THE RECENT FREE TRADE AGREEMENTS OF THE UNITED STATES AS ILLUSTRATION OF THEIR NEW STRATEGY REGARDING THE AUDIOVISUAL SECTOR

Ivan Bernier

Introduction: The new strategy and its characteristics

The free trade agreements concluded by the United States with Chile[1] in December 2002, with Singapore[2] in February 2003, with the Central American States in December 2003, with Australia in February 2004 and with Morocco in March 2004, mark a new development in the way the United States envisage the treatment of cultural goods and services in trade agreements. Up until 1998, the official position was that cultural products in general, including audiovisual products, were not different from other products and therefore should be treated exactly like any other products in trade agreements. A first indication that this position was open for revision appeared at the end of 2000 when the U.S. government, in a communication on audiovisual and related services to the WTO Council on Trade in services, emphasized that the audiovisual sector in 2000 was "significantly different from the audiovisual sector of the Uruguay Round period when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services" and went on to say that "[e]specially in light of the quantum increase in exhibition possibilities available in today's digital environment, it is quite possible to enhance one's cultural identity and to make trade in audiovisual service more transparent, predictable, and open"[3]. This view was taken up by the Motion Picture Association of America (MPAA) in a presentation made before the U.S. Congress in May 2001, where the argument was developed as follows:

> Many countries around the world have a reasonable desire to ensure that their citizens can see films and TV programs that reflect their history, their cultures, and their languages. In the past, when their towns might have had only one local cinema and received only one or two TV broadcast signals, the motivation for foreign governments to set aside some time for local entertainment products was understandable. In today's world, with multiplex cinemas and multi-channel television, the

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1 For the text of the *Chile – U.S. Free Trade Agreement*, see http://www.chileusafta.com/ or http://www.ustr.gov/new/fta/Chile/text/index.htm

2 For the text of the Singapore – U.S. Free Trade Agreement, see : http://www.ustr.gov/new/fta/Singapore/consolidated_texts.htm or http://www.mti.gov.sg/public/FTA/frm_FTA_Default.asp?sid=36.

3 WTO, Council for Trade in Services, Communication from the United States, Audiovisual and Related Services, Paragraph 9, 18 December 2000 : Doc. S/CSS/W/21.

> justification for local content quotas is much diminished. And, in the e-commerce world, the scarcity problem has completely disappeared. There is room on the Internet for films and video from every country on the globe in every genre imaginable. There is no "shelf-space" problem on the net.[4]

Then the MPAA it went on to explain to Congress the significance of this development for the ongoing trade negotiations:

> Fortunately, to date, we haven't seen any country adopt this form of market-closing measure for digitally delivered content. We hope this market will remain unfettered – and hope we can count on your support as we work with our international trade partners to keep digital networks free of cultural protectionism. Congressional authorization of Trade Promotion Authority will also be very helpful in empowering the Administration to negotiate these commitments in the WTO and other trade agreements.

That this view was actively pursued by the U.S. Government became apparent in July 2002, when the latter, in its proposals for liberalizing trade in audiovisual services in the context of the GATS negotiations, requested that countries schedule "commitments that reflect current levels of market access in areas such as motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services"[5], while at the same time strongly insisting on the need to keep free of barriers trade in electronically delivered audiovisual products. A few months later, U.S. Congress enacted the "Bipartisan Trade Promotion Authority Act of 2002" which gave fast-track authority to the Executive to conclude free trade agreements with the instructions, among other things, to conclude trade agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital age environment.[6] But it is only in its recent free trade agreements that this new approach was translated for the first time into legal rights and obligations, thus providing a clearer insight into the U.S. audiovisual strategy in the multilateral context[7].

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4 "IMPEDIMENTS TO DIGITAL TRADE": Testimony of Bonnie J.K. Richardson, Vice President, Trade & Federal Affairs, Motion Picture Association of America, before the House Commerce Committee Subcommittee on Commerce, Trade & Consumer Protection, May 22, 2001: http://www.mpaa.org/legislation/.

5 See United States Mission – Geneva, Press 2002 : [http://www.usmission.ch/press2002/0702liberalizingtrade.html]

6 See Sacha Wunsch-Vincent, "The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization", *Aussenwirtshaft,* Vol. 58 (2003), p. 7.

7 It is important to mention in that regard that new free trade agreement are presently being negotiated by the United States with the South African Customs Union (http://www.ustr.gov/new/fta/sacu.htm) , Bahrain (http://www.ustr.gov/fta/bahrain.htm) and with the Andean countries (Columbia, Peru and Ecuador) (http://www.ustr.gov/fta/andean/htm)

The main characteristics of the new U.S. negotiating strategy, as they emerge from those policy statements, can be described as follows.[8] The first one consists in the adoption of the most liberal approach possible to schedule trade commitments, that is, the negative list approach. The second one consists in the broad acceptance that existing financial support schemes for culture and content production need not be dismantled. The third one, perhaps the most surprising, consists in the relinquishing of traditional demand that local content requirements and other barriers to trade be totally eliminated in the audiovisual sector, at least where traditional technologies are involved. The fourth and last characteristic, at the core of the new strategy, consists in the demand that States commit themselves to keep digital networks free of cultural protectionism. In the following pages, we shall examine more closely how these various elements are incorporated in the five free trade agreements and consider their implications,

1. The negative list approach to scheduling commitments

Unlike the GATS, where specific commitments regarding national treatment and market access are made following a "positive list" approach where the parties are bound only to the extent that they commit themselves in a list or schedule, those in the service and investment chapters of the five agreements follow a " negative list" approach where all parties are bound in all sectors of services except to the extent that they have inscribed reservations or exceptions in their list or schedule. This last approach was the one used for the negotiation of the North American Free Trade Agreement (NAFTA) and was the preferred one of the United States for the new multilateral round of negotiations in the field of services that was launched in 2000. But the Members of the WTO having decided to stick to the existing approach, the United States simply decided to impose their preferred option in its free trade negotiations.

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[8] The description of those elements borrows from Sacha Wunsch-Vincent, supra, note 6, p. 11. See also Ivan Bernier, « A Comparative Analysis of the Chile – U.S. and Singapore – U.S. Free Trade Agreements with Particular Reference to their Impact in the Cultural Sector», April 2003 :

The significance of this change of approach is considerable. With the negative list approach, the pressure is clearly on those States that want to exclude certain measures or certain sectors of activities from their initial commitment because they have to explain why this should be the case in order to obtain the consent of the other contracting State or States. The result is that the number of reservations in each of the five free trade agreements remains in general quite small. With the " positive list" approach, the situation is very different. States that do not wish to commit themselves in the audiovisual sector for instance only have to abstain from making commitments in that sector. This is precisely what most States have done at the end of the Uruguay Round of negotiations. The pressure, if there is one, will come from those States which demand specific commitments in the audiovisual sector; in case of refusal to accede to their demand, they may in turn refuse to accede to requests in other sectors coming from those States which refuse to open their audiovisual sector. But the latter, ultimately, would have the last word. Another important consequence of this change of approach is that States that are not well prepared to express their preoccupations and concerns in the audiovisual sector run the risk of ending fully committed by default; and as we shall see, the most at risk from that point of view are the developing countries. Lastly, it is obvious that the "negative list" approach, if it becomes generalized, will spell the end of what a certain number of persons still call the GATS cultural exception, that is, the positive list approach.

2. A more detached view of subsidies

The second characteristic of the new strategy of the United States in the audiovisual sector is its more detached view of subsidies. In all five agreements, "subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance" are

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excluded from the scope of the service Chapter. This does not come entirely as a surprise as subsidies are not yet covered in the GATS itself notwithstanding Article XV. Article XV of the GATS recognises that, in certain circumstances, subsidies may have distortive effects on trade in services, and asks that members enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such distortive effects. In view of the substantial financial support given by many governments to their cultural industries, these negotiations were obviously a subject of concern.[9] However, because of the inherent complexity of developing guidelines in this area, the negotiations in question have progressed very slowly since their beginning, in 1995, in the context of the Working Party on GATS Rules.[10] Indeed, it remains unclear for the moment to what extent there is a real consensus on the need for such guidelines on subsidies.

But even though there are currently no multilateral disciplines on subsidies as such in the GATS, subsidies are not totally beyond the reach of the GATS. The Agreement does apply, for instance, in a situation where access to domestic subsidies is granted to certain States and not to others. A concrete example of this in the cultural sector is that of cinema and television co-production agreements which provide preferential access to funding: but for the exemption regime of Article II, paragraph 2, of GATS, those agreements would clearly have been in violation of the MFN obligation of Article II, paragraph 1. More importantly, the Agreement also applies to subsidies when Members list a sector in their Schedule of commitments without any limitation concerning national treatment. National treatment then requires governments providing subsidies to domestic services suppliers to make equivalent subsidies available to foreign services providers operating in the country. This explains why the United States, in one of its few limitations on specific commitments in audiovisual services, explicitly mentioned grants from the National Endowment for the Arts that are only available for individuals with US citizenship or permanent resident alien status, a clear indication that in its view such grants, in the absence of a limitation, would be

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9 In a 1998 background note prepared by the Secretariat for the Working Party on GATS Rules which analyzes, on the basis of information provided in the Trade Policy Reviews, subsidies for services sectors, aids to the audiovisual industries are the most frequently mentioned type of subsidies: see doc. S/WPGR/W/25 (26/01/98).

10 See the note on conceptual issues relating to subsidies prepared by the Secretariat: Doc. S/WPGR/W9. For the most recent report of the Working Party on GATS Rules, dated October 4, 2001, see doc. S/WPGR/6. See also Gilles Gauthier, with Erin O'Brien and Susan Spencer, *Déjà Vu or New Beginning for Safeguards*

incompatible with national treatment.[11] New Zealand has similarly indicated in its list that assistance to the film industry through the New Zealand Film Commission is limited to New Zealand films as defined in Section 18 of the *New Zealand Film Commission Act 1978*. [12] In practice, the majority of members have included limitations to their national treatment commitments that apply to all subsidy practices.[13]

This being the situation at the multilateral level, one may legitimately query whether similar conclusions are not warranted in the case of the recent U.S. free trade agreements. In other words, can a contracting party to these agreements commit to grant national treatment to foreign investors of the other party or parties and at the same time refuse them access to their subsidy programs? In light of the explicit provision of each free trade agreement on the subject, the answer is definitely yes. The provision in question, to be found in the Article on non-conforming measures of the investment Chapter, stipulates that "the national treatment obligation, the most-Favoured-Nation treatment obligation and the obligation relating to Senior management and boards of directors do not apply to "subsidies or grants provided by a Party, including government supported loans, guarantees, and insurance"[14] . From that point of view, it would appear that the recent U.S. free trade agreements are less constraining that the GATS regarding the use of subsidies.

However, the concession made by the United States regarding subsidies, when considered in context, is more apparent than real. The truth of the matter is that the production of audiovisual and cinematographic content in most countries of the world is practically impossible without subsidies. The United States know very well that any attempt to seriously constrain the use of subsidies in those sectors would meet a lot of resistance abroad. Furthermore, since the decision of the WTO Appeal Board in *U.S. - Tax treatment of foreign sales corporations*, [15] we know now that they have themselves offered considerable subsidies to their own audiovisual sector; and

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and Subsidies Rules in Services Trade, in *GATS 2000:* NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION, 165, 176-181(eds. Pierre Sauvé and Robert M. Stern 2000).

11 GATS/SC/90, p. 46.

12 GATS/SC/62, under audiovisual services

13 *See* GAUTHIER, O'BRIEN and SPENCER, *supra*, note 10, p. 177

14 See Article 11.13.5 (b) of the U.S.-Australia free trade agreement, Article 10.13.5 (b) of the U.S.-Central America free trade Agreement, Article 10.7.5 (b) of the U.S. - Chile Free Trade Agreement, Article 15.12.5 (b) of the U.S. Singapore Free Trade Agreement.

judging by the proposals made so far to implement the decision, chances are that the audiovisual sector will continue to benefit from very substantial financial support in the future, albeit in a different way.[16] More importantly, they don't need to be really concerned by what other States do in that respect. Since they can absorb a substantial part of the cost of producing creative content in their own huge market, this allows them in turn to sell such content in the rest of the world at a price locally adjusted.[17] Yet, according to Sacha Wunsch-Vincent, "U.S trade negotiators have made it clear that they will target very trade-distorting financial support schemes", which brings from him the following comment : "As most subsidy scheme may have a trade-distorting effect, the implication of this qualification is not totally clear"[18]

3. A relinquishing of traditional demands regarding discriminatory regulations in the audiovisual sector

In the new U.S. free trade agreements, as seen previously, Members are fully committed, subject to the exceptions and reservations set out in their Schedules. These reservations can be made regarding existing measures that are not subject to some or all of the obligations imposed in the service and investment chapters of the Agreement (Annex I reservations) or regarding specific sectors, subsectors, or activities for which each Party maintains existing, or adopt new or more restrictive, measures, that do not conform to the obligations imposed in the same chapters (Annex II reservations). This last type of reservations, as will be noted, is broader in its scope and applies to past as well as future measures. Before looking at the reservations actually made by the States concerned with regard to the audiovisual sector, however, it may be useful to see first the obligations to which this possibility of making reservations apply.

The basic obligations in the service Chapter concern the granting of national treatment (the granting to service suppliers of the other Party of treatment no less favourable than granted, in like circumstances to its own suppliers of services), the granting of the most-favored–nation

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15 WT/DS108/AB/RW

16 See Mike Turgeon, *The Hollywood Reporter.com*, "Proposed bill may hold tax benefit for domestic film production": http://www.hollywoodreporter.com/thr/pwc/talking_display.jsp?vnu_content_id=1937090. See also : http://www.export.gov/eu_tsatus.html

17 For a clear expression of that view, see Kim Dalton, Chief Executive, Australian Film Commission, "Cultural Impacts of the Aust/US Free Trade Agreement" : http://www.afc.gov.au/downloads/policies/apec_kd_final_web.pdf

18 Supra, note 6, p. 16, at note 38.

treatment (the granting to service suppliers of the other Party of treatment no less favourable than granted, in like circumstances, to service suppliers of a non-Party) and the granting of market access (the interdiction to maintain measures limiting a) the number of services suppliers, b) the total value of transactions, c) the total number of services or the total quantity of services output, d) the total number of natural persons that may be employed by a particular service sector and e) measures which restrict or require specific types of legal entity or joint ventures through which a service supplier may supply a service. These three basic obligations are completed by a further obligation concerning local presence stating that "[n]either Party shall require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service" .

The investment chapters of the five agreements follow a similar pattern. The basic obligations are to grant national treatment, most-favored-nation treatment and the minimum standard of treatment (that is a treatment in accordance with customary international law, including fair and equitable treatment and full protection and security). The obligation to grant national treatment is particularly important in the cultural sector because a number of States have measures that treat foreign investment and foreign investors less favourably than domestic investments and domestic investors in that sector These three basic obligations are completed by two others, the first one concerning performance requirements and the second one senior management and board of directors[19]. The obligation concerning performance requirements is of particular interest for the cultural sector because certain States effectively make foreign investments in the audiovisual sector subject to review in order to determine if such investment are likely to be of a

[19] The provision *regarding performance requirements* reads as follows : "Neither Party may impose or enforce certain types of requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory". As for senior management and boards of directors, a Party cannot require that an enterprise of that Party that is a covered investment appoint to a senior management position individuals of any particular nationality but may require that a majority of the board of directors be of a particular nationality.

net benefit, the determination being made on the basis of factors related to the performance of the investments.

Turning now to the reservations actually made with regard to the audiovisual sector, we shall proceed agreement by agreement, in the order of their date of signature, looking at the list of reservations of each party. In the case of the United States, which have few reservations that are largely the same in each agreement, we will simply mention here that they are essentially intended to preserve the right of the United States to adopt or maintain any measure that accords differential treatment to persons of other countries due to application of reciprocity measures or through international agreements involving sharing of the radio spectrum, guaranteeing market access or national treatment with respect to the one-way satellite transmission of direct-to-home (DTH) and direct broadcasting satellite (DBS) television services and digital audio services. In so far as concerns investments, they also have reservations concerning the right to restrict ownership of radio licenses for all communications by radio, including broadcasting. For the other States, as we shall see now, the list of reservations in the audiovisual sector varies considerably, both in length and in importance.

Chile, which signed the first of the five agreements, has made a significant use of reservations in so far as concerns cultural services. Under Annex I (existing measures), it reserves the right to maintain a non-conforming measure on open television programming which states that "the Consejo Nacional de Televisión may establish, as a general requirement, that programs broadcast through public (open) television channels include up to 40 percent of Chilean production". What is meant by "public (open) television" is not entirely clear, but judging from a Side letter on TV annexed to the Chapter on services, it would cover conventional television but not cable television or satellite television. The letter in question, apparently meant to reassure the United States, confirms the understanding of both Parties that the law of Chile gives the Consejo Nacional de Television de Chile the right to require up to 40% per channel public (open) television programming to consist of national production. This percentage is not applied to cable television. The letter recognizes also that on average, national production in open television has been over 50% of programming. In view of the fact that this reservation applies only to measures

existing at the date of entry into force of the agreement[20], it is clear that the establishment of a level of protection for national production programming higher than 40% is excluded for the future, as is excluded any expansion of the scope of the reservation.

Under Annex II, Chile first reserves the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreement with respect to cultural industries, such as audiovisual cooperation agreements. Chile equally reserves the right to adopt or maintain any measure related to cross-border trade in one-way satellite broadcasting of digital telecommunication services, whether these involve direct home television broadcasting, direct broadcasting of television services, or direct audio broadcasting, and supplementary telecommunication services. Chile finally reserves the right to adopt or maintain any measure relating to market access in all sectors, except for certain sectors explicitly mentioned that include entertainment services (including theatre, live bands, and circuit services), news agencies services, libraries, archives, museums, and other cultural services, as well as publishing services. The sector of communications services, which includes audiovisual services, not being mentioned here, would apparently be covered by this market access reservation ; however, the fact that a reservation was taken for an existing non-conforming measure concerning television quotas appears to indicate that audiovisual quotas in general are not covered by that reservation. Finally, with regard to investments as such, Chile has reserved the right "to adopt or maintain any measure related to the investors or to the investments of investors of the United States in one-way satellite broadcasting of digital telecommunication services, whether these involve direct home television broadcasting, direct broadcasting of television services, or direct audio broadcasting, and supplementary telecommunication services".

Singapore also has made two reservations concerning cultural services in Annex 8B which do represent a significant limitation to the application of the basic obligations under the service chapter. The first reservation concerns broadcasting services understood as the scheduling of a series of literary and artistic works by a content provider for aural and/or visual reception, and for which the content consumer has no choice over the scheduling of the series" (excluding therefore

[20] See the definition of « existing measures" in Article 2.1.

such services as T.V. on demand and pay T.V.); this reservation applies to the basic obligations regarding national treatment, most-favoured-nation treatment and market access and covers existing as well as future measures. The second reservation concerns distribution and publication of printed media, meaning by that "any publication containing news, intelligence, reports of occurrences, or any remarks, observations or comments relating thereto or to any matter of public interest, printed in any language and published for sale or free distribution at intervals not exceeding one week" ; here again the reservation applies to national treatment, most-favoured-nation treatment and market access but also, in addition, local presence, and it covers existing as well as to future measures.

In the Central American Free Trade Agreement (CAFTA), the six States that are now involved have all made reservations concerning services but the importance of their reservations vary considerably. The first States to sign on, Guatemala, Honduras, El Salvador and Nicaragua, have made few reservations that significantly limit their commitments regarding national treatment and market access in cultural services. In the case of Guatemala, for instance, the only reservation taken in Annex I states that in order for international artists or artists groups to perform in Guatemala, they must have a consent letter from any of the legally recognized artist unions in the country and that in mixed performances, made up of one or more films or variety shows, preference will be given to national elements if the circumstances of the cast, schedule, and contract so allow. In Annex II, Guatemala has no reservation that truly limits its commitments in the audiovisual sector or even in the cultural sector for that matter. Honduras for its part has one reservation in Annex I dealing specifically with the audiovisual sector, which stipulates that only Hondurian nationals by birth may exercise senior management of newspaper or of free over the air broadcast (radio and television) news media, and another reservation dealing with entertainment services, which states that foreign music artists who wish to perform individually or as a group in Honduras must pay five percent of the contracted fee to the Artists Union of Honduras. Curiously, Honduras does have a reservation concerning the right to maintain market access restrictions in certain sectors, but audiovisual services are explicitly excluded form those sectors. Honduras, as Guatemala, has no reservation limiting its commitments in the audiovisual sector in Annex II. El Salvador's and Nicaragua's reservation are essentially the same as those of Honduras both in Annex I and Annex II. As can be seen, Guatemala, Honduras, El Salvador and

Nicaragua have all opted to leave their audiovisual sector wide open to imports. Why they chose to do so is not quite clear, especially since they had the experience of Chile and Singapore to guide them in this area. All four States have also included a reservation similar to that of Chile concerning the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreement. But this reservation, apparently, is not seen as an important concession by the United States. As is pointed out in a report by the Industry Sector Advisory Committee for Trade Policy Matters to the United States Trade Representative concerning the U.S.- Morocco Free Trade Agreement, which contains a similar reservation, "Morocco's MFN exemption for cultural related industries is not commercially problematic as Morocco agrees to provide national treatment in this area and we do not expect that Morocco will provide better terms to third parties than it provides to its own producers very often".[21]

The situation is different in the case of Costa Rica, which took a little more time to complete its participation in the CAFTA, and in the case of the Dominican Republic, which was accepted in April 2004 in what is now called CAFTA + agreement. Whether or not it is because of the extra negotiating time granted to Costa Rica, the fact is that its list of reservations in the audiovisual sector is more encompassing than that of the four other Central American States. It includes in particular, in Annex I, a reservation which provides among other things that the number of radio programs and radio soap operas recorded abroad may not exceed 50% of the total number aired per domestically transmitted radio station per day and that the number of programs filmed or videotaped abroad may be limited to 60% of the total number of programs aired on domestically transmitted television per day. It also has a reservation which covers various measures requiring minimum ownership by Costa Rican national or enterprise in audiovisual industries. In annex II, Costa Rica has a reservation concerning the right to adopt or maintain any measure that accords differential treatment to countries under any existing of future bilateral or multilateral international agreement with respect to cultural industries, such as audiovisual cooperation agreements ; and for greater certainty, it is stated that government supported subsidy programs for the promotion of cultural activities are not subject to the limitations or obligations of this

[21] See: http://www.ustr.gov/new/fta/Morocco/advisor/isac13.pdf. A similar remark is made by Sacha Wunsch-Vincent, supra, note 6.

Agreement. In the case of the Dominican Republic, finally, the reservations under Annex I and II cover more or less the same ground as those of Costa Rica, except that "in all radio programming that originates in the Dominican Republic, 50% of the music played shall be by Dominican authors, composers or signers and that for every three soap operas that are broadcast, for a national audience in the Dominican Republic, one must be by Dominican authors and must have been made in the Dominican Republic.

Australia's list of reservations stands as the most elaborate and complex of all lists of reservations in the audiovisual sector. This does not come as a surprise as Australia, the only developed country among the States involved in the recent free trade agreements of the United States (leaving aside Singapore), has a long tradition of active governmental intervention in that sector for the purpose of preserving and promoting Australia's cultural expression and identity, and a strong public support in favour of such policy. Judging by the result, the discussions must have been quite intense at times. What comes out from that list of reservations is that Australia has succeeded by and large in retaining its existing commercial television quotas (55% of programs to be Australian and minimum amounts of "subquotas" for adult and children drama and documentaries), its existing content quotas for commercial radio (up to 25%) and its existing requirement that subscription television broadcasting (pay TV) spend 10% of the program budget of drama and general entertainment channels on new Australian drama (the agreement even allows here an increase in that requirement of up to 20% and an extension of the 10% requirement to other genres). The only thing that was lost in that regard was the capacity to adopt higher quotas or more restrictive measures. But Australia has been somewhat less successful in preserving its freedom to intervene as it wants in the field of new media services. Jock Given summarizes as follows the content of the reservations made in that regard:

> "Australia's right to introduce local content requirements (though not all other policy measures) on 'new media' services is tightly circumscribed. Measures can be imposed on 'interactive audio and/or video services', but only so as to ensure Australian content or genres are not, unreasonably denied' to Australian consumers, and only on companies that carry business in Australia." [22]

[22] Jock Given, Submission to Joint Standing Committee on Treaties Inquiry into the Australian-US Free Trade Agreement (AUSFTA), p. 6 : http://www.aph.gov.au/house/committee/jsct/usafta/subs/SUB147.pdf , April 2004

It is not the place here to enter into a discussion about the exact meaning of the words used, but one can easily imagine the interesting debates that will take place when the time comes to determine what is meant by "unreasonably denied". Concerning investments, finally, the reservations made by Australia preserve the existing broadcast and newspaper limits on foreign investments, as well as the requirement for notification and national interest scrutiny of all direct media investments irrespective of size, portfolio media investments of 5%. But here again, Australia loses the capacity to adopt stricter requirements.

The most recent State to become involved in a free trade agreement with the United States is Morocco. The Moroccan negotiators had the benefit from that point of view of having access to the texts of the free trade agreements already concluded by the United States in the previous fifteen months. They were certainly aware from that point of view that a majority of the States involved in those agreements had included in their reservations measures designed to preserve their capacity to maintain or adopt local content requirements. But contrary to Australia, Morocco had no such measures in place. Not surprisingly, in their Annex I reservations, the only two mentions regarding the audiovisual and film production services sectors concern their existing requirements that in order to be established in Morocco, production companies must be organized as corporations or limited-liability companies with capital fully paid, and that a production companies engaging in executive production must comply with certain conditions such as having produced, as an enterprise established in Morocco, at least one feature-length films or three short films turned in Morocco. In its Annex II reservations, Morocco has three mentions. The first one states that Morocco reserves the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreements with respect to cultural activities. The same reserves states that for greater certainty, subsidies in support of cultural industries are not subject to the agreement. The second mention reserves to Morocco the right to adopt or maintain any measure requiring cable service operators, or satellite service suppliers that provide encryption-based subscription services to consumers in Morocco to have a local representative. The third and last mention is rather brief in its formulation but potentially wide in its scope. It states in essence that "Morocco reserves the right to adopt or maintain any measure pertaining to investment in facilities for the transmission of radio and television broadcasting and cable radio and television"

and it is applicable to national treatment, performance requirements, senior management and board of directors and market access obligations. As written, it would allow Morocco to impose local content requirements at any level it wants to American investors, provided the investment concerns radio and television broadcasting or cable radio and television.

An obvious comment that comes to mind when one takes a broad look at the reservations made by these various States is that they reflect quite accurately the negotiating capacity of the States involved and that it is, as usual, the least able to protect themselves that end up paying the higher price. Another observation suggested by our look at the reservations is that there is an obvious catch in the very notion of a freeze in existing discriminatory regulations in the audiovisual sector: what may appear at first sight as a significant concession from the United States also excludes the possibility of adopting new measures that policy-makers could consider necessary in the on-line and non-broadcasting environment. The reservations of Australia from that point of view give a good idea of the kind of pressure that may be exerted by the Unites States in future free trade agreements in that area.

4. Keeping digital networks free of " cultural protectionism"

As we have seen in the introduction, a core objective of the new U.S. strategy in the audiovisual sector is to adapt the latter to the new communication technologies environment. Not surprisingly, the greatest innovation of the new bilateral free trade agreements is the inclusion of an electronic commerce Chapter that follow essentially the same pattern in each agreement.[23] It begins with general remarks concerning the goal and scope of the chapter, and then deals successively with electronic supply of services, digital products, transparency and finally cooperation.

The general remarks common to all agreements concern the economic growth and opportunity provided by electronic commerce and the importance of avoiding unnecessary barriers to its use and development. Regarding electronic supply of services, the provisions of the five agreements are nearly identical. In the Singapore – U.S. Free Trade Agreement, for instance, " [t]he

[23] As points out Sacha Wunsch-Vincent, supra note 6, p. 30.

Parties affirm that the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of Chapters 8 (Cross-Border Trade in Services), 10 (Financial Services) and 15 (Investment), subject to any reservations or exceptions applicable to such obligations". The expression "electronic means" is defined as "employing computer processing"[24]. But the exact scope of the expression "supply of a service using electronic means" remains ambiguous because in many instances, it is not clear whether a particular cultural product is a good or a service. In the cultural sector, the supply of a service employing computer processing would presumably encompass information services, multi-media products to the extent that they are considered as services, downloadable music and films, subscription-based and pay-per-view radio and TV; but conventional television and radio using hertzian transmission would be excluded by definition. The basic obligations applicable to such cultural services supplied by electronic means are those of the service and investment chapters, that is national treatment, most-favored nation treatment and market access, subject to the reservations taken by both Parties with regard to those obligations. The provisions of the electronic chapters on electronic supply of services do not truly modify the obligations of the parties under the service chapters. Their role is simply to confirm that the treatment provided in the service chapters is quite acceptable for the purpose of electronic commerce. This does not really come as a surprise considering the much broader scope of the service chapters in the free trade agreements, due in large part to the use of the negative list approach, as compared to the situation that prevails in the GATS.

The provisions regarding "digital products" are more elaborate and constitute the truly innovative part of that Chapter. The definition of "digital products" in the five Chapters refers to "computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a

[24] Article 15.6

good or a service under its domestic law". In a note annexed to that definition in the Chile – U.S. Free Trade Agreement, it is mentioned, "for greater certainty", that the definition of digital products "is without prejudice to the on-going WTO discussions on whether trade in digital products transmitted electronically is a good or a service". As we shall see, the provisions on "digital products" to all intents and purposes circumvent that distinction by making them subject in practice to the same obligations. Most cultural products including books and periodicals (but more particularly audiovisual products such as films, television programs, multimedia and music) are or can be made available as digital products, the tendency being towards an increasing digitalization of cultural products (almost completely realized in the case of music and multimedia, in the process of being realized in the case of television and films).

The basic obligations concerning digital products fall into three categories but they share the same common objective, which is to ensure that such products circulate as freely as possible. The first category concerns custom duties, the second one national treatment, the third one most-favored- nation treatment. The obligations concerning customs duties presupposes that the digital products to which they apply are goods rather than services since in principle only tangible products are the object of customs duties. The Parties are prohibited in that regard from applying customs duties on digital products of the other Party transmitted electronically[25]. In the Singapore-U.S. agreement and the Central American Free Trade Agreement, it is further provided that a Party is not prevented from applying customs duties to carrier media bearing digital products, "provided such duties apply to the cost or value of the carrier medium alone, without regard to the cost or value of the digital products stored in the medium carrier"[26]. A "carrier medium" is defined in the same agreement as "any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape"[27]

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25 The wording is taken from the Chile-U.S. agreement; it differs from the wording in the Singapore-U.S. agreement which is broader in scope and reads as follows : "A Party shall not apply customs duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission".

26 *Singapore-U.S. Free Trade Agreement*, Article 14.3 (2) and Central American Free Trade Agreement, article 14.3; the same approach to customs valuation of Carrier media applies in the Chile-U.S. agreement : see Article 3.5.

27 Article 14.5

The obligation regarding national treatment is set forth in broad terms in all five agreements. It reads as follows in the Chile-U.S. agreement:

> A Party shall not accord less favorable treatment to a digital product than it accords to other like digital products, on the basis that:
>
> (a) the digital product receiving less favorable treatment is created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party; or
>
> (b) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party.

However, the other four agreements go somewhat further by adding a third basis of discrimination to that text which reads as follows:

> (a) so as otherwise to afford protection to the other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.

This addition, which borrows from the text of Article III (1) of the GATT[28], significantly expands the scope of the national treatment obligation to cover any measures of a Party that does not provide competitive conditions for imports equal to those of domestic products, which could include measures with a commercial effect equivalent to that of quantitative restrictions.

The third type of obligation that applies to digital products is the most-favored-nation treatment. The wording of the five agreements on that subject is identical. It provides that:

> (a) A Party shall not accord less favorable treatment to a digital product created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to a like digital product created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party.
>
> (b) A Party shall not accord less favorable treatment to digital products whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party.

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[28] The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

As can be seen, the main objective of the electronic chapters, with regard to the audiovisual sector, is to ensure that digital products delivered via new communications media remain free of " cultural protectionism" . It provides for unlimited gains in the future in exchange for well circumscribed concessions in the present.

Conclusion

Our analysis of the five recent free trade agreements concluded by the United States Agreement with regard to the cultural sector shows that they are closely related in their design, that they do have a significant impact in the cultural sector and that they are part of a strategy by the United to insure that digital networks remain free of cultural proctionism.

That there is a common design to these five free trade agreements has been clear all along. There are some differences between them here and there that may be explained by the particular context State and to some extent also by the experience gained by the United States in negotiating these two " new generation" bilateral free trade agreements, the more recent agreement appearing in that respect somewhat more constraining, for instance, than that the one with Chile.

The impact of those agreements in the cultural sector is far from negligible. They suggest not only a change of approach in negotiating concessions, but also a change of priority in the type of concessions researched. The new strategy of the United States in the cultural sector rests quite clearly on the view that while measures that do not conform to national treatment, most-favored-nation treatment and free market access can be tolerated as they presently exist in the traditional audiovisual sector because they are bound one way or another to disappear with time, no such tolerance must be accepted for digitally delivered content which are at the hearth of the new

communication economy and should therefore remain free of cultural protectionism. To implement this strategy, the United States are now proposing an approach that clearly put the emphasis on the free circulation of digitally delivered content and circumvent the dichotomy between cultural goods and services by making digital products subject to the same basic obligations that apply to the electronic supply of services, that is national treatment, most-favored-nation treatment and free market access[29]. To facilitate the acceptance of such commitments, contracting Parties are entitled to make exceptions and reservations to cover their non-conforming cultural measures in the services and investments sectors and a carved out is made for subsidies in those two chapters. But this is more than fully compensated by the gains expected in the new digital environment.

Finally, it is also clear that the new strategy has a political objective which is to counter "attempts" by other States to have the cultural sector excluded in totality or in part from bilateral or regional free trade agreements[30]. This is explicitly acknowledged by Jack Valenti in a Press Release accompanying the announcement of the conclusion of the Chile-U.S. Free Trade Agreement negotiations, when he states that "[i]n stark contrast to some earlier trade agreements, this Agreement avoids the "cultural exceptions" approach….".[31]. Furthermore, indications are that the same strategy with the same political goal is being used in other free trade negotiations presently underway, such as the negotiations with South African Customs Union, Bahrain and the Andean countries[32]

What to think of that new strategy? To answer that question, we would like to use the following comment of Jack Valenti and the MPAA: "The U.S. Chile Free Trade agreement represents a

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29 Free market access for digital products is largely realized through the implementation of a broad national treatment commitment and the prohibition to apply customs duties and other fees or charges on or in connection with the importation or exportation of digital products through electronic transmission.

30 The bilateral free trade agreements concluded to this day by Canada with Israel, Chile and Costa Rica exclude cultural industries from the scope of those agreements as do all the bilateral investment agreements concluded by Canada since 1996. Provisions excluding the audiovisual sector from the services chapters are also to be found in the bilateral free trade agreements of the European Union with Mexico and Chile.

31 *See : http://www.mpaa.org/jack/index.htm*

32 See supra, note 7.

landmark achievement on market access for the filmed entertainment industry."[33] That the new trade agreements will provide improved access to the American film entertainment industry not only in Chile but also in Singapore, Central America, Australia and Morocco cannot be doubted in our view. But whether they will provide improved access to the film entertainment industry of those countries in the United States, whose consumption of films and audiovisual products from the rest of the world has never exceeded 5% of total consumption, is doubtful to say the least and whether they will contribute in any way to improve cultural diversity remains a question mark.

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[33] This statement is taken from quotes in support of the Agreement annexed to the United States Trade Representative Posting of December 11, 2002, concerning the U.S. Free Trade Agreement: http://www.ustr.gov/new/index.shtml. For a similar statement concerning the U.S.-Singapore Free trade Agreement, see : http://www.mpaa.org/jack/2003/2003_01_17.htm.