of specificity emerged as early as October, 1990.[86] At that time, while emphasizing the importance of reaching an agreement on services altogether, the European Council emphasized that certain sectors should be treated separately because of their specificity. The Council proposed the adoption of sectorial annexes to GATS,[87] affording specific treatment to certain sectors. Arguing that audiovisual policy includes, at least partially, a cultural and not a trade matter, the European Union claimed that trade in cultural goods could not be treated in the same manner as trade in other industrial products or services.[88] A cultural specificity clause in the Uruguay Round would have included the audiovisual sector in the liberalization process of GATS and, at the same time, would have guaranteed the protection of the European movie industry and the protection of European, national, and local cultural identities.[89]

In order to discuss the status of culture in the Uruguay Round, the twelve audiovisual ministers of the European Union met in Belgium and adopted a six-part resolution known as the "Six Informal Requirements of Mons."[90] That resolution sought: (i) to request an exemption from the Most-Favored-Nation clause for all E.U. Member States' audiovisual industry assistance programs;[91] (ii) to obtain the continuity and extension of public aid and operational subsidies;[92] (iii) to maintain the opportunity for regulating present and future broadcasting technologies;[93] (iv) to encourage the implementation of new policies favoring the E.U. audiovisual sector;[94] (v) to exclude the audiovisual sector from GATS' liberalization obligations;[95] and (vi) to maintain the E.U.'s policy achieve-

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85 As Vice-President of the European Commission, Sir Brittan was in charge of representing the European Union in the Uruguay Round negotiations. In a declaration to the European Parliament, Sir Brittan stated that his primary goal was to negotiate a specific treatment under GATS for television and films. Dehousse & Havelange, *supra* note 8, at 122.

86 European Council, Communication to the Press on the GATT Negotiations (Oct. 10, 1990).

87 *See* Dehousse & Havelange *supra* note 8, at 122.

88 *See* COOPERS AND LYBRAND, EC COMMENTARIES (Oct. 13, 1994).

89 *See* Dehousse & Havelange, *supra* note 8, at 121; Da Silva, *supra* note 37, at 135.

90 *See Gatt/Audiovisual: Update on an Increasingly Controversial Dossier*, TECH EUROPE, Nov. 4, 1993, at 87 [hereinafter *Gatt/Audiovisual Update*].

91 Such programs include co-production agreements, the MEDIA I/MEDIA II and EURIMAGES programs. *See* Dehousse & Havelange, *supra* note 8, at 123.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at 124.

ments, notably the results achieved through the 1989 Directive.[96]

Following the example of financial services, telecommunications, and air transport services, the European Union requested that the specificity of the European audiovisual sector be recognized in a special annex.[97] The proposed annex would have created express exceptions to the Most-Favored-Nation treatment and to National Treatment, and would have permitted parties to deny market access to imports of audiovisual services.[98]

Cultural specificity would have enabled the European Union to maintain its 1989 Directive and to continue subsidizing national film production. Specific treatment would also have permitted the inclusion of the audiovisual sector in GATS, an inclusion that the E.U. Commission sought for two reasons.[99] First, such inclusion would afford the audiovisual sector legal protection against unilateral action taken by other Members of GATS.[100] Second, an exclusion of the sector may have encouraged other countries to insist on excluding additional sectors from GATS.[101] Accordingly, the recognition of the audiovisual sector's specificity would have presented several advantages for the European Union.

The specificity clause, however, was disfavored by some E.U. countries, such as France, which lobbied for a more radical strategy that called for the exclusion of the audiovisual sector from GATS talks.[102] France, supported by a majority of members of the European film industry, argued that the specificity clause would ultimately jeopardize specific national regulations, because an inclusion of the audiovisual sector in GATS would ultimately result in a total liberalization of that sector[103] and would require countries to abide by specific commitments. Certain legal experts also pointed out that cultural specificity is a vague concept, making it difficult for the United States and the European Union to agree on exactly what the concept covers. Such vagueness would also make it difficult for a dispute resolution panel to construe concept of

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96 *Id.*

97 *See id.* at 122 (quoting the European Council).

98 *See* Da Silva, *supra* note 37, at 134.

99 *See EC, U.S. Differences Remain on Audiovisual; More Talks in GATT Needed, EC Official Says*, 10 Int'l Trade Rep. (BNA) No. 41, at 1777 (Oct. 20, 1993).

100 Dehousse & Havelange, *supra* note 8, at 121, 127-28 (While the inclusion of the audiovisual sector in the GATS subjects that sector to the mandatory dispute resolution provisions of the Uruguay Round, the exclusion of the sector from the GATS would have given the United States the ability to take unsanctioned unilateral retaliatory measures against the European Union.); *see also* Da Silva, *supra* note 37, at 134.

101 *See* Dehousse & Havelange, *supra* note 8, at 117.

102 *See id.* at 119-21; Da Silva, *supra* note 37, at 134.

103 *See* Jean-Jacques Plantin, *Exception Culturelle Contre Specificité Culturelle: Les Enjeux*, 5 REVUE DE LA SACD 10-11 (1993).

cultural specificity, possibly leading to an interpretation unfavorable to Europe. These experts also emphasized that an inclusion of the audiovisual sector into GATS, even through a specificity clause, would enable the United States to exercise pressure on the European Union in future negotiations and obtain a gradual liberalization of the audiovisual sector.[104]

Because of the Commission's strong attachment to legal certainty and the crucial importance of American audiovisual interests, it seemed impossible that the United States and the European Union would settle for an exclusion or a specific treatment of that sector. Accordingly, the United States and the European Union explored another legal construct: the cultural exception.[105]

iii. *The cultural exception:* The cultural exception strategy sought to give the audiovisual sector the status of "exception" to GATS' liberalization obligations, similar to GATS exceptions for public health or national security.[106] Three options were possible.[107] The first option was to seek a derogation to the Most-Favored-Nation clause. That option was not even put forward by European negotiators as such derogation would be both temporary and limited by the principles of Market Access and National Treatment. The second option was to seek a cultural clause similar to NAFTA's cultural exclusion clause.[108] Such a clause, allowing retaliatory action, would have left Europe with insufficient protection.[109] The third option was to negotiate a cultural exception clause into article XIV of GATS' final draft.[110]

Article XIV of GATS expressly provides that a Member country may take certain circumscribed measures unless the measures constitute "a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade."[111] The Commission proposed to add a subdivision to article XIV, stating that national measures regulating the supply of audiovisual services could be taken to preserve and pro-

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104 *See* Maindrault, *supra* note 38, at 107, 118.

105 *See* Dehousse & Havelange, *supra* note 8, 125.

106 *Id.* at 117-18.

107 *See* Yves Mamou, *L'Exception Culturelle Reste Une Pomme de Discorde*, LE MONDE, Dec. 7, 1993.

108 *See* Dehousse & Havelange, *supra* note 8, at 120-21.

109 *Id.* As discussed below, the United States contends that, under NAFTA, retaliatory measures can be taken by a party claiming that another party employs unreasonable restraints on cultural trade. *See infra* notes 183-86 and accompanying text.

110 *See* Dehousse & Havelange, *supra* note 8, at 119.

111 GATS, *supra* note 2, art. XIV.

mote local, national, and regional cultural identities.[112] Such a revised article XIV exception would have protected E.U. members by exonerating them from the application of the main GATT free market principles: the Most-Favored-Treatment, National Treatment, and Free Market Access.

On October 14, 1993, however, Sir Leon Brittan's spokesman explained the major obstacles to such an article XIV exception:[113] article XIV makes it clear that it prohibits discrimination between countries and arbitrary obstacles on trade. Hence, a Member State suspecting discrimination would file a claim with the dispute resolution panel and would probably prevail, as the panel would construe narrowly any exception to the general prohibition against discrimination between Members.[114]

While Sir Brittan's spokesman stated that a dispute resolution panel would probably interpret the exception contained in the proposed article XIV restrictively, experts in the Commission's legal service defended the opposite view in an internal Commission document.[115] These experts argued that in the past, GATT panels have only considered serious incidents of discrimination, and that a certain degree of discrimination in favor of European productions would be acceptable.[116] Accordingly, a dispute resolution panel might allow some measures designed to preserve cultural identity.[117]

While the European Union was struggling with its own internal divisions, wavering between specificity and exception, the United States repeatedly indicated its clear determination that there would be no exemptions from GATS' principles for cultural purposes.[118] In order to permit the conclusion of the final general agreement, the European Union abandoned its three strategies, and the United States, together with the European Union, agreed to suspend the negotiations on audiovisual services for five years.[119]

b. The Final Agreement: The Stand Still

In the Uruguay Round, the European Union and the United States did not reach any substantive agreement concerning the au-

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112 *See* Florence Jeanblanc Risler, *Y a-t-il un Choix? Les pistes. La Position Française, in* L'AUDIOVISUEL ET LE GATT 85, 88 (Presses Universitaires De France 1995).

113 *Gatt/Audiovisual Update, supra* note 90.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *See* Dehousse & Havelange, *supra* note 8, at 124-25.

119 *Id.* at 125; *see also* Di Rupo, *supra* note 7, at 23; Da Silva, *supra* note 37, at 137-38.

diovisual sector. The European Union and the United States merely agreed to disagree. Mickey Kantor, the U.S. Trade Representative, stated at a joint press conference with his E.U. counterpart, Sir Leon Brittan: "We have agreed to disagree but our differences remain."[120]

Indeed, no explicit cultural exception emerges from the Uruguay Round,[121] and the plain language of GATS provides that audiovisual services are governed by that agreement.[122] Moreover, twelve countries have made specific commitments to provide access to their audiovisual market.[123]

Despite the integration of audiovisual services into the Final Act of the Uruguay Round, however, the European Union was able to secure most aspects of its audiovisual policy.[124] The European Union was able to maintain bilateral and multilateral agreements on coproduction, subsidies, levies, and the quota requirements set forth by article 4 of the 1989 Directive.[125] Article 4 provides that, "where practicable," at least fifty percent of all audiovisual works broadcast in any European television network must be produced in Europe.[126] In other words, the European Union obtained an exemption from the application of the principle of non-discrimination, one of the main principles governing GATT and GATS.

First, the European Union obtained an exemption from the Most-Favored-Nation clause. Such an exemption allows any E.U. Member State to give preferential treatment to other European countries, or non-European countries having signed a cultural cooperation agreement with the European Union.[127] In other words, the exemption guarantees that the European Union is in no way obligated by GATS to modify its audiovisual policy.

Second, the European Union did not undertake any commitment whatsoever to liberalize its audiovisual sector. Neither the

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120 Larry Elliott & Edward Luce, *U.S. and Europe Clear Obstacles to GATT Deal*, GUARDIAN, Dec. 15, 1993, at 1.

121 COOPERS AND LYBRAND, *supra* note 88.

122 *See supra* note 69.

123 *See* Mario A. Kakabadse, The Audivisual Sector and the WTO, Paper presented at the Annual Meeting of the Institut du droit et des pratiques des affaires internationales (December 6, 1996) (on file with the *Cardozo Arts and Entertainment Law Journal*). These countries include, *inter alia*, the United States, Mexico, Switzerland, and several Asian countries, such as Japan, Korea, Malaysia, Thailand, and India.

124 *See* Dehousse & Havelange, *supra* note 8, at 128; Da Silva, *supra* note 37, at 137.

125 *See* Dehousse & Havelange, *supra* note 8, at 125-28; Da Silva, *supra* note 37, at 137-38.

126 *See* Yves Mamou, *L'Accord Sur le Commerce International, L'Exclusion du Secteur de la Culture et ses Conséquences, Les Européens Gardent leur Liberté Pour l'Audiovisuel*, LE MONDE, Dec. 16, 1993.

127 *See* List of MFN exemptions for audiovisual services by the European Community and its Member States, GATS/EL/31, April 1994.

European Union nor the United States have committed themselves to any particular liberalization measure in the audiovisual sector. Accordingly, the National Treatment principle will not apply to the E.U.'s audiovisual sector until 1998. Indeed, while the Most-Favored-Nation clause is a horizontal clause,[128] the National Treatment clause is vertical, meaning that it is a conditional rule, the application of which depends on commitments made by each country, sector by sector.[129] Under GATS, each member country has to formulate offers and commit itself by way of a written obligation in the sectors it opens to competition.[130] The schedules of specific commitments are annexed to GATS. If a Member country does not make any offer to liberalize specific sectors of services, it is not bound by the National Treatment rule.[131] In 1993, when the Uruguay Round was concluded, the European Union and the United States agreed that there would be no immediate commitment whatsoever concerning movies, television programs, and music recordings.[132] GATS Members have five years from the date of the agreement to start a new round of negotiations on the liberalization of services, sector by sector.[133] Therefore, the European Union is entitled to make no immediate offers in that sector until 1998.

The chapters concerning audiovisual services will thus remain free of any progressive or rapid liberalization commitment and will be kept outside of trade liberalization programs until 1998.[134] Until such date, subsidies violating the National Treatment principle may continue to operate without risk of progressive dismantling.

The "agreement to disagree" excludes audiovisual services from the immediate liberalization process.[135] In its Green Paper, the European Commission states that: "The audiovisual industry is fully covered by the GATS with no special status, culturally or

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128 *See* Da Silva, *supra* note 37, at 137 (horizontal rules are binding on all Member-states).

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *See* GATS, *supra* note 2, art. XIX; *see also* Kakabadse, *supra* note 123, at 2 ("In the longer term, the GATS will engage all Member countries in a process of progressive liberalization. As the audiovisual sector is covered by GATS rules, it is potentially subject to negotiation in the next round of service liberalization which is due to begin within five years of entry into force of the GATS.").

134 *See* Kakabadse, *supra* note 123, at 2.

135 We will be referring to the compromise reached during the Uruguay Round as the "agreement to disagree." This formula was used by Sir Leon Brittan and Mickey Kantor at a joint press conference held on December 13, 1993. *See* Elliott & Luce, *supra* note 120.

otherwise."[136] Likewise, David Hartridge, GATT's Director for Services, acknowledged the misuse of the term "cultural exception." According to Mr. Hartridge, the audiovisual sector does not come under any "cultural exception" clause, and the compromise between the European Union and the United States has been misunderstood.[137] The Motion Picture Association of America made the following similar comments:

> The services negotiations in the Uruguay Round failed to provide significant commitments which would have guaranteed access to foreign markets for motion pictures, television programming and home videos. Contrary to many press reports, audiovisual services were *not* excluded from the new services rules. There are no "cultural carve outs" or other special treatments for this sector. However, market access commitments in services cover less than 20% of our foreign markets by value.[138]

In other words, the European audiovisual industry has been inscribed into GATT as a "highlighted parenthetical."[139] Bilateral talks will, however, continue. According to David Hartridge, although no precise agreement has been reached yet as to when official negotiations on the audiovisual sector will be re-opened, negotiators have until 1998 to commence a new round of negotiations on the liberalization of services.[140] The European Commission described this period as "a transitional period of limited duration,"[141] and GATT Members will most likely initiate negotiations on audiovisual services before 1998. First as stated above, twelve countries have already undertaken specific commitments with respect to their audiovisual sectors and have already expressed their willingness to observe the so-called cultural commitments that the European Union has refused to undertake.[142] Second, Mr. Kakabadse of the World Trade Organization ("WTO") notes that the European Union and the United States have entered into unof-

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136 Strategy Options to Strengthen the European Programme Industry in the Context of the Audiovisual Policy of the European Union: Green Paper for the Commission, COM(94) 29, adopted on April 7, 1994 [hereinafter European Commission's Green Paper].

137 Agence France Presse, Pas D'Exception Culturelle Pour L'Audiovisuel, Selon Un Responsable Du GATT, Press Release (April 13, 1994).

138 Bonnie J.K. Richardson, *Potential Impact on the U.S. Economy and Industries of the GATT Uruguay Round Agreements: Impact on the Audiovisual Industry* [Investigation No. 332-353], May 2, 1994 (response to a notice published in the Federal Register on March 31, 1994).

139 *See* Mamou, *supra* note 126.

140 *See* Agence France Presse, *supra* note 137.

141 European Commission's Green Paper, *supra* note 136, at 32.

142 *See* Kakabadse, *supra* note 123, at 3.

ficial bilateral talks, which are far less agressive than the December 1993 talks.[143] Third, GATS Members have recently entered into negotiations on subsidies pursuant to article XV of GATS, which provides that Members shall enter into negotiations to avoid the distortive effects of subsidies. It is probable that these negotiations will entail new discussions on European mechanisms designed to finance the production and distribution of films.[144] Fourth, given the convergence between telecommunications and the audiovisual sector, negotiations concerning the Annex on Telecommunications of GATS will most likely involve discussions about audiovisual services.

2. The scope of the "agreement to disagree"

The scope of the "agreement to disagree" reached in the Uruguay Round does not go beyond the audiovisual sector.[145] The European Union has only obtained an implicit recognition of the cultural value of audiovisual services, rather than an express and broad recognition that goods with a cultural value are outside the scope of GATT. The United States and the European Union's "agreement to disagree" addresses only the issue of the progressive liberalization of audiovisual services.

The scope of the "agreement to disagree" is difficult to circumscribe, as there is no explicit guiding clause nor any specific language addressing the agreement. Because the compromise mainly enables the European Union to maintain its 1989 Directive for what may be a temporary period, one could argue that the scope of the "agreement to disagree" is related to the scope of the 1989 Directive.[146]

Accordingly, defining the scope of the 1989 Directive becomes an issue when defining the scope of the "agreement to disagree." João de Deus Pinheiro, a senior official in the Cabinet of the European Culture and Audiovisual Commissioner, stated that, "[a]nything that qualifies as broadcasting comes under the scope of the directive. The problem is where do you draw the border-

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143 *Id.*

144 *Id.*

145 *See* Dehousse & Havelange, *supra* note 8, at 125; Da Silva, *supra* note 37, at 137.

146 *See, e.g.*, Da Silva, *supra* note 37, at 137 (arguing that the practical effect of the Uruguay Round in the audiovisual sector is that Europe will be able to maintain its audiovisual policy, including, the 1989 Directive); *see also* Kakabadse, *supra* note 123, at 1 (As there are no liberalization obligations in the audiovisual sector arising from the Uruguay Round, "the television quotas contained in the European TV Directive and current policies regarding subsidization of cinema production remain untouched by the GATS.").

line?"[147] Article 1 of the 1989 Directive defines "television broadcasting" as "the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public."[148] The Commission's 1994 Green Paper provides a clear definition of broadcasting as distinct from telecommunications.[149] Broadcasting covers the transmission from a single transmission point to multiple reception points, while telecommunications covers the transmission from a single transmission point to a single reception point.

The 1989 Directive's rigid definition of broadcasting is ill-suited to cover the development of new technologies. The traditional division between broadcasting and telecommunications may no longer exist since most new technologies will incorporate both. For example, the video dial tone system, which was tested by NYNEX in New York City, already transmits cable television programming over telephone lines and enables viewers to use a telephone line to dial onto an onscreen menu from which they may select programs.[150] With the advent of the "information superhighway" and the digital revolution, newspapers, television programs, movies, phone calls, computer data, and commercial services such as banking and shopping will be reduced to the same format—digital bits—and will be sent along the same medium—fiber optic cables. Telephone lines, cables, and other fixtures that used to be separate in households will converge. The traditional distinction between audiovisual services and telecommunications will become obsolete.

The 1989 Directive remains attached to this soon-to-be obsolete distinction. On the one hand, both the European Council and the European Commission are of the view that video-on-demand, which enables the consumer to select at any time a program from a virtually unlimited catalogue, should be governed by telecommunication rules, not by broadcasting rules. They contend that video-on-demand falls outside the scope of the 1989 Directive since it is "point to point" communication.[151] On the other hand, the Com-

147 Mavis Clarance, *New Services May Evade Quotas in New Frontiers*, HOLLYWOOD REP., Nov. 15, 1994.

148 1989 Directive, *supra* note 17, art. I.

149 *See* European Commission's Green Paper, *supra* note 136, at 40.

150 *See Nynex Finishes Video Dial Tone Trial*, REUTERS FIN. SERVICE, July 6, 1995 (NYNEX began experimenting with the Video-Dial-Tone system in January 1994.); *see also The Video Dial Tone, Strangled*, N.Y. TIMES, Aug. 31, 1992, at A14 (Video-Dial -Tone system is the "transmission of television and other videoservices over phone lines.").

151 On the European Commission's March 22, 1995 position, see Jacques Docquiert, *Bruxelles Sauvegarde Pour Dix Ans Le Système Des Quotas Audiovisuels*, LES ECHOS, Mar. 23,

mission regards pay-per-view services as broadcasting since they are "point to multipoint" communication, which means that the transmission is initiated by a public service and sent to viewers who have the necessary equipment, and can choose only a segment of a program that they want to decode and view.

While the Directive fails to address some of the new technologies, GATS' Annex on Telecommunications provides a clear answer as to whether trade in such technologies should be liberalized. The Annex on Telecommunications calls for cross-border trade in the field of telecommunications networks and services.[152] Specifically, the Annex requires every GATS Member to avail its telecommunications networks to the supply of foreign services on a non-discriminatory basis, provided that these particular services have been inscribed in the Member's liberalization schedule.[153]

Article 2.2 of the Annex explicitly excludes from free access and free trade "measures affecting the cable or broadcast distribution of radio or television programming."[154] Therefore, if a national measure was to have an impact on broadcasting, the member responsible for the measure would not be subject to the obligation of providing access to and use of telecommunications transport networks. One could argue that the European Union would have the ability to restrict access to its telephone wires under article 2.2 and, for example, limit access to an American video-on-demand system broadcast onto European cable. But when invoked, article 2.2 would only provide an indirect means of restricting foreign programs. It is aimed at restricting foreign entities from broadcasting,[155] rather than providing Members of GATS with direct control over the transmitted programs.

In sum, the Uruguay Round gave the European Union neither

1995. On the European Council's November 20, 1995 position, see Stéphanie Pistre, *La Directive "TSF" à L'Epreuve Du Temps*, LÉGIPRESSE, June 1994, at 74.

152 *See* Dehousse & Havelange, *supra* note 8, at 106-07.

153 *Id.*

154 This Annex states in its article 5.1: "Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport network and services on reasonable and non discriminatory terms and conditions for the supply of a service included in its schedule." In a footnote, the text indicates that the term "non discriminatory" is understood to refer to Most-Favored-Nation and National Treatment as defined in the agreement. *See* GATS, *supra* note 2, art. 5.1. Article 5 is subject to article 2.2 of the same Annex that provides that "this annex shall not apply to measures affecting cable or broadcast distribution of radio or television programming." *Id.* art. 2.2.

155 Like section 310 of the U.S. Communications Act, 47 U.S.C. § 310 (1994 & Supp. 1997), which regulates alien ownership of communications companies, Article 2.2 is founded on the belief that if aliens acquire control of the nation's communications facilities, it might impede national defense and security efforts. *See* GATS, *supra* note 2, art. 2.2.

the right to permanently restrict the diffusion of U.S. audiovisual works in Europe, nor the permanent right to subsidize its cinematographic industry. No cultural exception per se emerges from the text of GATS. On the contrary, audiovisual works are fully covered by the free trade provisions of the Uruguay Round. The real victory that the European Union won is a temporary exclusion of the audiovisual sector from the liberalization process of GATS.

II. The Relationship Between Intellectual Property Rights and Both the "Agreement to Disagree" and NAFTA's Cultural Exception

The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") was ratified as part of the Uruguay Round on December 15, 1993. The preamble of the TRIPS Agreement states that the purpose of the agreement is "to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[156] Part one of the TRIPS Agreement reiterates the National Treatment and the Most-Favored-Nation principles of GATT. Specifically, the TRIPS Agreement provides that signatories shall confer upon nationals of other parties intellectual property protection no less favorable than that provided to their own nationals.[157] In addition, TRIPS provides that whatever rights are conferred upon nationals of one country must be granted to nationals of all Member countries.[158]

Because cultural exclusions affect trade in copyrighted goods, such exclusions inevitably affect the rights of copyright holders to freely "trade" their intellectual property rights and to fully exercise such rights. In other words, while erecting barriers to the free trade of cultural goods, cultural exceptions also erect barriers to copyright holders' enjoyment of their intellectual property rights.

This section will discuss the possible conflict between the "agreement to disagree" reached in the Uruguay Round and the TRIPS Agreement. It will also ascertain whether and how NAFTA's cultural exclusion clause has any effect on intellectual property rights; that is, whether NAFTA's cultural exclusion clause has any effect on chapter 17 of NAFTA.

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156 TRIPS Agreement, *supra* note 4, pmbl.
157 *Id.* art. 3.
158 *Id.* art. 4.

A. *The Impact of the TRIPS Agreement on the Uruguay Round's "Agreement to Disagree"*

The main achievement of the TRIPS Agreement is the integration of intellectual property into the global context of trade. However, it seems to be ineffective in preventing restrictions on the exercise of intellectual property rights where such restrictions are a consequence of the "agreement to disagree."

The TRIPS Agreement guarantees non-discrimination between foreign authors and domestic authors; that is, it provides that whatever intellectual property rights a country grants to its domestic authors must be similarly granted to foreign authors on a non-discriminatory basis. Because the "agreement to disagree" inherently restrains the normal exploitation of cultural works by foreign authors, that "agreement" appears to conflict with the non-discrimination principle of the TRIPS Agreement.

The real question, however, is whether the TRIPS Agreement confers to intellectual property right holders an affirmative right to exercise their intellectual property rights. The question should be answered in the negative for the following two reasons.

First, the TRIPS Agreement, which incorporates by reference most of the provisions of the Berne Convention,[159] focuses essentially on an intellectual property owner's right to authorize or prohibit the exploitation of his work. Trips fails to address the owner's positive right to exploit the intellectual property rights he or she holds in goods and services. For instance, the Berne Convention provides that:

> Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
> (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
> (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one.[160]

Similarly, the Berne Convention provides that the holders of intellectual property rights to a cinematographic work shall enjoy the same rights as the author of an original work.[161] The TRIPS

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159 *Id.* art. 9. The TRIPS Agreement provides that Members shall comply with articles 1-21 and with the appendix of the Berne Convention. Members, however, are not bound by article 6*bis* of the Berne Convention, the "moral rights" provision. *See* Berne Convention, *supra* note 25, art. 6*bis*.

160 Berne Convention, *supra* note 25, art. 11*bis*.

161 *Id.* art. 14*bis*.

Agreement focuses on the acquisition, maintenance, and transfer of intellectual property rights, not on an author's right to exploit his work. Accordingly, the TRIPS Agreement appears not to conflict with the "agreement to disagree."

Second, while there is some language in the TRIPS Agreement and in the Berne Convention that could be construed as conflicting with a country's ability to restrain trade, that language is ambiguous, and leaves room for argument about its enforcement. Article 13 of the TRIPS Agreement provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[162] Because of the amibguity of Article 13, it is unclear whether the article conflicts with the "agreement to disagree."

One way to demonstrate that the "agreement to disagree" would eventually be incompatible with the TRIPS Agreement would be through a broad interpretation of the rights granted in the Berne Convention. For instance, a foreign author could argue that a German law requiring that half of the bookstore shelves in Germany be devoted to German authors deprived him of the actual opportunity to authorize or prohibit the reproduction of his or her work. The argument, however, appears to be tenuous, and would probably be unsuccessful as the foreign author would have difficulties proving that the German law unreasonably prejudices his or her legitimate interest as a right holder.

Emery Simon, who participated in negotiations on the intellectual property during the Uruguay Round on behalf of the United States, explains the limits of a trade-based approach to intellectual property:

> [The TRIPS Agreement] may have failed to cure the principal shortcoming of international intellectual property agreements. These agreements . . . address *only* the acquisition, maintenance and enforcement of rights. They do not explicitly guarantee the right holders the ability to use or exercise their rights. The absence of such a guarantees [sic] has become both the major "new" threat to right holders, and the principal point of friction on the current scene.
>
> Focusing on the most visible issue not resolved by the TRIPs, the failure of the WTO agreement to guarantee true national treatment to copyright holders is quickly becoming an excuse for dis-

162 TRIPS Agreement, *supra* note 4, art. 13.

crimination and exploitation.[163]

Accordingly, while the TRIPS Agreement constitutes the first successful effort to incorporate an agreement on intellectual property in a broader agreement on trade, it appears that TRIPS will not prevent restrictions on the exercise of intellectual property rights through the "agreement to disagree."

B. *The Impact on Intellectual Property Rights of NAFTA's Cultural Exclusion*

NAFTA appears to create conflict between its cultural exclusion clause and the rights of an intellectual property owner to affirmatively exercise his rights. Chapter 17 of NAFTA regulates the rights of intellectual property owners[164] and goes beyond the provisions of the TRIPS Agreement: while TRIPS apparently fails to give intellectual property owners an affirmative right to exercise the rights granted by the Berne Convention, article 1705(3)(a) of NAFTA guarantees absolute contractual freedom for the owner or acquirer of an intellectual property right to transfer that right.[165] Article 1705(3)(b) also provides that the owner or acquirer of such right shall be entitled to fully exercise it in his name.[166] Accordingly, NAFTA's cultural exclusion seems to clearly conflict with the rights of intellectual property owners under chapter 17.

That conflict is, however, only apparent as NAFTA creates a safe harbor for measures protecting the parties' cultural industries.[167] NAFTA allows Canada and the United States to exempt their cultural industries from its free-trade obligations, such as National Treatment.[168] Thus, in the cultural industries sector, Can-

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163 Emery Simon, The Integration of Intellectual Property and Trade Policy, Address at *ALAI* (June 27-28, 1994) (on file with the *Cardozo Arts and Entertainment Law Journal*) (emphasis in original).

164 Chapter 17 sets forth: (i) an exhaustive list of the rights that the parties undertake to protect; (ii) an obligation to confer National Treatment to foreign intellectual property right holders; and (iii) the entitlement of such right holders to affirmatively exercise and transfer their rights. *See* NAFTA, *supra* note 3, ch. 17; Bernier & Malépart, *supra* note 13, at 156-61.

165 "Each Party shall provide that for copyright and related rights: any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee." NAFTA, *supra* note 3, art. 1705(3)(a).

166 "Each party shall provide that . . . any person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and sound recordings, shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights." *Id.*

167 *See* Bernier & Malépart, *supra* note 13, at 152, 159.

168 *Id.* at 152 (citing UNITED STATES GENERAL ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT-ASSESSMENT OF MAJOR ISSUES, 100 (1993) ("NAFTA permits the parties to exempt themselves from the agreement's obligations (such as National Treat-

ada and the United States have the right to take unilateral actions, inconsistent with their otherwise binding obligations under NAFTA.[169] Under chapter 17 of NAFTA, such obligations include (i) an obligation to grant foreign intellectual property right holders National Treatment, and (ii) an obligation to enable right holders to affirmatively exercise and transfer their rights.[170] Accordingly, NAFTA's cultural exclusion clause constitutes a safe harbor for measures affecting the cultural industries.

However, the degree of safety that safe harbor affords is hotly disputed.[171] While Canadian commentators are of the view that the United States may not impose unilateral sanctions on Canada in retaliation for action taken pursuant to the cultural exclusion clause, the U.S. government and U.S. commentators believe that such unilateral sanctions are appropriate under NAFTA.[172] That issue turns on a construction of NAFTA and of CFTA.

NAFTA's cultural exclusion clause is governed by the provisions of CFTA, as these provisions were incorporated by reference into NAFTA.[173] Specifically, NAFTA provides that

> [n]otwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access-Tariff Elimination), *and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the terms of the Canada-United States Free Trade Agreement.*[174]

The relevant provisions of CFTA are set forth in article 2005(1) and (2).[175] Article 2005(1) provides that, with limited exceptions, cultural industries are exempted from the free trade provisions of CFTA.[176] Article 2005(2) waters down the effect of the first subsection. It states that "[n]otwithstanding any other provision of this Agreement, a party may take measures of equivalent commercial

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ment), including those in the services, investment and intellectual property chapters, affecting cultural industries.")).

169 *See* Bernier & Malépart, *supra* note 13, at 152 (citing United States, Statement of Administrative Action in Connection With the Implementation of the NAFTA, at 221).

170 Bernier & Malépart, *supra* note 13, at 159-60 (citing article 1705(2) and (3)).

171 *Id.* at 153.

172 *Id.*

173 *Id.* at 151.

174 NAFTA, *supra* note 3, annex 2106 (emphasis added).

175 Bernier & Malépart, *supra* note 13, at 152-55; *see also* Victor Nabhan, *The Free Trade Agreement and Copyright, a Canadian Perspective*, 161 REVUE INTERNATIONALE DU DROIT D'AUTEUR 98, 128 (1994) ("[A]ccording to a widely held opinion in Canada, unilateral acts of retorsion could not be justified where the cultural industries exception has been applied in the field of intellectual property.").

176 *See* Bernier & Malépart, *supra* note 13, at 148.

effect in response to actions that would have been inconsistent with this Agreement but for [the exemption clause of subsection one]."[177]

Canadian commentators argue that, for two independently sufficient reasons, the United States may not take measures of equivalent effect in retaliation against Canada's invocation of the cultural exemption clause.[178] First, they contend that such measures would be inappropriate under CFTA,[179] as CFTA never purported to regulate trade in audiovisual services and records. Thus, measures affecting such trade would be consistent with CFTA and should not trigger the imposition of sanctions under article 2005(2).[180]

Second, they contend that such measures would be inappropriate under NAFTA.[181] As stated above, article 2005(2) of CFTA governs the imposition of measures of equivalent effect under NAFTA. As also discussed earlier, article 2005(2) only allows the imposition of sanctions in retaliation against a violation of CFTA. Accordingly, as CFTA never purported to govern intellectual property rights, a violation by Canada of chapter 17 of NAFTA may not trigger the imposition of sanctions under CFTA.[182] For these reasons, Canadian commentators claim that the United States may not impose unilateral sanctions against Canada in response to Canada's invocation of the cultural exemption clause.

U.S. authorities and commentators read CFTA and NAFTA differently.[183] They believe that unilateral sanctions constitute an appropriate means of retaliation against an invocation of the cultural clause. Specifically, the United States indicated that "the agreement's automatic retaliation provision should serve effectively to deter the Canadians from implementing any adverse measures affecting the intellectual property rights of the U.S. movie, recording and/or publishing industries."[184] Similarly, the Statement of Administrative Action accompanying the Act implementing NAFTA states that "[s]hould Canada choose to institute [measures

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177 CFTA, *supra* note 56, art. 2005(2).

178 *See* Bernier & Malépart, *supra* note 13, at 149, 153.

179 *Id.* at 149.

180 *Id.* at 148-49 (Trade in videotapes and audiovisual services never intended to come within scope of CFTA, unlike other kinds of trade in services expressly listed in chapter 14 of CFTA, such as trade in periodicals and newspapers.).

181 *Id.* at 153.

182 *Id.*

183 *Id.*

184 Bernier & Malépart, *supra* note 13, at 152 (quoting UNITED STATES GENERAL ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT-ASSESSMENT OF MAJOR ISSUES, 100 (1993)).

pursuant to the clause], the Administration, in cooperation with the relevant industries, is prepared to exercise fully the right to respond granted in this Agreement."[185] Moreover, most commentators agree that NAFTA and CFTA do not circumscribe measures of equivalent effect to the Canadian cultural industries; when imposing such measures, the United States may target either Canada's cultural industries or other Canadian industries.[186]

The U.S. determination to apply unilateral sanctions will ease the minds of those who view the adoption of cultural exemptions as a means of erecting trade barriers. For instance, Richard Self, the U.S. Chief Negotiator during the GATS negotiations, stated that "[w]hat is truly frightening to the U.S. is the idea of a cultural exception. To make culture untouchable is to enable people to protect anything because no one has a universal definition of culture."[187]

Some commentators have also argued that Canada's invocation of the cultural clause may not only subject Canada to unilateral sanctions but may also violate the Berne Convention, which Canada undertook to enforce.[188] Article 20 of the Berne Convention provides that "the Governments of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors *more extensive rights* than those granted by the Convention."[189] Accordingly, one could argue that "Canada could only legitimately take advantage of the cultural exception for legislative measures involving more extensive protection than the minimum required by the Berne Convention."[190]

For all these reasons, while NAFTA admittedly offers Canada the opportunity to take action inconsistent with free trade in the sector of its cultural industries, that opportunity is limited by a number of uncertainties.

III. Conclusion: The Cultural Exclusions' Limited Impact on Trade

Thus far, our assumption was that cultural exclusions may pre-

185 Bernier & Malépart, *supra* note 13, at 154 (quoting the Statement of the Administrative Action in Connection With the Implementation of the NAFTA, at 221).

186 *See id.* at 150.

187 *Debate Over EC's Attempt to Exclude Audiovisual Sector from GATS Continues*, 10 Int'l Trade Rep. (BNA) No. 38, at 1628 (Sept. 29, 1993).

188 *See* Nabhan, *supra* note 175, at 127; Bernier & Malépart, *supra* note 13, at 158 (NAFTA requires the United States and Canada to give effect to the substantive provisions of the Berne Convention).

189 Berne Convention, *supra* note 25, art. 20 (emphasis added).

190 Nabhan, *supra* note 175, at 127.

vent cultural industries from competing in the international marketplace, and that these exclusions affect the ability of intellectual property right holders to fully exercise their rights. We conclude, however, that NAFTA's cultural exclusion and the Uruguay Round's "agreement to disagree" have had limited effects on trade.

A. *The Limited Effects of the NAFTA's Cultural Exclusion*

To this day, Canada has failed to invoke NAFTA's cultural exclusion.[191] On the contrary, the adoption of Bill C-115, the Act implementing NAFTA, demonstrates Canada's commitment to complying with its obligations.[192] In the area of intellectual property, Bill C-115 substantially amended Canada's Copyright Act as well as Canada's trademark and patent laws:[193] over sixty articles in Bill C-115 amended Canada's prior intellectual property laws.[194] These amendments include the creation of new intellectual property rights,[195] as well as the modification of the duration of existing rights.[196]

B. *The Limited Effects of the "Agreement to Disagree"*

The effects of the "agreement to disagree" have been similarly limited as the European audiovisual industry remains dominated by its U.S. counterpart. U.S. studios produce nearly eighty percent of the motion pictures shown in Europe,[197] and these studios keep increasing their profits. Significantly, these profits kept rising after the 1989 Directive came into effect.[198]

Ironically, while one of the most visible aspects of the "agreement to disagree" is that Europe maintained its 1989 Directive,[199] that Directive has proven to have limited effects on trade for the following three reasons. First, the quota requirements of the 1989 Directive are expressed in flexible language and have been enforced disparately throughout the European Union. The Direc-

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191 *See* Bernier & Malépart, *supra* note 13, at 162.

192 *Id.* at 162; *see also* Nabhan, *supra* note 175, at 162.

193 *See* Bernier & Malépart, *supra* note 13, at 162.

194 *Id.*

195 *See* Nabhan, *supra* note 175, at 143 (Bill C-115 created new intellectual property rights, such as the right of commercial rental of the original or a copy of a computer program or sound recording).

196 *Id.* at 145 (several sections of Bill C-115 modified the duration of intellectual property rights to bring them into compliance with the Berne Convention).

197 *See* Di Rupo, *supra* note 7, at 21.

198 *See* Dehousse & Havelange, *supra* note 8, at 100. In 1991-92, before the enactment of the 1989 Directive, the profits of U.S. studios rose by 6.2%. The following year they rose by 6.5%. *Id.*

199 *See id.* 8, at 124-28 (the Final Act of the Uruguay Round allows Europe to maintain its audiovisual policy, embodied in the Directive Television Without Frontiers).

tive's quota requirements need only be enforced "progressively," "where practicable," and "taking economic realities into account."[200] Invoking that broad and flexible language, Great Britain's television regulation agency, the Independent Television Commission, granted TNT and the Cartoon Network a license where France and Belgium had previously refused to do so.[201] The British Commission explained that a requirement that new satellite channels broadcast a majority of European programs would be overly burdensome, as it is much more expensive to produce European programs than to buy existing U.S. products.[202] The Commission further explained that, in order to implement the 1989 Directive's quota requirements, channels should be allowed to start off with a majority of non-European programs and to progressively acquire European programs, as these channels start generating revenues.[203] Other European countries, such as Germany, the Netherlands, and Italy, relying on the Directive's flexible language and arguing that enforcing these requirements would be impracticable, have similarly granted exemptions from the quota requirements "to cable or satellite channels serving specialty audiences with targeted programming."[204]

Second, the language of the Directive creates a safe harbor for television programs jointly produced by E.U. and non-E.U. studios: the Directive's quota requirements fail to apply to such joint productions.[205] Accordingly, U.S. suppliers of television programs have begun to expand their presence in the European television scene.[206] U.S. media and communication companies now invest in European-based production companies, in broadcasting organizations, in cable and satellite networks, and in the forthcoming con-

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200 1989 Directive, *supra* note 17, pmbl., art. 4.

201 *See* Richard W. Stevenson, *Lights! Camera! Europe!*, N.Y. TIMES, Feb. 6, 1994, at 1. Both broadcasting organizations are part of a network owned by Ted Turner. The Cartoon Network broadcasts 100% U.S.-made programming, and the TNT movie channel broadcasts 97% U.S.-made programming. *Id.*; *see also* Hilary Clarke, *Hollywood Wins Battle of Quotas Euro Parliament Rejects Tougher Rules*, HOLLYWOOD REP., Nov. 13, 1996, at 1 (several E.U. Member States have exempted TNT and the Cartoon Network from the Directive's quota requirements).

202 *See* Michael C. D'Istria, *L'Accord sur le Commerce International; L'Exclusion du Secteur de la Culture et ses Consequences*, LE MONDE, Dec. 16, 1993 (legal and linguistic differences among European Union members make cooperation among European countries too limited to enable E.U. channels and studios to effectively compete with U.S. studios, accounting for a large deficit in production and dissemination of television programs in the E.U.).

203 *See UK "Does Not Understand Europe's Strongly-Felt Argument on Culture,"* SATELLITE TV FIN., Oct. 29, 1993.

204 Clarke, *supra* note 200; *see* Stevenson, *supra* note 201.

205 *See* Stevenson, *supra* note 201.

206 *Id.*

vergence of telecommunications and entertainment services.[207] In most cases, U.S. companies invest in joint ventures that fully comply with European regulations of foreign ownership of capital stock.[208] For instance, Disney created a joint venture to produce children's programs with the major French, German, Spanish, and Italian broadcast networks.[209] Similarly, Capital Cities/ABC bought stakes in three German, Spanish, and British production companies, and a group of American investors acquired a seventy-five percent interest in the Czech Republic's first privately owned television station.[210] Through investments in production and distribution, U.S. communication companies secured ways to control the content of entertainment: there is a "real prospect of American companies being the gatekeepers of entertainment distribution in large parts of Europe and indeed around the world."[211]

Third, the revision process of the 1989 Directive, which started in 1995, has revealed the lack of consensus among E.U. Members on quota requirements. While most powerful Members of the European Union, such as Germany, Great Britain, and Italy sought to dismantle these requirements, France was the only important Member of the Union in favor of maintaining them.[212] Even though the European Commission, the European Parliament, and the European Council have defended opposing views throughout the revision process, it now appears that the revised Directive, expected to be adopted in the course of this year, will maintain both the quota requirements and the "where practicable" loophole.[213]

Because of the Directive's limited effects on trade, unilateral retaliation on the part of the United States is unlikely. However, the United States threatened to retaliate against the European

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207 *Id.*; *see also* Kakabadse, *supra* note 123, at 4 (after the conclusion of the Uruguay Round, the U.S. motion picture industry has stressed its interest in developing co-productions and joint ventures with European partners).

208 *See* Stevenson, *supra* note 201.

209 *Id.*

210 *Id.* The Czech Republic, is not, however, a Member of the European Union.

211 *Id.* (quoting Nick Lovegrove of McKinsey & Company).

212 *Id.*; *see also* Emmanuel Schwartzenberg, *La France Sauve les Quotas de Diffusion Audiovisuels*, LE FIGARO ECONOMIE, Nov. 21, 1995 (Germany, Great Britain, and Italy have long indicated their hostility towards the quota requirements of the Directive.); Ange Dominique Bouzet, *A Bruxelles, Les Ministres Relégitiment les Quotas*, LIBERATION, Nov. 21, 1995 (in order to reach a compromise on the quota requirements and to overcome the hostility of other E.U. Members, France came under an obligation to defend a minimalist position.).

213 *See* Jean-Noël Martin, L'Exception Culturelle et son Domaine, Paper presented at the Annual Meeting of the Institut du droit et des pratiques des affaires internationales (December 6, 1996) (on file with the *Cardozo Arts and Entertainment Law Journal*); *see also* Schwartzenberg, *supra* note 212 (compromise on the revised Directive includes quota requirements and the "where practicable" loophole; compromise was hard to reach, and text unlikely to be further challenged by any E.U. Member State.).

Union's audiovisual policy both during the Uruguay Round negotiations when the United States and the European Union reached a deadlock on audiovisual policy issues[214] and after the conclusion of the Uruguay Round.[215] Commenting on the "agreement to disagree," Mickey Kantor stated, "[w]e have decided not to accept a meaningless figleaf. Instead, we think we can best advance the interest of our artists, performers, and producers—and the free flow of information around the world—by reserving all our legal rights to respond to policies that discriminate in these areas."[216]

European commentators have argued that unilateral retaliation on the part of the United States would be inappropriate, as trade in audiovisual services comes within the scope of GATS.[217] Thus, these commentators contend, the United States should address any complaint about the European audiovisual policy to the World Trade Organization ("WTO"), the body created by the Uruguay Round in charge *inter alia* of dispute resolution.[218] The WTO, however, is unlikely to rule against the European Union. First, the clear market imbalance between U.S. and European studios demonstrates that the European market is open.[219] Second, the WTO's dispute resolution system "applies mainly if a Member acts contrary to its specific commitments or [Most-Favored-Nation] obligations."[220] As stated above, the European Union made no liberalization commitment whatever in the area of audiovisual services and secured many exemptions to the Most-Favored-Nation obligation in that area.[221] Accordingly, having "reserved the right to discriminate," the European Union may well have insulated itself from an adverse finding by the WTO.[222]

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214 *See* Da Silva, *supra* note 37, at 138. Mickey Kantor, the U.S. Trade Representative, threatened to use section 301 of the Trade Act of 1974 to compel the European Union to liberalize trade in audiovisual services. *See* Trade Act of 1974 § 301 (codified at 19 U.S.C. § 2411 (1994 & Supp. 1997)).

215 *Uruguay Round Agreement is Reached; Clinton Notifies Congress Under Fast Track*, 10 Int'l Trade Rep. (BNA) No. 49, at 2103 (Dec. 15, 1993).

216 *Id.*

217 *See* Dehousse & Havelange, *supra* note 8, at 127-28; *see also* Kakabadse, *supra* note 123, at 1, 2.

218 *Id.*

219 *See* Clarke, *supra* note 201 (the U.S. has a $6 billion trade surplus with the European Union in movies, television programs, and music).

220 Kakabadse, *supra* note 123, at 2.

221 *See supra* notes 128-34 and accompanying text; *see also* Kakabadse, *supra* note 123, at 2.

222 *See* Kakabadse, *supra* note 123, at 2; *see also* Dehousse & Havelange, *supra* note 8, at 128.