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

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The free trade agreements concluded by the United States with Chile[1] in December 2002 and with Singapore[2] in February 2003 mark a new development in the way the United States envisage the treatment of cultural goods and services in trade agreements. Up until 2000, the official position was that cultural products were not different from other products and therefore should not be distinguished in trade agreements from other products. 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", then 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], and finally announced that they would «consider developing and understanding on subsides that will respect each nation's need to foster its cultural identity by creating environment to nurture local culture.» 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

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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.

> 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 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 concretely adopted 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. But it is only in its free trade agreements with Chile and Singapore that this new approach was translated for the first time into legal rights and obligations, thus providing a clearer insight into the U.S. strategy in the multilateral context[6]. A closer look at the implications of those two free trade agreements in the cultural sector, in that context, appears fully justified.

The structure of the two agreements is largely similar ; although the numbering of the chapters as well as their scope and content slightly varies, they address basically the same

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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] *Behind this request which appears very reasonable at first sight, there is the obvious desire on the part of the United States to have a maximum number of States committing themselves in the audiovisual sector so as to break the apparent resistance of most States to accept national treatment and market access obligations in that sector.*

6 It is important to mention in that regard that new free trade agreements are presently being negotiated by the United States with Australia, Morocco, the South African Customs Union and the Central American Economic Integration System.

issues more or less in the same order. Only a limited number of chapters are particularly susceptible to have an impact on trade in cultural goods and services. These are the chapters on cross-border trade in services, on electronic commerce and on investment, which we shall examine in that order.

1. Cross-border trade in services

The scope of the Chapter on cross-border trade in services in the two agreements is largely the same : they apply to the measures by a Party affecting trade in services by service suppliers of the other Party, trade in service being defined as the supply of a service:

(a) from the territory of one Party into the territory of the other Party;
(b) in the territory of one Party by a person of that Party to a person of the other Party; or
(c) by a national of a Party in the territory of the other Party.

Of particular significance for the cultural sector is the exclusion of “subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance” from the scope of the service Chapter.

The basic obligations in the two service Chapters are the same. They 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), of the most-favored–nation 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 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”. Unlike the GATS, where the obligations regarding national treatment and market access are “bottom up”, that

is linked to the specific commitments of each Party, those same obligations, in the service chapter of the two agreements, are “top down”, that is compulsory for both Parties and all services, subject to reservations or exceptions, which is more constraining.

The four obligations in question thus apply to all services, including audiovisual services and other cultural services. However, the Parties are entitled in both agreements to register reservations regarding a) existing measures that do not conform with those four obligations and b) specific sectors, subsectors, or activities for which a Party may maintain existing, or adopt new, or more restrictive, measures that do not conform with the same obligations. In practice, such reservations regarding the cultural sector have been made in both agreements by both Parties. In the case of the United States, the reservations are very limited and are intended essentially 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.

Singapore also has made reservations concerning cultural services (only two) which do represent a significant limitation to the application of the basic obligations under the service agreement. 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 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. 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 covers national treatment, most-favoured-nation treatment and market access but also, in addition, local presence. It is not clear, however, to what extent this second reservation truly

protects Singapore. To the extent that the two services covered (distribution and publication) are related to the provision of a good (the printed media itself), it means that the measures concerning such services, if they are incompatible with the national treatment, the most-favoured-nation treatment and market access, could also be challenged under the GATT 1994. This is precisely the situation that arose in the Periodicals Case where the Appellate Body asserted that "that "a periodical is a good comprised of two components : editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product - the periodical itself "[7].

Chile has equally 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 40% requirement has to be mandated through a *Consejo* resolution. However, since its creation in 1989, the *Consejo* has never needed to adopt said resolution since national production programming has always exceeded the minimum requirement. On average, national production in open television has been over 50% of programming.

- the *Consejo* monitors the percentage of national content by calculating at the end of the year the content level based on a two months sample of that year. As the level of national content has never been less than that required by law, the *Consejo* has never imposed the requirement.

[7] Doc. WT/DS31/AB/R, June 30, 1997. Canada was arguing in that case that the provision of the *Excise Tax Act* challenged by the United States was not a measure regulating trade in goods but rather a measure regulating trade in services (access to the advertising market).

In view of the fact that this reservation applies only to measures existing at the date of entry into force of the agreement[8] (as is the case of all reservations included in annex I), it is clear that the establishment of a level of protection for national production programming higher than 40% is excluded, as is excluded an expansion of the scope of the reservation.

Under Annex II, *Chile also* 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. For greater certainty, government supported subsidy programs for the promotion of cultural activities are not subject to the limitations or obligations of this Agreement. 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 in that list, would appear at first sight to be covered by this market access reservation ; however, the fact that a reservation was taken under Annex I for a measure concerning television quotas without any reference to market access obligations appears to indicate that audiovisual quotas in general come under national treatment rather than under market access.

By comparison with the existing obligations of the United States, Chile and Singapore under the GATS, the service chapters of the two free trade agreements introduce a fundamental change which is the passage from a “bottom up” approach to a” top down” approach regarding the national treatment and market access obligations. Whereas under the GATS in its present form, “when [Parties] schedule commitments for audiovisual, or for any service sector, they have the flexibility to make full or partial commitments, should they

[8] See the definition of « existing measures” in Article 2.1.

so desire"[9], they accept, in the new free trade agreements, to be fully committed, subject to the exceptions and reservations set out in their Schedules regarding existing measures (Annex I) or specific sectors, subsectors, or activities for which each Party maintains existing, or adopt new or more restrictive, measures, that do not conform with the obligations imposed (Annex II). Presently, under both Article XVI (market access) and XVII (national treatment) of the GATS, the United States are totally committed in the audiovisual services sector, while Chile has excluded altogether the audiovisual sector from its specific commitments and Singapore has made partial commitments concerning film production, distribution and projection (subject to obtaining appropriate licences which are granted in a limited number), sound recording and library, archives and other cultural services, but excluded completely free-to-air, cable, pay T.V., and direct satellite television. Under the free trade agreements, therefore, the level of commitment of the United States with regard to national treatment and market access in the audiovisual sector remains unchange by comparison with their commitments under the GATS, while that of Chile and Singapore substantially increases as they become fully committed subject only to their exceptions and reservations.

2. Electronic commerce

Indications that the Chapter on electronic commerce must be read in conjunction with the Chapter on services in so far as concerns cultural services come from various sources. First of all, the language of the Chapters themselves explicitly and implicitly refer to services. Explicit reference, as we shall see, is made in the Article that deals with electronic supply of services and in the one that defines digital products ; implicit reference is made in the Singapore–U.S. agreement which carves out from the scope of the provisions on digital products what amounts in practice to broadcasting services. The close relationship between these two chapters also finds confirmation in the U.S. – Singapore Joint Statement on Electronic Commerce, annexed to the Chapter on electronic commerce, which speaks at some length of the contribution of electronic commerce to the development of cultural diversity in the following words :

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[9] The wording used here reproduces exactly the argument made by the United States in their communication on audiovisual and related services to the WTO Council on Trade in services in order to prove that the GATS has all the flexibility to accommodate specific cultural concerns: see supra, note 3.

> Content that is produced on the Internet can and should be used to afford an opportunity to promote cultural diversity and preserve cultural identity as various cultural, social, and linguistic interests can be produced and accessed by others with similar interests world-wide. We support the deployment of information and telecommunications technologies and services that enable these opportunities.

The relationship between electronic commerce and audiovisual services also shows through in the following statement of Jack Valenti, chairman of the Motion Picture Association of America, following the release of the text of the Chile–U.S. free trade agreement : "We also warmly welcome the state-of-the art commitments on e-commerce. Chile's advanced telecommunications infrastructure, coupled with these forward-looking provisions on e-commerce, will ensure benefits for the filmed entertainment industry under this agreement far into the future".

The chapters on electronic commerce follow essentially the same pattern in the two agreements. They begin with general remarks concerning the goal and scope of the chapter, then deal successively with electronic supply of services, digital products, transparency and cooperation and finally definitions. The general remarks common to both agreements concern the economic growth and opportunity provided by electronic commerce and the importance of avoiding unnecessary barriers to its use and development. They include also a statement to the effect that nothing in the Chapter shall be construed to prevent a Party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with the Agreement. There is a further remark of a general character in the Singapore – U.S. agreement which is not found in the Chile – U.S. agreement : it concerns the explicit recognition of the applicability of WTO rules to electronic commerce. This raises an interesting question regarding the possibility of conflicts between the WTO rules on e-commerce and those of the free trade agreement. In some free trade agreements there is a provision that specifically deals with such a possibility. Thus, in the North American Free Trade Agreement, there is a provision which states that "[i]n the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the

extent of the inconsistency, except as otherwise provided in this Agreement". But there is nothing similar in the two free trade agreements considered here[10].

Turning now to the obligations of the Parties, the most important one are to be found in the articles on electronic supply of services and on digital products. We shall examine the obligations relating to those two topics separately, making references where appropriate to the definitions provided.

Regarding electronic supply of services, the provisions of the two agreements are nearly identical. In the *Singapore – U.S. Free Trade Agreement*, "[t]he 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". In the *Chile – U.S Free Trade Agreement*, the wording is the same except that there is no reference to the Chapter on investment, which means that the obligations of that Chapter are not applicable to the supply of a service using electronic means. The expression "electronic means " is defined as "employing computer processing"[11]. 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 ; 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 Chapter[12], that is national treatment, most-favored nation treatment and market access, subject to the reservations taken by both Parties with regard to those obligations.

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[10] See Article 103 (2) of the North American Free Trade Agreement. It may be useful to mention here that the text of an identical provision in the Canada-United States Free Trade Agreement was severely criticized in the review of that agreement that was made by the GATT.

[11] Article 15.6; for the Singapore Agreement, see Article 14.5

The provisions regarding "digital products" are more elaborate and constitute the truly innovative part of that Chapter. The definition of "digital products" in both 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 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 later, the provisions on "digital products" to all intents and purposes circumvent that distinction by making them subject in practice to the same obligations notwithstanding their qualification as goods or services. 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. 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[13]. But this obligation, judging from the Singapore-U.S. agreement, does not prevent a Party 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"[14]. A "carrier

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[12] See the previous section on cross-border trade in services. The obligations of the financial Chapter have no applications in the cultural sector and those of the investment chapter, which are applicable only in the Singapore agreement will be examined below.

[13] 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".

[14] *Singapore-U.S. Free Trade Agreement*, Article 14.3 (2) ; the same approach to customs valuation of carrier media applies in the Chile-U.S. agreement : see Article 3.5.

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"[15]

The obligation regarding national treatment is set forth in broad terms in both 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:
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> (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 Singapore-U.S. agreement goes somewhat further by adding a third basis of discrimination to that text which reads as follows :

> 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[16], 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 two agreements on that subject is identical. It provides that :

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15 Article 14.5

16 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.

(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.

As is the case for obligations pertaining to electronic supply of services, those three basic obligations regarding digital products are also subject to restrictions and limitations in the two agreements but those restrictions and limitations are not the same in each agreement. In the Chile-U.S. agreement, the Parties are allowed to maintain existing measures that do not conform with the national treatment and most-favored-nation treatment obligations for one year after the date of entry into force of the Agreement, and are allowed thereafter to maintain them if such measures are no less favourable than they were on the date of entry into force of the Agreement and are set out in its Schedule in Annex 15.4. In concrete terms, this means that if a Party has no such restrictions and limitations at the date of entry into force of the Agreement, it will not be allowed to introduce new ones thereafter. In the case of Singapore-U.S. agreement, the provisions on digital products simply do not apply to measures “affecting the electronic transmission of a series of text, video, images, sound recordings and other products scheduled 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”, in other words to broadcasting services in general to the exclusion of subscription-based and pay-per-view radio and TV. This last approach appears to confirm the greater interest of the United States, in bilateral and multilateral negotiations, for trade in electronically delivered digital content than for conventional T.V and radio.

3. Investments

The investment chapters of the two agreements follow a pattern that is very similar to that adopted for the services chapters. They begin with provisions that establish the scope of the chapter, then set out the basic obligations that apply in matters of investment, which are themselves followed by an article on non-conforming measures, then deal with a number of topics specific to investments, such as transfers of investments, expropriation

and compensation, to finally end with a lengthy section on investor-State dispute settlement. We shall limit ourselves here to a brief examination of the scope, basic obligations and non-conforming provisions of the chapters having in mind their impact in the cultural sector.

In both agreements, the investment chapter applies to measures adopted or maintained by a Party relating to a) investors of the other Party, b) covered investments (those coming under the exhaustive definition of investments that is provided) and c) in some specific circumstances, to all investments in the territory of the Party. The basic obligations with respect to such measures 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 obligations are completed by two other obligations, the first one concerning performance requirements and the second one senior management and board of directors[17]. The obligation concerning performance requirements is of particular interest for the cultural sector because certain States effectively make foreign investments in that sector subject to review in order to determine if such investment are likely to be of a net benefit, the determination being made on the basis of factors related to the performance of the investments.

In both agreements also, the Parties are allowed to maintain non-conforming measures provided they conform to certain requirements and are listed in their Schedule of reservations and exceptions. Since the United States as well as Chile and Singapore have made their reservations simultaneously applicable in most cases to the obligations of the services and investments chapter, there is no need to come back to those reservations

[17] 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

already mentioned in connection with services. However, there are a few reservations that were made exclusively with reference to investment obligations and which must be mentioned here. The United States have one such reservation in the cultural sector which concerns the right to restrict ownership of radio licenses for all communications by radio, including broadcasting. Chile has also one where it reserves 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".

Conclusion

Our comparative analysis of the Chile–U.S. Free trade agreement and the Singapore-U.S. Free Trade 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 respond to what is perceived as attempts by various actors to carve out culture from trade agreements.

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

The impact of those agreements in the cultural sector is far from negligible. They involve not only a change of approach in negotiating concessions (from a "bottom up" to a "top down" approach), 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

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individuals of any particular nationality but may require that a majority of the board of directors be of a particular

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[18]. 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[19] 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[20]. This preoccupation was already present in the communication from the United States to the WTO Council on Trade in Services regarding audiovisual and related services in December 2000[21]. It is also present in the two free trade agreements, as explicitly acknowledged by Jack Valenti in a Press Release commenting 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" [22].

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nationality.

18 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.

19 *This does not necessarily mean that any reservation is automatically acceptable ; reservations can also be the object of negotiations as is made abundantly clear in the Side letter on TV annexed to the Chapter on services in the Chile-United States agreement.*

20 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.

21 Supra, note 3, par. 5

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

What to think of that new strategy ? To answer that question, we would like to use the following quote of Jack Valenti and the MPAA : “The U.S. Chile Free Trade agreement represents a landmark achievement on market access for the filmed entertainment industry…."[23]. That the new trade agreements will provide improved access to the American film entertainment industry in Chile and Singapore cannot be doubted in our view. But whether they will provide improved access to the film entertainment industry of Chile and Singapore in the United States is doubtful to say the least and whether they will contribute in any way to improve cultural diversity remains a question mark.

[23] *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*