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FRANKLY, MY DEAR AMERICA, WE DON'T GIVE A DAMN: COMPARING CHINESE AND EUROPEAN TRADE BARRIERS TO AMERICAN AUDIOVISUAL WORKS AND THE AMERICAN RESPONSE

SHALIA SAKONA*

Abstract: For Hollywood film studios, strict Chinese regulations controlling the importation and distribution of foreign audiovisual works within China have made the Chinese audiovisual market as impenetrable as the Great Wall. Recently, in *China—Measures Affecting Trading Rights*, the World Trade Organization (WTO) ordered China to relax its barriers to foreign films. China has yet to comply with the order, causing ongoing protest by the United States. Meanwhile, the United States has long tolerated Television Without Frontiers, a European Union (EU) Directive that imposes local content quotas that restrict the amount of non-European programming aired on television. This Note compares the Chinese regulations with the EU Directive, and the corresponding American responses. It theorizes that the U.S. position against Television Without Frontiers has been strengthened by *China—Measures Affecting Trading Rights*, and that the United States should take a uniformly aggressive stance against foreign barriers to audiovisual trade to protect Hollywood's interests abroad.

INTRODUCTION

China began 2012, the year of the Dragon,¹ with a fiery blow to the nation's television programming.² In February 2012, the Chinese State Administration of Radio, Film and Television (SARFT) announced a new set of regulations which prohibits the showing of imported programs during prime time and requires channels to fill at

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¹ See Gary Du et al., *Flushing Parade Celebrates Chinese New Year*, EPOCH TIMES (Feb. 6, 2012), <http://www.theepochtimes.com/n2/united-states/flushing-parade-celebrates-chinese-new-year-187231.html>.

² See Andrew Jacobs, *Aiming at Its Asian TV Competitors, China Limits Foreign-Made Programs*, N.Y. TIMES, Feb. 15, 2012, at A11.

least seventy-five percent of their total airtime with Chinese programming.³ The regulations send a message to Western television producers: in China, there is no business for show business.⁴

Hollywood producers are, however, no strangers to burdensome regulations restricting the importation and distribution of audiovisual products within China.⁵ In 2007, the United States brought a complaint before the World Trade Organization (WTO) against China for its discriminatory importation and distribution structure for foreign films.⁶ Chinese regulations not only deprive American enterprises of the ability to compete for box office revenues, they also prompt widespread piracy of American works throughout China, costing the American film industry billions of dollars each year.⁷ In 2009, in *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China—Measures Affecting Trading Rights*), the WTO Panel and Appellate Body found in part that China's current distribution system, which allows only authorized distributors to import films into China for theatrical release and distribution, violates China's trade obligations under the Chinese Accession Protocol and Accession Working Party Report.⁸ The WTO gave China two years to restructure its distribution system, a deadline China ultimately failed to meet.⁹ Though they restrict TV programming rather than feature films, the new SARFT regulations indicate the Chinese government's continued hostility toward foreign audiovisual works and its unwillingness to liberalize trade in these markets.¹⁰

In contemplating how to proceed in the face of China's non-compliance with the WTO ruling, America should also consider why it

³ *Id.* These regulations come on the heels of another recent SARFT directive limiting the number of entertainment programs each satellite channel is allowed to air "each week to two," which came into effect January 1, 2012. See CNN Wire Staff, *China Sees Culture as a Crucial Battleground*, CNN (Jan. 5, 2012), <http://www.cnn.com/2012/01/05/world/asia/china-western-culture/index.html>.

⁴ See Jacobs, *supra* note 2; CNN Wire Staff, *supra* note 3 (explaining the recent crack-downs on entertainment programming within China and predicting that the Chinese media scene will become increasingly restrictive of foreign media).

⁵ See SHUJEN WANG, FRAMING PIRACY: GLOBALIZATION AND FILM DISTRIBUTION IN GREATER CHINA 61–64 (2003).

⁶ Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 4, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter Appellate Body Report].

⁷ See David Pierson, *China Still Restricting Foreign Media, U.S. Complains*, L.A. TIMES, Mar. 22, 2011, <http://articles.latimes.com/2011/mar/22/business/la-fi-china-wto-20110322>.

⁸ Appellate Body Report, *supra* note 6, ¶¶ 161, 200.

⁹ See Pierson, *supra* note 7.

¹⁰ See CNN Wire Staff, *supra* note 3; Pierson, *supra* note 7.

has not aggressively challenged similar economic restrictions in place in other countries.¹¹ Over the past century, various countries have erected trade barriers against American film and television programming in the forms of national subsidies and local content quotas.¹² Most notably, the European Union (EU) enacted Television Without Frontiers, a Directive requiring all member states to reserve a majority of their TV airtime for works produced in Europe (the local content requirement).¹³ Although several compelling arguments have indicated that the European treatment of American film and TV programming violates various WTO agreements, the United States has not followed through with formal action against the EU.¹⁴

The purpose of this Note is to explore the distinctions between the Chinese and European treatment of American audiovisual works that have prompted the United States to take an aggressive stance against the former but not the latter. Part I begins with a brief discussion of the significance of the American audiovisual industry. It also describes the relevant trade restrictions in place in China and the EU and the economic impact of these restrictions upon the American film and television industries. Part II outlines the United States' legal arguments against both the Chinese and European restrictions and discusses the 2009 WTO ruling condemning China's treatment of films imported for theatrical release. Part III analyzes the legal, cultural, economic, and philosophical differences underlying Chinese and European impediments to American audiovisual works. Part III suggests that the United States has an equally compelling WTO case against the EU and has only failed to fully pursue such a case out of a sense of pragmatism. It further suggests that if the United States wants to maintain its place as the world's leading provider of audiovisual entertainment and to preserve the integrity of the free trade agreements to which it is a party, it should take a uniformly aggressive legal stance against foreign barriers to audiovisual trade.¹⁵

¹¹ See John David Donaldson, "Television Without Frontiers": *The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 FORDHAM INT'L L.J. 90, 111 (1996).

¹² See MICHAEL CURTIN, PLAYING TO THE WORLD'S BIGGEST AUDIENCE: THE GLOBALIZATION OF CHINESE FILM AND TV 19 (2007).

¹³ See Donaldson, *supra* note 11, at 92, 99.

¹⁴ See *id.* at 110–11.

¹⁵ See W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 147 (1995).

I. BACKGROUND

A. *The Dominance of the U.S. Audiovisual Entertainment Industry and the World's Response*

The United States has been the world's leading producer of films and television programming since World War I, when war ravaged European production capabilities.¹⁶ Today, film and television comprise a significant portion of the U.S. entertainment industry, an industry which represents the United States' second-largest trade surplus and accounts for over five percent of the U.S. gross domestic product.¹⁷ Foreign revenues from sales of American entertainment products abroad constitute roughly half of the industry's overall profits.¹⁸ Hollywood studios rely upon foreign markets for roughly seventy percent of their total box office sales.¹⁹

The United States' role as a leading producer of film and television enables it to produce audiovisual works of a higher budget and caliber than most of its foreign counterparts.²⁰ Hollywood capitalizes on its large profits within the United States by reselling its products to foreign theaters and broadcasters for a fraction of the cost of production.²¹ Consequently, other countries struggle to create competitive audiovisual works, and in many regions, American films and television programming make up the majority of audiovisual entertainment available for consumption.²² Because of this competitive imbalance, many countries have enacted protectionist measures like subsidies for local producers, restrictions on importing foreign audiovisual works, and local content restrictions requiring that certain percentages of films and TV programs aired be domestically produced.²³

¹⁶ See Donaldson, *supra* note 11, at 94–95.

¹⁷ Claire Wright, *Hollywood's Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 AKRON L. REV. 739, 747 (2006); Memorandum from Ken Bhattacharjee & Toby Mendel, Article19 Legal Programme, Local Content Rules in Broadcasting (Mar. 2001), available at <http://www.article19.org/data/files/pdfs/publications/local-content-rules.pdf> [hereinafter Article19 Memo].

¹⁸ See Wright, *supra* note 17, at 747.

¹⁹ See Richard Verrier et al., *Warner Bros. to Distribute Films in China on Cable TV*, L.A. TIMES, June 16, 2011, <http://articles.latimes.com/2011/jun/16/business/la-fi-ct-china-warner-20110616>.

²⁰ See Shao, *supra* note 15, at 121–22; Article19 Memo, *supra* note 17.

²¹ See Shao, *supra* note 15, at 121–22; Article19 Memo, *supra* note 17.

²² See Shao, *supra* note 15, at 116; Article19 Memo, *supra* note 17.

²³ See CURTIN, *supra* note 12, at 19; Shao, *supra* note 15, at 118–19.

Policymakers in such countries rely upon two principal arguments to justify trade barriers in this area.²⁴ First, they argue that domestic producers must be given preferential treatment at home to counteract Hollywood's sizeable competitive advantage in foreign markets.²⁵ Second, they claim that their markets must be protected from a deluge of American audiovisual works because the dominance and omnipresence of Hollywood dilutes and overshadows their own national and cultural identities.²⁶ Former French President François Mitterrand framed the issue in the following manner: "What is at stake, and therefore in peril . . . is the right of each country to forge its imagination and to transmit to future generations the representation of its own identity."²⁷

B. *China's Barriers to Foreign Films and the Impact on the American Audiovisual Industry*

As the most heavily populated country in the world,²⁸ China also has the potential to be the world's greatest audience.²⁹ Over one billion Chinese citizens watch TV and more than two hundred million attend movie theaters.³⁰ In 2010, China's box office revenues were approximately \$1.5 billion, the sixth highest in the world.³¹ This value represents a sixty-four percent increase from the previous year, and movie attendance in China is expected to continue to climb.³² The China Film Producers' Association predicts that by 2015, as many as seven thousand new movie theaters will be built in China, and that the nation will enjoy box office revenues of about \$5.74 billion.³³ Accordingly, unfettered participation in the Chinese audiovisual market would secure large profits for Hollywood.³⁴

²⁴ See Shao, *supra* note 15, at 125–26.

²⁵ See *id.* at 131.

²⁶ See Donaldson, *supra* note 11, at 148–49; Shao, *supra* note 15, at 125, 137–38.

²⁷ *Mitterrand Denounces U.S. Domination at Francophone Summit*, AGENCE FR. PRESSE, Oct. 16, 1993, available at WestlawNext (follow "News" hyperlink; then search "(Mitterrand & Denounces) & DA(10–16–1993)"; then select the first result).

²⁸ *The World Factbook: Country Comparison: Population*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (last visited May 14, 2013).

²⁹ See CURTIN, *supra* note 12, at 1.

³⁰ *Id.*

³¹ Pierson, *supra* note 7.

³² *Id.*; see Ellen E. Jones, *Can Hollywood Serve China's One Billion Film-Goers?*, GUARDIAN (London), June 9, 2011, <http://www.guardian.co.uk/film/2011/jun/09/china-hollywood-film-industry>.

³³ Jones, *supra* note 32.

³⁴ See WANG, *supra* note 5, at 64; Jones, *supra* note 32.

China, however, has always been resistant to the influx of foreign audiovisual works.³⁵ Chinese law prohibits foreign-owned-and-invested enterprises from importing films for theatrical release or home distribution.³⁶ SARFT designates the domestic enterprises that are permitted to import foreign films and has granted only two enterprises such authority: the China Film Group Corporation (previously called the China Film Import and Export Corporation), and the Huaxia Film Distribution Company, both of which are state-owned.³⁷ Additionally, SARFT only allows twenty foreign films to be played in Chinese movie theaters each year, subject to harsh revenue-sharing arrangements.³⁸ Under these revenue-sharing arrangements, foreign producers typically receive only thirteen to eighteen percent of the ticket revenues their movies earn in China, in comparison to the fifty percent these producers would receive in the United States.³⁹ The remaining eighty-two to eighty-seven percent of revenues is split between the Chinese import/export distribution office and local film companies.⁴⁰ For example, in 2011, Paramount Pictures' *Transformers 3* grossed \$159 million at Chinese box offices, of which Paramount received only \$30 million.⁴¹ Foreign films are increasingly excluded from Chinese theaters during peak viewing periods in order to prompt patronage of Chinese-made films.⁴²

Strict import controls circumvent Hollywood's vast distribution network and severely undermine its ability to get its products to Chinese viewers.⁴³ Some major Hollywood studios have managed to circumvent import restrictions and reap greater shares of movie profits by forming joint ventures and co-producing movies with Chinese companies.⁴⁴ In this manner, Dreamworks Animation will reap fifty percent of the profits from *Kung Fu Panda 3*, a co-production between the Ameri-

³⁵ See WANG, *supra* note 5, at 61.

³⁶ Appellate Body Report, *supra* note 6, ¶ 161.

³⁷ See *id.* ¶¶ 4, 161; Pierson, *supra* note 7; *Movie Sector Undergoes Constant Changes*, CHINA DAILY (Nov. 18, 2004), http://www.chinadaily.com.cn/english/doc/2004-11/18/content_392455.htm.

³⁸ See WANG, *supra* note 5, at 63.

³⁹ *Id.*; Paula M. Miller, *Reeling in China's Movie Fans*, CHINA BUS. REV. (2007), available at <http://www.chollywood.org/en/news/reeling-in-chinas-movie-fans.html>.

⁴⁰ See WANG, *supra* note 5, at 63.

⁴¹ Ben Fritz & John Horn, *Reel China: U.S. Film Producers Are Engaging the Chinese*, L.A. TIMES, Aug. 24, 2011, <http://articles.latimes.com/print/2011/aug/24/entertainment/la-et-china-film-quota-20110824>.

⁴² See Miller, *supra* note 39.

⁴³ See WANG, *supra* note 5, at 64; Miller, *supra* note 39.

⁴⁴ Fritz & Horn, *supra* note 41.

can company and three of China's largest media companies.⁴⁵ Such arrangements, however, subject American studios to unpredictable and overbearing foreign investment laws, and equally unpredictable and overbearing censorship by the Chinese government.⁴⁶

In addition to diminishing Hollywood studios' autonomy and box office revenues, the Chinese restrictions have also contributed to massive piracy and bootlegging throughout China.⁴⁷ Chinese viewers gravitate toward American films, which surpass Chinese films in terms of production values and special effects.⁴⁸ Thus, when denied legitimate and timely access to American audiovisual works, Chinese viewers seek illegal bootlegs on the internet and the black market.⁴⁹ The delays that even the SARFT-approved American films encounter before making their way onto Chinese screens give bootleggers a head start to obtain and sell illegal copies of the same films, thereby decreasing box office sales.⁵⁰ In 2010 alone, China's bootleg DVD industry made an estimated six billion dollars in profits, a figure that roughly quadrupled Chinese box office revenues during the same period.⁵¹ Bootlegs made in China find their way into the hands of other global consumers, weakening demand for U.S. audiovisual works in the broader international community.⁵²

While China's restrictions on foreign audiovisual products are motivated in part by the nation's desire to make the Chinese film industry more competitive,⁵³ the government also uses these restrictions to control Chinese citizens' access to Western ideas and culture.⁵⁴ Chinese officials believe that Western audiovisual works are damaging to the

⁴⁵ Richard Verrier, *DreamWorks Animation's 'Kung Fu Panda 3' to Be China Co-Production*, L.A. TIMES, Aug. 6, 2012, <http://articles.latimes.com/2012/aug/06/entertainment/la-et-ct-dreamworks-china-kung-fu-panda-3-20120806>.

⁴⁶ See Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 21–23, 47 (2006); Fritz & Horn, *supra* note 41.

⁴⁷ See Miller, *supra* note 39; Dan Levin & John Horn, *DVD Pirates Running Rampant in China*, L.A. TIMES, Mar. 22, 2011, <http://articles.latimes.com/2011/mar/22/entertainment/la-et-china-piracy-20110322>; Pierson, *supra* note 7.

⁴⁸ See CURTIN, *supra* note 12, at 75. As one Chinese film critic noted, “[t]raditional Chinese values are mainly non-confrontational and do not make good movies.” Jones, *supra* note 32.

⁴⁹ See Miller, *supra* note 39; Levin & Horn, *supra* note 47; Pierson, *supra* note 7.

⁵⁰ See Miller, *supra* note 39.

⁵¹ Pierson, *supra* note 7.

⁵² See MOTION PICTURE ASS'N OF AMERICA, TRADE BARRIERS TO EXPORTS OF U.S. FILMED ENTERTAINMENT 11–12 (2010), available at <http://www.mpa.org/resources/69721865-ac82-4dc4-88ec-01ee84c651a1.pdf>; WANG, *supra* note 5, at 47.

⁵³ See WANG, *supra* note 5, at 66.

⁵⁴ See *id.* at 61; CNN Wire Staff, *supra* note 3.

Chinese conscience and could prompt a popular revolt against socialist ideology, and ultimately the Chinese government itself.⁵⁵ Because of these fears, the Chinese government strives to eradicate Western influence in the form of foreign audiovisual works despite China's trade obligations under the WTO framework.⁵⁶

C. Europe's Barriers to Non-European Television and Their Impact on the American Entertainment Industry

Before Hollywood's rise to prominence in the 1920s, Europe was the world's leader in film production.⁵⁷ Today, many European nations—most notably, the United Kingdom, France, Germany, and Italy—remain competitive in the global entertainment industry.⁵⁸ In their efforts to sustain and increase the viability of European cinematography, individual European nations and the community at large have created subsidies for local producers.⁵⁹ In the United Kingdom, for example, the state-financed British Screen Finance agency loans production funds to about a quarter of all British films.⁶⁰ In France, the French National Center for Cinematography provides direct funding and tax concessions to producers on a points-based system that allocates points for the use of French language and—to a lesser extent—European production firms, subject matter, talent, filming locations, etc.⁶¹ These French subsidies are funded in part by a tax on ticket sales at French cinemas, where most of the revenues are earned by American films.⁶² Additionally, co-production treaties and subsidiary bodies like Eurimages and the European Convention on Cinematographic Co-Production allocate funding for films that are co-produced by multiple EU member states or reflect the European identity.⁶³ In order to obtain the benefits of local subsidies like those in place throughout the EU, American studios increas-

⁵⁵ See Donaldson, *supra* note 11, at 149; CNN Wire Staff, *supra* note 3; Louisa Lim, *China Targets Entertainment TV in Cultural Purge*, NPR (Jan. 11, 2012, 12:01 AM), <http://www.npr.org/2012/01/11/144994861/china-targets-entertainment-tv-in-cultural-purge>.

⁵⁶ See WANG, *supra* note 5, at 42; CNN Wire Staff, *supra* note 3.

⁵⁷ Donaldson, *supra* note 11, at 94.

⁵⁸ See Shao, *supra* note 15, at 116.

⁵⁹ See Carolyn Hyun-Kyung Kim, *Building the Korean Film Industry's Competitiveness: Abolish the Screen Quota and Subsidize the Film Industry*, 9 PAC. RIM L. & POL'Y J. 353, 369–71 (2000).

⁶⁰ See David H. Horowitz & Peter J. Davey, *Financing American Films at Home and Abroad*, 20 COLUM.-VLA J.L. & ARTS 461, 482–83 (1996); Kim, *supra* note 59, at 371.

⁶¹ See Horowitz & Davey, *supra* note 60, at 483.

⁶² See *id.*

⁶³ See Kim, *supra* note 59, at 369–70.

ingly choose to shoot and produce their films and TV programs abroad.⁶⁴

Despite the various forms of national and regional assistance available to local audiovisual producers, Hollywood remains the dominant player at European box offices.⁶⁵ With over seventy percent of Europe's box office revenues deriving from tickets to American films, Hollywood continues to enjoy considerable success with European moviegoers.⁶⁶ Accordingly, television programming, rather than film importation and distribution, is Hollywood's major battleground in Europe.⁶⁷

In 1989, the European Economic Community (succeeded by the EU) limited consumption of American TV programming within Europe through the issuance of the Television Without Frontiers Directive.⁶⁸ The Directive requires that, "where practicable," the majority of each member state's TV airtime must be occupied by European⁶⁹ programming.⁷⁰ This requirement burdens smaller states with unsophisticated production capabilities.⁷¹ Rather than cheaply accessing high-quality American programming, these states must pay higher prices for less-desirable European programming.⁷² The Directive threatens the viability of high-budget U.S. programming, which has come to rely upon resale in the European market to recoup its costs.⁷³ When Television Without Frontiers entered into force, the sale of American programming to European broadcasters earned Hollywood annual profits of over one billion dollars.⁷⁴ A decade later, this figure had risen to two

⁶⁴ See Horowitz & Davey, *supra* note 60, at 461; Kim, *supra* note 59, at 369; Wright, *supra* note 17, at 739–40.

⁶⁵ See Gordon H. Hanson & Chong Xiang, *International Trade in Motion Picture Services*, in *INTERNATIONAL TRADE IN SERVICES AND INTANGIBLES IN THE ERA OF GLOBALIZATION* 203, 204 (Marshall Reinsdorf & Matthew J. Slaughter eds., 2009); Daniel Singer, *GATT & The Shape of Our Dreams*, NATION (Jan. 17, 1994), available at <http://www.thenation.com/article/gatt-shape-our-dreams>.

⁶⁶ See Hanson & Xiang, *supra* note 65, at 203–04; Singer, *supra* note 65.

⁶⁷ See Donaldson, *supra* note 11, at 93, 95; Singer, *supra* note 65.

⁶⁸ Donaldson, *supra* note 11, at 92.

⁶⁹ See Council Directive 89/552, of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, art. 6, 1989 O.J. (L 298) 23 (EC) (classifying works as "European" based on the production company's nationality as well as the personnel involved); Donaldson, *supra* note 11, at 152.

⁷⁰ Council Directive 89/552, *supra* note 69, art. 4.

⁷¹ See Donaldson, *supra* note 11, at 98–99, 117–19.

⁷² See *id.*; Kirsten L. Kessler, *Protecting Free Trade in Audiovisual Entertainment: A Proposal for Counteracting the European Union's Trade Barriers to the U.S. Entertainment Industry's Exports*, 26 LAW & POL'Y INT'L BUS. 563, 565–66 (1995).

⁷³ See Donaldson, *supra* note 11, at 120; Kessler, *supra* note 72, at 566.

⁷⁴ Donaldson, *supra* note 11, at 95.

billion dollars.⁷⁵ Given rising inflation and a rapidly growing European TV market, Hollywood's profits would have likely been even greater without the Directive's limitations on non-European programming.⁷⁶ Because of these restrictions, TV providers within the EU have cancelled lucrative contracts with American producers to avoid enforcement actions.⁷⁷ Europe has also recently experienced a proliferation of new TV stations.⁷⁸ Historically, new TV stations have been prime consumers of U.S. programming because of its relatively low cost.⁷⁹ In order to comply with Television Without Frontiers and avoid state and community sanctions, however, new stations are constrained from purchasing more than forty-nine percent of their programming from U.S. producers.⁸⁰

EU policymakers cite cultural concerns in defense of Television Without Frontiers' discriminatory treatment of U.S. programming.⁸¹ Member states argue that their unique cultural identities are threatened when their markets are inundated with American television.⁸² Consequently, EU policymakers seek to use television as a tool of cultural advancement and preservation.⁸³

II. DISCUSSION

The Chinese and European treatment of foreign film and television implicates China's and Europe's obligations as members of the WTO.⁸⁴ Formed in 1995, the WTO liberalizes international trade through the removal of state barriers to foreign goods and services.⁸⁵ The WTO facilitates uniform trade terms between member nations through a system of bilateral and multilateral treaties.⁸⁶ The EU has been member of the

⁷⁵ Toby Miller, *Anti-Americanism and Popular Culture* 15 (Ctr. for Policy Studies, Anti-Americanism Working Paper, 2005), available at <http://cps.ceu.hu/sites/default/files/publications/cps-working-paper-antiamericanism-and-popular-culture-2005.pdf>.

⁷⁶ See Donaldson, *supra* note 11, at 95, 117; Kessler, *supra* note 72, at 564–65.

⁷⁷ See Donaldson, *supra* note 11, at 117–18.

⁷⁸ See *id.* at 118; Kessler, *supra* note 72, at 564–65.

⁷⁹ Donaldson, *supra* note 11, at 118.

⁸⁰ See *id.*

⁸¹ See *id.* at 145, 169.

⁸² See *id.* at 146–47; Jon Filipek, "Culture Quotas": *The Trade Controversy over the European Community's Broadcasting Directive*, 28 STAN. J. INT'L L. 323, 351 (1992).

⁸³ See Donaldson, *supra* note 11, at 143–44; Kessler, *supra* note 72, at 567.

⁸⁴ See Appellate Body Report, *supra* note 6, ¶ 200; WANG, *supra* note 5, at 42; Donaldson, *supra* note 11, at 169.

⁸⁵ See *What Is the World Trade Organization?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited May 14, 2013).

⁸⁶ See WANG, *supra* note 5, at 43; *What Is the World Trade Organization?*, *supra* note 85.

WTO since the organization's inception.⁸⁷ All twenty-seven EU members are also WTO members with rights and obligations independent of the EU as a whole.⁸⁸ After fifteen years of contentious negotiations, China finally joined the WTO in 2001.⁸⁹

A. Accession and Dispute Settlement Under the WTO

The process of joining the WTO varies for each state.⁹⁰ An acceding state is bound by the terms set forth in general rules like the General Agreement on Tariffs and Trade (GATT) which are binding upon all members.⁹¹ Additionally, as part of the accession process, the acceding state must often make specific commitments above and beyond its general WTO obligations, sometimes referred to as "WTO-plus obligations."⁹² The acceding state negotiates its WTO-plus obligations with a working party comprised of interested members until all members are satisfied and consent to the accession.⁹³ At this point, the acceding state's WTO-plus obligations, as well as its consent to be bound by general WTO provisions, are codified in its accession package, consisting of the accession protocol and working party report.⁹⁴ The accession package addresses trade barriers in place in the acceding state which offend current WTO members.⁹⁵ These barriers must be lowered to appease existing member states.⁹⁶ Upon approval by the WTO General Council and subsequent ratification by the acceding state, the accession package enters into effect and the acceding state becomes a full-fledged member of the WTO.⁹⁷

⁸⁷ *The European Union and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited May 14, 2013).

⁸⁸ *See id.*

⁸⁹ *China Officially Joins WTO*, CNN (Nov. 11, 2001, 1:17 AM), <http://edition.cnn.com/2001/WORLD/asiapcf/central/11/10/china.WTO/index.html>.

⁹⁰ *See How to Become a Member of the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (last visited May 14, 2013).

⁹¹ Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 484-85 (2003).

⁹² *See id.* at 483-85.

⁹³ *See How to Become a Member of the WTO*, *supra* note 90.

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *Id.*

The WTO has in place a multilateral system of dispute settlement to encourage compliance with its requirements.⁹⁸ If a member feels another member is violating either general rules or specific market access obligations under its accession protocol, the injured member can invoke the WTO's dispute settlement procedure to halt the offending practice.⁹⁹ The dispute settlement process works as follows: First, the injured party must consult the offending party to try to independently resolve the dispute.¹⁰⁰ If the two parties are unable to reach a solution, the WTO Dispute Settlement Body appoints a Panel at the request of the injured party.¹⁰¹ This Panel receives arguments from both sides and rules upon the legitimacy of the practice in question.¹⁰² The Panel issues a report containing its ruling and, where applicable, a recommendation on how the losing party may bring its practices into compliance with its WTO obligations.¹⁰³ Next, either party may appeal on the points of law set forth in the Panel Report.¹⁰⁴ If the respondent is unsuccessful upon appeal or chooses not to appeal the Panel ruling, the respondent is given a reasonable period to comply with the ruling.¹⁰⁵ If the respondent fails to bring its offending practice into conformity with its WTO obligations during that period, the winning party can impose reciprocal sanctions with the permission of the Dispute Settlement Body.¹⁰⁶

B. *The U.S. Argument Against Television Without Frontiers Under GATT*

GATT was established in 1947, and in 1995 was subsumed under the WTO framework such that all WTO members are bound by GATT's provisions.¹⁰⁷ GATT's creators sought to reduce states' discrimination against foreign goods exemplified by the "beggar-thy-neighbor" trade

⁹⁸ See *A Unique Contribution*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited May 14, 2013).

⁹⁹ See *id.*

¹⁰⁰ See *The Process—Stages in a Typical WTO Dispute Settlement Case*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/displ_settlement_cbt_e/c6s2p1_e.htm (last visited May 14, 2013).

¹⁰¹ *A Unique Contribution*, *supra* note 98.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ *Id.*

¹⁰⁷ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; *The 128 Countries That Had Signed GATT by 1994*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited May 14, 2013).

policies in place around the world throughout the preceding decades.¹⁰⁸ By breaking down trade barriers that would otherwise impede the free flow of goods, GATT fosters the efficient allocation of global resources and eases global tensions which often arise from discriminatory economic policies.¹⁰⁹

Opponents of Television Without Frontiers argue that the local content requirement imposed on European TV providers violates at least two central provisions of GATT: most favored nation (MFN) treatment and national treatment.¹¹⁰

1. Most Favored Nation Treatment

Contained in Article I(1) of GATT, the MFN provision requires that, if a contracting party gives another nation's goods preferential treatment over other foreign goods, it must extend the same benefit to the goods of all contracting parties.¹¹¹ That is, a contracting party must place all other contracting parties on the same economic playing field within its borders as its "most favored nation."¹¹² In negotiations, the United States has argued that Television Without Frontiers' local content requirement violates MFN because it gives European programming a trade advantage without extending the same advantage to other contracting parties.¹¹³ The Directive forces EU members to favor other European states over non-European states.¹¹⁴ For example, barring domestic regulations to the contrary, a Danish station could choose to fill its entire airtime with French (or Spanish, or Italian, or any other individual European state's) programming.¹¹⁵ On the other hand, the same station could only fill up to forty-nine percent of its airtime with

¹⁰⁸ See Donaldson, *supra* note 11, at 106–08. The term "beggar-thy-neighbor" is used in economics to describe the phenomenon of a country striving to better its own economic position through the imposition of burdensome tariffs, import quotas, etc., on its trading partners. Scott Minerd, *The Return of "Beggar Thy Neighbor,"* GUGGENHEIM PARTNERS (June 1, 2010), <http://guggenheimpartners.com/Perspectives/Media/The-Return-of-Beggar-Thy-Neighbor>. Tolerance of "beggar-thy-neighbor" policies creates a type of prisoner's dilemma in which each state has an incentive to implement trade barriers which results in a universally inefficient allocation of goods that makes everyone, even the imposing state, worse off. See *id.*

¹⁰⁹ See Donaldson, *supra* note 11, at 107–08.

¹¹⁰ See *id.* at 110.

¹¹¹ See GATT art. I(1).

¹¹² See *id.*; Donaldson, *supra* note 11, at 112.

¹¹³ See Donaldson, *supra* note 11, at 113.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

U.S. programming.¹¹⁶ In this scenario, France enjoys the benefit of being Denmark's MFN because it faces no quantitative restrictions in this area, while the United States suffers discriminatory treatment.¹¹⁷

2. National Treatment

Contained in Article III of GATT, the national treatment provision dictates that once the foreign goods of a contracting party legally cross the border of the relevant state, they must be treated in the same manner as domestic goods.¹¹⁸ GATT contracting parties are not allowed to impose quotas that favor domestic goods over comparable foreign goods that have legally crossed the border.¹¹⁹ The United States argues that Television Without Frontiers encourages community members to deny national treatment to U.S. programming.¹²⁰ Each European state faces no quantitative restrictions in this area—a European station could comply with Television Without Frontiers by filling all of its airtime with domestic programming.¹²¹ On the other hand, if a station had already met its maximum allowance for foreign programming, it would be barred from airing any additional U.S. programming.¹²² Consequently, U.S. programming is denied the preferential treatment enjoyed by national programming.¹²³

3. U.S. Action Against Television Without Frontiers Under GATT

Shortly after Television Without Frontiers' passage, the United States issued a formal complaint with the ruling council of GATT on the issue of the local content requirement and requested bilateral consultations with the EU.¹²⁴ When the EU adamantly maintained that Television Without Frontiers was compatible with its GATT obligations, the bilateral consultations between the two parties broke down.¹²⁵ The United States could have subsequently triggered the next phase in the WTO dispute settlement process by requesting the appointment of a

¹¹⁶ See *id.* at 120.

¹¹⁷ See *id.* at 112–13.

¹¹⁸ See GATT art. III(2); Qin, *supra* note 91, at 499.

¹¹⁹ GATT art. III.

¹²⁰ Donaldson, *supra* note 11, at 115.

¹²¹ See *id.* at 102 n.56.

¹²² See *id.* at 115.

¹²³ See *id.*

¹²⁴ See *id.* at 109–10.

¹²⁵ See *id.* at 110–11.

Panel.¹²⁶ Instead, it has allowed its complaint to lie dormant for years,¹²⁷ and Television Without Frontiers' local content requirement remains in full force.¹²⁸

C. The WTO Proceedings Between the United States and China over China's Barriers to Audiovisual Trade

While television programming is not specifically exempted from contracting parties' GATT obligations, cinematographic works (films) are granted special consideration.¹²⁹ Whereas television stations have historically been state-owned or heavily regulated, movie theaters have traditionally been private, profit-driven enterprises.¹³⁰ Thus, contracting parties recognized that local cinema may need special protection to avoid being driven out of the market by the films from countries with stronger entertainment industries.¹³¹ Article IV of GATT sets forth the cinema exception which allows states to dedicate a fixed proportion of national screen time to domestically produced works.¹³² The exception contains no ceiling, so a contracting party could technically reserve all of its national screen time for domestic works.¹³³ When China acceded to the WTO, it agreed to raise its limit on the number of foreign films that could be imported each year from ten to twenty.¹³⁴ Accordingly, though the meager foreign film quota remains a major point of contention for Hollywood, the quota was not part of the United States' WTO proceedings and was not addressed by the Panel.¹³⁵

1. China's Obligations to Liberalize Audiovisual Trade Under the Chinese Accession Package

China's accession to the WTO was much more complicated than a typical accession.¹³⁶ China's economic strength, socialist underpinnings,

¹²⁶ See Donaldson, *supra* note 11, at 110–11.

¹²⁷ See *id.* at 111.

¹²⁸ See *Television Broadcasting Activities: "Television Without Frontiers" (TVWF) Directive*, EUROPA, http://europa.eu/legislation_summaries/audiovisual_and_media/124101_en.htm (last updated Sept. 9, 2008).

¹²⁹ See Donaldson, *supra* note 11, at 134–35.

¹³⁰ See *id.* at 137; Shao, *supra* note 15, at 112.

¹³¹ See Donaldson, *supra* note 11, at 137.

¹³² GATT art. IV. Clause (d) of the cinema exception specifies that quotas are "subject to negotiation for their limitation, liberalization or elimination." *Id.* art. IV(d).

¹³³ *Id.* art. IV; see Shao, *supra* note 15, at 111.

¹³⁴ WANG, *supra* note 5, at 65.

¹³⁵ See Miller, *supra* note 39; Pierson, *supra* note 7.

¹³⁶ See Qin, *supra* note 91, at 483, 488–89.

and long-time hostility to foreign goods and services prompted negotiations to last for fifteen years.¹³⁷ The resulting accession package was an eleven-page, highly specialized document, compared to the average two-page, relatively standardized accession protocols of most WTO members.¹³⁸ The trading rights of foreign ventures within China were major focal points of the document.¹³⁹ China committed to according foreign individuals and enterprises “treatment no less favorable than that accorded to enterprises in China with respect to the right to trade” within three years of accession.¹⁴⁰ Paragraph 5.1 of the Accession Protocol dictates that all enterprises in China (including foreign-owned-and-invested enterprises) must enjoy the right to import and export all goods throughout China, qualified only by China’s right to regulate trade in a manner consistent with the general rules of the WTO.¹⁴¹ This obligation to grant trading rights to all enterprises is confirmed by paragraphs 83(d) and 84(a) of the China Accession Working Party Report.¹⁴²

2. China’s Retention of Trade Barriers and the U.S. Response

Several years after the three-year timetable had expired, China retained regulations undermining the ability of foreign-owned-and-invested enterprises import and distribute foreign audiovisual works.¹⁴³ Consequently, the United States lodged a formal complaint with the WTO.¹⁴⁴ In part, the complaint alleged that Article 16 of China’s Film Enterprise Rule and Article 30 of China’s Film Regulation violated China’s obligations under the accession package.¹⁴⁵ These provisions prohibit all entities from importing films into China for theatrical release or distribution unless specifically authorized by SARFT.¹⁴⁶ No substantive criteria are set forth to govern the conditions under which au-

¹³⁷ See SEAN LEONARD, *THE DRAGON AWAKENS: CHINA’S LONG MARCH TO GENEVA* 22–24 (1999); Qin, *supra* note 91, at 488, 510.

¹³⁸ See Qin, *supra* note 91, at 488–89.

¹³⁹ See *id.* at 501.

¹⁴⁰ World Trade Organization, *Accession of the People’s Republic of China*, ¶ 5.2, WT/L/432 (2001) [hereinafter *Accession Protocol*].

¹⁴¹ *Id.* ¶ 5.1.

¹⁴² World Trade Organization, *Report of the Working Party on the Accession of China*, ¶¶ 83–84, WT/ACC/CHN/49 (2001) [hereinafter *Working Party Report*].

¹⁴³ See Appellate Body Report, *supra* note 6, ¶ 200.

¹⁴⁴ See Pierson, *supra* note 7.

¹⁴⁵ See Appellate Body Report, *supra* note 6, ¶¶ 2, 54.

¹⁴⁶ See *id.* ¶ 175.

thorization is to be granted, so SARFT retains complete discretion.¹⁴⁷ Only two entities, both of which are state-owned, have been authorized to import foreign films.¹⁴⁸ Thus, foreign theatrical enterprises in China are prevented from fairly competing with the two SARFT-sanctioned, state-owned enterprises because they are unable to exhibit the foreign films which account for a sizeable portion of Chinese box office revenues.¹⁴⁹ The Chinese restrictions also force foreign film producers to accept artificially low prices in exchange for the right to exhibit their films.¹⁵⁰ If they want their films to reach Chinese moviegoers at all, foreign producers must currently settle for whatever price the two approved, state-owned enterprises are willing to pay them.¹⁵¹

In August 2009, the WTO Panel found that Article 16 of the Film Enterprise Rule and Article 30 of the Film Regulation violate China's obligations under paragraphs 5.1 of China's Accession Protocol and 83(d) and 84(a) of the Working Party Report.¹⁵² The Panel reasoned that SARFT's discriminatory designation scheme interferes with the rights of all private enterprises (including foreign-owned-and-invested enterprises) to engage in the trade of foreign films.¹⁵³ China appealed the ruling, and the Appellate Body rendered a decision in December 2009.¹⁵⁴

In its appeal, China challenged the Panel's finding that the contested regulations affect trade in goods.¹⁵⁵ China argued that films are not goods within the meaning of the WTO framework, and thus, its accession commitments did not implicate China's treatment of foreign enterprises wishing to import films for theatrical release.¹⁵⁶ The Panel applied a basic version of the "necessary form of the transaction" test to determine that films are a good rather than a service.¹⁵⁷ This test dictates that an item's classification as a good depends upon the form of the property in the underlying transaction.¹⁵⁸ Though the value of a

¹⁴⁷ See *id.* ¶¶ 168, 175; Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 7.574–576, WT/DS363/R (Aug. 12, 2009) [hereinafter Panel Report].

¹⁴⁸ See Pierson, *supra* note 7.

¹⁴⁹ See Appellate Body Report, *supra* note 6, ¶ 175; WANG, *supra* note 5, at 63–64.

¹⁵⁰ See WANG, *supra* note 5, at 63; Miller, *supra* note 39.

¹⁵¹ See Miller, *supra* note 39; Pierson, *supra* note 7.

¹⁵² See Panel Report, *supra* note 147, ¶¶ 7.576, 7.598.

¹⁵³ See *id.* ¶ 7.598.

¹⁵⁴ See Appellate Body Report, *supra* note 6, ¶ 11.

¹⁵⁵ See *id.* ¶¶ 14–15.

¹⁵⁶ See *id.* ¶¶ 15, 173.

¹⁵⁷ See *id.* ¶ 184; Donaldson, *supra* note 11, at 127.

¹⁵⁸ Donaldson, *supra* note 11, at 127.

film comes from the ideas it transmits to the viewer's mind, that content is necessarily embodied in a tangible physical form—namely the film on which it is printed, or the digital media in which it is embedded.¹⁵⁹ Thus, the Appellate Body upheld the Panel's findings that films are goods within the meaning of the WTO framework and that the contested regulations violate China's accession commitments.¹⁶⁰

China's appeal also asserted that the contested regulations were permissible under the public morals exception found in Article XX(a) of GATT, a line of argument that the Panel rejected.¹⁶¹ The public morals exception allows contracting parties to restrict the importation of foreign goods when such restriction is necessary to protect public morality.¹⁶² WTO ruling bodies interpret the public morality clause strictly and the invoking party bears the burden of proof.¹⁶³ China argued that only a state-run entity could be trusted to know which media products are compatible with Chinese morality; thus, only a state-run entity should be allowed to import foreign films.¹⁶⁴ In contrast, the Panel found that China had not demonstrated that other enterprises 1) would be unable to understand the moral climate, or 2) would be unable to hire qualified consultants to advise them on what constitutes morally acceptable content in Chinese society.¹⁶⁵ Additionally, the government could supervise independent enterprises' imports to ensure that the content of the imported media was compatible with public morality.¹⁶⁶

In evaluating a public morality defense, the Panel weighs the respondent state's interest in protecting public morality against the international community's interest in free trade.¹⁶⁷ Given the heavy burden China's film regulations impose on private enterprise, coupled with the availability of reasonable alternatives that would equally safeguard public morality, the Appellate Body upheld the Panel's finding that the public morals exception did not legitimize China's practices in this area.¹⁶⁸

¹⁵⁹ See Appellate Body Report, *supra* note 6, ¶¶ 179, 184, 195; Donaldson, *supra* note 11, at 127; Shao, *supra* note 15, at 125.

¹⁶⁰ See Appellate Body Report, *supra* note 6, ¶¶ 195–199.

¹⁶¹ See *id.* ¶ 234.

¹⁶² See GATT art. XX(a); Donaldson, *supra* note 11, at 156.

¹⁶³ See Appellate Body Report, *supra* note 6, ¶¶ 66, 242, 289.

¹⁶⁴ See *id.* ¶¶ 272–273.

¹⁶⁵ See *id.* ¶ 277.

¹⁶⁶ See *id.* ¶¶ 277, 312.

¹⁶⁷ See *id.* ¶ 240.

¹⁶⁸ See *id.* ¶¶ 255, 312, 415(e).

III. ANALYSIS

The United States' aggressive stance against Chinese barriers to foreign films stands in contrast to its relative tolerance of parallel European impediments to television programming.¹⁶⁹ The rationale for this discrepancy may be traced to legal, cultural, economic, and political distinctions that differentiate China and Europe and their respective treatment of foreign audiovisual works.¹⁷⁰ Despite these distinctions, the United States has a viable legal argument against European television quotas, and American economic interests would be served by pursuing a formal WTO judgment against the EU.¹⁷¹

A. Legal Differences: The EU's Defenses Under GATT and Possible U.S. Responses Informed by China—Measures Affecting Trading Rights

Whereas China's obligations to liberalize its audiovisual market are quite clear under its accession package,¹⁷² the EU's local content requirement for television does not run afoul of any explicit commitments to the United States.¹⁷³ Instead, the United States would have to rely upon general GATT provisions like MFN, national treatment, and the ban on quantitative restrictions to make its case against Europe.¹⁷⁴ On their faces, these provisions seem to invalidate the local content requirement, but the EU argues that its treatment of foreign television programming is permissible under a few GATT defenses.¹⁷⁵ The EU's proposed defenses are, however, undermined by the decision in *China—Measures Affecting Trading Rights*.¹⁷⁶ Accordingly, the United States should use the persuasive force of the Appellate Body Report to formally attack the EU's treatment of foreign programming before the WTO.¹⁷⁷

¹⁶⁹ See Donaldson, *supra* note 11, at 111; Pierson, *supra* note 7.

¹⁷⁰ See, e.g., *infra* Part III.A–D.

¹⁷¹ See, e.g., Donaldson, *supra* note 11, at 180; Shao, *supra* note 15, at 147, 150.

¹⁷² See Accession Protocol, *supra* note 140, ¶ 5; Working Party Report, *supra* note 142, ¶¶ 83(d), 84.

¹⁷³ See Donaldson, *supra* note 11, at 110.

¹⁷⁴ See *id.*

¹⁷⁵ See Filipek, *supra* note 82, at 349.

¹⁷⁶ See Appellate Body Report, *supra* note 6, ¶¶ 195, 234; Donaldson, *supra* note 11, at 121, 144–45.

¹⁷⁷ See Felix David, *The Role of Precedent in the WTO—New Horizons?* 18–19 (Maastricht Faculty of Law, Working Paper No. 2009-12, 2009), available at <http://ssrn.com/abstract=1666169> (explaining that although WTO precedents are not formally binding, they are considered firm persuasive authority).

In negotiations with the United States over Television Without Frontiers, the EU has argued that television programming constitutes a service rather than a good, and is thus beyond the purview of GATT.¹⁷⁸ This argument is based on the notion that programs derive their value not from the physical medium on which they are stored, but rather from the information they transmit to the viewer's mind.¹⁷⁹ China attempted this same line of argument before the Appellate Body in *China—Measures Affecting Trading Rights*, and failed.¹⁸⁰ The differentiation of goods and services on the basis of whether their real value comes from the tangible good or the metaphysical content contained therein is referred to as the “real value” test.¹⁸¹ In the past, GATT Panels have dismissed the “real value” test when resolving disputes over newspapers, books, and magazines, and found that such items qualify as goods, despite the fact that literature's “real value” comes from the information it communicates, not from the physical words printed on the paper.¹⁸² The “necessary form of the transaction” test¹⁸³ “best comports with the standards adopted by the GATT, GATT panels, Community case law, and international customs and trade practices.”¹⁸⁴ Furthermore, the Appellate Body applied a version of the “necessary form of the transaction” test to reject China's claims that films are services and not goods.¹⁸⁵ Because the content of foreign films is transported into China “via a physical delivery material,”¹⁸⁶ such films constitute goods for the purposes of WTO agreements.¹⁸⁷ Similarly, television programs are necessarily transported into Europe via a physical medium upon which the informational content is stored.¹⁸⁸ Thus, transactions in which TV programs are exchanged are likely to be treated by the WTO as trades in goods governed by GATT.¹⁸⁹

¹⁷⁸ See Filipek, *supra* note 82, at 350.

¹⁷⁹ See *id.* For a thorough discussion of the problem of classifying television as either a good or a service, and the different tests that theorists and ruling bodies have devised to solve this problem, see Donaldson, *supra* note 11, at 121–29.

¹⁸⁰ See Appellate Body Report, *supra* note 6, ¶ 195.

¹⁸¹ See Donaldson, *supra* note 11, at 125–26.

¹⁸² See *id.* at 126.

¹⁸³ See *supra* text accompanying notes 157–158.

¹⁸⁴ See Donaldson, *supra* note 11, at 127.

¹⁸⁵ See Appellate Body Report, *supra* note 6, ¶ 195.

¹⁸⁶ *Id.* ¶ 184.

¹⁸⁷ See *id.* ¶¶ 195, 199.

¹⁸⁸ See Donaldson, *supra* note 11, at 123; Shao, *supra* note 15, at 125.

¹⁸⁹ Donaldson, *supra* note 11, at 129; see Appellate Body Report, *supra* note 6, ¶ 195.

Any EU attempts to justify Television Without Frontiers under the public morals clause of GATT would almost certainly fail.¹⁹⁰ Measures instituted for the protection of state morals are “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”¹⁹¹ In *China—Measures Affecting Trading Rights*, the Appellate Body indicated that the public morals exception is to be narrowly construed and requires balancing the state’s moral interest in the disputed regulation against the trading partner’s interest in free trade.¹⁹² Where the disputed regulation has little impact upon the state’s preservation of public morals, it will not be upheld under this exception.¹⁹³ Despite the fact that Chinese moral, political, and social norms differ significantly from the American tradition,¹⁹⁴ the WTO rejected China’s public morals defense because China’s means of restricting the influx of deleterious Western influences were not narrowly tailored.¹⁹⁵

Television Without Frontiers restricts programming only on the basis of its origin, not the wholesomeness or authentically European nature of its content.¹⁹⁶ The public morals exception might be an effective means of blocking pornographic or excessively violent programming from entering the region, but it cannot be construed so broadly as to implicate all foreign programming.¹⁹⁷ This is particularly true in the context of European rejection of American goods.¹⁹⁸ Europe and the United States have similar moral underpinnings, rooted in their shared democratic and Judeo-Christian traditions.¹⁹⁹ Therefore, American programming is unlikely to have a deleterious or even transformative impact on Europe’s moral climate.²⁰⁰ Accordingly, the public morality defense would likely fail in this context.²⁰¹

¹⁹⁰ See Donaldson, *supra* note 11, at 156.

¹⁹¹ GATT art. XX(a).

¹⁹² See Appellate Body Report, *supra* note 6, ¶¶ 66, 240, 242.

¹⁹³ See *id.* ¶¶ 234, 277.

¹⁹⁴ See, e.g., CNN Wire Staff, *supra* note 3; Zhouying Jin et al., *Bridging U.S.-China Cross-Cultural Differences Using Internet and Groupware Technologies*, CIM ENGINEERING, INC., http://www.cim-oem.com/bridge_8c18c.html (last visited May 14, 2013) (Tables 1 & 2).

¹⁹⁵ See Appellate Body Report, *supra* note 6, ¶¶ 255, 277.

¹⁹⁶ See Donaldson, *supra* note 11, at 154.

¹⁹⁷ See *id.* at 156.

¹⁹⁸ See *id.* at 156–57.

¹⁹⁹ See *id.* at 150.

²⁰⁰ See *id.* at 156–57.

²⁰¹ See *id.*

Europe's cultural similarities to the United States also undermine the EU's ability to invoke the cultural exception which some contracting states (including the EU itself) read into GATT.²⁰² Though this "culture exception" is not set forth anywhere in the text of GATT, proponents of the cultural exception insist that GATT's general provisions should not apply in the context of cultural goods—those goods that play an important role in shaping and promoting national identity.²⁰³ Such goods are said to have intrinsic worth beyond their commercial values because they are important vehicles for instilling social norms.²⁰⁴ Nevertheless, the cultural exception is nonsensical when applied to Europe as a unit, and especially in relation to the United States.²⁰⁵ It is impossible to define one uniform European identity; the EU boundaries circumscribe various contrasting cultural identities.²⁰⁶ This means that programming from a non-EU state may be far more reflective of an importing European state's own cultural identity than would programming from another European state.²⁰⁷ For example, a TV show made in Brazil would likely reflect Portuguese culture better than a show made in Finland.²⁰⁸ Similarly, a show made in the United States would likely reflect British culture better than a show made in Serbia.²⁰⁹ Yet, Television Without Frontiers would restrict importation from the former, culturally similar non-European states, but not from the latter, culturally distinct European states.²¹⁰ National and community boundaries are not useful proxies for culture in this context.²¹¹

Additionally, rather than using the regulation to foster authentic European talent, European film executives may be using the local content requirement to entice American talent to work and film in Europe.²¹² By providing financing and personnel, European executives can essentially slap a "made in Europe" sticker on works that are decid-

²⁰² See Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 283–84, 293 (1997); Donaldson, *supra* note 11, at 121, 150–51.

²⁰³ See 25 *Questions on Culture, Trade and Globalisation*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., http://portal.unesco.org/culture/en/ev.phpURL_ID=18683&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited May 14, 2013).

²⁰⁴ *Id.*

²⁰⁵ See Donaldson, *supra* note 11, at 150–51, 153.

²⁰⁶ See *id.* at 152–53; Filipek, *supra* note 82, at 359–60.

²⁰⁷ See Donaldson, *supra* note 11, at 150, 155; Filipek, *supra* note 82, at 359–60.

²⁰⁸ See Donaldson, *supra* note 11, at 150, 155; Filipek, *supra* note 82, at 359–60.

²⁰⁹ See Donaldson, *supra* note 11, at 150, 155; Filipek, *supra* note 82, at 359–60.

²¹⁰ See Donaldson, *supra* note 11, at 154–55.

²¹¹ *Id.* at 151.

²¹² See Filipek, *supra* note 82, at 358.

edly American, thereby circumventing the local content requirement.²¹³ This trend indicates that “some of the Directive’s supporters are less interested in preserving national identity than in transferring pieces of the entertainment business from Hollywood to Paris.”²¹⁴ The Appellate Body Report in *China—Measures Affecting Trading Rights* suggests that, when a nation deviates from general GATT principles in order to protect its cultural well-being, the deviation will only be considered legitimate if it is reasonably tailored toward the professed social goal.²¹⁵ Given that there is no uniform European artistic identity and that the European film industry is not making good-faith efforts to establish one, it would be difficult for the EU to defend Television Without Frontiers under its proposed culture exception.²¹⁶

B. *Cultural Differences: Human Rights Implications of the European and Chinese Treatment of Foreign Audiovisual Works*

The EU undoubtedly defends what is primarily an economic, protectionist practice through untenable rhetoric about preserving European culture and (somewhat more convincingly) preventing “mental colonization” via American programming.²¹⁷ Were the promotion of cultural self-determination and pluralism (the individual’s right to access information from a number of diverse sources) truly the motivating forces behind Television Without Frontiers, the local content requirement would be justifiable from a human rights standpoint.²¹⁸ Given its scope, however, Television Without Frontiers actually has some negative human rights implications because it impedes—to a limited extent—the free flow of information and interferes with individual freedom of choice and consumer preference.²¹⁹ Still, given that forty-nine percent of EU airtime may still be filled by foreign programming, there is little serious risk that non-European influences will be halted at the community borders, particularly since Europeans enjoy liberal access to foreign media through other sources.²²⁰

²¹³ See *id.*

²¹⁴ *Id.*

²¹⁵ See Appellate Body Report, *supra* note 6, ¶¶ 234, 277.

²¹⁶ See Donaldson, *supra* note 11, at 150–51, 154–55.

²¹⁷ See Cahn & Schimmel, *supra* note 202, at 283; Donaldson, *supra* note 11, at 154–55; Shao, *supra* note 15, at 126.

²¹⁸ See Article 19 Memo, *supra* note 17.

²¹⁹ See Donaldson, *supra* note 11, at 151; Filipek, *supra* note 82, at 369–70.

²²⁰ See Donaldson, *supra* note 11, at 118, 120; Phillip H. Gordon & Sophie Meunier, *Globalization and French Cultural Identity*, 19 FRENCH POL. CULTURE & SOC’Y, Spring 2001, at 22, 23–24, 27.

China, on the other hand, uses its tight controls over the influx of foreign media to preserve the Chinese identity to the exclusion of all others.²²¹ The Chinese administration fears that foreign influences in the form of film and television could ultimately eviscerate socialist ideology and prompt a popular uprising against the government.²²² China's barriers to foreign audiovisual works serve as instruments of political control to prevent this possibility.²²³ Foreign websites, publications, and television programming are similarly restricted, meaning that the lack of access to Western media extends far beyond China's movie theaters.²²⁴ Consequently, in its WTO dispute against China, the United States had the moral high ground in a way that it might not were it to oppose the EU.²²⁵ Despite the very different political and cultural reasons for its own protectionist policies, the EU's underhanded attempts to shirk its free trade obligations and illegitimately favor European television enterprises warrant third-party intervention.²²⁶

C. Economic Differences: U.S. Competition with Europe and China in the Audiovisual Sector and Beyond

The United States' decision to attack China's treatment of foreign audiovisual works before the WTO may be traceable to U.S. trepidation about China's rising economy.²²⁷ U.S. policymakers fear that China poses a large threat economically and may soon overtake the United States' position as the world's leader in trade.²²⁸ Thus, the debate over China's treatment of foreign films may just be a data point in a larger scheme to break down China's trade barriers and ensure that China is not benefitting from WTO membership without incurring its fair share of obligations.²²⁹

The conflict between China and the United States extends beyond just trade policy—economic tensions are part of a larger ideological

²²¹ See CNN Wire Staff, *supra* note 3.

²²² See Donaldson, *supra* note 11, at 149; CNN Wire Staff, *supra* note 3; Lim, *supra* note 55.

²²³ See CNN Wire Staff, *supra* note 3.

²²⁴ See *id.*

²²⁵ See Gordon & Meunier, *supra* note 220, at 27; CNN Wire Staff, *supra* note 3.

²²⁶ See Donaldson, *supra* note 11, at 154–55.

²²⁷ CRAIG K. ELWELL ET AL., CONG. RESEARCH SERV., RL33604, IS CHINA A THREAT TO THE U.S. ECONOMY? 1–2 (2007), available at <http://www.fas.org/sgp/crs/row/RL33604.pdf>.

²²⁸ *Id.*

²²⁹ See *id.* at 34–35, 37.

battle between the Eastern and Western ways of life.²³⁰ What is in conflict is the proper way of running a country and its markets.²³¹ Chinese domination of the global economy would arguably undermine the legitimacy of capitalism and democracy.²³² This concern is exacerbated by the fact that China is using its newly accumulated wealth to build up its military, a step toward exerting more control over global politics.²³³

Though Europe dominated the global economy for centuries, European economic strength is not perceived as a threat to the American social order in the way that Chinese economic strength is.²³⁴ Furthermore, the European economy has been weak over the past several years as a result of its sovereign debt crisis, as well as fallout from the subprime mortgage crisis.²³⁵ Because the EU is not viewed as posing a serious economic threat to the United States, the United States has less incentive to challenge specific European trade barriers before the WTO.²³⁶

Despite the fact that the current European economy overall may not pose a major threat to the U.S. economy, several European states do have sophisticated film and television industries that could eventually challenge Hollywood's dominance in the global television industry.²³⁷ Television Without Frontiers effectively subsidizes production capabilities in such states to the detriment of American film production.²³⁸ European states with unsophisticated production capabilities are not likely to build up their film industries in response to fulfill the local content requirement imposed on them by Television Without Frontiers.²³⁹ Instead, they will likely elect to purchase programming from other European states with already-developed production capabilities when, absent the Directive, they would have purchased American programming.²⁴⁰ In purchasing these European programs as required, they will often incur higher costs for lower-quality programming than that which they would

²³⁰ Michael Schuman, *Why Do We Fear a Rising China?*, TIME (June 7, 2011), <http://business.time.com/2011/06/07/why-do-we-fear-a-rising-china/>.

²³¹ *See id.*

²³² *See id.*

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See* Reginald Dale, *Europe More Worried Than U.S. by Global Economic Threats*, CTR. FOR STRATEGIC & INT'L STUD., <http://csis.org/blog/europe-more-worried-us-global-economic-threats> (last visited May 14, 2013).

²³⁶ *See id.*; Schuman, *supra* note 230.

²³⁷ *See* Shao, *supra* note 15, at 116.

²³⁸ *See* Donaldson, *supra* note 11, at 118.

²³⁹ *See id.* at 98–99.

²⁴⁰ *See id.* at 98–99, 118.

receive from the United States.²⁴¹ It is exactly this sort of inefficient allocation of resources that GATT and other free trade agreements were drafted to prevent.²⁴² Thus it behooves the United States (and the international community as a whole) to force the EU to comply with GATT provisions in the television market.²⁴³

U.S. policymakers also may have chosen to attack China's barriers to foreign films because such barriers are believed to prompt massive piracy of U.S. films throughout China, costing the U.S. film industry billions of dollars within China and abroad.²⁴⁴ The Motion Picture Association of America reasons that the marginal availability of American films within China causes Chinese citizens to use illegal means to view the films from which they are barred legitimate access.²⁴⁵ If piracy served as a significant impetus to challenge China's actions before the WTO, the United States should also challenge Television Without Frontiers, for piracy of American programming is rampant throughout Europe.²⁴⁶ In 2009, the United Kingdom, France, Italy, Spain, Poland, and Germany occupied six of the top ten spots in a ranking of the highest consumers of pirated American television programming.²⁴⁷ While such piracy has declined in the United States in the past few years, levels remain high in Europe.²⁴⁸ Data suggests that "availability is the key when combating piracy,"²⁴⁹ so the decreased availability of U.S. programming under Television Without Frontiers presumably contributes to widespread piracy of U.S. programming throughout Europe.²⁵⁰ It is worth noting that France, the fifth-highest consumer of pirated U.S. programming, imposes an even stricter local content requirement on its television stations than that imposed by Television Without Frontiers.²⁵¹ France requires that forty percent of French airtime be occupied by French programming, and that the remaining sixty percent to be occu-

²⁴¹ See *id.* at 118; Kessler, *supra* note 72, at 565–66.

²⁴² See Donaldson, *supra* note 11, at 107, 169.

²⁴³ See *id.* at 169; Shao, *supra* note 15, at 150–51.

²⁴⁴ See *supra* text accompanying notes 47–52.

²⁴⁵ See Pierson, *supra* note 7.

²⁴⁶ See Robert Briel, *Top 10 Most Pirated U.S. TV Shows Unveiled*, BROADBAND TV NEWS (Dec. 20, 2011), <http://www.broadbandtvnews.com/2011/12/20/top-10-most-pirated-us-tv-shows-unveiled/>; Brent Lang, *Television Piracy Increases Fourfold*, WRAP (Nov. 25, 2009, 11:54 AM), <http://www.thewrap.com/tv/article/television-piracy-increases-fourfold-10772>.

²⁴⁷ Lang, *supra* note 246.

²⁴⁸ See Briel, *supra* note 246.

²⁴⁹ *Id.*

²⁵⁰ See Donaldson, *supra* note 11, at 117–18; Briel, *supra* note 246.

²⁵¹ See Filipek, *supra* note 82, at 362; Article19 Memo, *supra* note 17; Lang, *supra* note 246.

pied by European programming, allotting no space for any non-European productions.²⁵² Additionally, “European works” are defined more strictly under France’s European works quota than under Television Without Frontiers.²⁵³ French viewers’ meager access to U.S. programming through French broadcasters may help explain why France is the second-highest non-English-speaking consumer of pirated American television.²⁵⁴

D. Political Differences: Europe’s Comparative Strength Within the WTO

In addition to economic considerations, the United States’ decision to attack China’s barriers to foreign films might have been influenced by China’s relative vulnerability within the WTO.²⁵⁵ Although China was a founding member of GATT, it withdrew just two years after the organization’s inception.²⁵⁶ China later attempted to rejoin GATT, but its membership was not reinstated until China acceded to the WTO in 2001.²⁵⁷ China’s accession to the WTO was unusually long and difficult due to the fact that the highly protectionist, state-run Chinese economic system was (and to a large extent, still is) incompatible with the spirit of the WTO and the free trade agreements that it encompasses.²⁵⁸ Since joining the WTO, China’s progress in meeting its accession obligations has been slow, placing it in contention with other WTO members and making it an easy U.S. target for a WTO complaint.²⁵⁹ Twelve years after acceding to the WTO, China’s deep-seated hostility toward free trade is still evident.²⁶⁰

²⁵² Article19 Memo, *supra* note 17.

²⁵³ Filipek, *supra* note 82, at 362.

²⁵⁴ See *id.* at 362; Article19 Memo, *supra* note 17; Lang, *supra* note 246. The only non-English-speaking country ranked higher on this list was Brazil, where U.S. programming is largely unavailable or heavily delayed on national cable. See Vanessa Mendes Moreira De Sa, *Internet Piracy as a Hobby: What Happens When the Brazilian Jeitinho Meets Television Downloading?*, 5 GLOBAL MEDIA J., no. 1, 2011, at 1, 3, 6, available at http://www.commarts.uws.edu.au/gmjau/v5_2011_1/vanessa_mendes_AA.html.

²⁵⁵ See Yu Min-you, *China’s Compliance with WTO Commitments: A Compliance Theory Analysis*, in INTERNATIONAL ECONOMIC LAW AND CHINA IN ITS ECONOMIC TRANSITION 101, 128 (Huiping Chen & Eric E. Bergsten eds., 2007); Editorial, *China and the W.T.O.*, N.Y. TIMES, Aug. 14, 2009, at A18.

²⁵⁶ Min-you, *supra* note 255, at 116–17.

²⁵⁷ See *id.* at 101, 116–17.

²⁵⁸ See *id.* at 125, 128.

²⁵⁹ See *id.* at 128; Editorial, *supra* note 255.

²⁶⁰ See Min-you, *supra* note 255, at 128; Editorial, *supra* note 255.

In contrast to China, the EU, a founding member of the WTO,²⁶¹ has a long-standing reputation for promoting free trade.²⁶² European states comprised seven of the twenty-three original GATT signatories, and the European Economic Community became a full GATT participant in 1960.²⁶³

Additionally, the EU is comprised of twenty-seven member states, all of which are also independent members of WTO.²⁶⁴ These states represent a wide range of cultural and economic interests, so the EU is perceived as more powerful and important within the WTO than a single state actor.²⁶⁵ Accordingly, restrictive EU-wide regulations look more credible and less unilateral than restrictive Chinese regulations.²⁶⁶ These factors would presumably make obtaining an adverse WTO ruling against the EU more difficult than against China.²⁶⁷

Nevertheless, disputes between the United States and the European community at large (transatlantic disputes) under the WTO/GATT framework have been numerous and have yielded significant successes in the past.²⁶⁸ Between 1960 and 2001, eighty-five distinct transatlantic disputes were filed.²⁶⁹ Forty-nine percent of these disputes ended in substantial concessions and twenty percent in partial concessions from the respondent.²⁷⁰ Data also reveals that a pro-complainant bias exists within the WTO; Panels have found for the complainant in a sizeable majority of all GATT cases.²⁷¹

Negotiations between the United States and the EU have consistently failed to result in any progress toward increased liberalization of

²⁶¹ See *The European Union and the WTO*, *supra* note 87.

²⁶² See Lisa Van Well & Mitchell Reardon, *The WTO and the EU: Leadership Versus Power in International Image* 4 (EuroBroadMap, Working Paper No. 4.6-4.7, 2011), available at http://halshs.archives-ouvertes.fr/docs/00/64/87/61/PDF/EWP_politics_ideology_EU_WTO.pdf.

²⁶³ Christina L. Davis, *A Conflict of Institutions? The EU and GATT/WTO Dispute Adjudication* 2 (Mar. 12, 2007) (unpublished manuscript), available at <http://www.princeton.edu/~cldavis/files/euwtto.pdf>; *Press Brief: Fiftieth Anniversary of the Multilateral Trading System*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (last visited May 14, 2013).

²⁶⁴ *The European Union and the WTO*, *supra* note 87.

²⁶⁵ See Van Well & Reardon, *supra* note 262, at 5.

²⁶⁶ See *id.*

²⁶⁷ See *id.* at 4–5.

²⁶⁸ See Marc L. Busch & Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO* 465, 469–70 (Ernst-Ulrich Petersman & Mark A. Pollack eds., 2003).

²⁶⁹ *Id.* at 469.

²⁷⁰ *Id.* at 470.

²⁷¹ See *id.*

the European television market.²⁷² Accordingly, the United States should not shy away from seeking a formal WTO judgment invalidating Television Without Frontiers.²⁷³ Such a decision would legitimize the U.S. position on Television Without Frontiers and pressure the EU to comply in order to protect its trade reputation and avoid potential retaliation.²⁷⁴ If the EU failed to comply with a WTO order to liberalize its television market, the United States would then be entitled to implement reciprocal sanctions to compensate for the adverse effects suffered by the American audiovisual industry under the Directive.²⁷⁵

CONCLUSION

Foreign barriers to audiovisual trade, like those posed by Television Without Frontiers and China's current film distribution framework, threaten the continued success of Hollywood. Hollywood relies heavily upon foreign markets to recoup its production costs, so asymmetrical barriers to the sale of American films abroad cut into the United States' overall economic success and threaten to improperly propel foreign film competitors ahead of their American counterparts. In addition, such barriers contribute to massive and widespread piracy of American films and TV that further undermines Hollywood's viability.

Foreign barriers to audiovisual trade harm more than just the U.S. economy. They also create an inefficient distribution of resources throughout the global community and interfere with individual consumer choice and free access to information. In China, barriers to U.S. audiovisual products isolate citizens from Western ideas. In the EU, barriers to American products force television stations to purchase European programming to the exclusion of American programming, sometimes paying more money for an inferior or less-desirable product.

The United States sought and obtained a WTO judgment against China in *China—Measures Affecting Trading Rights*, ostensibly forcing China to liberalize its audiovisual sector. The EU's Television Without Frontiers Directive, on the other hand, remains in full force after more than twenty years, and the United States has never pursued the Directive further than the bilateral consultation stage of WTO dispute set-

²⁷² See Donaldson, *supra* note 11, at 111.

²⁷³ See Busch & Reinhardt, *supra* note 268, at 469–70; Donaldson, *supra* note 11, at 172.

²⁷⁴ See John H. Jackson, *The WTO Dispute Settlement: Understanding-Misunderstandings on the Nature of Legal Obligation*, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION 69, 73–74 (James Cameron & Karen Campbell eds., 1998); Van Well & Reardon, *supra* note 262, at 4; Davis, *supra* note 263, at 7.

²⁷⁵ See Jackson, *supra* note 274, at 73–74; Davis, *supra* note 263, at 7.

tlement. Consultations with the EU resulted in a standstill and were eventually abandoned.

Given the lack of success that the United States has experienced in negotiating with the EU over its television restrictions, the United States should revive its dormant WTO complaint against the EU, and this time follow the complaint through to the decision stage. Though a powerful player within the WTO, the EU is not immune from an adverse ruling where its transgressions against the global free market cannot be justified under the GATT framework. The decision in *China—Measures Affecting Trading Rights* indicates that a WTO Panel would most likely rule in favor of the United States and find that Television Without Frontiers' local content requirement violates GATT. Such a decision would pressure the EU to abolish the local content requirement and may encourage EU member states to repeal some of their own local content requirements, or revise them so that they are more narrowly tailored toward legitimate objectives like the protection of local culture.

Ultimately, if the United States wishes to ensure that Hollywood continues to be adequately rewarded abroad for creating superior products, it must take a uniformly aggressive stance against foreign trade barriers, particularly when such barriers are no more than protectionist policies masquerading as something more legitimate.