

# *Is There No Business Like Show Business?* Free Trade and Cultural Protectionism

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## I. INTRODUCTION

After more than seven years of negotiations and two major postponements, the representatives of 108 countries and the European Commission signed the Final Act of the Uruguay Round on April 15, 1994.<sup>1</sup> This latest round of trade negotiations under the General Agreement on Tariffs and Trade ("GATT") boasts a number of measures that should help liberalize world trade significantly.<sup>2</sup> Because of these measures, the Uruguay Round has rightly been called a boon to freer trade.<sup>3</sup>

The failure of GATT negotiators to agree on the issue of trade in audiovisual goods and services ("A/Vs"), however, represents a stark omission from the list of the Uruguay Round's accomplishments. Despite protracted deliberations, the United States and the European Union were unable to agree on the rules that should govern A/V trade, which is now worth four billion dollars annually between those two trading partners alone.<sup>4</sup> The European Union argued that A/Vs are not like conventional goods and thus pressed for the permissibility of A/V import quotas under the GATT. This claim was in effect a demand for a GATT exception for cultural industries.<sup>5</sup> The United States, on the other hand, appealed to GATT principles and demanded either that there be free trade in A/Vs,<sup>6</sup> or alternatively, if quotas were to be permitted, that American A/V producers be included as beneficiaries of national subsidy pools generated through levies on

1. *Over 100 Nations Sign GATT Accord to Cut Barriers to World Trade*, 11 Int'l Trade Rep. (BNA) No. 16, at 610 (Apr. 20, 1994).

2. For example, the Final Act lowers the customs duties of industrialized countries from 38% on average to 3.9% on average. See *GATT: New World Trade Regime is Born Out of the Uruguay Round Final Act*, Multinational Service (European Information Service), May 10, 1994, available in LEXIS, World Library, MULSRV File [hereinafter *New World Trade Regime is Born*]. Negotiators also agreed to begin phasing out the Multi-Fiber Arrangement and to reintroduce textiles under GATT auspices starting in 1995. See *Agreement on Textiles and Clothing, Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA II-A1A-5 (Dec. 15, 1993). In addition, GATT negotiators forged agreements with respect to trade in services and intellectual property built on many of the same liberal trade principles underlying trade in goods under the existing GATT. See *General Agreement on Trade in Services, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA II-A1B (Dec. 15, 1993).

3. See, e.g., *GATT Comes Right*, THE ECONOMIST, Dec. 18, 1993, at 13, 13-14; *Uruguay Round Agreement is Reached*, 10 Int'l Trade Rep. (BNA) No. 49, at 2103 (Dec. 15, 1993).

4. See David R. Sands, *Clash of Cultures Creates Latest Block to World Trade Pact*, WASH. TIMES, Nov. 24, 1993, at B7.

5. See, e.g., E.C., *U.S. Differences Remain on Audiovisuals; More Talks in GATT Needed, EC Official Says*, 10 Int'l Trade Rep. (BNA) No. 41, at 1777 (Oct. 20, 1993) [hereinafter *Differences Remain on Audiovisuals*].

6. See, e.g., U.S., *U.S. Urges Free Worldwide Trade in Movies, Radio Programs During Uruguay Round Talks*, 7 Int'l Trade Rep. (BNA) No. 36, at 1369 (Sept. 12, 1990) [hereinafter *U.S. Urges Free Worldwide Trade*].

film admissions and blank videotapes.<sup>7</sup> With battle cries for cultural integrity pitted against those for GATT integrity, the dispute over A/Vs evoked impassioned responses<sup>8</sup> and even threatened to derail the achievements of the entire round of negotiations.<sup>9</sup> The heart of the dispute appeared, on one level, to involve different answers to three questions seemingly unique to A/Vs: First, what are A/Vs, and how are they different from other goods and services? Second, do these differences merit the exclusion of A/Vs from customary free trade rules? Finally, should trade in cultural goods and services be included in the GATT regime or any other multilateral trade agreement?

On another level, however, these questions can be seen as part of a set of basic policy issues that strike at the core of the GATT and its successor, the World Trade Organization.<sup>10</sup> This set of questions asks whether free trade principles have any desirable limit. Although economic efficiency is important enough to serve as a standard against which many trade policies should be measured, other values, such as distributive and social justice, also rightly compete for our attention. Cultural integrity could be one such value.<sup>11</sup> Thus,

7. See, e.g., *Aircraft Subsidies, Audiovisuals Remain Barriers to U.S.-E.C. Accord*, 10 Int'l Trade Rep. (BNA) No. 48, at 2038 (Dec. 8, 1993) [hereinafter *Aircraft Subsidies*].

8. For example, in defending the right of nations to protect their cultural integrity against American A/V imports, former French Culture Minister Jack Lang declared that "[t]he soul of France cannot be sold for a few pieces of silver." Sands, *supra* note 4, at B7. Similarly, French film director Claude Berri told the European Parliament in Strasbourg that "European culture is finished if the American [A/V] invasion is not turned back." *Id.* In contrast, Jack Valenti, the president of the Motion Picture Association of America, characterized the A/V negotiations as having "nothing to do with culture, unless French European soap operas and game shows are the equivalent of Molière." *U.S. Industry, Members of Congress Offer Mixed Reaction, But Most Back Accord*, 10 Int'l Trade Rep. (BNA) No. 49, at 2110 (Dec. 15, 1993). To Valenti and many others, the call for cultural protection in trade was "blatant protectionism unmasked." *Id.* Even U.S. Trade Representative Mickey Kantor seemed to jump into the rhetorical fray by publicly dismissing the European Union's last-minute compromise proposal as "a meaningless figleaf." *Negotiators Clear Path to GATT Pact by Sweeping Away Remaining Differences*, 10 Int'l Trade Rep. (BNA) No. 49, at 2107 (Dec. 15, 1993). Furthermore, nationality did not always determine viewpoint. Most notably, American film producer Steven Spielberg openly sided with the European Union's proposed cultural exemption in the GATT. See Matthew Fraser, *High Noon: U.S., Europe Arm Themselves for Movie, T.V. Showdown Before GATT Deadline*, THE GAZETTE (Montreal), Sept. 12, 1993, at B1.

9. See, e.g., *Aircraft Subsidies*, *supra* note 7, at 2038; *Differences Remain on Audiovisuals*, *supra* note 5, at 1777; *Foreign Ministers Fail to Agree on Position on Audiovisual Sector*, 10 Int'l Trade Rep. (BNA) No. 42, at 1811 (Oct. 27, 1993); Fraser, *supra* note 8, at B1; *Uruguay Round Agreement is Reached*, *supra* note 3, at 2103.

10. If ratified by the governments of the GATT Contracting Parties ("CPs"), the WTO will officially come into being in 1995. Unlike the provisional GATT regime, the WTO will not only sponsor all future rounds of negotiations under the General Agreement, but will also be responsible for administering all agreements made under the provisional GATT regime. See *New World Order Trade Regime is Born*, *supra* note 2; *Uruguay Round Agreement is Reached*, *supra* note 3.

11. The tension between cultural values and free trade has spawned a diverse and growing body of trade and law-related literature. There are a number of manuscripts, for example, that examine cultural identity in the context of A/V trade. See, e.g., Richard Collins, *The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community*, 11 CARDOZO ARTS & ENT. L.J. 361 (1993); Wolfgang Hoffmann-Riem, *National Identity and Cultural Values: Broadcasting Safeguards*, 31 J. BROADCASTING & ELECTRONIC MEDIA 57 (1987); Kevin Robins & David Morley, *Euroculture: Communications, Community, and Identity in Europe*, 11 CARDOZO ARTS & ENT. L.J. 387 (1993).

In 1989, the former European Community adopted a broadcast directive, popularly known as "Television Without Frontiers," that called upon European broadcasters to reserve the majority of air time for European works. Council Directive of 3 October 1989 on Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 89/552, 1989 O.J. (L298) 23 [hereinafter *Directive*]. Since then,

framed in the context of the A/V dispute, these more fundamental policy questions ask whether free trade in A/Vs might lead to excessive social and political uniformity or somehow unduly restrict the creative freedom of societies to pursue their own goals.<sup>12</sup>

The above questions are difficult and thus make the A/V dispute interesting and significant. In short, these questions strike at our collective understanding of the broad objectives — the vision — of the GATT. Accordingly, this Article isolates the basic areas of contention and proposes a conceptual framework for resolving the A/V trade dispute.

Part II discusses the development of the GATT and the historic tension between its premises and A/V trade. The next three parts look at particular dimensions of A/V trade that are commonly invoked as reasons for treating A/Vs differently than other traded goods. Part III reflects upon special economic qualities of A/Vs that have given rise to charges of dumping and to a debate over whether A/Vs should be classified as goods or services for trade policy purposes. Part IV looks at A/V trade practices and patterns, particularly arguments about hegemony, unfair trade practices, and the operation of comparative advantage in the A/V sector. Part V then speaks directly to cultural and other non-economic concerns and their place in the A/V dispute. Finally, Part VI suggests directions for international A/V trade policy.

## II. RISE OF THE A/V TRADE ISSUE

GATT Contracting Parties ("CPs") are not unfamiliar with the issue of A/V trade. The original treaty, ratified in 1947, contains an article that singles out motion pictures for special treatment. The first Section of this Part discusses both the context in which the GATT and its Cinema Article were adopted and the subsequent unsuccessful attempts by the United States to bring

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several articles have discussed the applicability of the GATT to the Directive. *See, e.g.*, Jon Filipek, "Culture Quotas": *The Trade Controversy over the European Community's Broadcast Directive*, 28 STAN. J. INT'L L. 323 (1991); Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495 (1990); Suzanne M. Schwartz, *Television Without Frontiers?*, 16 N.C.J. INT'L L. & COM. REG. 351 (1991); 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 Tariffs and Trade*, 10 INT'L TAX & BUS. LAW. 97 (1993) [hereinafter Smith, *International Trade in Television Programming*]; Kelly L. Wilkins, *Television Without Frontiers: An EEC Broadcasting Premiere*, 14 B.C. INT'L & COMP. L. REV. 195 (1991).

The use of "cultural exclusions" in trade agreements has also created debate in international copyright law. *See, e.g.*, Stacie I. Strong, Note, *Banning the Cultural Exclusion: Free Trade and Copyrighted Goods*, 4 DUKE J. COMP. & INT'L L. 93 (1993). The problems that new A/V technologies pose for international trade policy in general are also beginning to receive mainstream attention. *See, e.g.*, Keith Acheson & Christopher Maule, *Trade Policy Responses to New Technology in the Film and Television Industry*, 23 J. WORLD TRADE 35 (1989).

12. *See* JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 28-29 (1969) [hereinafter JACKSON, *WORLD TRADE AND THE LAW OF GATT*]. Comments to this effect appear throughout the popular literature. French President Francois Mitterand, for example, has asked, "[w]ho can be blind today to the threat of a world gradually invaded by an identical culture, Anglo-Saxon culture, under the cover of economic liberalism? . . . Are the laws of money and technology about to achieve what the totalitarian regimes failed to do?" Charles Bremner, *Mitterand Enlists Old Empire in Linguistic Defence of Gaul*, THE TIMES (London), Oct. 19, 1993, at 11.

television programming under the GATT. The latter two Sections document A/V trade flows and describe current trade barriers, thereby setting the stage for a discussion of A/V trade practices and advantages.

#### A. *The GATT*

##### 1. *The Foundations of the GATT*

Originally conceived as a temporary trade agreement to aid in the establishment of the International Trade Organization, the General Agreement on Tariffs and Trade<sup>13</sup> has become the most important international trade agreement and institution in the postwar period. The GATT's general objective is to ensure that its CPs conduct economic relations "with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods . . . ."<sup>14</sup> To achieve this objective, CPs have committed themselves to the liberalization of international trade through "substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international commerce."<sup>15</sup>

The perceived need for an institution like the GATT grew out of lessons from painful international experiences. The first experience occurred in the 1920s and 1930s, when a number of countries pursued "beggar-thy-neighbor" commercial policies that had devastating economic consequences. These policies included quantitative trade restrictions, high tariff walls, exchange rate manipulation, and other nationally self-interested trade restrictions that caused chaos in international markets.<sup>16</sup> No less important were the experiences during the two World Wars. By the post-World War II period, domestic leaders in the United States and elsewhere began to see that purely self-interested trade policies contributed to instability in international relations.<sup>17</sup>

Two powerful strands of thought emerged from this realization and motivated initiatives that eventually led to the GATT.<sup>18</sup> One was the desire to harmonize and universalize the program of trade arrangements that the

13. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

14. *Id.* at A11.

15. *Id.*

16. *See, e.g.*, JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 12, at 9; *see also* WILBUR F. MONROE, *INTERNATIONAL TRADE POLICY IN TRANSITION* 13-15 (1975) (noting desire for freer, nondiscriminatory trade relations in response to "chaos" of 1930s).

17. The philosophy of former U.S. Secretary of State Cordell Hull, for example, echoed the realization of many Americans that free trade not only encouraged, but was necessary for, peaceful international development: "I have never faltered, and I never will falter, in my belief that enduring peace and the welfare of the nations are indissolubly connected with friendliness, fairness, equality, and the maximum practicable degree of freedom in international economic relations." Cordell Hull, *Economic Barriers to Peace*, Address on the Occasion of the Presentation of the Woodrow Wilson Medal to the Honorable Cordell Hull (April 5, 1937), in *ECONOMIC BARRIERS TO PEACE* 1, 14 (1937).

18. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 31 (1989) [hereinafter JACKSON, *WORLD TRADING SYSTEM*].

United States had begun after enacting the 1934 Reciprocal Trade Agreement.<sup>19</sup> In fact, many of these trade arrangements "had clauses which foreshadowed those currently in [the] GATT."<sup>20</sup> The other strand of thought was that because mistakes in economic policy could again lead to war, countries should create international economic institutions that would prevent such mistakes from happening again.<sup>21</sup>

These two strands of thought mutually reinforced each other and produced a set of basic premises shared by proponents of the GATT: (1) international trade is beneficial (based on economic principles such as the theory of comparative advantage); (2) self-interested national economic policies often result in instability, rifts, and conflict in international relations; and (3) multilateral consensus on policy is beneficial, and perhaps necessary, because actions taken by individual states to advance stability through free trade are often thwarted by the actions of other states.<sup>22</sup> While some may question these propositions, each is widely held today.<sup>23</sup>

The GATT furthers its goal of freer international trade with two nondiscrimination principles that facilitate the exploitation of comparative advantages.<sup>24</sup> The most favored nation ("MFN") principle, codified in Article I, requires that any GATT CP granting an advantage to any other country must grant it to all CPs.<sup>25</sup> As a result, although reductions in tariff rates, for example, are typically negotiated bilaterally, any agreed-upon reductions benefit all CPs. The GATT in effect utilizes a multilateral approach to reduce trade barriers.<sup>26</sup> The second principle, national treatment, is codified in Article III and requires that imported goods, once past customs and border procedures, be accorded the same treatment as goods of local origin with respect to taxation and regulation.<sup>27</sup>

## 2. Cinema Films

Though drafted to liberalize world trade through generally applicable rules, the GATT included among its original articles a set of provisions

19. *Id.* The U.S. Reciprocal Trade Agreements Program sought to liberalize the U.S. tariff structure in order to facilitate the expansion of foreign trade and help free the United States from economic depression. MONROE, *supra* note 16, at 10. It began with the 1934 Trade Agreements Act, which contained two principles (among others) that were ultimately incorporated into the GATT. First, tariff reductions conceded by the United States were to be given effect simultaneously with equivalent concessions by other nations — that is, the concessions were to be reciprocal. *Id.* Second, any concession granted by the United States to another country was to extend automatically to third countries, regardless of whether those other countries were willing to offer the United States an equivalent concession in return. *Id.* at 10-11. This principle was, and is still, known as "unconditional most favored nation." *Id.*

20. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 18, at 31.

21. *See id.* at 20.

22. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 12, at 9-10.

23. *Id.* at 10.

24. The GATT assumes that business entities conduct trade based on commercial considerations and that comparative advantages encourage them to expand their international trade in order to gain the same economic benefits that expanded domestic trade affords. *Id.* at 330.

25. GATT, *supra* note 13, art. I.

26. For a concise explanation of the origins of this bilateral-multilateral negotiation approach, see KARIN KOCK, *INTERNATIONAL TRADE POLICY AND THE GATT, 1947-1967*, at 62-70 (1969).

27. *See* JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 12, at 273.

subjecting trade in motion pictures to special treatment. These provisions, set out in Article IV, permit CPs to establish "screen quotas" to assure that a guaranteed proportion of total motion picture screen time is dedicated to exhibiting films of national origin.<sup>28</sup> The GATT thus exempts motion pictures from the general principle of nondiscrimination.<sup>29</sup> Article IV(d) does state, however, that screen quotas are "subject to negotiation for their limitation, liberalization or elimination."<sup>30</sup> Article IV does not mention television programs because trade in these was not significant at that time.<sup>31</sup> In any event, Article IV does not establish any upper limit on screen quotas; theoretically, a CP may maintain a screen quota of one hundred percent for films considered to be of national origin.<sup>32</sup>

Most commentators attribute the origins of the cinema exception more to domestic cultural policies than to economics and trade.<sup>33</sup> In the original GATT negotiations, the United States pushed for the removal of all restrictions on film trade.<sup>34</sup> A number of other prospective CPs, however, believed that tariffs would not be an effective means of protecting their domestic film industries from foreign competition, and that quotas were therefore necessary.<sup>35</sup> As discussed in greater detail in the next Section, the United States ultimately conceded a cinema exception to the GATT based on the belief that the financial incentives of cinema exhibitors would naturally prevent significant screen quotas.<sup>36</sup>

### 3. *Television Programming*

In 1961, citing the introduction into international trade of a new "commodity-television programme, either recorded on video tape or photographed on film,"<sup>37</sup> the United States sought assurance from GATT CPs that exporters of television programs would receive fair access to the

28. Such quotas usually entail either a number of days reserved each year for nationally produced films or a restriction on the number of foreign films screened. STEVEN S. WILDMAN & STEPHEN E. SIWEK, *INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS* 105 (1988). Article IV of the GATT does not provide standards for determining the national origin of films. GATT, *supra* note 13, art. IV.

29. GATT, *supra* note 13, art. III(10), explicitly exempts trade in motion pictures from the principle of national treatment.

30. GATT, *supra* note 13, art. IV(d).

31. See *Application of GATT to International Trade in Television Programmes: Report of the Working Party*, GATT Doc. L/1741, ¶ 10 (Mar. 13, 1962) [hereinafter *Application of GATT to International Trade in Television Programmes*].

32. See GATT, *supra* note 13, art. IV; see also *Application of GATT to International Television Programmes*, GATT Doc. L/1615 (Nov. 16, 1961) (communication from U.S. government).

33. See, e.g., JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 12, at 293. The ability of governments to supplement their incomes with film revenues may have been an additional factor behind the cinema exception. WILDMAN & SIWEK, *supra* note 19, at 136.

34. See IAN JARVIE, *HOLLYWOOD'S OVERSEAS CAMPAIGN* 251 (1992).

35. See *Application of GATT to International Trade in Television Programmes*, *supra* note 31, ¶ 8; Filipek, *supra* note 11, at 339 (citing *Matters Relating to Trade in Audiovisual Services: Note by the Secretariat*, GATT Doc. MTN.GNS/AUD/W/1 (Oct. 4, 1990) (unpublished document on file at GATT Information and Media Relations Division in Geneva)).

36. See, e.g., *Application of GATT to International Trade in Television Programmes*, *supra* note 31.

37. *Id.*

television program markets of foreign countries.<sup>38</sup> The United States noted that the exhibition of television programs differed from that of films in an important way. Governments, according to the U.S. argument, were naturally constrained from imposing significant motion picture screen quotas because commercial film exhibitors would want to show films — many of which would be foreign films — that attracted large audiences and, hence, large revenues. Most governments themselves, however, owned or controlled television broadcasting facilities. As a result, many domestic markets for television programs enjoyed only limited competitive bidding. In fact, television programs were usually licensed in exchange for lump-sum payments determined independently of the popularity of individual programs. The United States contended that, under this system, the use of foreign programs mattered less.<sup>39</sup>

The United States later argued that regulations limiting the ability to show foreign television programs technically violated Article III's national treatment principle.<sup>40</sup> The cinema exception in Article IV and the corresponding exemption of cinema films from national treatment in Article III, the United States maintained, did not apply to television programs. The argument was that television programs are goods because the CPs found it necessary to write a separate article relating to restrictions on showing films. Television programs should not be treated like films, however, because many are recorded on videotape, and Article IV's use of screen quotas clearly did not apply to television programs. The United States did concede nonetheless that while Article IV's cinema exception did not encompass television programs, governments had understandably taken a special interest in television because of its important role as a cultural and informational medium.<sup>41</sup>

A GATT Working Party was established in December 1961 in response to the U.S. request for assurances of fair market access. The Working Party was to examine the relationship between existing provisions of the GATT and measures affecting international trade in television programs and decide whether those existing provisions adequately dealt with the problem of market access.<sup>42</sup> The Working Party, however, failed to reach agreement on the matter.<sup>43</sup> Although several draft recommendations followed, the Working

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38. *Id.*

39. *Id.* Some scholars argue forcefully that the continued lack of competitive demand structures in many countries for A/Vs, especially television programs, negatively affects the competitiveness of those countries' A/V industries. See *infra* notes 114 and 115 and accompanying text.

40. *Application of GATT to International Trade in Television Programmes: Statement by the United States Representative*, GATT Doc. L/1646 (Nov. 21, 1961).

41. *Id.*

42. *Working Party on Application of GATT to International Trade in Television Programmes*, GATT Doc. L/1686 (Dec. 18, 1961).

43. In the proceedings of the Working Party, the United States proposed that regulation of trade in television programs be explicit, and that foreign programs be accorded reasonable access to domestic markets. The Working Party, however, could not reach a consensus on the meaning of "reasonable." Regardless, most CPs felt that any GATT decision concerning trade in television programs should await further developments in the then rapidly changing technology. *Application of GATT to International Trade in Television Programmes*, *supra* note 31, ¶ 15.

Party and the CPs as a whole took no final action.<sup>44</sup>

#### 4. *The GATT Uruguay Round Negotiations and A/Vs*

For reasons unclear in the literature, GATT CPs apparently did not formally address the issue of trade in television programming again until the Uruguay Round talks began in 1986. To facilitate negotiations on the establishment of a General Agreement on Trade in Services ("GATS"), a Group of Negotiations on Services ("GNS") began work independently of the Group of Negotiations on Goods ("GNG").<sup>45</sup> The GNS later created an Audio-Visual Sector Working Group ("A/V Working Group") to focus on trade issues in that particular sector, especially issues pertaining to broadcasting and films.<sup>46</sup>

Although the Uruguay Round ultimately failed to produce an agreement on trade in A/Vs, a brief look at the negotiations provides a convenient summary of the issues in dispute. In short, several CPs, led by the European Union, sought to include in the GATS a "cultural exception."<sup>47</sup> These CPs contended that the GATT regime should exempt trade in A/Vs, and possibly other cultural items, from the GATT's core principles to permit countries to protect and promote their cultural identities.<sup>48</sup> The United States opposed the exemption, noting that the cultural identity of A/Vs was increasingly difficult to ascertain given the trend toward multinational productions.<sup>49</sup>

The draft agreement on trade in services produced by the GNS manifested this lack of consensus. It included an exception for "cultural values," but the words were bracketed to indicate the discord among the negotiators as to the meaning of the exception.<sup>50</sup>

Despite this obvious disagreement, the United States, the European Union, and other CPs continued to press for a services agreement incorporating A/Vs until just days before the talks concluded. In the flurry of negotiations immediately preceding the end of the Uruguay Round talks, the scope of the disagreement appeared to narrow considerably to only a handful of specific issues. A close examination of these issues shows, however, that the strength of the underlying disagreement on the application of MFN and national treatment to A/V trade prevented the brokering of a final accord.

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44. See *Application of GATT to International Trade in Television Programmes: Proposal by the Government of the United States*, GATT Doc. L/2120 (Mar. 18, 1964); *Application of GATT to International Trade in Television Programmes: Revised United States Draft Recommendation*, GATT Doc. L/1908 (Nov. 10, 1962).

45. Filipek, *supra* note 11, at 343.

46. *Id.*

47. The European Union's draft proposal for a services agreement explicitly exempted A/Vs from both the MFN and national treatment principles. See Filipek, *supra* note 11, at 344.

48. See *id.*; U.S., *Japan Block Uruguay Round Effort to Restrict Content of Audiovisual Services*, 7 Int'l Trade Rep. (BNA) No. 40, at 1548 (Oct. 10, 1990).

49. See U.S. *Urges Free Worldwide Trade*, *supra* note 6, at 1369. The U.S. draft services proposal apparently did not include a cultural exception or permit culture-based exceptions to the MFN or national treatment principles. See Filipek, *supra* note 11, at 345.

50. *Id.* (citing *Draft: Multilateral Framework For Trade in Services*, GATT Doc. MTN.GNS/35, art. XIV (July 23, 1990) (unpublished document on file at GATT Information and Media Relations Division in Geneva)).

First, the United States was willing to allow the European Union to maintain its discriminating "Television Without Frontiers Directive,"<sup>51</sup> but only if the European Union made concessions on the subsidies issue.<sup>52</sup> The Directive requires that the majority of television broadcasts in the European Union be of European origin as defined by the Directive.<sup>53</sup> By consenting to its use, the United States was clearly willing to exempt the Directive from the general principle of MFN. In exchange for this concession on the issue of quotas, the United States demanded that its producers benefit from European A/V subsidies.<sup>54</sup> The U.S. position stemmed from the insistence of many governments on taxing videotape purchases and box-office revenues as a means of subsidizing domestic film production. France, for example, places levies on blank videotapes and imposes a twelve percent tax on all cinema ticket purchases.<sup>55</sup> The European Union, led by France, rejected the U.S.-proposed compromise on subsidies, arguing that sharing the subsidies with American A/V producers would defeat their purpose.

Second, supporters of "cultural specificity" in an A/V agreement proposed a compromise in which reasonable market access could be written into the agreement.<sup>56</sup> The United States apparently entertained the idea of including assurances of reasonable access but ultimately deemed the proposition to be insufficient, especially in light of the European Union's unwillingness to make concessions on the subsidies issue.<sup>57</sup>

Although last-minute negotiations — mainly between the United States and the European Union — appeared to show some promise, the two sides simply disagreed over the fundamental conception of rules governing trade in A/Vs. The United States wanted the sector to be fully covered by the GATT and subject to the same free trade principles that would regulate services under the GATS. The European Union for its part insisted on an A/V exemption or, at least, special treatment or "specificity" for the A/V sector to enable countries to regulate A/V imports in the name of preserving cultural identity. According to the European Union, because of the cultural content of AVs, trade in A/Vs should not receive the same treatment as trade in other goods or services.<sup>58</sup>

## B. *International A/V Trade Flows*

Even proponents of greater national control over cultural development do not agree upon the scope of "cultural goods and services" or the "cultural

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51. Directive, *supra* note 11, art. 4(1).

52. See *Aircraft Subsidies*, *supra* note 5, at 2038.

53. Directive, *supra* note 11, art. 4(1).

54. *Aircraft Subsidies*, *supra* note 7, at 2038.

55. *Id.*

56. See *Brittan Indicates Commission Will Push for GATT Ratification by EU Parliament*, 11 Int'l Trade Rep. (BNA) No. 4, at 154 (Jan. 26, 1994).

57. See *Uruguay Round Agreement is Reached*, *supra* note 3, at 2103.

58. *Differences Remain on Audiovisuals*, *supra* note 5, at 1777. The United States and the European Union could not even agree on whether the GATT's multilateral dispute settlement procedures cover disputes regarding A/V trade. See *EC, U.S. Aides Put Off Discussion on Intellectual Property*, 11 Int'l Trade Rep. (BNA) No. 3, at 93 (Jan. 19, 1994).

industry.”<sup>59</sup> Most nonetheless share the belief that culture possesses certain values that are inherently opposed to, and threatened by, commercial forces; that the need for these values is universal; and that the market cannot satisfy this need.<sup>60</sup> Interpreted broadly, then, cultural industries could conceivably include the commercial production of anything that affects values. GATT negotiators favoring a cultural exemption or specificity allowance, however, restricted their trade-related cultural concerns largely to films, television programs, and videotape programs.<sup>61</sup> Although the restriction is troublesome in principle, massive trade imbalances that favor the United States in these three sectors allegedly justify it.<sup>62</sup>

Because trade imbalances in A/Vs appear to significantly motivate cultural concerns, this Section documents specific A/V trade flows. Three aspects concerning data on A/V trade merit special attention. First, different measures are necessary to evaluate A/V trade flows because of their public good characteristics.<sup>63</sup> If films and television programs were like standard commodities such as steel or oil, economic theory would predict a correlation among the quality of films imported, the size of domestic audiences, and payments for these films.<sup>64</sup> Public good characteristics weaken the associations between these aspects of trade in A/Vs. Second, measuring A/V trade flows can be an unusually inaccurate process, again due to public good characteristics. Broadcast overspill and widespread A/V piracy, for example, significantly affect measurement accuracy. Third, the data below assume without critical analysis the “national origins” of A/Vs. Increasingly, multinational business entities and individuals of different nationalities produce films with international markets in mind. This fact makes determining the “national origins” of many films somewhat capricious. More importantly, it brings into question the reasonableness of using national origin as a proxy for culture, as Part V demonstrates.

### 1. *Trade Flows in Film*

A study conducted by economists Wildman and Siwek<sup>65</sup> and data from UNESCO show that most countries produce relatively few films and import most of the films viewed by their citizens. However, a few countries produce

59. See, e.g., UNESCO, *CULTURAL INDUSTRIES* 21 (1982).

60. NICHOLAS GARNHAM, *CAPITALISM AND COMMUNICATION* 154 (1990).

61. Several delegations of the A/V Working Group, for example, regarded the A/V sector as comprising the film, video, and television industries, including production, distribution, and diffusion. *Services — Audio-visual sector working group*, NEWS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Information and Media Relations Div. of the GATT, Geneva, Switz.), Oct. 9, 1990, at 11.

62. Available data show that lucrative trade flows in such items as books and pamphlets also favor U.S. producers heavily. See UNESCO, 1993 STATISTICAL YEARBOOK, 10-3 to 10-6 (1993) [hereinafter 1993 STATISTICAL YEARBOOK]. Because books, music tapes, and the like are presumably also “cultural goods,” their exclusion from any special treatment accorded A/Vs would be arbitrary.

63. These characteristics differentiate A/Vs from conventional goods and services in other important ways, as Part III discusses.

64. WILDMAN & SIWEK, *supra* note 28, at 13.

65. This Article relies heavily on WILDMAN & SIWEK, *supra* note 28, because it is one of the few, if not only, recent and comprehensive studies of trade flows in film and television programs.

many films. The United States is a prominent but by no means the leading film producer. Countries producing more than 150 films in 1991 included India (910), the United States (345), Hong Kong (239), Japan (239), Thailand (194), and France (156).<sup>66</sup>

The nine major film-exporting nations are the United States, France, Italy, India, the former Soviet Union, the United Kingdom, West Germany, Japan, and Hong Kong.<sup>67</sup> To give a more meaningful measure of the relative importance of the United States among major film-exporting nations, the Wildman-Siwiek study used four indices.<sup>68</sup> The first compared the number of countries in which films from the primary exporting nations were distributed. The United States (79) was first by a slim margin over Italy (71), the United Kingdom (69), and France (68).<sup>69</sup>

The second index compared the number of countries in which the sales of films from each of the primary exporting countries were number one. The United States (56) outperformed all other countries in this category except the USSR (10) and India (6) by a margin of at least ten to one. France, for example, was a distant fourth, selling the most films in only five countries.<sup>70</sup>

The third index analyzed the number of countries in which a primary exporting country's films were among the top three sources of films. Once again, the United States led (77), followed by Italy (39), France (36), and India (23).<sup>71</sup> As the authors of the study point out, the second and third indices may be the best indicators of the international importance of U.S. film suppliers as compared with those of the other major film-exporting states.<sup>72</sup>

Worldwide revenue shares also reflect the success of U.S. films in individual foreign markets. In 1993, for example, the top one hundred grossing films worldwide earned over eight billion dollars. Eighty-eight of these films were considered American productions.<sup>73</sup>

Furthermore, the dominance of U.S. films in foreign markets is complemented by a blatant lack of penetration by foreign films in the U.S. cinema market. Although large numbers of foreign films are released in the United States each year,<sup>74</sup> few attain prominent status at the box office. For example, independent distributors in the United States released forty-four foreign films in a twelve-month period between 1983 and 1984.<sup>75</sup> Of these, only two earned more than one million dollars in the United States in 1984: *Les Compères*, a French film, and *El Norte*, a Spanish-language film. Both

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66. 1993 STATISTICAL YEARBOOK, *supra* note 62, at 8-3 to 8-5. The UNESCO statistical tables do not explain how the national origins of films were determined.

67. WILDMAN & SIWEK, *supra* note 28, at 16 (Table 22-2) (based on data compiled in late 1970s and early 1980s).

68. *Id.* This Section discusses only three of the four indices.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 17.

73. Leonard Klady, *Int'l Top 100 Earn \$8 Bil*, DAILY VARIETY, Jan. 4, 1994, at 1.

74. For instance, in a 12-month period between 1992 and 1993, independent distributors and classics divisions released 77 foreign films in the United States. 1994 INTERNATIONAL MOTION PICTURE ALMANAC 437-38 (Barry Monush ed., 65th ed. 1994) [hereinafter 1994 INT'L MPA].

75. WILDMAN & SIWEK, *supra* note 28, at 23 (citing 1985 INTERNATIONAL TELEVISION ALMANAC 313 (Richard Gertner ed., 1985)).

used English subtitles.<sup>76</sup>

## 2. *Trade Flows in Television Programs*

Measuring trade flows in television programs represents an even greater challenge than in films. As with films, the public good characteristics of television programs necessitate looking at different measurements to describe trade flows meaningfully. In the case of television programs, however, transnational broadcasting and signal overspill present the additional difficulty of properly identifying importing and exporting countries. Consider the scenario in which French and Belgian audiences view the American television series *Dallas* on a Luxembourg television station.<sup>77</sup> Has the series been imported only by Luxembourg or by France and Belgium as well, and if the latter, have France and Belgium imported the series from Luxembourg or from the United States?<sup>78</sup> Furthermore, how would the determination of importing and exporting countries be affected by the fact that the Luxembourg television station sold commercial segments during the broadcast of *Dallas* based on total viewership?<sup>79</sup>

In spite of such measurement difficulties, U.S. television program producers are clearly the largest supplier of imported television programming. A study conducted in the 1970s, for example, revealed that the United States exported approximately three times the number of television programming hours each year as that of the next three leading export countries combined (the United Kingdom, France, and West Germany).<sup>80</sup> In marked contrast, according to surveys conducted in 1973 and 1983, imports constituted only one to two percent of the programs shown in the United States.<sup>81</sup> As in film trade, U.S. producers dominate trade in television programs.

## 3. *Trade Flows in Videotape Programs*

Although trade in videotape programs is not as well documented as trade in films and television programs, available statistics and existing studies tell a similar story about the role of American producers. The U.S. producers that dominate trade in motion pictures dominate trade in videotapes as well because motion pictures comprise a large portion of videotape rentals and purchases. One study compared shares of U.S. cassette distributors with other distributors in five European countries. The combined shares of U.S. cassette distributors accounted for between forty and sixty percent of videocassette rentals and sales in each of these five countries.<sup>82</sup>

In short, assertions that U.S. suppliers dominate A/V trade appear to be

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76. *Id.*

77. *See id.* at 38-39.

78. *See id.* at 39.

79. *Id.* at 39.

80. TAPIO VARIS & KAARLE NORDENSTRENG, TELEVISION TRAFFIC — A ONE-WAY STREET 32-36 (1974).

81. Tapio Varis, *The International Flow of Television Programs*, in CURRENT ISSUES IN INTERNATIONAL COMMUNICATIONS 26, 28 (Table 1) (L. John Martin & Ray E. Hierbert eds., 1990).

82. WILDMAN & SIWEK, *supra* note 28, at 26, 30 (Table 2-14).

true. The relative magnitudes of trade flows between countries have heavily favored U.S. producers. Although systematic studies of trade flows in the last five years are not yet available, recently reported statistics do not indicate any significant break from past trade patterns.<sup>83</sup>

### C. A/V Trade Barriers

U.S. producers in the international A/V market have succeeded in spite of a plethora of trade barriers. Indeed, the GATT explicitly sanctions one trade barrier, screen quotas, as discussed earlier. This Section briefly explores indirect trade barriers and some of the more common ways in which countries have directly regulated A/V trade.

One of the most costly barriers to A/V trade is piracy.<sup>84</sup> Recent estimates place the annual loss to U.S. film producers from foreign piracy between one and two billion dollars.<sup>85</sup> Copyright enforcement problems appear, of course, in all countries and markets. However, the lack of copyright enforcement in some countries, such as Italy, Taiwan, and those in Latin America, is particularly egregious.<sup>86</sup>

Many countries impose quantitative restrictions. For example, the European Union has recently passed and begun to implement a television broadcast directive requiring each broadcaster to reserve more than half of all air time for works of European origin.<sup>87</sup> Private stations in Canada must offer Canadian programming for a minimum of fifty percent of their broadcast time.<sup>88</sup> Spain recently passed a new bill requiring major U.S. studios to distribute one Spanish film or EU film in its original undubbed version for

83. For example, in 1992 U.S. producers exported \$3.7 billion of films, television programs, and video programs to the European Union, an increase of \$2.3 billion from 1987, whereas the European Union's A/V exports to the United States amounted to only \$300 million. *Taking Cultural Exception*, THE ECONOMIST, Sept. 25, 1993, at 61. U.S. cinema films appear to be particularly successful in international markets. According to one European document, U.S. films increased their market share in the European Union from 60.2% to 71.75% and their market share in France from 36.8% to 58.7% between 1984 and 1991. *Differences Remain on Audiovisuals*, supra note 5, at 1777. American film, television, and video industries earn approximately \$18 billion annually — \$8 billion of which comes from foreign markets. See *Company Town: U.S., France Agree to Seek Resolution of Film Dispute*, L.A. TIMES, June 14, 1994, at D4.

84. Intellectual property rights issues are significantly intertwined with the controversy regarding free trade and cultural integrity, and a full treatment of the triad is beyond the scope of this paper. For an informative discussion on the relationship between copyright, free trade, and culture, see Strong, supra note 11, at 106-11. For an illustration of piracy's magnitude, see Giovanna Grassi, *Valenti Makes Case Against Italian Pirates*, HOLLYWOOD REP., Dec. 3, 1992, at 4; Robert Marich, *Latin Pirates Under Attack*, HOLLYWOOD REP., Sept. 29, 1992, at 3.

85. The International Intellectual Property Alliance estimates that U.S. motion pictures accounted for \$1.02 billion of the estimated \$4 billion in global intellectual copyright violations in 1991. *Piracy Wars: Skirmishes, Setbacks and Some Progress; Intellectual Copyright Violations*, VIDEO MARKETING NEWS, May 4, 1992, at 1, available in LEXIS, News Library. Other sources estimate annual film piracy to be as high as \$2 billion. See, e.g., James Cox, *Bootlegging Billions: U.S. Loses Ground in Crackdown*, USA TODAY, Mar. 9, 1993, at 1B.

86. In Italy, for instance, videotape sales and rentals generate some \$300 million in revenues annually although over \$180 million is lost through piracy. 1994 INTERNATIONAL TELEVISION & VIDEO ALMANAC 767 (Barry Monush ed., 39th ed. 1994) [hereinafter 1994 INT'L TVA].

87. Directive, supra note 11, art. 4(1).

88. WILDMAN & SIWEK, supra note 28, at 106.

every two U.S. films released.<sup>89</sup>

Import restrictions go even further to prevent the free flow of A/V trade. Reports from Sri Lanka periodically note burdensome licensing arrangements for English-language films, including outright prohibitions on imports.<sup>90</sup> Indonesia completely bans the import and distribution of films by foreign companies, while Pakistan, until recently, permitted importation of foreign movies only through a national monopoly organization.<sup>91</sup>

Many countries also subsidize domestic film industries, often through box-office taxes. As mentioned earlier, the French government imposes a twelve percent tax on cinema admissions as one way of funding its annual subsidies to French movie producers. Such subsidies amounted to \$245 million in 1992.<sup>92</sup> Norway's 1993 state film subsidies were more than \$9 million.<sup>93</sup> While admission taxes are a common means of subsidizing domestic film production, licensing fees, tax rebates, loans, and grants represent other common methods of subsidization.

### III. DISTINCTIVE ECONOMIC QUALITIES OF A/Vs

Before examining the different explanations and policy arguments that have naturally arisen from the domination of A/V trade by U.S. producers, one should consider at least two distinctive economic qualities<sup>94</sup> of A/Vs. First, as noted earlier, A/Vs have strong public good characteristics. Second, A/Vs possess attributes resembling both conventional goods and services. This Section shows that any set of rational trade rules governing A/Vs will have to account appropriately for these qualities.

#### A. *Public Good Aspects*

##### 1. *A/Vs as Public Goods*

Even if all GATT CPs agreed to include A/Vs in a free trade regime, they would still have to account for what may be the most distinctive aspect of A/Vs: their public good characteristics. Economists divide goods into two types, private and public.<sup>95</sup> A pure private good is a good whose production cost is directly related to the number of people who consume the good.<sup>96</sup> Once consumed by one person, this good is no longer available for anyone

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89. 1994 INT'L MPA, *supra* note 74, at 734.

90. *Id.* at 735.

91. Bruce Stokes, *Tinseltown Trade Wars*, 23 NAT'L J. 432, 436 (1991).

92. *Taking Cultural Exception*, *supra* note 83, at 16.

93. 1994 INT'L MPA, *supra* note 74, at 733.

94. The term "economic qualities" is useful shorthand for those qualities of goods and services that play standard roles in conventional economic analysis. It is used here to distinguish between those qualities and the "cultural qualities" of A/Vs that have given rise to "non-economic objectives" in the A/V import policies of many countries.

95. "Goods" here refers to both goods and services. Services were historically considered distinct from goods and, to some extent, still are distinguished. The concept of a "public good," however, implicates both categories. Note also that the words "private" and "public" have nothing to do with whether a good is produced by a government; a government can produce both.

96. BRUCE M. OWEN & STEPHEN S. WILDMAN, *VIDEO ECONOMICS* 23 (1992).

else to consume. A hamburger is a classic example of a pure private good.

A pure public good, in contrast, is a good whose consumption by one person "leads to no subtraction from any other individual's consumption of that good."<sup>97</sup> More precisely, to be a pure public good, a good must satisfy two conditions commonly referred to as *non-excludability* and *nonrivalness*.<sup>98</sup> Non-excludability means that consumption of a good is impossible to exclude, or if exclusion is technically feasible, that it is too expensive to apply. National defense is a typical example of a good that is non-excludable. A good is nonrival in consumption when the marginal cost of adding another person to consume the good is zero or close to zero.<sup>99</sup> Examples of nonrivalness (at least up to a capacity constraint) include a relatively empty freeway or a park with empty benches. All non-excludable goods are also nonrival, but not all nonrival goods are non-excludable. For instance, in the nonrival empty freeway example above, use of simple and inexpensive exclusion devices like a toll gate could exclude consumers.

As it turns out, "cultural goods" such as films, television programs, music tapes, and books possess elements of both private and public goods. In the language of economists, they tend to be excludable, nonrival goods. They are excludable because they are normally provided in the form of a private good such as a reel or tape. They are nonrival, however, because the marginal cost of adding another viewer is generally very low relative to production costs, and any capacity constraints are usually cheap to overcome.

In essence, "[t]heir content is a public good, but they are [often] delivered to customers in the form of a private good."<sup>100</sup> To see more precisely how their content is a public good, consider the process of production. In the cases of both books and films, the production costs are almost exclusively confined to the process of making the original copy. Once it is made, the replication of the original entails comparatively little additional cost. Thus, the purchase and consumption of a book or film by an individual does not really affect the ability of someone else to consume the good. The story in a book, the special effects in a movie, an author's writing style, and an actor's charisma are public good elements of books and films.

While most goods possess a mix of private and public good characteristics to some degree,<sup>101</sup> the relative importance of the public good characteristics distinguishes cultural commodities such as A/Vs from other goods. For example, television programs are almost pure public goods;<sup>102</sup> after a television program is made, replication adds virtually no cost. Therefore, the cost of production bears little relation to the number of people who could watch the program. Furthermore, if the program is broadcast, the broadcast

97. C.V. BROWN & P.M. JACKSON, *PUBLIC SECTOR ECONOMICS* 27 (1978) (quoting economist Paul Samuelson).

98. *See id.* at 27-34.

99. *See id.* at 28.

100. OWEN & WILDMAN, *supra* note 96, at 23.

101. The wearer of a pretty shirt, for instance, "consumes" it like a private good. People other than the wearer, however, also "consume" the shirt to the extent that they too can appreciate its good looks on the wearer.

102. BRUCE M. OWEN ET AL., *TELEVISION ECONOMICS* 16 (1974).

itself is nonexcludable, at least within the area covered by the signal.<sup>103</sup> Of course, not all A/Vs possess the same degree of public good characteristics. They all, however, possess sufficiently strong public good aspects to warrant distinguishing them from other goods for policy purposes, as the following Sections show.

## 2. *Price Discrimination*

Recognizing the strong public good aspects of A/Vs is important for at least two reasons. The first involves the pricing of A/Vs. Because a private good can only be consumed once, its price generally must cover at least the combined cost of production and transportation. As a result, the price for the same private good sold in different countries can vary only slightly. Profit-motivated suppliers will quickly squeeze out any appreciable differences in price by shifting the sale of the product from markets with comparatively low prices to markets with comparatively high prices. With no trade barriers, international trade in a private good will tend to equalize prices across nations after accounting for differences in costs.<sup>104</sup>

The relative importance of the public good characteristics of A/Vs dramatically reduces the tendency for prices of A/Vs to equalize across nations. Because the cost of replicating a film or television program (e.g., copying it onto videotape) is virtually nothing compared to the cost that went into producing the first copy, owners of films and television programs have no financial incentive to restrict sales in one country just because the film or program sells at a higher price in another country. Once the producer covers distribution costs, the sale of the film or program in each additional country represents a net addition to total profits.<sup>105</sup>

In fact, prices for A/Vs do vary dramatically across countries. According to a survey conducted by *Variety* in the mid-1980s, prices for feature-length U.S. films for television ranged from \$90-150 in Bermuda to \$30,000-40,000 in France.<sup>106</sup> Cinema admission costs in various countries also differ substantially. In 1993, for instance, the average ticket price in the United States was around \$6 to \$7, while it was \$3 to \$3.50 in Mexico.<sup>107</sup>

## 3. *The Dumping Issue*

The ability of A/V producers to price discriminate based on demand for A/Vs in particular markets has created a great point of contention. Many supporters of a cultural exemption or specificity allowance in the GATT argue that after recovering costs in the large U.S. market, American film producers

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103. *Id.*

104. WILDMAN & SIWEK, *supra* note 28, at 3.

105. *Id.* at 4.

106. *Global Prices for TV Films*, VARIETY, Apr. 23, 1986, at 58. A/V prices probably vary within domestic markets as well. The variation is not likely to be as great as it is worldwide, however, because per capita incomes, A/V exhibition structures, and other factors affecting demand tend to be more uniform.

107. 1994 INT'L MPA, *supra* note 74, at 732.

can and do "dump" their films in foreign markets.<sup>108</sup> In doing so, the argument continues, American producers undercut foreign competitors in their own markets and thus compete with an unfair advantage.

For nearly a century, international trade policy rules have condemned the practice of dumping and permitted an importing nation to take certain countermeasures, at least when dumped goods cause "material injury" to competing industries in the importing country.<sup>109</sup> The GATT defines dumping as the sale of products for export at a price less than normal value, where normal value means roughly the price for which those same products are sold for consumption in the exporting country.<sup>110</sup> Where the margin of the domestic price over the export sale price is greater than zero, dumping has occurred. Although simply expressed, the formula for calculating dumping margins is not simple to implement. Each variable in the equation involves complex and often inexact calculations.<sup>111</sup>

Calculating dumping margins for A/Vs, such as films and television programs, would face these same difficulties. Moreover, their public good characteristics would further complicate the application of antidumping rules to A/Vs. Recall that because of these characteristics, trade in A/Vs does not lead to price equalization across national markets. Prices in different national markets would be similar only to the unlikely extent that demand elasticities are similar in those different countries. In the case of A/Vs, the "home market sales price" will almost invariably differ from the "export sales price." Determining what constitutes dumping in A/V trade is thus problematic.<sup>112</sup>

A number of other considerations also complicate the application of conventional notions of dumping to A/V trade. For example, a common dumping argument claims that American A/V producers make money first in the large U.S. market and then reap windfall profits from sales at low prices in foreign markets. This view, however, artificially divides producer behavior into two stages. Rational producers consider the entire potential market — domestic and foreign — in making production decisions. This consideration explains why someone would produce watches in Switzerland or grow Kiwi fruits in New Zealand.<sup>113</sup> Similarly, if the size of a domestic market alone determined export success, U.S. producers would presumably control most world markets. They do not, however, because producers account for international markets in their investment and production decisions.

Furthermore, strong arguments can be made to the effect that the "low

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108. Variations on this argument appear in both academic and popular literature. See, e.g., Hoffmann-Riem, *supra* note 11, at 62-63 (explaining why U.S. broadcast producers are able to expand into foreign markets); Presburger & Tyler, *supra* note 11, at 504 n.65; *Panel Guests Examine the Pros and Cons of GATT* (CNN television broadcast, Dec. 8, 1993), available in LEXIS, News Library; Sands, *supra* note 4, at B7.

109. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 18, at 221.

110. See GATT, *supra* note 13, art. VI(1).

111. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 18, at 231-36 (discussing determination of "export price," "home market price," and "constructed price" in context of dumping). Indeed, some argue that antidumping rules are so inherently difficult to apply fairly that they should be scrapped entirely, not only from national laws but also from the GATT. See, e.g., James Bovard, *Clinton's Dumping Could Sink GATT*, *WALL ST. J.*, Dec. 9, 1993, at A16.

112. See Acheson & Maule, *supra* note 11, at 46.

113. ELI NOAM, *TELEVISION IN EUROPE* 15 (1991).

prices" at which U.S. suppliers sell their A/Vs in foreign markets are less indicative of conventional notions of dumping than of uncompetitive demand structures in those foreign markets. Supporters of this view point to the numerous cartel arrangements in Europe that prevent competition in demand for A/V products and hence make rival bidding practically nonexistent.<sup>114</sup> This lack of bidding in turn supposedly keeps import prices lower than they would be if competitive bidding existed.<sup>115</sup>

#### 4. *Implications for International A/V Trade Policy*

The above observations have potentially important implications for both the GATT and international A/V trade policy. For example, the fact that "dumping" of A/Vs occurs does not require their exemption from the GATT. As discussed above, it is unclear how, if at all, conventional notions of dumping apply to goods like films and television programs that possess strong public good characteristics.<sup>116</sup>

The public good characteristics of A/Vs nevertheless call into question the applicability of free trade principles to A/V trade. Indeed, economic theory demonstrates that the conditions for efficient allocation of a pure public and pure private good differ considerably. Because supplying an existing public good such as a film or a television program to an additional consumer costs virtually nothing, excluding any consumer who values the good would be inefficient.<sup>117</sup> Any uniform price is hence inefficient to the extent it prevents the consumption of the good by consumers who attach to the good a positive value below the uniform price.

Economic theory of efficient public good allocation demonstrates that producers will not maintain the optimal level of output unless the marginal cost of the public good is set equal to the sum of the prices consumers are willing to pay for it.<sup>118</sup> This kind of calculation requires that the government or some other entity determine the demand for the public good by each consumer, collect payment from them all, and then distribute the money to the producer of the public good.<sup>119</sup> Unfortunately, this economic theory does not provide the institutional details of the political decisionmaking processes that would be necessary to carry out this elaborate scheme. As a result, few, if any, economists believe that the benefits of such a scheme would justify the

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114. *Id.*

115. Noam argues powerfully that this lack of competitive demand in many countries is what ails their A/V industries, especially their public television systems. For instance, because "programs for which American networks paid a million dollars were acquired only months later for large European audiences at a price of only thousands and sometimes hundreds of dollars . . . American producers, advertisers, and audiences thus propped up the European public system." *Id.* at 20. For other arguments advanced by Noam attacking claims that American A/V producers have inherent and unfair economic advantages over other producers, see *id.* at 12-21.

116. If, however, the CPs could agree upon a dumping concept for A/Vs, they could incorporate it into the GATT regime as a sector-specific provision and obviate the need for a complete exemption of A/Vs from the GATT on account of "dumping" problems.

117. OWEN & WILDMAN, *supra* note 96, at 23-24.

118. John R. Woodbury, Comment, *Welfare Analysis and the Video Marketplace*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 274, 274 (Eli M. Noam ed., 1985).

119. *Id.*

cost.<sup>120</sup>

Economic theory nevertheless suggests two important considerations for A/V trade policy. First, price discrimination and dumping in A/V trade are not entirely inconsistent with efficiency notions. Although A/V suppliers may not produce and distribute their goods in the precise way theory prescribes, price discrimination by A/V suppliers in world markets is beneficial to the extent that it reduces inefficiency. Thus, forcing American A/V producers to sell their A/Vs at higher prices in foreign markets may protect domestic producers in those markets, but it simultaneously represents a welfare loss to those consumers who attach positive values to American A/V products above the old prices, but below the new higher prices. Second, with respect to markets for quasi-public goods such as films and television programs, strong statements about the relative efficiency of alternative market and nonmarket structures are inherently difficult to make. Thus, it is difficult if not impossible to ascertain whether and to what extent the elimination or imposition of "culture quotas" in trade would affect net welfare. This latter point suggests that norms that are not strictly economic may be helpful in deciding whether customary free trade rules should apply to A/V trade.<sup>121</sup>

## B. *The Goods/Services Distinction*

Some scholars have attempted to justify the application of free trade rules to A/Vs on grounds that they are more like goods than services and therefore fall under the GATT regime.<sup>122</sup> This Section demonstrates, however, that while classification is important, the bipolar struggle to classify A/Vs strictly as goods or as services tends to obscure more fundamental questions about the treatment of A/Vs as public goods and the externalities to which trade in such goods gives rise.

### 1. *The Dual Nature of A/Vs*

Distinguishing between goods and services can be difficult because no precise and universally agreed-upon definition exists for either. In using the terms "goods" and "services," people nevertheless usually have in mind some general notion of their meanings. For example, three characteristics commonly distinguish services from goods.<sup>123</sup> First, production and consumption must be simultaneous in the case of services but not goods. Second, unlike goods, services are impossible to store. Third, services are intangible, while goods are tangible.<sup>124</sup>

Although the above criteria work well in distinguishing activities like haircutting from conventional goods, they have not proven very useful in

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120. *Id.*

121. *See infra* part V.

122. *See, e.g.,* Filipek, *supra* note 11, at 355-57; Smith, *International Trade in Television Programming*, *supra* note 11, at 123-27.

123. *See* NIGEL GRIMWADE, *INTERNATIONAL TRADE: NEW PATTERNS OF TRADE, PRODUCTION, AND INVESTMENT* 407 (1989).

124. *See id.*

classifying A/Vs. Cinema films, broadcast television programs, and videotape programs arguably possess attributes of both goods and services. All three, on the one hand, are traded much like goods — usually in the form of a film reel or videotape. On the other hand, the film reel or videotape acts only as the means of delivering what was originally produced as a service. Treating the live presentation of a play (clearly a service) differently than a videotape recording of the same play would seem somewhat arbitrary and illogical.<sup>125</sup> This dual nature of A/Vs has prompted some to create distinctions within the category of services. One thoughtful commentator, for example, characterizes A/Vs as “splintered, or separated, services” because they involve services that “have been splintered or separated from their original production in the sense that they are now embodied in goods for separate sale.”<sup>126</sup>

## 2. *The Underlying Issues*

The curious aspect of the trade policy debate over whether to classify A/Vs as goods or services is that classification alone does not address the main substantive issues surrounding A/V trade. For example, the dumping issue discussed earlier remains unchanged regardless of whether A/Vs are labelled as goods or services. Furthermore, as discussed in Part V, cultural concerns persist regardless of classification. The classification of A/Vs as goods or services thus has limited relevance in resolving the initial question of whether to subject A/Vs to customary free trade rules.

## IV. A/V TRADE PRACTICES AND ADVANTAGES

The almost unidirectional flow of A/Vs from U.S. producers to the markets of other countries has caused great concern among many GATT CPs. Opponents of freer trade in A/Vs believe that this deluge of American A/V imports threatens the cultural integrity of other countries. Although couched in purely cultural terms, the arguments these opponents assert fall into two distinct classes. The first class includes those arguments alleging unfair trade practices on the part of U.S. producers and the U.S. government. One such alleged practice is “dumping,” discussed above. The second class includes arguments about the way in which U.S. domination in A/Vs negatively affects a particular country’s cultural integrity.

This distinction is useful because the two classes of arguments are not necessarily related for international trade policy purposes. As this part of the Article demonstrates, the first class of arguments — concerning unfair trade practices — points usefully to factors that may explain in part the rise of U.S. domination in A/V trade. These factors are not, however, unique to A/V trade. Hence, while they deserve attention and perhaps even an international response, they do not themselves distinguish A/Vs from goods and services

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125. For a more extended discussion of this point, see *Application of GATT to International Trade in Television Programmes*, *supra* note 31.

126. GRIMWADE, *supra* note 123, at 416 (citing Herbert G. Grubel, *All Traded Services are Embodied in Materials or People*, 10 *WORLD ECONOMY* 319, 320 (1987)).

that are subject to free trade rules. The second class of arguments poses a direct challenge to the desirability of free trade in A/Vs and is explored separately in Part V.

### A. *American Hegemony or Imperialism Arguments*

#### 1. *The Commercialization of Media*

Many proponents of a cultural exemption or specificity allowance in the GATT justify their position as essential to combatting the imperialistic tendencies of American A/V producers and the U.S. government. Although this hegemonic or imperialist argument includes minor variations, it has two key thrusts.

The first asserts that the commercialization of the U.S. media has led U.S. multinational companies to seek and ensure their commercial interests abroad in and through all media industries. Herbert Schiller, one of the most prolific and representative exponents of this strand of the hegemonic argument, writes that the United States alone among the advanced industrialized nations in the pre-television era conducted radio broadcasting in an unambiguously commercial fashion.<sup>127</sup> In Europe, for example, the state typically owned broadcast stations. After the invention of television, many nations increasingly began to look to the commercial broadcasting structure of the United States as a model. Since then, even strong industrialized nations have supposedly been overwhelmed by the influence and ideology of profit-motivated American media and thus have been "forced" to adopt commercial operations.<sup>128</sup>

Dismissing the claim that commercial broadcasting is the most satisfactory method of meeting the needs of the public, Schiller argues that "[n]othing less than the viability of the American industrial economy itself is involved in the movement toward international commercialization of broadcasting."<sup>129</sup> More specifically, "[t]he continuing and pressing requirements of United States manufacturers to reach annually higher output levels to sustain and increase profit margins activate the process that is relentlessly enveloping electronic (and other) communications in a sheath of commercialization."<sup>130</sup> Schiller even goes so far as to claim that the U.S. government and American multinational corporations deploy First Amendment values in order to mask

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127. HERBERT SCHILLER, *MASS COMMUNICATIONS AND AMERICAN EMPIRE* 138 (1969) (citing *Satellite Communications, 1964 (part 2): Hearings Before the Comm. on Gov't. Operations*, 88th Cong., 2d Sess. 660 (1964) (testimony of William Gilbert Carter)). This paper draws heavily from Schiller's book in explicating the basic theses of the American hegemony paradigm because his work is considered the earliest and most influential in the modern strain of this paradigm. For other works representative of the paradigm, see *BEYOND NATIONAL SOVEREIGNTY: INTERNATIONAL COMMUNICATIONS IN THE 1990S* (Kaarle Nordenstreng & Herbert I. Schiller eds., 1993) [hereinafter *BEYOND NATIONAL SOVEREIGNTY*]; ANTHONY D. SMITH, *THE GEOPOLITICS OF INFORMATION* (1980) [hereinafter *SMITH, GEOPOLITICS*]; JEREMY TUNSTALL, *THE MEDIA ARE AMERICAN* (1977).

128. SCHILLER, *supra* note 127, at 95.

129. *Id.* (emphasis omitted).

130. *Id.*

efforts to dominate the world commercially.<sup>131</sup>

The term "American multinational corporations" in this sense refers to U.S. producers of consumer goods and A/Vs. The fundamental driving forces of the commercialization of media are thus consumer goods, advertising industries, and A/Vs themselves. The result, according to Schiller, is "the propagation and extension of the American business system and its values to all corners of the international community."<sup>132</sup> Furthermore, powerful American companies supposedly marshal their influence to overwhelm state-controlled media structures. The human cost is the emergence of *homo consumens*, a person whose need for mass consumption is stimulated and manipulated by largely U.S. commercial and advertising interests.<sup>133</sup>

U.S. trade in motion pictures and television programming is an integral part of this aspect of the hegemony argument. As with U.S. producers of other goods, American A/V producers also seek profit in foreign markets. Equity investment in facilities offers direct outlets to U.S. broadcast companies. However, the largest revenues come from the export of U.S. programming.<sup>134</sup> The U.S. film industry, under Schiller's formulation, is even more advanced in its global expansion.<sup>135</sup>

## 2. *U.S. Government-Industry Alliance*

The second part of the hegemony argument maintains that the U.S. government has used its hegemonic powers to help American A/V producers secure foreign markets for U.S. products and ideas. This argument directly challenges the notion that American A/V producers have been "merely the passive recipient[s] of the good fortune of historical circumstances and economic laws."<sup>136</sup> To be sure, the rise of the top film producers (the "majors") in the United States is interesting and controversial.<sup>137</sup> This Article will focus on specific events in their development that proponents of the American hegemony paradigm cite as particularly relevant to international A/V trade policy.

World War I represented a dramatic turning point for the United States and its film producers because the war transformed the United States from a

131. See ROBERT L. STEVENSON, *GLOBAL COMMUNICATIONS IN THE TWENTY-FIRST CENTURY* 141 (1994).

132. SCHILLER, *supra* note 127, at 92.

133. *Id.* at 98 (quoting Erich Fromm, *The Psychological Aspects of the Guaranteed Income*, in *THE GUARANTEED INCOME* 179 (Robert Theobald ed., 1966)).

134. *Id.* at 85.

135. *Id.* at 91.

136. Thomas Guback, *Non-Market Factors in the International Distribution of American Films*, in *1 CURRENT RESEARCH IN FILM: AUDIENCES, ECONOMICS, AND LAW* 111, 113 (Bruce A. Austin ed., 1985) [hereinafter Guback, *Non-Market Factors*].

137. See generally *THE AMERICAN FILM INDUSTRY* (Tino Balio ed., 1976) (surveying effects of economics, changing legal restraints, technological advances, financing, and distribution trade practices on history of American film industry); *THE AMERICAN MOVIE INDUSTRY* (Gorham Kindem ed., 1982) (surveying history of American movie industry from business, law, mass communications, and film perspectives); SUZANNE MARY DONAHUE, *AMERICAN FILM DISTRIBUTION* (1987).

debtor to a creditor nation.<sup>138</sup> The war basically redirected capital flows. For instance, U.S. capital went to war-damaged countries in Europe, while European capital went to the war fronts. The American film industry was, among other U.S. industries, a beneficiary of the war and the resulting stark changes in capital markets. War devastation seriously disrupted European film industries or forced them out of international markets.<sup>139</sup> U.S. film producers filled the vacuum, as a brief look at changes in film trade flows between the United States and the rest of the world confirms: During 1913, the last year before World War I, the United States exported 32 million feet of motion pictures. Twelve years later, the total reached 235 million feet. American film exports to Europe increased by five hundred percent during these dozen years, while the industry's development of markets in the Far East, Latin America, and Africa spurred a tenfold growth in U.S. exports.<sup>140</sup> Before long, the mobile inputs of film production — creative personnel and film financing — began shifting across national boundaries, from countries with less favorable conditions to those with more. Hollywood became a focus for this movement and thereby attracted film professionals from around the world.<sup>141</sup>

Besides profiting from the war-disrupted film markets of foreign countries, American film producers also benefited significantly from practicing price discrimination in foreign markets and from the cooperation of the U.S. government in assuring open film markets abroad. The significance of the former is set out in Part III.A.2 above; the latter constitutes one of the key arguments that proponents of the hegemonic paradigm advance to explain the domination of American A/V producers today. American A/V producers and the U.S. government share a richly documented history of cooperation with respect to foreign trade barriers. By the 1920s, many countries had already noticed that Hollywood products accounted for approximately four fifths of all film screenings in the world.<sup>142</sup> The concerns of these foreign countries fell into two categories. First, the popularity of American pictures not only monopolized exhibition time, but also created greater financial risks for locally-made films.<sup>143</sup> As a result, local filmmakers produced fewer films. Furthermore, some thought that film persuasively glamorized certain traits and ideals that clashed with those of local populations.<sup>144</sup> Because of these concerns, countries with major cinema markets began to curtail the import of U.S. films.<sup>145</sup> In short,

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138. Thomas Guback, *Hollywood's International Market*, in *THE AMERICAN FILM INDUSTRY*, *supra* note 137, at 388.

139. See ROBERT SKLAR, *FILM: AN INTERNATIONAL HISTORY OF THE MEDIUM 75* (1993); see also KRISTIN THOMPSON, *EXPORTING ENTERTAINMENT 61-99* (1985) (analyzing expansion of American film industry into foreign markets as result of World War I).

140. SKLAR, *supra* note 139.

141. See *id.* at 95. The ability of Hollywood to attract film talent from around the world undoubtedly has enhanced its ability to produce video products with transnational appeal. For further discussion of the transnational appeal of American A/Vs, see Section C of this Part.

142. SMITH, *GEOPOLITICS*, *supra* note 127, at 41.

143. Guback, *Hollywood's International Market*, *supra* note 138, at 392.

144. *Id.*

145. *Id.* at 392-93. In 1921 Germany, which had strongly supported domestic film production, became the first state to limit film imports legislatively. SKLAR, *supra* note 139, at 95.

the deluge of post-war American movie exports created a backlash in many markets, leading governments to set protectionist quotas designed to shelter their own film industries.<sup>146</sup>

The new barriers prompted Hollywood to solicit the help of the U.S. government. In the 1920s, the State Department intervened on behalf of the U.S. film industry in France, Spain, Italy, Germany, Austria, Hungary, and Czechoslovakia by emphasizing the need for freer trade so that investment and other economic decisions would be less risky.<sup>147</sup> The United States and its producers were quick to point out that the United States did not restrict the importation of foreign films into the United States.

Besides noting that the U.S. government has sought to keep foreign markets open for business reasons, advocates of the cultural imperialism paradigm point emphatically to the ideological reasons behind the government's promotion of U.S. film exports. Indeed, evidence supports the proposition that the U.S. government considered the dissemination of U.S. films abroad as a means of spreading American ideals to areas destabilized by World War II. Many U.S. officials apparently believed that, with the end of Nazi control in Western Europe, the "fluid political climate . . . offer[ed] the Left an opportunity to win popular support and to come to political power . . . ."<sup>148</sup> This belief led to "an intensive campaign . . . to thwart such a political tendency" by "all means of official and private communications" — including American films.<sup>149</sup> Promoted by the Bureau of Psychological Warfare, American films followed in the wake of American troops.<sup>150</sup> In addition, to fight the spread of communism in Europe — and in Italy in particular — President Truman secretly supported propaganda schemes that included the promotion of U.S. film exports.<sup>151</sup>

### 3. *Evaluation of the Hegemonic Paradigm*

Hegemonic explanations of U.S. domination aid analysis of A/V trade issues in at least two ways. First, until recently mainstream trade policy literature has paid little attention to the history of A/V industries and trade. Existing research shows that an evaluation of A/V market operations in the United States and international markets must account for nonmarket factors. Second, politico-economic explanations can capture many significant historical factors that have disproportionately benefitted certain producer groups and not others. For instance, the collapse of film industries in Europe and elsewhere after the World Wars almost certainly made it easier for U.S. producers to export A/Vs.<sup>152</sup>

Yet, without providing further analysis, hegemonic explanations and arguments do not serve as persuasive rationales for particular trade law

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146. Guback, *Hollywood's International Market*, *supra* note 138, at 393.

147. *Id.*

148. Guback, *Non-Market Factors*, *supra* note 136, at 116.

149. *Id.*

150. Guback, *Hollywood's International Market*, *supra* note 138, at 395.

151. State Department documents confirm President Truman's support. *Id.* at 396.

152. *See supra* notes 139 and 140 and accompanying text.

reform, much less a particular trade regime. For example, the argument that the United States led countries to commercialize broadcasting and other A/V industries contributes little to answering the question of what policies an international A/V trade regime should include. Schiller's and others' interpretations of American domination in A/Vs do not include well specified criteria for measuring well-being. Without specific standards, the hegemonic paradigm has difficulty showing that the current A/V trade regime, or an even less globally regulated system, is inferior to an alternative regime.

In addition, many of the political and historical events cited by proponents of the hegemony argument have limited relevance for trade policy. For example, U.S. film producers enjoyed a significant "head start" in the industry. They benefitted from the disruption the World Wars caused in foreign A/V markets and from U.S. foreign policy during the middle of this century. In addition, they invented the feature film, which gained popular acceptance worldwide. Focusing on these examples contributes to our understanding of the American A/V industry's international growth but, again, says little about what the rules of A/V trade should be.<sup>153</sup> These historical and political factors thus do not require advocating a cultural exemption or specificity allowance in the GATT; in fact, they ironically suggest the opposite. Assume, for instance, that the GATT legitimized the privilege of governments to regulate A/V imports. If the above example of the U.S. government-industry alliance is taken seriously, it seems only right to assume that governments with such a privilege would exploit it to protect and promote economic and ideological interests at home for the very same reasons the U.S. government has allegedly sought to do so abroad. This part of the hegemonic paradigm actually argues against governmental privileges, not for them.<sup>154</sup>

Finally, the hegemonic paradigm is questionable on its own terms. For example, foreign countries certainly did not have to emulate the United States in its commercialization of the media. Little suggests that advanced industrial states like France and Germany did not, and do not, have the ability to formulate policies more consistent with their best interests. These two states have frequently adopted policies in other arenas at odds with U.S. interests.<sup>155</sup> Indeed, recently strengthened film and television import barriers

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153. Recent work in economic theory suggests that, where certain conditions are met, "[a] pattern of specialization can be established as a result of accident or some initial difference in countries' resources, then get locked in by the cumulative advantages that go with large scale." PAUL R. KRUGMAN, *RETHINKING INTERNATIONAL TRADE* 6 (1990). This theory, sometimes called the "new theory of international trade," is potentially important for trade policy because it implies that, under some circumstances, government intervention in certain sectors is justifiable as enhancing national welfare. See generally Paul Krugman, *Strategic Sectors and International Competition*, in 2 *THE INTERNATIONAL POLITICAL ECONOMY OF TRADE* 3-28 (David A. Lake ed., 1993) (discussing beneficial aspects of some forms of protectionism). The primary authors of this new theory, however, are quick to emphasize its descriptive, rather than prescriptive, value for three reasons. First, any implications for trade policy based on the new theory depend critically on the particularities of individual markets. ELHANAN HELPMAN & PAUL R. KRUGMAN, *TRADE POLICY AND MARKET STRUCTURE* 8 (1989). Second, "highly dubious" political movements may use the theory for their own ends. *Id.* Last is the danger of "beggar-thy-neighbor" policies, because those that "benefit one country acting unilaterally may be harmful if everyone else does it." *Id.* at 8-9.

154. Part V develops this argument more fully.

155. Take, for example, France's participation in NATO and Germany's interest rate policies. WILDMAN & STWEK, *supra* note 28, at 64-65.

in Spain, France, and the European Union suggest that these countries can stand up to the United States.

### B. *Anticompetition Arguments*

Proponents of a cultural exemption or specificity allowance in the GATT also claim that these measures are necessary to protect nations against anticompetitive practices employed by U.S. producers. This charge arises most often in the context of film trade, where American firms allegedly use their positions as dominant distributors to discriminate against foreign-produced films.<sup>156</sup>

American film distribution clearly dominates both within the United States and abroad. Few analysts would disagree that the "majors" are still the dominant force in film production, financing, and distribution in the United States and in many other areas of the world.<sup>157</sup> Before the 1948 U.S. Supreme Court decision splitting the production and distribution of films away from their exhibition, these studios were even more powerful.<sup>158</sup>

Commentators often use the Canadian film distribution sector as an example of U.S. distribution power in foreign markets. As one notes, "[t]he Canadian distribution sector is firmly in the hands of the large, integrated U.S. production-distribution companies, which are members of a cartellike trade association — the Motion Picture Export Association of America (MPEAA)."<sup>159</sup> A 1977 study showed that eight of the eighty-three distribution companies operating in Canada took 77.8% of the total revenues from film and videotape sales.<sup>160</sup> All eight were subsidiaries of U.S. production-distribution firms.

The large vertically integrated U.S. distributing companies and their affiliated circuits in Canada seem to keep the unintegrated, Canadian-owned distribution and exhibition enterprises in an uncompetitive market position.<sup>161</sup> For example, between 1968 and 1978, Canada produced 448

156. *Id.* at 63; see also Paul Webster, *Asterix versus the Dinosaurs*, THE GUARDIAN, Sept. 17, 1993, at 24 (noting that U.S. firms control most of French film distribution circuit).

157. David Gordon, *Why the Movie Majors are Major*, in THE AMERICAN FILM INDUSTRY, *supra* note 137, at 459. The so-called "major studios" include Columbia Pictures, The Walt Disney Company, MGM, Orion Pictures, Paramount Pictures, Tristar Pictures, Twentieth Century Fox, Universal Pictures, and Warner Brothers. 1994 INT'L MPA, *supra* note 74, at 510-19.

158. See *United States v. Paramount Pictures*, 334 U.S. 131 (1948). Antitrust issues have played a prominent role in the history and development of the U.S. film industry and probably foreshadow the importance of antitrust law to the development of a workable international A/V trade policy. See generally Simon N. Whitney, *Antitrust Policies and the Motion Picture Industry*, in THE AMERICAN MOVIE INDUSTRY, *supra* note 137, at 161-204 (discussing evolution of U.S. antitrust policy regarding film industry and its impact on film producers, film exhibitors, and public).

159. Manjunath Pendakur, *Cultural Dependency in Canada's Feature Film Industry*, in THE AMERICAN MOVIE INDUSTRY, *supra* note 137, at 352.

160. *Id.*

161. *Id.* at 356. Some say block and blind booking are additional practices that hinder Canadian distributor companies' access to domestic theatrical markets. "In block booking, the exhibitor agrees to buy a package of films which may consist of one or two potential box-office hits, and the rest second-rate pictures. Blind booking is a policy of obtaining playdates whereby the theater operator has had no chance to see the film because it may still be in production." Pendakur, *supra* note 159, at 356. The U.S. Supreme Court declared block booking illegal under the Sherman Antitrust Act in *Paramount Pictures*, 334 U.S. at 156-57. Canada does not have such a precedent under its combine laws. Pendakur, *supra* note

films, but, according to the Canadian Motion Picture Distributors Association, only fourteen were distributed by the U.S. majors.<sup>162</sup>

American domination of a domestic distribution system such as Canada's may initially appear peculiar. Control of distribution is a critical step not only in bringing film productions to exhibition, but also in maximizing profits in an industry with unusually high financial risk. The importance and complexity of distribution are, however, precisely the primary reasons for the consolidation of control in distribution worldwide.<sup>163</sup> Dispersed control is difficult because producing, financing, and distributing films are necessarily linked.<sup>164</sup> First, film producers tend not to be sufficiently acquainted with trends and changes in the preferences of the filmgoing public to judge the potential profitability of films. Thus, they need to work closely with distributors to decide what to produce and how to bring productions to the market. Second, and perhaps most importantly, the film industry is vertically integrated because distribution includes the risks of marketing as well as film distribution.<sup>165</sup> Distributors need not only to exercise some control over what they distribute, but also to spread the risks of distribution over many different A/V products. In order to survive, they must set off the profits of one production against the losses of another. This risk-spreading requires the tremendous cash flow of the distributors.<sup>166</sup> Furthermore, distributors must carefully coordinate the release of A/Vs to maximize profits.<sup>167</sup>

Third, the riskiness of A/V distribution renders it inherently expensive. In 1976, for every \$100 in cinema receipts, roughly \$60 covered cinema costs and profit; \$15 covered the negative costs of the film; and the rest paid for overhead and the profits of the distributor.<sup>168</sup> Hence, distributors must have an international sales organization in order to maximize film exhibition and profits. One commentator analogized that "big time distribution is like the steel industry; the costs of entry are very high."<sup>169</sup>

The above factors provide a coherent explanation for the domination of a few producers/distributors in the United States as well as in other countries. They may even point to a tendency among film producer/distributors to utilize questionable practices to minimize risk and maximize profits in a highly volatile industry. The practices of Hollywood firms in the U.S. market sparked decades of antitrust litigation; such dubious practices clearly deserve investigation and may even warrant international regulation if they prove otherwise unalterable.

Nonetheless, the fact that some A/V firms may conduct business or trade

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159, at 357.

162. Pendakur, *supra* note 159, at 357.

163. See, e.g., David Waterman, *Prerecorded Home Video and the Distribution of Theatrical Feature Films*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY, *supra* note 118, at 221-43.

164. Gordon, *supra* note 157, at 460.

165. Waterman, *supra* note 163, at 229.

166. Gordon, *supra* note 157, at 463.

167. The importance of controlling release sequences goes back to the ability of A/V producers to price discriminate. See NOAM, *supra* note 113, at 31.

168. Gordon, *supra* note 157, at 462.

169. *Id.*

unfairly does not inherently merit exempting A/Vs from customary free trade rules. Absent more concrete evidence, there is little reason to think that national or international laws could not restrict unfair business practices in the A/V sector in the same way that domestic legislation or international agreements restrict such practices in other sectors.

In any case, other considerations weaken any association between U.S. distribution power and the large market shares that American A/Vs maintain abroad. Namely, the international success of American A/V producers is likely to be a function of the transnational appeal of their products. This otherwise bald assertion seems credible in light of two observations. First, even in some countries that do not permit U.S. ownership or control of distribution, U.S. films still enjoy considerable success.<sup>170</sup> Second, distribution by a major U.S. studio does not appear to increase appreciably the box office appeal of foreign-language films in the United States.<sup>171</sup> The economics of the film industry — including a lack of internationally marketable products — arguably prevent non-American A/V distributors from building a distribution network as powerful as that of American distributors.

In short, although distribution-power arguments highlight U.S. domination and barriers to entry in film distribution, historical and economic factors seem to mitigate the weight that can be accorded these arguments in the debate over a cultural exemption or specificity allowance in the GATT. On the historical side, the World Wars helped U.S. distributors gain a market share abroad that they have continued to strengthen. Simultaneously, the ability to price discriminate aided the export efforts of American A/V firms. The inherent risk in film production and distribution encourages the control of distribution systems by a few dominant players. Finally, the persistence of any questionable business practices in distribution provides a strong argument for placing A/V trade under the protective umbrage of multilateral agreements such as the GATT.<sup>172</sup>

### C. *Economic Explanation of Trade Advantages*

Because the economic principle of comparative advantage forms the foundation of free trade and the GATT, any analysis of A/V trade must consider explanations of trade patterns in light of economic models. This Section briefly describes the findings of one particular model — the Wildman-Siwiek model<sup>173</sup> — and assesses the model's relevance to international A/V trade policy. Wildman and Siwiek conclude that American A/V producers enjoy what they term a "domestic opportunity advantage" over other producers because of the large, wealthy, and mostly English-speaking markets in the United States and other parts of the world. This Section argues

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170. WILDMAN & SIWIEK, *supra* note 28, at 65.

171. *Id.* at 24. Furthermore, economists do not clearly understand how U.S. producers/distributors would profit from discriminating against foreign producers. *Id.* at 80-81 n.10.

172. GATT members are currently considering an antitrust code. See *International Antitrust Code Will Be Studied by GATT Members*, 10 Int'l Trade Rep. (BNA) No. 35, at 1470 (Sept. 1, 1993).

173. See generally WILDMAN & SIWIEK, *supra* note 28. This is the most recent and comprehensive economic model of international A/V trade.

that those endorsing protectionist privileges must address serious questions of fairness because the domestic opportunity advantage and other advantages significantly favor large A/V producers.

### 1. *Assumptions*

The Wildman-Siwiek model contains seven explicit assumptions, four of which are fairly standard.<sup>174</sup> Wildman and Siwek added the three remaining assumptions to help explain the relative magnitude of trade flows. The first additional assumption states that, with other considerations being equal, viewers prefer A/Vs in their native language.<sup>175</sup> In other words, translation would diminish a film's appeal to an audience. The second new assumption asserts a positive correlation between large budgets and the appeal of A/V products.<sup>176</sup> Finally, the model added the assumption that the market setting forms the context for both production and consumption decisions.<sup>177</sup>

### 2. *Model Results*

Given the above assumptions, the Wildman-Siwiek model shows that "producers in larger countries, and producers in countries that belong to large natural-language markets, have a financial incentive to create larger budget films and programs that generally will have greater intrinsic audience appeal, a clear advantage in international competition."<sup>178</sup> Wildman and Siwek refer to this advantage as a "domestic opportunity advantage" ("DOA").<sup>179</sup>

While a thorough evaluation of this model is not possible here, a few basic observations can be made to assess its relevance to international A/V trade policy. Many of the model's strengths and weaknesses rest in its unique assumptions. On the one hand, language probably explains, at least in part, the success of American and other English-speaking producers in world markets. The English-speaking A/V markets in the world are among the largest and wealthiest. In addition, because such markets are large, they are very diverse, even though English is the predominant language. Producers of films in English probably have strong financial incentives to create and market films that appeal to large and diverse audiences. In theory, A/V producers from non-English-speaking countries have the same incentive. Their financial incentive is usually outweighed, however, by the cost of producing quality English language films that appeal to diverse audiences.<sup>180</sup> This

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174. *See id.* at 67-68. The four standard assumptions merely describe conditions necessary for A/V trade to occur and are attributed to work done earlier in Jorge Schement et al., *The International Flow of Television Programs*, in COMMUNICATIONS RESEARCH at 163-82 (1984).

175. WILDMAN & SIWEK, *supra* note 28, at 68.

176. *Id.* Though their immediate revenue sources may differ, the financial success of films, television programs, and videotape programs ultimately depends on viewership.

177. *Id.*

178. *Id.*

179. *Id.*

180. For French producers, making films in English rather than French would likely present serious obstacles and therefore add substantial costs even though technology and human capital for film production are increasingly mobile. The films, for example, would presumably have to be set in English-speaking countries, and experts would have to be employed to resolve linguistic and other communications problems

interpretation of A/V trade patterns suggests that, while the potential reward in the world market is the same for all producers, not all producers are equally endowed to compete for that reward.

Comparing the DOA to traditional notions of comparative advantage is worthwhile because the DOA seems to view endowments as potentially important determinants of A/V trade flows. The DOA does not fit snugly within textbook notions of comparative advantage. It merely seems to describe specific features of the world A/V consumption market that happen to favor English-speaking producers. These features appear distinct from, for example, the geographical and ambient factors that give the French a comparative advantage in wine production. After all, the conventional understanding of comparative advantages considers them to stem from differences in natural resources or educational or industrial ability. In contrast, the DOA, while giving advantages to certain producers, originates more from the consumption side than from the production side of markets.

Regardless of its origins, the DOA, if it exists, nevertheless effectively yields the same results as a comparative advantage for A/V producers in countries where English is the dominant or native language. The DOA affects the *cost* to film producers of making internationally successful films relative to the cost of carrying out some other economic activity. Just as French producers have historically derived a comparative advantage in wine-making from geographical factors, American A/V producers may have gained what amounts to a comparative advantage from global linguistic and economic patterns.<sup>181</sup> Similarly, American producers probably also derive a "comparative advantage" in A/V production from the relatively rich cultural diversity within the United States. Such diversity simultaneously prods and helps U.S. producers develop A/V products with cross-cultural and therefore transnational appeal.<sup>182</sup> In any case, the Wildman-Siwiek model suggests that certain A/V producers enjoy rather strong advantages in the A/V sector.

The unique assumptions behind the Wildman-Siwiek model are nevertheless vulnerable to criticism. First, modern technology and expertise in dubbing lessen the importance of the assumption that viewers prefer A/Vs in their native language over A/Vs in other languages. For example, many distributors in European countries dub English language films and programs almost seamlessly. That U.S. films capture audience shares as high as eighty percent in some European countries<sup>183</sup> suggests strongly that this assumption about language preferences may play a relatively unimportant role in

during the production and marketing of the films. More importantly, French script writers, producers, and actors are unlikely to express themselves or their ideas as well in English. This difficulty of expression would probably diminish the creativity and quality of the final product, and a poorly made English-language film would not be competitive against well made films by U.S. producers.

181. The "economic pattern" here refers primarily to the comparatively wealthy English-speaking markets around the world.

182. A truly open and international A/V market would tend to diminish any advantage U.S. producers might derive from cultural diversity within the United States because nothing would prevent internationally-minded producers from learning about each other's markets. Indeed, the United States' advantage is arguably already diminishing. See, e.g., Nigel Andrews, *Identity Crisis in the Euro-movies — Nigel Andrews Explains Why It is Becoming More and More Difficult to Tell European and Hollywood Films Apart*, FIN. TIMES, Dec. 18, 1993, at XVII [Tarun: XVII or xvii?].

183. WILDMAN & SIWEK, *supra* note 28, at 18-19 and Table 2-3.

determining overall viewer demand.

Second, some relatively large-budget film productions fail while some relatively small-budget films succeed.<sup>184</sup> These exceptions raise significant doubts about the assumed positive correlation between the size of a film's budget and what Wildman and Siwek term "inherent" audience appeal. The success of some small-budget films supports the notion that creative talent and production are vital elements in determining the box-office success of films. The advantage of large film producers may thus be far from ironclad. However, relaxing or rejecting either or both of these unique assumptions would arguably only strengthen the assertion that American A/V producers simply make more appealing films and programs and, as a result, dominate A/V trade because they are more competitive.

In sum, the Wildman-Siwek model provides an economic explanation of A/V trade patterns that conforms more or less to the available data and to intuition. Of course, this model is not a complete explanation; like all models, it is an imperfect interpretation of reality. If taken seriously, its findings nevertheless provide analytical support to the fairness argument used by free traders. The existing trade order seems to require us to exploit comparative advantages in order to maintain our collective economic and political well-being. To make an exception for the A/V sector would unfairly hinder those traders with strong comparative advantages. Even more importantly, such an exception could seriously weaken our mutual understanding of the conduct of economic relations, which the GATT has strengthened considerably. Before we risk that occurrence, we must find persuasive reasons to justify violating basic principles like the exploitation of comparative advantages. The next Section thus discusses cultural concerns and the extent to which they might serve as good reasons to depart from a core trading principle.

## V. CULTURAL AND OTHER "NON-ECONOMIC" CONCERNS

So far, this Article has focused on arguments that are used to support a cultural exemption or specificity allowance in the GATT but which do not implicate culture directly. This Part examines cultural and other non-economic concerns explicitly and reaches three general conclusions. First, in many markets, the prices of A/Vs may not fully reflect the value of cultural integrity. Recognizing this incongruence is crucial because welfare maximization occurs only when prices fully reflect all the costs and benefits of an action to the society as a whole. Second, while this recognition may indicate that cultural concerns are legitimate, those concerns do not necessarily warrant trade barriers. National culture, the cultural content of A/Vs, and the interaction between the two are so difficult to measure that content regulation and restrictions based on the national origin of A/Vs provide only dubious cultural benefits.<sup>185</sup> Finally, the immensely beneficial

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184. Consider, for example, the dismal failure of the expensively produced American film *Last Action Hero* (Columbia Pictures 1993) and the success of the modestly budgeted film *The Crying Game* (Miramax Films 1992), produced by an English film company.

185. This Section focuses on content regulation and regulations based on national origin because they are the proposed means of protecting cultural integrity from A/V imports.

role that informational flows have played in world development strongly cautions against A/V import restrictions.

#### A. *Cultural Concerns as Negative Externalities*

Cultural arguments are typically very difficult to grasp because culture can be an amorphous, if not subjective, idea. Borrowing the concept of externalities from economic theory can aid in clarifying the analysis of these cultural arguments. The use of this concept here is not an attempt to view everything through an economic lens or to subordinate non-economic values and concerns to efficiency; rather, the approach is an attempt to translate those values and concerns into a more precisely defined concept. Using externality analysis also reveals both weaknesses of free trade on its own terms and the ultimate folly of a purely economic approach to the A/V dispute.

Even those who believe on grounds of economic theory that A/Vs should be freely traded cannot deny that trade in A/Vs, like trade in other goods and services, may have externalities. Externalities occur when the market price of a good or service does not reflect all the benefits and costs associated with its production and consumption.<sup>186</sup> Market failure can result and may justify nonmarket allocation of these goods and services.

To see how externalities can lead to market failure, consider the case of automobiles and pollution. Consumers acquire automobiles largely through the market. As their numbers increase, however, automobiles cause familiar negative externalities like the pollution of the atmosphere, increased traffic congestion, and more accidents.<sup>187</sup> Everyone, including the motorist, suffers from greater pollution, delays in traffic, and the increased likelihood of accidents. Yet, the market alone cannot force motorists to pay for these "negative externalities." For example, a motorist could help reduce air pollution by fitting a catalytic converter to his car, but that would cost him a significant amount of money, and the environmental benefits would be imperceptible unless everybody else were to do the same thing. Thus, unsurprisingly, nothing was done about the problem of smog in Los Angeles until California and the federal government passed laws requiring every car to be fitted with exhaust controls.<sup>188</sup>

Analogously, negative externalities can accompany trade in A/Vs. The cultural integrity argument is essentially an externalities argument. As French Prime Minister Edouard Balladur urged the National Assembly in October 1993, "[the French] cannot accept everything related to the fundamental values of our tradition, our culture, our civilization [as] being treated like ordinary traded goods."<sup>189</sup> Similarly, speaking in support of a cultural exemption in the GATT, French President François Mitterand has contended that "[w]hat is at stake, and therefore in peril, in the current negotiations is

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186. A. KOUTSOYIANNIS, *MODERN MICROECONOMICS* 541 (2d ed. 1979).

187. This example is derived from the work of Iain McLean. IAIN MCLEAN, *PUBLIC CHOICE: AN INTRODUCTION* 21 (1987).

188. *Id.*

189. Sands, *supra* note 4, at B7.

the right of each country to forge its imagination and to transmit to future generations the representation of its own identity."<sup>190</sup> Underlying the rhetoric of both comments is the argument that free trade in A/Vs somehow does not adequately account for certain social costs and benefits. Speaking in more economic terms, the Premier and the President might have said that the French lose certain valuable things — say, French sensibilities — from exposure to American A/Vs that the prices of movie tickets, television advertising, and video rentals do not capture.<sup>191</sup>

The argument that trade in A/Vs contains cultural externalities is intuitively persuasive. For example, individual French viewers may not only enjoy French film productions, but may also want the French movie industry to increase the number of films it produces annually to encourage cinematic expression of French sensibilities.<sup>192</sup> Individual viewers could increase French film industry revenues by choosing to see French movies rather than those produced in other countries. They probably would not limit themselves in that way, however, because they also enjoy seeing movies made by non-French producers. Seeing only French movies would cost much in terms of enjoyment relative to the imperceptible benefit of helping the French movie industry.<sup>193</sup> As a result, many French cinemagoers may desire a stronger French film industry but, for purely selfish reasons, may not be willing to sacrifice other entertainment to pay for it.

The argument that significant externalities plague A/V trade may be even stronger in the context of developing countries. For instance, if the economic elite of a developing country watch *Dallas* or another U.S. television show that portrays lavish lifestyles, they may develop aspirations or expectations that reduce the amount that they are willing to sacrifice for indigenous development or other important national goals.<sup>194</sup> Such externalities seem especially likely to exist when U.S. producers can price discriminate in selling A/Vs abroad. The cheaper the prices are, the less accurately they reflect the true social cost of exhibiting those films and television programs in a less developed country.<sup>195</sup>

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190. Port Louis, *Mitterand Denounces U.S. Domination at Francophone Summit*, AGENCE FRANCE PRESSE, Oct. 16, 1993, available in LEXIS, News Library.

191. Peter Passell, *Is France's Cultural Protection a Handy-Dandy Trade Excuse?*, N.Y. TIMES, Jan. 6, 1994, at D2.

192. Assume for the moment that the content of French culture or sensibilities is identifiable. For a discussion of the validity of cultural assumptions, see *infra* Part V.B.

193. However, a rational movie consumer might be willing to increase her consumption of French movies or to pay higher taxes to subsidize the French film industry if she thought others were willing to take the same actions.

194. ALAN WELLS, PICTURE-TUBE IMPERIALISM? 121 (1972). Identifying and measuring the relationship between A/Vs and cultures is an extremely difficult and controversial enterprise. The absence of mutually agreeable reference points and the complexity of establishing causation, for example, make it very difficult to draw precise conclusions about the impact of A/Vs on culture and vice-versa. See, e.g., TAMAR LIEBES & ELIHU KATZ, THE EXPORT OF MEANING (1990). While this Article does not seek to prove any specific relationship between A/Vs and culture, it does assume that A/Vs impact cultural development.

195. A/V trade can have positive as well as negative externalities. Developing countries can plausibly derive social benefits from cheap, imported A/V products that outweigh the social costs of the imports both in terms of price and negative externalities.

### B. *The Difficulty of Defining and Applying Cultural Standards*

Externalities can sometimes justify government intervention, as in the case of cars and pollution. In the case of A/V trade, however, government import restrictions are not desirable. On the one hand, concerns about cultural integrity are legitimate in many countries because A/V purchases by individuals do not accurately account for them. On the other hand, little suggests that content regulation or restriction of A/V imports based on national origin can reasonably address these cultural concerns. Furthermore, the harm such regulation poses to international trade norms greatly outweighs the marginal benefit, if any, that such regulation affords cultural integrity.

As argued above, prices under a free trade regime may not fully reflect the value of cultural integrity to consumers. Cultural integrity, like air quality, is something consumers are unlikely to pay for even though they want it. Price discrimination in A/Vs further decreases the ability of prices to account for cultural integrity values. Thus, under a free trade regime, countries can in theory legitimately voice concerns about cultural integrity.

However, content regulation or regulation of A/Vs by national origin have serious shortcomings if their purpose is to reflect the value private individuals place on cultural integrity. The difficulty of identifying and defining the relevant culture presents the first obstacle.<sup>196</sup> Governments can declare with confidence that “[t]he audiovisual sector is of great importance to the cultural identity of peoples, regions and nations,”<sup>197</sup> and few would dispute their claim. Films, news and entertainment programs, and video documentaries have already shaped societies and will continue to do so.<sup>198</sup> People can also legitimately note that A/Vs are not like refrigerators or cars because they have strong public good characteristics; their value lies in their informational rather than their functional content.

Nevertheless, to conclude from those two claims that governments should be able to regulate A/V trade presupposes that government regulation is a better alternative than no regulation. Regulating culture is not like regulating refrigerators or cars. Unlike the content of most goods, the content of culture is extremely difficult, if not impossible, to identify in a reasonable way. In terms of meaning, “[c]ulture is one of the two or three most complicated words in the English language.”<sup>199</sup> A reasonable definition might be that culture “consists of knowledge, beliefs, perceptions, attitudes, expectations, values, and patterns of behavior that people learn by growing up in a given

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196. Any measure purporting to regulate culture must do at least three things reasonably well. First, it must define and identify the culture to be protected. Second, it must identify the cultural content of the relevant A/V product. Third, it must show that the impact of viewing the A/V product would probably compromise the viewer's sense of cultural integrity in a way that would exceed any benefits the viewer might receive. Domestic content rules with respect to manufactured goods have been troublesome under the GATT. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 18, at 191. Therefore, one can easily surmise that cultural content rules would pose even greater problems.

197. Collins, *supra* note 11, at 361 (quoting Eur. Parl. Doc. (A2-0347/88) 8 (1989)).

198. See, e.g., *CULTURE, SOCIETY AND THE MEDIA* (Michael Gurevitch et al. eds., 1982); JOHN FISKE, *TELEVISION CULTURE* (1987); CONRAD PHILLIP KOTTAK, *PRIME-TIME SOCIETY* (1990).

199. Collins, *supra* note 11, at 363 (emphasis in original) (quoting RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 76 (1976)).

society."<sup>200</sup> This definition, however, only breaks up the metaphysical concept of culture into other concepts with their own metaphysical difficulties.

Even if one could reasonably delineate a particular culture at a given time, much of its content would not be purely indigenous in origin. For example, French culture includes a number of imported elements. Part of the Louvre was designed by I.M. Pei, a Chinese American. Many French wine grapes grow on root stocks that originally came from California, while the towers of Neuilly and Montparnasse were designed in Chicago.<sup>201</sup> Furthermore, many French voters cast their ballots for parties whose platforms originated from foreign thinkers like Marx or Lenin.<sup>202</sup> Even popular sports in France, such as soccer and tennis, are imported. Like French culture, almost all other cultures are to a significant degree *cross-cultural*. Indeed, cultural affinities certainly account to an appreciable extent for the popularity of U.S. films and television programs abroad.

Finally, many cultures can be delineated in ways that bear little relationship to national boundaries. The existence of a "proletarian culture," "youth culture," and now even "mass culture" demonstrates some of the common ways in which culture can be defined to defy sovereign boundaries.<sup>203</sup> The similarity of interests (classical music, tuxedos, French wine, golf, etc.) among the elite of different countries suggests that "high culture" too has for some time been transnational. Moreover, distinct cultures that define different ethnic groups thrive in more than one country. In sum, national boundaries do not necessarily correspond to cultural boundaries.

The problems of definition, origination, and boundaries noted above make arbitrary any governmental trade measure aiming at cultural specificity. The 1989 European Community Broadcast Directive<sup>204</sup> serves as an excellent example. While the Directive ostensibly seeks to protect European culture, the criteria used to define "European works" focus primarily on the location of production companies and the residences of their workers.<sup>205</sup> As one commentator observed, "under this definition, an episode of *Dallas* filmed in Paris with European actors and producers would qualify as a European work, while a drama on the French Revolution filmed in Paris with American actors and producers presumably would not."<sup>206</sup> The EU Directive also assumes without adequate reason that EU member states are somehow culturally more similar to each other than to nonmember states. It is hardly clear, for example, that the United Kingdom has more in common culturally with Italy than with the United States.<sup>207</sup> In fact, if the assumption of cultural

200. This is the standard anthropological definition. KOTTAK, *supra* note 198, at 5.

201. ITHIEL DE SOLA POOL, *TECHNOLOGIES WITHOUT BOUNDARIES* 131 (Eli M. Noam ed., 1990).

202. *See id.*

203. NOAM, *supra* note 113, at 23.

204. Directive, *supra* note 11.

205. *See id.* at 27. For an excellent treatment of the problems with the "European works" criteria under the Directive, see Filipek, *supra* note 11.

206. Filipek, *supra* note 11, at 358 (citation omitted).

207. If a common culture exists in Europe, it is similar to U.S. culture because the United States has absorbed and assimilated many European cultural influences. NOAM, *supra* note 113, at 24. This reasoning suggests that the European Union may be trying to create, rather than to protect, a common culture in Europe through such measures as the broadcast Directive. Recognizing this possible motive introduces another important variable — the role of governments — into the analysis of cultural concerns. *See infra*

commonality in Europe were true, an A/V market larger than that of the American market would presumably be more favorable to EU producers rather than American A/V producers.

In addition, the globalization of film production renders import restrictions based on national origin increasingly problematic. For example, foreign investors now control four of the largest seven American film production companies.<sup>208</sup> Today, A/V production companies of different nationalities also co-produce more films and programs and even integrate operations.<sup>209</sup> Individuals of different nationalities commonly direct, write scripts for, and otherwise significantly contribute to the creation of films produced or financed by companies of still different nationalities.<sup>210</sup> This growth of multinational film companies and production efforts greatly reduces the ability of the nationality of the producer or actors or the location of production to serve as reasonable proxies for culture.

Finally, given the difficulties presented above, an individual or government could not reasonably assign monetary or other concrete measures of value to any cultural externalities present in A/V trade. Without some reasonable means of assessing such values, government bureaucracies formulating import restrictions can only rely on the kind of cultural speculation illustrated above. Regulation experts have in fact long recognized that the less susceptible objectives are to monetary estimation, the less useful externality-type characterizations are to policy formation.<sup>211</sup>

In short, it is tempting to conclude that cultural externalities in A/V trade necessitate government intervention. However, externality-type arguments can also be used too readily to justify measures that lead to outcomes the market would not sanction. As demonstrated above, content regulation and regulation of A/Vs on the basis of national origin are so arbitrary that they probably do not further the ends they seek. Seen in this light, the "cultural benefits" of A/V import restrictions appear illusory at best.

### C. *Other "Non-Economic" Norms*

As the preceding Section demonstrates, accepting that A/V trade can have negative cultural externalities does not compel approval of content regulation or regulation based on national origin. It nevertheless reinforces a fact that few can dispute: A/V trade does challenge the integrity of cultures, regardless of their precise content or boundaries. In fact, all international

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208. For example, Sony now owns Columbia Pictures Entertainment Inc., and Matsushita Electrical Industrial Co. owns MCA, Inc. *Audiovisual Report Examines Measures for Shoring Up European Industry*, 11 Int'l Trade Rep. (BNA) No. 15, at 589 (Apr. 13, 1994). In addition, a state-controlled French bank, Credit Lyonnais, owns MGM Studios. Alice Rawsthorn, *MGM Cinemas Back in Spotlight — Credit Lyonnais is Casting for the Role of Buyer*, FIN. TIMES, January 7, 1995, at 10.

209. For example, NBC has invested in Super Channel, a pan-European cable network, and Home Box Office and Canal-Plus are collaborating on a project to produce pay-per-view TV service in Turkey. Bailey Morris, *Tinsel Town Eyes Europe's Glitter*, THE INDEPENDENT, Dec. 19, 1993, at 4.

210. *The Piano* and *Terminator 2*, for instance, were financed in part by the French concerns Ciby 2000 and Studio Canal-Plus, respectively. Roger Cohen, *Aux Armes! France Rallies to Battle Sly and T. Rex*, N.Y. TIMES, Jan. 2, 1994, at B1.

211. STEPHEN BREYER, REGULATION AND ITS REFORM 26 (1982).

communications challenge the integrity of established cultures. Such communications "obliterate many of the impediments that served in the past to slow down changes in ideas and mores. Barriers of time and space that once protected the status quo are easily penetrated or circumvented by modern media."<sup>212</sup>

As a result, the issue of whether to allow a cultural exemption or specificity in the GATT does not rest solely on the mechanical evaluation of externalities in the framework of market economics; it also implicates other normative values regarding the development processes of peoples around the world. The remainder of this portion of the Article argues that focusing on such normative values has at least three advantages for resolving the GATT dispute over A/Vs, the first two of which were indirectly discussed above. First, this focus recognizes that trade in A/Vs is not purely a positive economic issue. Formulating international A/V trade policy requires discussion of normative values other than the value of free market economics. At the same time, however, the issue of trade in A/Vs is not simply a "cultural issue" that can fairly be reduced to relativism. To do so encourages the arbitrary use of sovereignty as a means of settling international disputes. Finally and most practically, looking to values premised on larger issues of world development can help identify values that are not exclusively rooted in either free market economics or cultural relativism, but on which many countries can generally agree.

### 1. *The Mass Media Revolution, World Development, and Sovereignty*

Among the various normative values that might inform the A/V dispute, one arguably commands special attention: the role of mass media and information flows in political, economic, and social development. As this Section demonstrates, notions of cultural protection based on sovereignty are not inevitably benign. In fact, such notions represent the predictable and continuing tendency of nation-states to undervalue the benefits of unrestricted information flows. Recognition of this tendency and its negative impact on society as a whole strongly cautions against the adoption or continuance of culture-specific import restrictions in A/V trade.

Mass media began with the invention of the printing press in Asia in the 15th century A.D. Some of the more obviously beneficial changes that resulted include the emergence of modern languages, improved legal systems, and the tremendous growth in science.<sup>213</sup> Other developments of great

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212. Ithiel de Sola Pool, *Direct Broadcast Satellites and the Integrity of National Cultures*, in NATIONAL SOVEREIGNTY AND INTERNATIONAL COMMUNICATION 120, 123 (Kaarle Nordenstreng & Herbert I. Schiller eds., 1979) [hereinafter Pool, *Integrity of National Cultures*]. The accuracy of this statement increases with the intervention and use of new technologies such as the direct broadcast satellite. See, e.g., Sharon L. Fjordbak, *The International Direct Broadcast Satellite Controversy*, 55 J. AIR L. & COM. 903 (1990); Eric Schine, *The Little Dish That Could . . . ?*, BUS. WEEK, Apr. 4, 1994, at 43.

213. See Elizabeth Eisenstein, *Some Conjectures about the Impact of Printing on Western Society and Thought: A Preliminary Report*, 40 J. MOD. HIST. 1, 1-56 (1968) [hereinafter Eisenstein, *Conjectures*]. See generally ELIZABETH EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979) (surveying contribution to social change made by evolution from script to print).

historical importance, such as the rise of Protestantism<sup>214</sup> and the separation of the sacred from the secular,<sup>215</sup> also stemmed from the advent of the printed word.

Still other noteworthy developments were arguably more negative. For example, the “heresies” that proliferated from printshops prompted the introduction of censorship. Censorship, in turn, led many countries to restrict their domestic printing industries. Britain, as a result, became dependent on the Dutch for printing devices because its own publishers left the country for others that were free from censorship.<sup>216</sup>

In short, the advent of the printing press commodified information in the form of the printed word and, in doing so, intertwined people of all nationalities. The printing press and the books, pamphlets, and leaflets it spawned were in retrospect significant contributions to mankind’s progress.

The ultimate contribution of the printing press, however, is not the only relevant observation. What is also relevant is the way — the *predictable* way — in which social organizations, such as governments and religious institutions, reacted to the advent of mass media. Governments and religious organizations justified restricting the printed word essentially on grounds of political and religious sovereignty. Their reaction was predictable because the printing press created new conduits of information or belief in the form of books, pamphlets, and the like, that operated as “counterweights to the established authorities.”<sup>217</sup> Thus, censorship and other domestic restrictions rapidly followed the mass utilization of the printing press.

Governments and religious organizations are not the only entities whose “authority” is challenged by the mass media. These organizations often depend on support from the adherents of specific traditions of a nation’s culture, whose authority is also challenged. In India, for example, the All India Radio has established quotas on movie themes, a favorite program item, “to preserve traditional musical forms.”<sup>218</sup>

Consequently, “sovereignty” invoked as a basis for restricting the flow of culture and information does not represent a monolithic interest. Rather, it aggregates and distorts the individual interests in a “panoply of overlapping viewpoints” that have in common only the belief that free or freer flows of culture are detrimental to their entrenched interests.<sup>219</sup> These interests include those of film companies subsidized or otherwise protected under both present and contemplated government regulations; producers, directors, and actors whose work and ideas politicians and government officials favor; and even government agencies, officials, political parties, and politicians whose power depends on the ability to regulate the so-called cultural industries. They

214. See James Curran, *Communications, Power, and Social Order*, in *CULTURE, SOCIETY, AND THE MEDIA*, supra note 198, at 202, 219-20; Eisenstein, *Conjectures*, supra note 213, at 45.

215. With the appearance of printed media, church sermons were no longer a major source of reporting community news. Church services became more purely religious in nature, making the distinction between the sacred and secular more clear and meaningful. Eisenstein, *Conjectures*, supra note 213, at 41-43.

216. POOL, *TECHNOLOGIES WITHOUT BOUNDARIES*, supra note 201, at 5.

217. Pool, *Integrity of National Cultures*, supra note 212, at 124.

218. *Id.* at 125.

219. POOL, *TECHNOLOGIES WITHOUT BOUNDARIES*, supra note 201, at 115.

also include the interests of people who seek to create or to strengthen a particular kind of culture for ideological or other advantage — for example, people who have unfounded prejudices against other countries, or political leaders who can garner support by trumpeting “sovereignty” to restrict A/V imports.<sup>220</sup>

The point of the above analysis is threefold. First, it sets out the myriad of interests that march under the banner of cultural sovereignty. Like slogans, the terms “cultural integrity” and “cultural preservation” are intellectually convenient and politically expedient. Second, many of those interests are ones that the international community does not or should not encourage. Many of them are classic economic protectionist arguments that are disapproved in other trade sectors; others simply do not deserve recognition because they foster invidious international discrimination. Any remaining benign interests would still confront the problems of arbitrariness discussed earlier.

More importantly, the above analysis serves as a powerful reminder that there are good reasons and notable international precedents for looking behind the curtain of sovereignty to enhance our collective well-being. International human rights, for example, limit the ability of governments to act in certain ways against their people. The GATT, too, limits national sovereignty by committing its signatories to the liberalization of trade in goods. In fact, nations have formally recognized the value of the free flow of information, which stems from the right of all people to freely receive and communicate information.<sup>221</sup> Commentators have labelled this formalization the “doctrine of the international free flow of information.” Although the doctrine’s legal binding power upon nations is somewhat controversial,<sup>222</sup> the reasons behind the doctrine are clear: nations understand the importance of the free flow of information to increased mutual understanding, peace, and the stability of foreign relations.

## 2. *Perspectives on Sovereignty and Cultural Integrity*

The value of mass media and information flows to peaceful, rapid development lessens the desirability of a cultural exemption or specificity allowance in the GATT. Besides permitting regulations that would confer dubious cultural benefits, such an exemption or allowance would invite excessive nationalism, arbitrary regionalism, and cultural rigidification, all of which tend to undervalue the mutual benefits of unrestricted informational and

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220. Indeed, as the political writer Jean-Louis Drape comments, “[Prime Minister] Balladur is portrayed as the man who saved French culture from destruction by the Americans. . . . He and his supporters aren’t about to stop beating that particular drum. The nearer the presidential election approaches, the louder they’ll beat it.” Bernard Kaplan, *France Extends Its Cultural Crusade to American Rock’n’Roll*, THE GAZETTE (Montreal), Dec. 24, 1993, at D16.

221. The principal treaties include the Universal Declaration of Human Rights, art. 19, G.A. Res. 217A, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, art. 19, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 55, U.N. Doc. A/6316 (1966); Helsinki Accords (Conference on Security and Cooperation in Europe: Final Act), DEP’T ST. BULL., Sept. 1975, at 323, 341-42 (1975).

222. For a thorough discussion of the applicability of the doctrine of free flow of information to broadcasting, see Vincent B. Feher, “*Television Without Frontiers*”: Possible U.S. Responses, 9 U. MIAMI ENT. & SPORTS L. REV. 65, 104-18 (1992).

cultural flows.

The argument that nations should collectively guard against such propensities seems particularly persuasive considering the inherent resilience of cultures. The marketplace for ideas naturally favors local products. Locally produced A/Vs, for example, have many advantages that foreign imports must overcome.<sup>223</sup> First, language and other interpretation barriers protect them.<sup>224</sup> As mentioned above, people probably prefer watching a film in their own language than one with subtitles or one that is dubbed. Second, barriers of social support also protect local A/Vs. Much of the enjoyment and satisfaction of watching films, for instance, lies in discussing them with family and friends. Third, local A/Vs are further protected by barriers of what we conventionally call "culture." Domestic A/Vs portray characters eating foods the local people eat and wearing clothes they wear. As a Japanese delegate to the GATT aptly remarked, Japan brings in many foreign products and influences and turns them into something uniquely Japanese: "[i]n Japan culture is considered to be something with many layers."<sup>225</sup>

In short, while cultural concerns may to some extent be legitimate, the invocation of sovereignty alone appears unpersuasive as a basis for cultural protectionism. Political boundaries are poor proxies for overlapping and amorphous cultural spheres. Furthermore, the international community disapproves of many of the often arbitrary interests that fuel national movements for cultural sovereignty. Notions of cultural integrity based on political sovereignty thus tend to underrate the advantages of unrestricted informational flows to development and foreign relations.

## VI. DIRECTIONS FOR INTERNATIONAL A/V TRADE POLICY

This Article does not pretend to survey and evaluate all the different issues that the A/V dispute implicates. It does, however, try to build a framework in which the most important arguments can be contrasted, compared, and then assimilated for trade policy purposes. The previous Parts of this Article have discussed the main arguments found in the A/V debate; this Part assimilates them in the hope of developing broad policy directions for A/V trade.

### A. *Competing Faiths*

In some ways, the free trade versus cultural protection debate boils down to competing faiths. The free traders rely largely on faith in competition because the public good aspects of A/Vs make it difficult to obtain clear statements about the efficiency of different A/V allocation structures. Cultural

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223. These advantages are adapted from Pool, *Integrity of National Cultures*, *supra* note 212, at 142.

224. One study researched the interpretation of the popular television series *Dallas* in different countries. The authors of the study concluded that while a program like *Dallas* may beam a homogeneous message to its international audience, viewers often interpret the message differently. LIEBES & KATZ, *supra* note 194, at 152.

225. *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) (quoting Akihiko Soyama).

protectionists thus have good reasons to worry about price discrimination and dumping behavior in A/V markets. Moreover, cultural goods can have hidden social costs and benefits (the externalities discussed above) that market transactions do not fully reflect.

The conviction of cultural protectionists similarly stems from faith in amorphous notions of culture. These ideas are exceedingly hard to define with reasonable precision and involve intractable questions such as how cultures are precisely reflected in and impacted by A/Vs. Notions of national culture are also arbitrary. Cultural boundaries, even if precisely defined, do not always correspond to political boundaries. Free traders thus correctly worry about a trading system that arbitrarily discriminates against A/V producers under the cover of cultural protection.

### B. *Common Faith*

To view the A/V dispute in terms of competing faiths alone, however, would be to see the trees and miss the forest. The A/V sector is only one of many spheres in which countries interact. In this broader context the GATT, as an institution of common faith, gives valuable guidance to the A/V dispute.

Regardless of their positions on the narrow issue of A/V trade, the contracting parties of the GATT share a belief in the premises behind the regime. As discussed in Part II, those premises are that international trade is beneficial; that self-interested national economic policies contribute to misunderstanding, instability, and war in international relations; and that international agreement on trade policy is useful, if not necessary, because national actions to promote trade and stability will usually be frustrated by the actions of other states.<sup>226</sup>

To be sure, the common faith of the CPs has clear limits. Few believe, for instance, that the framers of the GATT meant for markets eventually to replace governments. Similarly, under the analysis in this paper, one possible limitation to the GATT common faith is the treatment of trade in quasi-public goods. Trade in these goods, like films, television programs, videotapes, books, music tapes, and CDs, does not seem to fit conveniently within our conventional understanding of trade. Another possible limitation concerns the desirability of regulating "cultural trade" because of its impact on national cultures.

Although the problems that quasi-public goods pose for free trade are not insignificant, they do not appear so large when one considers the alternative to free trade. No one can know with reasonable certainty whether particular import restrictions would lead to a more efficient allocation of A/Vs than would no regulation at all. As the Section on mass media and information flows shows, if permitted to restrict A/V trade, governments are in fact likely to significantly undervalue the informational benefits of A/V trade. The

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226. See *supra* part II. Reasonable people can, of course, disagree on the exact formulation of the premises behind the GATT. Professor Jackson's formulation is used here only to show that even a very modest formulation demonstrates that sanctioning A/V import restrictions would severely undermine the existing world trading order.

concern over cultural integrity is easy to overstate as well: cultural concerns may be legitimate, but, as shown above, basing import restrictions on notions of national cultural integrity simply does not hold up under rational scrutiny.

If the analysis were to end here, choosing to disallow A/V import quotas could be justified, although not comfortably. One further observation, however, swings the pendulum distinctly in favor of unrestricted trade despite the public good aspects of A/Vs. If the GATT premises are to hold, A/V trade restrictions should not be allowed, if only because they are arbitrary and unfair. To reiterate, notions of national cultural integrity — however they are formulated — do not hold up under rational scrutiny. Furthermore, the import restrictions to which they give rise deny the full benefits to traders with comparative advantages in the A/V sector. Not surprisingly, trade restrictions based on notions of cultural integrity have in fact already spawned precisely those problems that the GATT seeks to avoid: threatened reductions in international A/V trade, misunderstanding, and lack of international agreement. These problems would arise even if A/V import restrictions were justified on the grounds of their public good aspects. Economists could not devise import restrictions that would reasonably address distortions caused by the public good aspects of A/Vs. Even if they could, governments are rarely the puppets of benign economists. Granting the privilege to restrict A/V imports would merely invite its abuse.

The arbitrariness of content regulation or regulation based on national origin is pivotal in the analysis because of the role that governments play in trade relations. The integrity of the GATT relies implicitly but critically on the idea that government should not act arbitrarily. Without this idea, none of the premises behind the GATT could survive. Allowing governments to use A/V import restrictions would thus severely undermine the GATT because any such government restrictions would clearly be arbitrary and unfair. Sanctioning them would set a dangerous precedent for the entire trading system. Arguably, unrestricted trade in A/Vs is preferable, not because it leads to a superior allocation of A/Vs in the world, but because it guards against arbitrary national or regional trade policies. Permitting governments to discriminate against particular A/V imports would undermine the basic premises of an existing world trade order whose concern goes well beyond the A/V sector.

### *C. The Role of Protective Provisions in the GATT*

Rejection of a cultural exemption or specificity allowance would admittedly pose some doctrinal problems for the GATT. Namely, one possible interpretation of Article IV holds that it codifies cultural sovereignty as a legitimate exception to GATT principles. There are at least two responses to this problem. First, CPs could eliminate Article IV by amendment. An amendment may not be necessary, however, if it can be proven that screen quotas are in practice ineffective at restricting film trade flows. More practically, CPs can simply interpret Article IV literally, thereby confining the exception to the use of screen quotas for cinema films. In this manner, the GATT's principles could encompass all other A/Vs.

Eliminating or disarming Article IV does not mean that CPs would have no way of protecting their culture or cultural industries. The debate over A/Vs often overlooks the fact that the current GATT already provides means of achieving some protection. For example, Article XIX, popularly known as the "Escape Clause," allows a CP temporarily to suspend GATT obligations for the protection of domestic industries suffering from a decline in international competitiveness.<sup>227</sup> If countries want to strengthen or rebuild their cultural industries, they should invoke this provision rather than some general notion of "cultural sovereignty." The international community could then more concretely assess and agree upon the reasonableness of departures from core GATT principles.

In addition, Article XX permits the use of quotas or other trade restrictions to the extent they are "necessary to protect public morals."<sup>228</sup> Under the GATT, countries can legitimately restrict the import of A/Vs, such as pornographic films, if they deem the restriction necessary for the moral protection of their citizens. As further evidence that GATT CPs have committed themselves to rational, nonarbitrary trade policies, however, Article XX states that use of the listed "general exceptions" are "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries."<sup>229</sup>

#### D. *Incorporating A/Vs into the GATT*

The GATT offers an attractive framework for ensuring that A/Vs are traded freely and without restrictions. Its principles of MFN and national treatment, among others, have proven extremely helpful in reducing international commercial discrimination, and the international community largely accepts them.

Incorporating the A/V sector into the GATT regime nonetheless raises some additional issues that are beyond the scope of this Article.<sup>230</sup> The problem of widespread A/V piracy, for example, causes some to question whether unconditional MFN should be the short-term goal of GATT members.<sup>231</sup> Because of the importance to A/V producers of controlling distribution within national markets, variations on the principle of national

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227. To be invoked, Article XIX requires increased import quantities that have resulted from "unforeseen developments" and that "cause or threaten serious injury to domestic producers . . . of like or directly competitive products." GATT, *supra* note 13, art. XIX. See generally KENNETH DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 99-107 (1970) (discussing operation of Escape Clause actions); JACKSON, *WORLD TRADING SYSTEM*, *supra* note 12, at 556-73 (same).

228. GATT, *supra* note 13, art. XX.

229. *Id.* Although Article XX does not define what constitutes arbitrary or unjustifiable discrimination, it clearly recognizes and seeks to limit potential abuses by CPs.

230. This Article does not argue that A/Vs should be classified as goods or services for the purposes of incorporating them into the GATT regime; instead, it argues that A/V trade should follow rules similar to those that promote free trade in goods. Certain characteristics of A/Vs may, however, make variations on the GATT's nondiscrimination principles desirable. Consequently, an agreement on the A/V sector would probably fall under the GATS, which is more flexible than the GATT.

231. See WILDMAN & SIWEK, *supra* note 28, at 157.

treatment and the right of establishment may also prove desirable.<sup>232</sup> Furthermore, GATT members may want to permit governments to subsidize domestic A/V producers as a rough compromise between market and cultural concerns.<sup>233</sup> If necessary, CPs could even adopt a sector-specific agreement that addresses these and other peculiarities of the A/V industry but that does not sanction import restrictions.

## VII. CONCLUSION

This Article provides some order to the various arguments advanced in the A/V trade dispute, though it is far from a definitive study or a comprehensive approach to the problems that A/Vs pose for international trade policy. If the analysis here proves anything, it shows that the A/V dispute implicates a diverse range of issues, from trade theory and law to communications and the social sciences. This breadth presents both challenges and dangers for the GATT.

The challenges are of the kind that GATT members will increasingly have to face as they try to reap the benefits of a more liberal and globalized economy. Thus, the difficulties that the public good characteristics of A/Vs present need greater attention. Price discrimination by A/V suppliers has understandably resulted in questions about pricing and about the application of traditional competition theory to A/V trade in general. The importance of the goods/services distinction for international trade policy also deserves reconsideration in light of the growing importance of trade in items that are not easily classified as either. Furthermore, as the dispute perhaps best demonstrates, GATT members should be wary not only of the limitations of free trade in achieving certain goals, but also of the clash between free trade and other values. Concerns about the effect of free trade on cultural integrity are not simply cover for economic protectionism; they are real and legitimate.

The A/V dispute, however, also presents dangers for the GATT and the existing world trade order. While the novel challenges of A/V trade help us to refine our understanding of trade relations, they simultaneously invite distortion of that understanding. As this Article demonstrates, cultural concerns are legitimate to some extent, but the import restriction privileges that many countries are attempting to legitimize within the GATT do not reasonably address those concerns. Political boundaries and cultural boundaries simply do not correspond in a way that permits rational and meaningful import discrimination, and a benign privilege that can only be exercised arbitrarily merely invites governmental abuse.

The rejection of a cultural exemption in the GATT does not mean that A/Vs should be treated exactly like conventional goods and services. Their unique economic qualities may call for some special treatment. Any special

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232. *See id.* at 159.

233. *See, e.g.*, SMITH, *GEOPOLITICS*, *supra* note 127, at 135-37. Under the analysis in this Article, however, governments should perhaps *not* be allowed to subsidize A/V producers. First, governments are not obviously better than the market in determining what ought to be produced. Second, absent persuasive reasons to the contrary, subsidies in the A/V sector should be discouraged for the same well-known reasons they are discouraged in other sectors.

treatment, however, should not be premised on cultural concerns because it would provide dubious cultural benefits at the expense of undermining the GATT. The idea that national governments should not create arbitrary discriminatory trade policies underlies the very benefits of a liberal trade order and the commitment of GATT members to each other. Although cultural concerns may be legitimate, GATT members should resist the call for a cultural exemption and refuse to sanction A/V import quotas.