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Article

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Betrachtungen zur Aussenwirtschaftspolitik

International Economic Relations: Notes & Comments

The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization

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1 The U.S. Digital Trade Agenda: Contents and Applications

In August of last year, U.S. Congress enacted the "Bipartisan Trade Promotion Authority Act of 2002"[1]. Thereby it has ended an eight year period in which the United States lacked the fast-track authority to conclude trade agreements with a simplified congressional ratification procedure[2].

President BUSH's intention is to use the new Trade Promotion Authority (TPA) to pursue a parallel track of preferential and multilateral trade negotiations.[3] This is a reaction to the fact that during the lack of fast-track authority American policy-makers increasingly worried that the U.S. has been losing out in the race for preferential trade agreements.[4] Thus, in parallel to the ongoing Doha negotiations of the World Trade Organization (WTO), the TPA that is barely six months old has already provided

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1 Public Law 107–210.

2 Fast track is a grant of constitutional authority from U.S. Congress to the Executive branch to regulate trade treaties with foreign countries. In this legislative procedure, Congress sets formal negotiating goals for major trade agreements and agrees (i) to vote on the results of the negotiations and the proposed implementing legislation, and (ii) to vote only on the agreement as a whole, to do so without amendments and within a limited time period.

3 See the recent statement of USTR ROBERT B. ZOELLICK before the Committee on Ways and Means of the House of Representatives, February 26, 2003 on the 2003 Trade Agenda of President BUSH, Internet: http://www.ustr.gov/speech-test/zoellick/2003-02-26-waysandmeans.pdf (downloaded February 27, 2003). He calls it an "activist strategy to rebuild American leadership". See also "2001 International Trade Legislative Agenda", May 10, 2001, Internet: http://www.americasnet.net/trade_integration/agenda.pdf (downloaded February 25, 2003).

4 See HUBBARD (2002) p. 2; the statement of U.S. Trade Representative ROBERT B. ZOELLICK, February 7, 2002, p. 2, Internet: http://www.ustr.gov/speech-test/zoellick/zoellick_15.html (downloaded February 25, 2003); and HOUSE OF REPRESENTATIVES (2001b). Often this small number of U.S. preferential agreements is contrasted to the EC (European Communities) that is party to around 30 preferential trade agreements.

impetus to a flurry of concluded bilateral trade agreements with Chile and Singapore[5] and to pending bilateral trade negotiations with Australia, Morocco, SACU (five African nations), CAFTA (five Central American nations), and more new bilateral FTA partners to come.[6] In addition to the FTA with Singapore, the bilateral agreements under the recently started enterprise for ASEAN Initiative" must be seen as a strategy for deeper trade integration of the U.S. with the whole Asian region.[7] On top of the geographically dispersed bilateral agreements that target Asia, Africa and countries in South America[8], the negotiations to conclude the Free Trade Agreement of the Americas (FTAA) in 2005 are also progressing on the front of regional trade negotiations.[9]

A central innovation of the new fast-track authority is its instruction to the USTR to conclude trade agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital trade environment.[10] Apart from the greater specificity of negotiation objectives on issues like the protection of U.S. trade remedy rules and the inclusion of labor and environmental standards that stand out *vis-à-vis* prior fast-track authorities, the TPA thus posits a set of ambitious negotiation goals that formalize a new U.S. digital trade policy.[11]

Under this negotiation agenda a set of rules and trade concessions are called for that concern the elimination of tariffs on physical media carrier, the liberalization of trade in telecommunication, computer, entertainment and other electronically deliverable services, free trade chapters on e-commerce, and a strong protection of intellectual property rights (IPRs) – especially copyrights – in an online environment.[12] The digital trade agenda is thus tailored to the free trade of so-called *digital products* like music,

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5 The U.S. had already concluded a bilateral FTA with Jordan before the TPA passed Congress.

6 The South African Customs Union (SACU) encompasses South Africa, Botswana, Namibia, Lesotho and Swaziland. The U.S.-Central American Free Trade Agreement (CAFTA) will be negotiated with Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

7 Under the Enterprise for ASEAN Initiative (EAI) the USTR plans to create a network of bilateral FTAs between the U.S. and individual ASEAN countries (Philippines, Thailand, New Zealand, etc.) that in turn work on preferential trade arrangements with China. See www.whitehouse.gov/news/releases/2002/10/20021026-7.html (downloaded February 27, 2003) for more information on the EAI.

8 See KOOPMANN (2003) who addresses this phenomenon of preferential trade agreements that increasingly transcend regional borders.

9 The FTAA is under negotiation between all 34 countries of the Western hemisphere except Cuba.

10 See WILLIAM NEW, "Trade: Congress Sets Terms On E-Commerce, Intellectual Property", *National Journal's Technology Daily,* August 2, 2002; and WUNSCH-VINCENT (2003).

11 See Bipartisan TPA Act of 2002 (Section 2102(b)(2) on services, 2102(b)(4) on intellectual property rights, 2102(b)(7)(B) and 2103(d) on IT products, and 2102(b)(9) on e-commerce).

12 For early thoughts on this new American trade agenda see BARSHEFSKY (1998) and BARSHEFSKY (2000) who calls the digital trade agenda the "second generation of high-tech trade policy".

software or movies that derive their value from "content" produced by the information technology (IT) and entertainment industries, and that were previously – in the offline world – delivered on physical carrier media like CDs.[13] Although this comment concentrates on the negotiations relevant to digital products, the U.S. digital trade policy also targets the trade liberalization of other services that can be delivered across borders electronically (e.g. financial or architectural services). Most of these rules and trade concessions go beyond the current state-of-the-art rules or commitment levels in the WTO ("GATS-plus", "TRIPS-plus", etc.).

This ambitious digital trade agenda originates from the fact that within the last couple of years a powerful alliance of American business associations that represent high-tech firms (e.g. Information Technology Industry Council) and associations that represent classical content producing firms (e.g. Motion Picture Association of America) has joined forces to voice its interests in avoiding the rise of new digital trade barriers. Apart from lucrative and bipartisan campaign contributions from these industries[14], the reasons for their congressional support are their past contribution to American growth and employment[15], and the strong comparative advantage of the U.S. in the trade of service in general and IT (especially software), entertainment products and activities related to royalties and license fees in particular[16].

In its non-trade related legislation the U.S. Congress has thus followed the industry's advice that e-commerce, and digital trade of content in particular, will thrive best with a strong intellectual property regime[17] and little government interference in other regulatory matters.[18] But domestic U.S. legislation, like the 1998 Internet Tax Freedom Act, also called for actions to minimize the rise of barriers to e-commerce in international trade negotiation fora like the WTO.[19] Since then e-commerce and the liberalization of digital trade products have been a top negotiation priority of the

13 With the term "product" the author refers to both goods and services.

14 See CENTER FOR RESPONSIVE POLITICS (1996); and CENTER FOR RESPONSIVE POLITICS (2001).

15 See USTR (2002) pp. 14, 18 ff.

16 The comparative advantage in the service sector industries is reflected not only in their rising share in total exports but also in the positive and increasing net export balance in services (see MANN 1999, pp. 35 ff., table 3.3). See HAUSER and WUNSCH-VINCENT (2002) pp. 36–37 for the large U.S. trade surplus of royalties and license fees.

17 The Digital Millennium Copyright Act (DMCA) is the U.S. legislation that implements the WIPO Internet treaties.

18 See ADVISORY COMMITTEE ON E-COMMERCE (1997).

19 The Internet Tax Freedom Act bans discriminatory taxes on e-commerce but also instructs the President to seek bilateral and multilateral agreements to remove barriers to global e-commerce through various international organizations (section 6).

BUSH administration.[20] Throughout the tough congressional negotiations leading to the TPA the strong mandate for digital trade was actually one of the few trade topics where unconditional bipartisan support existed. It is also an item that will be monitored closely by the newly founded Congressional Oversight Group that was built to ensure an unseen congressional involvement during trade negotiations[21].

The comprehensive bundle of negotiation objectives that the U.S. negotiators aim for in bilateral, regional and multilateral negotiations are displayed in *Table 1*. The wide spectrum of all the different areas addressed here hints at the complexity of pursuing free digital trade. This complexity mainly arises from the fact that digital trade flows transcend the legal borders that have traditionally been erected between trade in goods, trade in services, and trade-related aspects of IPR protection in the existing and especially the multilateral trade agreements.

20 See "2001 International Trade Legislative Agenda", May 10, 2001, Internet: http://www.americasnet.net/trade_integration/agenda.pdf (downloaded February 25, 2003).

21 See Section 2107 of the Bipartisan TPA Act of 2002; CRS (2002); CRS (2001); "Trade Act of 2002", speech by Senator MAX BAUCUS at the conference on "Trade Policy in 2002", February 26, 2002, at the Institute for International Economics; and WUNSCH-VINCENT (2003) pp. 51–61.

Table 1: U.S. Digital Trade Policy Objectives (Part 1)

Trade Topic	Specific U.S. Digital Trade Policy Objectives
Trade in IT Goods	Ensure that trade partners accede to the WTO's Information Technology Agreement (ITA), that the ITA product coverage is extended, and that non-tariff trade barriers to IT goods are reduced or eliminated. For digital products delivered on physical carrier media trade partners shall agree to base customs duties on the value of the carrier media rather than the content.
Digital Service Trade (focus on Entertainment, Telecom and IT)	Ensure that, when possible, the most liberal form to schedule trade commitments (negative list approach) is used so that new services are automatically covered by old commitments, and ensure the absence of discrimination against electronic service delivery. **Audiovisual Services:** (A) Trade partners are not asked to dismantle existing financial support schemes for culture and content-production. The U.S. only requests the elimination of very trade-distorting subsidies and other financial support schemes. (B) Trade partners are not asked to eliminate existing regulations that discriminate against foreign content and that usually apply to traditional technologies like broadcasting or the cinema. Rather trade partners are asked to schedule their existing audiovisual regulations and thus freeze them at a particular level (50 % local broadcasting content quota, for instance). (C) The U.S. is requesting commitments on new audiovisual services like video-on-demand, new forms of content distribution, etc. **Telecommunication Services and Computer and Related Services** (A Deepen and broaden the commitments for basic telecommunications, for value-added telecommunications (like online information services, database retrieval, etc.) and for computer and related services. Ensure that evolving IT products (incl. entertainment games and software) are covered by these commitments. **Other Service Sectors that can be delivered electronically across borders** (A) Deepen and broaden the commitments for the cross-border trade in financial, business, professional and other services.

Table 1: U.S. Digital Trade Policy Objectives (Part 2)

Trade Topic	Specific U.S. Digital Trade Policy Objectives
E-commerce/ Trade in Digital Products	(A) Ensure that current obligations, rules, disciplines, and commitments under the WTO apply to electronic commerce. (B) Ensure that electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form. Ensure that the classification of such goods and services ensures the most liberal trade treatment possible. (C) Ensure that governments refrain from implementing trade-related measures that impede electronic commerce.Where legitimate policy objectives require domestic regulations that affect electronic commerce, obtain commitments that any such regulations are the least restrictive on trade, non-discriminatory, and transparent, and promote an open market environment. (D) Extend the moratorium of the WTO on duties on electronic transmissions. (E) The importance of maintaining free flows of information should be explicitly acknowledged.
Intellectual Property Protection in the Digital Age	(A) Ensure accelerated and full implementation and enforcement of the TRIPS. (B) Ensure that any trade agreement governing intellectual property rights that is entered into by the U.S. reflects a standard of protection similar to that found in United States law. (C) Provide strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property. Recommended adoption of the two new WIPO Internet treaties. (D) Ensure that standards of protection and enforcement keep pace with technological developments, and in particular ensure that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media and to prevent the unauthorized use of their works.

Source: Bipartisan Trade Promotion Authority Act of 2002 (Section 2102(b)(2) on services, 2102(b)(4) on intellectual property rights, 2102(b)(7)(B) and 2103(d) on IT products, 2102(b)(8) on regulatory practices, and 2102(b)(9) on e-commerce); SENATE COMMITTEE ON FINANCE (2002); interviews with the USTR and the relevant U.S. industry.

Some of the elements of the U.S. digital trade agenda can only be understood in the context of questions (e.g., correct classification and other elements of a predictable digital trade framework, etc.) that were actually first raised on the multilateral level in 1999 by the "WTO Work Program on E-commerce" and the ensuing U.S. desire to maintain the usually high degree of market access for content delivered on physical carrier media also for content delivered electronically.[22] The open WTO e-commerce questions are still whether the multilateral temporary duty-free moratorium on all digital transactions that has been temporarily agreed on in the WTO in 1998 can be made permanent, and which rules and commitments should apply to digitally delivered content. Uncertainty arose on whether products delivered in digital form should be treated as goods (GATT-like treatment) or as services (GATS-like treatment). Even if considered under the GATS, WTO Members must also agree under what GATS commitments in the different categories of "value-added telecommunication", "audiovisual services" or "computer and related services" digital content falls.

These classification issues and the decision on the moratorium on electronic transactions obviously have a very tangible effect on the applicable degree of trade liberalization. Whereas in the multilateral trading system physical carrier media under the GATT are subject to only few or – if the WTO Member is a signatory to the Information Technology Agreement – no customs duties or import quotas, the same content can face severe market access barriers or even absent trade commitments altogether when classified under the GATS "audiovisual services" category.[23] Especially, the U.S. software industry is not ready to face a "reclassification" of their products, the ensuing GATS treatment and the potential audiovisual exemptions (i.e. entertainment games) when selling their products online.[24] Most importantly, it is this classification debate that introduces the link between a rather technical categorization question and the outright refusal of many WTO Member States to liberalize cultural and especially audiovisual services (the so-called desire for the *"exception culturel-*

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22 The program was launched in 1998 while assigning a set of questions to the four different WTO Councils (Council for Trade in Goods, Trade in Services, the TRIPS (Agreement on Trade-related Aspects of Intellectual Property Rights), and for Trade and Development). See the "Declaration on Global Electronic Commerce", WTO document WT/MIN(98)/DEC/2, December 2, 1998; and WTO-documents S/C/8, March 31, 1999 and G/C/W/158, July 26, 1999 for interim reports.

23 For a more elaborate discussion on the differences between GATS or GATT that are relevant to e-commerce see MATTOO and SCHUKNECHT (2001) pp. 12–13; PANAGARIYA (2000b); and HAUSER and WUNSCH-VINCENT (2002) pp. 76–78.

24 In addition, the increasing interest of high-technology firms like IBM in non-GATT issues is easily understood if one considers their current evolution from goods- to service-producing firms.

le"[25]). This link may appear innocent at first sight. But its dimension becomes clear when considering that the ambition of many WTO Members to maintain absolute policy flexibility with respect to audiovisual services has nearly been a stumbling block to the whole Uruguay Round.[26]

In the light of these unresolved questions the U.S. digital trade policy as shown in *Table 1* has four sub-strategies:

(i) *To make sure that WTO principles and commitments apply to e-commerce and to resolve the classification issues in the most liberal way for digital trade*[27]*:* When asking for current obligations and rules of the WTO to apply to e-commerce the U.S. wants to counter the idea of some WTO Member States that their current commitments and the rules of the WTO Treaties may not apply to electronic transactions.[28] Given that for movies and other digital products commitments in the GATT are almost always greater than commitments in the GATS, the most liberal trade approach to the classification questions is a more elegant way of asking not to submit digital products to the market access and national treatment limitations entered for audiovisual services. For understandable reasons, this point (i) on classification issues and the point on additional cross-border commitments in audiovisual services of the subsequent point (ii) are, however, rarely seen together in communications of the U.S. to the WTO.[29]

(ii) *To use the following negotiation opportunities to secure improved market access commitments for digital products:* negotiations relating to trade in goods (the Information Technology Agreement, ITA)[30],

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25 Technically speaking, this term is misleading as – apart from services supplied by the governmental authorities – the GATS does not actually exclude audiovisual services from its general obligations. Nevertheless, most WTO Member States have refused to make any commitments for audiovisual services to achieve policy flexibility to maintain regulations that are discriminatory and preferential when it comes to market access and national treatment.

26 The problematic link between trade and culture is also often cited as a reason behind the failure to build the OECD Multilateral Investment Agreement (MIA) in 1998 or to envisage a Transatlantic Free Trade Area (TAFTA) in the foreseeable future.

27 *Table 1:* Points (A) and (B) in the section on E-commerce / Trade in Digital Products.

28 *Table 1:* Point (A) in the section on E-commerce / Trade in Digital Products.

29 Officially it is rather the U.S. IT industry that takes a strong stance for liberal classification of digital products. The fact that no formal and public coalition between the Motion Picture Association (MPA) and the software-producing IT industries exists is highly understandable. During the Uruguay Round the MPA's aggressive stance in favor of U.S. audiovisual trade interests has caused it to lose much political capital with other WTO Member States (especially in France). It is thus more beneficial to the overall goal of a liberal digital trade framework if the classification debates are led by the U.S. IT industry.

30 *Table 1:* All points in the section on Trade in IT Goods.

trade in services (requests for cross-border trade commitments in the field of audiovisual, value-added telecommunication, and computer-related services, etc.)[31], or other venues (e.g., duty-free moratorium for electronic transactions[32]). Together with the request for the adherence of all WTO Member States to the ITA[33] and the duty-free e-commerce moratorium, the U.S. wants to make sure that – no matter if goods or services – no tariffs are levied on digital products. To secure market access for products that are considered goods, the U.S. urges its trade partners to adhere to the ITA. It also requests members and non-members to the ITA to levy duties on the value of the carrier media in the context of the ITA rather than on the usually much higher value of the content[34]. The U.S. also works for the extension of the ITA product coverage and the reduction of non-tariff barriers (i.e. technical regulations and conformity measures) to IT products.

When it comes to more specific commitments in the field of services the U.S. suggests the most liberal form of scheduling (negative list approach[35]) and interpretation with respect to standing commitments.

Regarding specific commitments the U.S. has learned its lesson from the Uruguay Round when approaching the issue of audiovisual service trade liberalization.[36] The USTR's new strategy has evolved from asking for an elimination of all discriminatory market access barriers to requests that U.S. trade partners should "freeze" their current level of discriminatory audiovisual regulations in their

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31 *Table 1:* All points in the section on Digital Service Trade.

32 *Table 1:* Point (D) in the section on E-commerce / Trade in Digital Products.

33 *Table 1:* Section on Trade in IT Goods.

34 With this request the U.S. does justice to two interests: on the one hand, non-members to the ITA that levy *ad valorem* tariffs on digital products that are traded offline will do so on the lesser value of media carrier and not on the generally much more expensive content included. On the other hand, this low-tariff approach to non-electronic sales sets an interesting precedent for the assessment of trade barriers to electronically traded digital products. To assess whether "like products" (offline and online sales of digital products) are not afforded the same treatment a panel would surely contrast existing low tariffs to levies on online sales or potentially more burdensome regulations.

35 Under the negative list approach all service sectors and delivery modes are liberalized as long as Member States do no list limitations to market access and national treatment. This approach guarantees that all new arising services are covered by existing commitments. Under the so-called positive list approach service sectors are only liberalized if Member States make explicit commitments for the particular sector. In sum, signatories have influence on two parameters: whether they make full or partial commitments or whether they leave the sector unbound, and if they opt to bind the sector they must draw up an exhaustive list of limitations to market access and national treatment obligations and thus make a definitive choice as to what discriminatory regulations they want to maintain in the future.

36 Interviews with the MPA (Brussels and Washington) and the USTR. See also RICHARDSON (2002); and WTO documents S/C/W/78, December 8, 1998, Audiovisual Services, Communication from the U.S. on audiovisual services, and S/CSS/W/21, December 18, 2000, Communication of the U.S. on audiovisual services.

GATS schedule or other preferential service agreements.[37] With this negotiation objective, the USTR is seeking a binding of access that is already provided and, thus, to ensure a predictable trade framework for U.S. entertainment industries. Furthermore, the U.S. – increasingly displaying an understanding of the value of cultural diversity – will not be asking their trade partners to eliminate most of their financial support schemes (like subsidies) that usually violate the national treatment principle.[38] Whenever possible the U.S. is requesting commitments on many new electronically delivered audiovisual services that are very different from traditional broadcasting (video-on-demand, etc.).

Although the requests look innocent as compared to requests for full market access that was asked for during the Uruguay Round, there is a catch to these U.S. requests. As contemporary audiovisual regulations usually do not already address new digital content delivery services, a "freezing" of all existing regulations basically has the effect of limiting changes in existing discriminatory audiovisual regulations (except of course a reduction in their discriminatory scope) and of limiting the creation of future discriminatory regulations that policy-makers feel may be necessary in the online and non-broadcasting environment.[39] The latter effect of guaranteeing that "audiovisual protectionism" stays aloof of digital products delivered via new trade media re-establishes the link between audiovisual negotiations and the U.S. digital trade policy. However, the American intention not to ask for the elimination of subsidy schemes would also mean that content for electronic networks like the Internet can be subsidized or supported in other forms.

The U.S. requests for full commitments to telecommunication and computer services are less politically sensitive and thus more straightforward. Together with the strategy adopted with respect to classification issues the U.S. thus either secures GATT or favorable GATS treatment for software and IT services. When U.S. negotiators stress that "all" software services should be covered by computer service commitments this is an indirect appeal to resist any tempta-

37 Rather than making no entry at all WTO Members should rather enter their existing limitations (like foreign content quotas, etc.) in the columns of market access and national treatment limitations of their GATS schedules.

38 This means that foreign content producers cannot benefit from these financial support schemes for cultural products and activities. However, the U.S. negotiators have made it clear that they will target very trade-distorting financial support schemes. As most subsidy schemes may have a trade-distorting effect, the implications of this qualification is not totally clear.

39 This logic is especially true in the context of the positive list approach practiced in the GATS.

tion to extend audiovisual exemptions to software that contains music or video sequences.

The same straightforward approach to elimination of limitations to market access and national treatment also applies to the other electronically deliverable sectors (i.e. business, professional, financial services)[40].

(iii) *To create a regulatory trade discipline for e-commerce*[41]*:* The U.S. desire for a regulatory discipline for e-commerce derives from the fact that the increasing national regulatory patchworks that target digital trade and the originally "borderless" electronic networks in general are felt to have a negative impact on the development of global electronic trade flows.[42] In line with the U.S. domestic "hands-off approach" to the regulation of e-commerce, the American request for regulatory forbearance and transparency intends to limit the number of trade-related e-commerce measures.[43] In cases where regulatory action by trade partners is warranted the proposed regulatory discipline suggests a necessity and proportionality test for these regulations that is well-known in the WTO for regulations that apply to goods.[44] The U.S. is also particularly interested in getting a commitment on the free flow of information.[45] Interestingly, the USTR has so far rejected such a "least-trade restrictive approach" in negotiations concerning the mandated development of a regulatory discipline in the GATS that would apply horizontally to all service sectors.[46] Apart from this regulatory discipline for digital trade the U.S. wants to avoid any content-related discussion or integration of regu-

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40 At this point the comment cannot go into greater details concerning these other service sectors that have their own sector-specific characteristics and – at times – special trade rules (e.g., the Understanding on Financial Services for the financial service sector).

41 *Table 1:* Point (C) in the section on E-commerce / Trade in Digital Products.

42 See MATTOO and SCHUKNECHT (2001) pp. 23–24; and HAUSER and WUNSCH-VINCENT (2002) pp. 95 ff.

43 See HOUSE OF REPRESENTATIVES (2001a); and MANN (2000) for transatlantic conflicts surrounding regulations applicable to digital trade.

44 See, for instance, Art. 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT). A necessity and/or proportionality test is a means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the pursuit of legitimate regulatory objectives. The least-trade restrictive test is a requirement to assess whether regulations are properly calibrated to redress local harms. See BERKEY (2002) on this approach to the issue of regulatory heterogeneity in digital trade.

45 *Table 1:* Point (E) in the section on E-commerce / Trade in Digital Products. Here the link must be seen to the EC-US feud on data privacy issues described in *Part 2* of this comment.

46 The development of a regulatory discipline in the GATS is mandated by GATS Art. VI:4 and is worked on by the GATS Working Party on Domestic Regulations. In the latter, the U.S. rather called for elements that guarantee transparency and consultation with trade partners during the process of rule-making. Insiders argue that a necessity test under a new regulatory GATS discipline applicable to all service sectors is not acceptable to the U.S. Congress.

latory digital trade standards in the WTO framework (i.e. integration of a clause on data protection in a potential WTO e-commerce chapter).[47]

(iv) *To update trade agreements so that new treaties deal with trade-related aspects of intellectual property protection in the digital trade age*[48]: Finally, the digital trade agenda recognizes that intellectual property disciplines (especially copyright and related rights) are jeopardized by the emergence of the Internet and electronic commerce.[49] Two problems are most pressing: on the one hand, in the digital age the enforcement of IPRs that all WTO members have subscribed to while adhering to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a real challenge to both industrialized and developing WTO members.[50] On the other hand, the TRIPS still only derives its main content by making reference to treaties[51] of the World Intellectual Property Organization (WIPO) that were concluded before the Uruguay Round. Meanwhile the WIPO and its Member States have followed a modernization development that in 1996 led to the two so-called "WIPO Internet treaties": the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) that both entered into force in 2002.[52] Issues addressed in these treaties are the definition and scope of copyrights, greater precision on what constitutes infringement and reproduction of works in digital form, more clarity on the extent of the rightholders' control when works are on the Internet, etc.[53] The final element of the U.S. digital trade policy is the negotiation objective that trade partners should ratify the two new WIPO treaties and that these new obligations shall be linked to existing or new trade agree-

47 Thereby any legitimization of trade barriers of this sort shall be avoided in the WTO framework. It is however a standard procedure within the WTO not to address the particular content of regulation but only to subject regulations that pursue legitimate policy objectives to a regulatory discipline.

48 *Table 1:* All points in the section on Intellectual Property Protection in the Digital Age.

49 See WIPO (2000) pp. 27 ff.; and MERGES ET AL. (2000) for an elaborate explanation of how intellectual property rights are affected by the online environment. WTO document IP/C/W/128, February 10, 1999, and HAUSER and WUNSCH-VINCENT (2002) p. 100, present the main trade-related challenges to intellectual property rights that the TRIPS Council faces.

50 *Table 1:* Point (A) in the section on Intellectual Property Protection in the Digital Age.

51 The Berne Convention for the Protection of Literary and Artistic Works (1886), and the Paris Act of the Berne Convention (1971) are available at http://www.wipo.int/treaties/ip/berne/index.html and http://www.wipo.int/treaties/ip/paris/index.html, respectively (on February 25, 2003).

52 The WIPO Copyright Treaty (WCT) can be found at http://www.wipo.int/treaties/ip/wct/index.html, and the WIPO Performances and Phonograms Treaty (WPPT) at http://www.wipo.int/treaties/ip/wppt/index.html (downloaded February 25, 2003). Both constitute a substantial improvement to the older Berne and Rome Conventions. See FICSOR (1997) for details.

53 And the work of WIPO does not end with these two new treaties.

ments.[54] At times the U.S. will also ask for country-specific improvements of IPR laws. To conclude, a link between future agreements that result from the very dynamic digital agenda of the WIPO and the WTO must be envisaged by all WTO Member States.[55]

U.S. negotiators have chosen a concurrent bilateral, regional and multilateral approach to the above-mentioned digital trade objectives. As will be seen in *Part 2* on the multilateral negotiations and *Part 3* on the first bilateral and regional efforts in this field, the U.S. negotiators have different expectations and, thus, negotiation objectives in the different negotiation fora. In other words, not the full spectrum of the objectives of *Table 1* are necessarily advanced in all negotiation fora. Whereas progress on the U.S. digital trade agenda described in *Table 1* is, at the moment, difficult to achieve on the multilateral level, U.S. negotiators have achieved some first notable successes with regard to their digital trade objectives in the first two bilateral agreements resulting from the TPA (U.S.-Chile/U.S.-Singapore). It is argued that – without losing sight of the WTO negotiations – these bilateral digital trade frameworks will serve as a template for further U.S. preferential trade talks.

2 The Multilateral Doha Negotiations: A Difficult Environment for the U.S. Digital Trade Agenda

The implementation of U.S. negotiation objectives with respect to digital trade are difficult to implement swiftly on the multilateral level. In fact – despite of the launch of the WTO E-commerce Work Program in 1998 – none of the U.S. negotiation objectives listed in *Table 1* have yet been satisfactorily met in the WTO.

Apart from the cultural exemption debate concerning digital products[56] that has lead to a deadlock in the WTO E-commerce Work Program, one

54 *Table 1:* Points (C) and (D) in the section on Intellectual Property Protection in the Digital Age. As via the Digital Millennium Copyright Act the U.S. has updated its laws on IPRs in line with the new WIPO treaties in 1996. Point (B) in the same section indirectly specifies the same requests on U.S. trade partners.

55 In fact, the WIPO has its own "WIPO Digital Agenda" that continually evolves. Thus, for instance, the WIPO currently promotes the adjustment of the international legislative framework to facilitate e-commerce through the extension of the principles of the WPPT to audiovisual performances, the adaptation of broadcasters' rights to the digital era, progress towards a possible international instrument on the protection of databases, and to improve the work of the WIPO on the Internet Domain Name Process. Moreover, it currently plans a "World Summit On Intellectual Property and the Knowledge Economy" in Beijing from April 24 to 26, 2003.

56 Should digital products fall under the GATS or the GATT?

of the more important reasons for this lack of process is an institutional one. On the multilateral level, it is difficult to negotiate digital trade issues that transcend standing institutional and legal boundaries that have been erected in the WTO context in a bundled and coherent fashion. Therefore it is, for example, difficult to find institutional room for agreements like an e-commerce chapter applicable across goods and services. In general, innovation in the WTO is complicated by the facts that in the WTO rule-making takes a long time and that few Member States are ready to re-open existing rules and obligations for renewed negotiations.[57]

Furthermore, a bundled and timely approach is difficult because the different trade topics (ITA, TRIPS, etc.) all have their own negotiation agenda. In fact, the Doha Development Agenda – the first opportunity where elements of the digital trade agenda may be successfully negotiated – only started in 2001. Even if negotiations in the relevant areas proceed satisfactorily for the U.S., rules and commitments will only be effective if and when the whole WTO round is successfully concluded.[58] Without doubt, digital trade issues do not figure prominently in the overall Doha Agenda.[59] Its complex other priorities and the current gridlock on agriculture and TRIPS and Health issues will take much of the negotiators' attention.[60] Formally, a negotiation agenda on digital trade issues does not even exist in the WTO. Apart from above reasons this can also be explained by the fact that the very heterogeneous WTO membership has a varying degree of interest in rules and obligations concerning digital trade.

Clearly, this does not mean that no progress will be made on the multilateral front. After all, one of the reasons for the absent agreements of issues listed in *Table 1* is that most of the Doha negotiations only recently got started, and that openings for digital trade negotiations must be found in the process. It simply means that in the WTO only small parts of the U.S. digital trade agenda will be met in the medium run (2005 or later), and that some issues may not be negotiated on the multilateral level at all. The below paragraphs outline where decisions are unlikely to be taken anytime soon, and where the digital trade agenda can be advanced.[61]

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57 This is particularly relevant to the GATS scheduling methodology and to a possible cross-cutting discipline on digital products.

58 To put it bluntly, in this single undertaking process the success in digital trade matters also depends on the success in areas like agriculture.

59 For the contents of the Doha Development Agenda see Ministerial Declaration, Doha WTO Ministerial 2001, WTO-document WT/MIN(01)/DEC/1, November 20, 2001.

60 See "Trade Gridlock – Without Serious Talks Soon, The Doha Round Will Founder", *Financial Times*, February 19, 2003.

61 See WUNSCH-VINCENT (2002a) for more background on the current status of negotiations in the WTO.

When it comes to decisions that fall outside the scope of the regular Doha negotiations – basically, the points in the E-commerce/Trade in Digital Products section in *Table 1* – the following can be concluded: although the WTO E-Commerce Work Program perfectly rose to the challenge of identifying the need for action and opening questions in 1999 its status as working and non-negotiation group did not enable it to make the necessary decisions on whether trade rules apply to digital trade or where digital products were to be classified. The logjam in the WTO E-commerce Work Program is well-reflected in the Doha mandate's paragraph on e-commerce that only instructs the General Council to rethink institutional arrangements until September 2003.[62]

Specifically, not even a formal decision on the applicability of WTO rules and obligations to digital trade has been taken by the WTO Member States.[63] Although the duty-free moratorium on e-commerce has been extended in 2001, it will elapse again during this year's Fifth Ministerial Meeting in Cancun.[64] Developing countries are still weary to concede to this potential tariff loss before getting something in return which is of greater perceived relevance to them.[65] Also, until the classification debates are solved many WTO Member States will not agree to the permanence of this moratorium.

Unfortunately, it is just this long-standing debate on digital product classification that has stalled the WTO's work on a digital trade agenda.[66] WTO Member States like the EC and Canada maintain that digital products should be classified as services and see the U.S. proposals to afford GATT treatment to digital products as an attempt to circumvent the cul-

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62 See para. 34 of the Doha Mandate: "[...] We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference [...]". This comes after the reports of the different Councils already showed no progress in 2000. See HAUSER and WUNSCH-VINCENT (2001) pp. 11–12 on this point. The General Council will, however, continue to hold a series of dedicated sessions on e-commerce until the Cancun Ministerial in September 2003. In 2002, two meetings were dedicated to e-commerce and focused on classification and fiscal implications of electronically transmitted products.

63 Some members actually question that for example GATS mode 1 commitments on cross-border trade actually apply to electronic transactions.

64 See para. 34 of the Doha Mandate: "[...] We declare that members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session [...]".

65 A central characteristic of the single undertaking process of the WTO negotiations is that package agreements are agreed upon at the end of the negotiations (2005 or 2007 in the case of a successful Doha Round). Thus, from the perspective of the negotiators, it does not make much sense to advance any meaningful unilateral concessions in the early stage of negotiations. See UNCTAD (2002a) and MATTOO and SCHUKNECHT (2001) on the potential tariff loss that developing countries might face.

66 See "U.S. Looks For WTO Guidelines On E-commerce By Cancun Ministerial", *Inside U.S. Trade*, September 20, 2002.

tural exemption.[67] Although not addressed directly by the EC the classification under the GATS would in turn allow the WTO Member States to extend their practice of discriminatory limitations and cultural support measures to audiovisual services delivered online.[68]

The issue of a regulatory discipline for e-commerce mandated in the U.S. TPA and a firm commitment to acknowledge the importance of free information flows also fall prey to "cultural" issues in WTO. Whereas in principle the U.S. wants to introduce their regulatory hands-off approach on the multilateral level, in the meantime other WTO Member States have introduced domestic legislation that applies to electronic networks (e.g. data or consumer protection) that they do not want to see curtailed by WTO obligations. After all, the interest of U.S. Congress in such a regulatory e-commerce discipline was particularly spurred by two directives of the European Communities – one on data privacy and the other one on online value-added tax on digital products – that are considered harmful to digital transatlantic trade in the U.S.[69] Obviously, countries like the EC will not want to compromise on this type of legislation without making sure that issues like data privacy are addressed in a potential WTO e-commerce chapter.[70] The latter intake of such more content-related "regulatory barriers" into the multilateral framework, however, is a non-starter for the U.S.

All in all, the digital trade-specific objectives of *Table 1* (regulatory e-commerce discipline, a permanent e-commerce moratorium or the most trade liberal treatment of digital products) are unlikely to be achieved by the U.S. anytime soon in the WTO. Specifically, the U.S. has not even started formal requests in the WTO that would pave the way for a sub-

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67 The EC's stance that digital products are services must also be understood in the light of the fact that these products are classified as services internally (so-called "information society services"). Another reason is that in EC law most regulations that the lawmakers want to apply to online transactions are based on the notion that sales of digital products are service transactions.

68 At this point it must also be emphasized that the European media and IT industry either has different interests than the U.S. industry or that it fails to effectively communicate its business interests to the EC negotiators in Brussels.

69 One directive on data privacy prevented the outflow of data from the EC to third countries that have no comparable data protection level (Directive 2002/58/EC of July 12, 2002), and another EC directive requires U.S. providers of digital products to levy value-added tax (VAT) for the EC Member States when selling to European households (Directive 2002/38/EC of May 7, 2002). See SWIRE and LITAN (1998); and SINGLETON (2002) for details on the U.S.-EC feud over data privacy and the VAT directive. See also "Administration Indicates EU Plan To Impose VAT On Digital Sales May Violate WTO Rules", *BNA International Trade Reporter,* February 14, 2002, Vol. 19, No. 7.

70 Also one may wonder why the U.S. is ready to introduce language on least-trade restrictiveness for digital trade whereas in the discussion for the horizontal GATS regulatory discipline the U.S. negotiators have shunned such an approach.

stantial discussion of an e-commerce chapter that in turn would entail above elements. In fact, in Cancun U.S. negotiators may well focus only on obtaining another temporary duty-free moratorium on electronic transactions and positive statement from the WTO about the importance of free-trade principles and rules to the development of global e-commerce.[71] As a matter of fact, it is also quite unclear how the General Council will decide on how to proceed with the WTO E-commerce Work Program.

The United States is actively engaged in the work program on electronic commerce, now being conducted under the auspices of the WTO's General Council. In 2002, two meetings were dedicated to e-commerce and focused on classification and fiscal implications of electronically transmitted products. As the work progresses, the U.S. will push for a set of objectives to form the basis for a positive statement from the WTO about the importance of free-trade principles and rules to the development of global e-commerce.

Due to the absence of an independent WTO E-Commerce Initiative and the deadlock in the WTO E-commerce Work Program[72], the list of sophisticated trade objectives in *Table 1* will now be pursued by the U.S. and other interested WTO Member States where the possibility arises in the market access negotiations on goods / services (mostly) during the current Doha round.[73]

(i) On the goods side the U.S. is likely to be able to use the current Doha negotiations to request accession to the ITA from non-members.[74] As the ITA currently encompasses only 56 out of 145 WTO Member States, scope for improvement exists. This would secure low or zero tariff treatment of digital content that comes on a physical media carrier and would extend the number of WTO countries that – if agreement is reached on a most trade liberal approach to digital products – may have to afford the same treatment to electronic transactions. Nevertheless, given the debate on the cultural exemp-

71 See ROBERT B. ZOELLICK's statement before the Ways and Means Committee referred to in Note 3 above. It seems as if in Cancun – as part of this positive statement – there may also be room for a formal agreement that WTO's rules and obligations apply to digital trade.

72 See calls for such a concerted initiative that would guarantee the independence of free digital trade from the successful conclusion of a broader, multi-year WTO negotiation round which date back to 2000. See HAUSER and WUNSCH-VINCENT (2001).

73 See "U.S. Looks For WTO Guidelines On E-Commerce By Cancun Ministerial", *Inside U.S. Trade,* September 20, 2002.

74 See "U.S. E-Commerce Industry Plots Strategy for WTO Talks", *Inside U.S. Trade,* May 24, 2002.

tion it is highly unlikely that WTO Member States can agree on a formal decision to base customs duties on the value of the carrier media rather than on the content.[75] Whereas the ITA II efforts to extend the ITA product coverage are currently in coma[76], the Work Program on Non-Tariff Measures that is currently under way seems more promising.[77]

(ii) On the services side the GATS request and offer process (initial requests due in July 2002 and initial offers in March 2003) provides a good platform to deal with the specific market access commitments addressed in *Table 1.* As WTO delegations have agreed to maintain the basic architecture of the GATS[78] – it uses a combination of a "positive list" of covered services with a "negative list" of scheduled measures – the more trade liberal negative list approach[79] will not be used on the multilateral level. The request process has been somewhat slowed by the mandated assessment of trade in services[80] and the recognition mode for autonomous liberalization (especially for new members).[81] Due to the open classification questions concerning digital trade products some uncertainty surrounds the request-offer phase.[82]

Initial offers on the individual service sectors relevant to digital products and electronic transaction are not public and are only due in

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75 This is true although this method of levying tariffs has been a long-standing practice before this digital trade debate started. See HAUSER and WUNSCH-VINCENT (2002) pp. 80 ff.; and WTO-documents WT/GC/24, April 12, 1999 on "Valuation Issues arising from the application of the agreement on the implementation of Art. VII of the GATT 1994", G/VAL/1-8, and G/VAL/W/1-5.

76 See WASESCHA and SCHLAGENHOF (1998); and "ITA II Talks Suspended", WTO Press Release No. 110 (1998).

77 See "ITA Committee Approves Work Programme on Non-tariff Measures", WTO Press Release No. 198, November 17, 2000, Internet: http://www.wto.org/english/news_e/pres00_e/pr198_e.htm (downloaded February 27, 2003). The work programme will, for instance, produce a first substantial meeting of national regulators and technical standard setting bodies in April of this year to advance the elimination of non-tariff trade barriers for IT products. For more information, see Internet: http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm (downloaded February 27, 2003). See also the WTO-document G/IT/SPEC/6, October 16, 2002, for a U.S. communication on this work.

78 See WTO (2001) p. 119.

79 *Table 1:* section on Digital Service Trade. This negotiation objective was therefore not followed by the U.S. in the WTO.

80 Extract of the GATS Negotiation Guidelines: "The Council for Trade in Services in Special Sessions shall continue to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of Article IV in particular. [...]"

81 Extract of the GATS Negotiation Guidelines: "Based on multilaterally agreed criteria, account shall be taken and credit shall be given in the negotiations for autonomous liberalization undertaken by Members since previous negotiations. Members shall endeavour to develop such criteria prior to the start of negotiation of specific commitments."

82 Further uncertainty results from the fact that the negotiations on GATS rule-making (subsidies, government procurement, safeguards, domestic regulations, etc.) that have been under way for years have not yet produced any result (see SAUVÉ 2002). Member States are thus asked to make specific commitments without full clarity on the future GATS framework rules.

March 2003. But as opposed to the above-mentioned classification issues, real progress is to be expected with respect to better market access commitments in at least two of the three fields relevant to digital products: computer and telecommunication services. This also applies to financial, business or professional services that can be delivered electronically. The majority of commitments scheduled in the Uruguay Round were in fact "standstill bindings" and, at the time, even more advanced developing countries like Brazil and India only made minimal commitments. The low level of current commitments, the seemingly greater interest of developing countries in obtaining market access to other service markets, the fact that the Doha service negotiations can build on first concluded GATS negotiation guidelines and sectoral proposal decided upon before the start of the Doha negotiations[83], and the overall dynamism of the GATS negotiations indicate that improvements with respect to cross-border GATS commitments (mode 1 and mode 2) are to be expected.

The situation for negotiations on audiovisual services – one of the three fields of great relevance to digital products – is less clear.[84] On the one hand, the technological evolutions, the new interest of developing countries in market access for digital products (India, Brazil, etc.)[85], the notion that trade rules may be sufficiently flexible to address all aspects of the audiovisual sector, and the sustained interest of the U.S. have certainly introduced new components to the debate. These new components have been reflected in four very innovative sectoral proposals[86] and in a significant number of GATS requests in the field that decrease the likelihood that the audiovisual service negotiations will be paralyzed from the beginning on because of a open transatlantic confrontation.[87]

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83 The start of further service trade talks were actually mandated by the Uruguay Round to commence in 2000. The so-called GATS 2000 negotiations laid a good foundation for progress on service trade liberalization in the Doha Round as they constituted a very vivid forum that agreed on how progressive liberalization should be negotiated (GATS negotiation guidelines and sector-specific discussions and proposals).

84 See IAPADRE (2000); GRABER (2002); and WUNSCH-VINCENT (2002a) p. 46 ff. for more details on the current audiovisual negotiations.

85 See WTO-document S/CSS/W/99, July 9, 2001, Communication from Brazil; and UNCTAD (2002b).

86 See WTO-documents S/C/W/78, December 8, 1998, Communication of the USA; S/CSS/W/21, December 18, 2000, Communication of the USA; S/CSS/W/74, May 4, 2001, Communication of Switzerland; and S/CSS/W/99, July 9, 2001, Communication from Brazil. For more details on the content of these discussion papers see HAUSER and WUNSCH-VINCENT (2002) pp. 136 ff.

87 According to the U.S., the "all-or-nothing approach" taken during the Uruguay Round should not be used in the Doha negotiations because the new technological environment does not warrant the absence of any audiovisual market access commitments. See WTO-document S/CSS/W/21, December 18, 2000, Communication of the USA.

On the other hand, it should not be forgotten that out of a desire to preserve their cultural sectors very few WTO Member States made commitments in audiovisual services during the Uruguay Round.[88] Although it is difficult to forecast how many WTO Member States will try to maintain their practice of not scheduling the audiovisual sector, the resistance of many WTO Member States will be fierce. Especially very influential countries like the EC, Canada and Australia – the hardliners on cultural exemption from trade integration – have so far rejected any audiovisual discussion during the ongoing GATS negotiations and made it very clear that no offers will be made for the cultural service sectors and that no classification of digital products under the GATT will be accepted.[89] In the case of the EC both the mandate given by the EC Member States and the fact that each EC Member States can block any offer in this field leaves no flexibility to the EC negotiators to make just any concession.[90]

Under the new header of *"diversité culturelle"* rather than *"exception culturelle"*, especially the French-Canadian and the other above-mentioned WTO Member States are currently trying to push the issue of audiovisual service liberalization – and therefore also the issue of the trade of some digital products – outside the WTO (mostly to the UNESCO[91]), and to build an international instrument on cultural diversity that recognizes the importance of all cultural support measures.[92] If a GATS classification for digital products prevails, the absence of market access commitments in the audiovisual field will mean that the least trade liberal approach to digital products has been chosen. Recent EC proposals to exclude any software or computer

88 Only the U.S., New Zealand, Hong Kong, Japan, Korea, Mexico, New Zealand, Singapore, and Switzerland made full or partial commitments to the audiovisual sector.

89 See EUROPEAN COMMISSION (2002); EUROPEAN COMMISSION (2003); and EC Position taken by VIVIANE REDING (Commissioner DG Education and Culture) on "Cultural Policy and WTO", 58th Mostra Internazionale d'Arte Cinematographica, Venice, September 7, 2001, DG EAC C.1/XT D (2001) p. 3. For an official position of Canada to trade and audiovisual services see Internet: http://www.dfait-maeci.gc.ca/tna-nac/C-P&P-en.asp?format=print (downloaded February 25, 2003).

90 As is demonstrated in WUNSCH-VINCENT (2002b), the hand of the EC's negotiators are tied to this defensive position with respect to audiovisual services due to (i) the current negotiation mandate adopted by the EC Member States and (ii) the fact that the Treaty of Nice accords each individual EC Member State a veto right over the EC's trade policy in the field of audiovisual services and that – at least – France would veto any move towards limiting the cultural policy autonomy. The negotiation mandate of the EC is contained in EUROPEAN COUNCIL, "Preparation of the Third WTO Ministerial Conference, Council Conclusions", October 26, 1999.

91 United Nations Educational, Scientific and Cultural Organization. See the strong support of the French President CHIRAC for this objective in his speech "La Diversité Culturelle" during the Johannesburg Summit in September 2002 at http://www.elysee.fr/actus/dep/2002/etranger/09-johanburg/johan06.htm (downloaded February 27, 2003).

92 See SAGIT (1999, 2002); and GROUPE DE TRAVAIL FRANCO-QUÉBÉCOIS SUR LA DIVERSITÉ CULTURELLE (2002) for such an approach and efforts to drive the discussion out of the WTO forum.

services with audiovisual content (like entertainment games) from the very liberal commitments on computer services would even extend this approach.[93]

Currently, it seems that the fate of further audiovisual service liberalization in the WTO crucially depends on whether either the U.S. or the Canada-EC tandem can manage to gather a majority of WTO Member States on their respective side. The fact that the request-offer process is bilateral and not public will, however, enable the U.S. to approach trading partners individually before the topic of audiovisual service negotiations attracts more spotlight in the overall negotiations.

(iii) At this point in time a proposal to modernize the TRIPS for the digital age – and hence to extend its current rules and obligations – is a non-starter at the WTO level. In fact, any such proposal would be seriously out of step with what is currently acceptable to the majority of the WTO Member States. Many developing countries still doubt if their TRIPS accession during the Uruguay Round was a beneficial move to begin with. Actually many also struggle with the enforcement of current TRIPS obligations. Such a proposal would also be out of step with the current TRIPS negotiations that – in accordance with the "Declaration on the TRIPS Agreement and Public Health" – rather deal with setting limits to the applicability of the current TRIPS obligations under certain conditions than with discussing more demanding IPR protection.[95] Although technically speaking the mandated "Review of TRIPS Provisions" could be used to introduce extensions of the TRIPS, neither the U.S. nor any other industrialized nation have yet seriously addressed this aspect of the digital

93 See "Consultation on the GATS 2000 / WTO negotiations concerning certain audiovisual services (music and recreational software), and cultural services", Internet: http://europa.eu.int/comm/avpolicy/extern/gats2000/ncon_en.htm (downloaded February 25, 2003), where internally the EC questions whether entertainment games should be subject to a cultural exemption, and "Questionnaire on Services in the Recreational Software Sector", Internet: http://europa.eu.int/comm/avpolicy/extern/gats2000/conrs_en.htm (downloaded February 25, 2003). See also WTO document S/CSS/W/34/Add.1, July 15, 2002, Communication from the EC and their Member States on the scope of the computer and related service classification CPC 84. In these proposals the EC tries to make sure that only IT services but no content or other professional or financial services get coverage through computer service commitments.

94 Compare to paragraphs 17–19 of the Doha Ministerial Declaration on TRIPS matters.

95 An agreement in this field could, for instance, allow developing countries to import generic copies of patented drugs to treat a range of grave diseases that threaten public health. See the "Declaration on the TRIPS Agreement and Public Health", Doha WTO Ministerial 2001, WTO document WT/MIN (01)/DEC/2, November 14, 2001.

96 See "U.S. To Raise E-commerce Copyright Issues In WTO TRIPS Talks", *Inside U.S. Trade,* July 19, 2002. According to this source, although the U.S. has begun discussions on strengthening copyright protections on the Internet, it is not yet ready to push for incorporation of the two WIPO treaties in WTO rules.

trade agenda in the WTO.[96] This also reflects the fact that in January 2003 only one third of the WTO Member States had signed and ratified the comparatively new WIPO Internet treaties.[97]

All in all, parts of the U.S. objectives with respect to greater market access for goods and services are likely to be achieved,[98] whereas most of its objectives specifically targeted to digital trade and in particular digital products, and its objectives with respect to intellectual property rights will not be pursued directly in the WTO.[99] Of course, due to the single undertaking approach of the Doha Development Agenda even the limited potential achievements in the current market access negotiations depend on the successful conclusion of the ongoing multilateral trade round.[100] Seen from a mercantilistic perspective that dominates trade negotiatons, especially the developing countries have no reason to be enthusiastic about digital trade rules if industrialized countries refuse to apply free trade principles to their limited export portfolio that often only consists of agricultural products.

3 First Successes of U.S. Digital Trade Policy on the Bilateral Front, and More to Come ...

The situation with respect to the successful implementation of the U.S. digital trade agenda looks quite different if one considers the two first preferential trade agreements concluded among the flurry of planned U.S.-driven bilateral and regional FTAs. Similarly as for other TPA negotiation objectives that will be hard to implement on the multilateral stage (i.e. the inclusion of labor and environmental standards), both the U.S.-Chile and the U.S.-Singapore Free Trade Agreement – notified to the U.S. Congress on January 31, 2003[101] – manage to almost completely satisfy all U.S. digital trade objectives. Unimpressed by the deadlock or the slow progress on digital trade matters in the WTO, both agreements set ground-

97 On January 15, 2003, around 40 countries had signed and ratified the WPPT and the WCT. In January 2003 WIPO members like the EC had not yet deposited instruments of ratification with WIPO because not all individual EC Member States have yet ratified the implementing legislation. But many other WTO Member States have no intention to sign and/or ratify the new WIPO Internet Treaties.

98 *Table 1:* parts of the section on Trade in IT Goods and the section on Digital Service Trade.

99 *Table 1:* section on E-commerce / Trade in Digital Products.

100 Even then, the commitments will only be effective when the Doha negotiations are concluded (2005 at the earliest if the unlikely scenario of a timely concluded Doha Round materializes).

101 See "President Notifies Chile, Singapore FTAs; Zoellick Sees Fall Passage", *Inside U.S. Trade,* January 31, 2003.

breaking and similar precedents for future U.S. and other digital trade objectives in trade agreements.[102]

Specifically, most of the U.S. digital trade objectives with respect to the section on Trade in IT Goods in *Table 1* were satisfied from the start because Chile and Singapore are members to the ITA. In addition, both agreements now specify that for digital products delivered on physical carrier media customs duties will be assessed on the value of the media.

When it comes to trade in services, both U.S.-Chile and U.S.-Singapore follow the U.S. negotiation objectives in *Table 1* and use the most liberal form to schedule trade commitments (the negative list approach).[103] Basically the most-favored nation approach (MFN), market access, and national treatment must be granted to all services provided on a cross-border basis if limitations to these principles are not specifically scheduled.[104] This top-down approach guarantees that narrow classification schemes (i.e. the classification of entertainment games under audiovisual vs. computer services) do not limit the applicability of commitments to digital products or electronic services[105] and that new services are automatically covered by past commitments. The parties to the two agreements thus have accorded significant market access across their entire service regime, and have listed only very few exceptions. In line with *Table 1* the commitments cover the cross-border trade in computer and in other business services. Special efforts have been made to liberalize the cross-border supply of telecommunication, financial and professional services. In its e-commerce chapter, the agreement with Singapore even affirms that commitments related to services also extend to their electronic delivery.

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102 As both trade agreements were not yet public at the time of writing, the information given below is taken from publicly available information like the USTR fact sheets on the FTA with Chile and the FTA with Singapore in USTR (2003a, 2003b), from GOBIERNO DE CHILE (2003), from press reports, or it is taken from personal discussions. See also "Officials Tout Manufacturing, Services Benefits From U.S.-Singapore FTA", *Inside U.S. Trade,* January 31, 2003.

103 See STEPHENSON (2002) who outlines that many service trade agreements in the Western hemisphere have used the negative list approach. This article also provides other details on service trade agreements that were previously concluded in the Americas.

104 In Annex I of the U.S.-Chile Agreement, for instance, the two parties to the agreement must schedule existing measures that do not conform to the market access or national treatment obligations. Once the limitations are listed, in principle no new discriminatory measures may be adopted for any service sector. This holds true except if either the U.S. or Chile have listed a particular service sector in Annex II of the same agreement. Then new measures that are not in conformity with the agreement's principles of free trade may be adopted for that particular service sector.

105 In fact, then no separate categorization baskets exist any longer for a set of products that is converging anyway.

When it comes to audiovisual services, both Chile and Singapore have accepted to dismiss the notion of a fully-fledged *"exception culturelle"*. Both have agreed to make specific commitments on their audiovisual service sector while – in line with the U.S. requests on audiovisual services – retaining room of maneuver in order to maintain central elements of existing and, in some cases like subsidies, future cultural policies.[106]

Instead of maintaining full policy flexibility with respect to audiovisual services, the two U.S. trade partners both agreed to schedule and thereby freeze their existing discriminatory regulations applicable to audiovisual services. Chile, for instance, has only listed a few limitations: a ceiling to its national broadcast quota at 40%, some nationality requirements for important positions in the Chilean media, limitations on radio licenses when the invested foreign capital exceeds a certain percentage, etc.[107] As no discriminatory regulations currently exist for new media the Chileans thus agreed to full market access and national treatment obligations for all audiovisual services transmitted by these new electronic delivery modes.[108] At the same time, the Chileans scheduled limitations that guarantee that any current or future financial support scheme for Chilean culture can be maintained. Moreover, the Chileans formally preserved their right to conclude any international cultural cooperation agreement.[109] In sum, especially the FTA with Chile can be considered as a test-bed for the new U.S. approach to trade liberalization of audiovisual services.

The greatest innovation of the two new bilateral FTAs of the U.S. are, however, their inclusion of legally binding and very similar e-commerce chapters and their precedent-setting provisions about the protection of

106 Internally, the Chilean government, for instance, therefore argues that the cultural exemption ("reserva cultural") has been maintained. See "El TLC con Estados Unidos y el desarrollo de la industria cultural chilena", December 19, 2002, press statement from the Chilean government, Internet: http://www.direcon.cl/html/noticias/noticias/2002/noti_12_36mn.php (downloaded February 26, 2003); and GOBIERNO DE CHILE (2003) p. 5. Due to arguments mentioned in the text this description of their own commitments is doubtful.

107 See GOBIERNO DE CHILE (2003) p. 19; and the press statement in Note 106 above. As confirmed by other sources, Chile has historically far exceeded a 40 % local content quota for their public broadcasters.

108 In fact, this reservation does not even apply to cable or satellite transmission. In line with the U.S. digital trade agenda new media (not only the Internet) are therefore exempted from the cultural exemption.

109 Due to the national treatment obligation this right does not free Chile to accord the U.S. industry a treatment no less favorable than they give their own industry.

copyright in the digital age.[110] Thus, as opposed to the multilateral level that has no particular official digital trade talks, these bilateral deals were reached through special "e-commerce negotiations" and negotiations on the updating of IPRs to the digital age.

Both agreements recognize that e-commerce is an important means of trade and that new trade barriers to digital trade – including e-commerce regulations that are more burdensome than necessary – should be avoided. Specifically, the parties agree to a permanent duty-free moratorium on e-commerce. The first e-commerce chapters ever to be legally integrated into FTAs also guarantee national treatment on the basis of MFN to a comprehensive set of digital products (video, any kind of software, etc). Again a top-down approach is pursued. Although in the U.S.-Chile agreement, for instance, the contracting parties have one year to list existing non-conforming measures to these obligations,[111] outside of these limitations the principle of non-discrimination applies to all digital products delivered electronically.

Interestingly, the latter digital products need not be fully created and exported via one of the contracting parties to benefit from these principles. The e-commerce chapters indicate that they must only transit through or be created, altered, or published on the territory of either contracting party, or be created by a citizen of either contracting party to benefit from this most trade liberal treatment. In effect, this means that digital products from other countries can benefit from the obligations under the bilateral U.S.-Chile FTA if their products are, for example, routed over or transformed in Chile before they are send to the U.S.[112] Moreover, the rules and obligations on e-commerce apply horizontally without introducing a distinction between goods and services.

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110 Although the U.S.-Jordan FTA – in force since December 2001 – had already experimented with such an e-commerce chapter it contained rather exerted language than a legally binding obligation. See Article 7 of the U.S.-Jordan FTA: "1. Recognizing the economic growth and opportunity provided by electronic commerce and the importance of avoiding barriers to its use and development, each Party shall seek to refrain from: (a) deviating from its existing practice of not imposing customs duties on electronic transmissions; (b) imposing unnecessary barriers on electronic transmissions, including digitized products; and (c) impeding the supply through electronic means of services subject to a commitment [...] 2. The Parties shall also make publicly available all relevant laws, regulations, and requirements affecting electronic commerce. 3. The Parties reaffirm the principles announced in the U.S.-Jordan Joint Statement on Electronic Commerce. [...]".

111 The ability of listing some exemptions *ex post* was agreed upon by the negotiators because there was a concern that non-conforming regulations may exist at the subfederal level that the negotiators are not aware of. It does not allow the introduction of new non-conforming measures.

112 See GOBIERNO DE CHILE (2003) p. 23.

Finally, when it comes to intellectual property protection for the digital age, both bilateral trade agreements are very similar in securing significantly improved protection for digital products and its enforcement. In line with *Table 1* Chile and Singapore have both agreed to adopt sophisticated copyright and trademark protection. Many of the provisions are based on principles agreed upon in the WIPO Internet treaties that protect online works. But they go much further in addressing respective country-specific improvements of the IPR protection (e.g. Singapore prohibits the production of optical discs without a source identification code unless authorized[113]), in adopting some standards that reflect U.S. internal IPR legislation from the Digital Millennium Copyright Act (i.e. parts on the limited liability for Internet Service Providers in U.S.-Chile) and including additional obligations (e.g. the commitment of governments in the U.S. and Chile to use only legitimate software). The agreements also include provisions on the use of trademarks on the Internet.[114] Most importantly, these changes in IPR law are proof that the U.S. is successful in using bilateral agreements to reach through and trigger profound changes in not necessarily trade-related domestic Singaporian law[115].

A comparison of above treaty elements with the Association Agreement between Chile and the EC that entered into force in December 2002 reinforces the impression that the U.S. agreement includes far-reaching and novel digital trade rules and obligations.[116] The trade in service commitments in most service sectors – especially in the field of telecommunications and financial services[117] – are rather similar between the EC-Chile and the U.S.-Chile FTAs. Moreover, the EC-Chile Association Agreement also includes obligations on the adoption of the new WIPO Internet

113 See USTR (2003a) for more examples on country-specific IPR obligations taken on by Singapore. On IPR enforcement, for instance, the U.S.-Singapore FTA goes on to lay out details on criminal penalties for pirate copies from legitimate products, and on the treatment of counterfeit and pirate products seized by the government, etc. Other contributions like "Officials Tout Manufacturing, Services Benefits From U.S.-Singapore FTA", *Inside U.S. Trade,* January 31, 2003, record that Singapore had met every demand on a list of 73 demands for IPR protections the U.S. had submitted during the negotiations.

114 At this point it must be conceded that the ratification of IPR treaties does not guarantee that the contracting party will quickly pass the implementing legislation. As emphasized in CRS (2003) p. 12, Chile has not yet passed the implementing legislation for the TRIPS agreement that it has signed nearly eight years ago. In addition, the enforcement of any new IPRs will be a great challenge to all contracting parties, including the U.S.

115 A very similar influence of the US on foreign domestic law in "trade and ..."-issues will be seen with respect to environmental and labor standards.

116 Association Agreement between the European Community and its Member States and the Republic of Chile, Internet: http://europa.eu.int/comm/trade/bilateral/euchlagr_en.htm (downloaded February 25, 2003).

117 See Part IV, Title III, Section 3 of the EC-Chile Association Agreement on telecommunication services, Part IV, Chapter II on financial services, and the EC's and Chilean list of specific commitments.

treaties and therefore goes nearly as far as the U.S.-Chile Agreement[118]. However, the EC-Chile Agreement uses the less trade liberal positive list approach to schedule service commitments. While making pledges to reinforce cultural cooperation[119], cultural services are excluded from the chapter on trade matters[120]. Instead of agreeing on a comprehensive e-commerce chapter analogous to the U.S., the Association Agreement only includes a pledge for cooperation in e-commerce matters that has no specific content-related implications[121] and parts that explicitly address data protection and consumer protection[122].

But now that the U.S. industry's expectations are high, the U.S. agreements on digital trade with Singapore and Chile are just the start when it comes to the U.S. digital trade ambitions. What the U.S. has not yet achieved on digital trade multilaterally, it now plans to seed in a tight net of gradually increasing bilateral agreements that are negotiated sequentially.[123] When looking at the IPR and e-commerce requests it becomes particularly clear that many elements of the U.S. digital trade agenda are a mere transposition of domestic regulatory approaches to trading partners. Undoubtedly, the above-mentioned rules and obligations on digital trade will now set important precedents for all other prospective preferential trade deals. Of course, an important element of this strategy was to take two rather easy negotiation partners to start with. Both Chile and Singapore are very open-trade minded U.S. trading partners that signed the WIPO treaties[124], they both have longed for a FTA with the U.S. for some time now[125] and – in terms of economic size – they are very unequal

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118 See Title VI, Art. 170 of the EC-Chile Association Agreement on IPRs. However, the EC-Chile Agreement calls for accession to and implementation of the two new WIPO treaties only by January 1, 2007.

119 Part III, Title III Culture, Education and Audiovisual of the EC-Chile Association Agreement.

120 Part IV of the EC-Chile Association Agreement. Of course, the obligations that result from the GATS for audiovisual services are still valid to both parties.

121 Art. 104 of the EC-Chile Association Agreement on E-commerce reads: "The Parties, recognising that the use of electronic means increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, in particular by co-operating on the market access and regulatory issues raised by electronic commerce." Interestingly, although this paragraph on e-commerce is included in Part IV, Title III on Trade in Service and Establishment, in footnote 7 to this paragraph it is noted that the inclusion of this provision is made without prejudice of the Chilean position on the question of whether or not e-commerce should be considered as a supply of services.

122 Art. 29 of the EC-Chile Association Agreement on consumer protection, and Art. 30 on data protection.

123 The literature predicts that a hegemonic power is likely to gain a greater payoff by bargaining sequentially with a group of non-hegemonic powers than simultaneously. See PANAGARIYA (1998) p. 44; and BHAGWATI (1994).

124 Both are already members to the new WIPO treaties and the Information Technology Agreement, for instance.

125 Since 1994 Chile, the greatest free trader of Latin America according to the U.S., was considered as the first "expansion" member of NAFTA. Singapore's aim is to become the port of the U.S. to Asia.

bargaining partners. Therefore, the U.S. negotiators managed to set high benchmarks with respect to digital trade but also with respect to other TPA objectives (i.e. the reference to environmental and labor standards) that will be difficult to achieve on the multilateral level. These now serve as high initial benchmarks for following negotiations.

Accordingly, the readiness of potential FTA partners to include aspects crucial to U.S. interests like intellectual property protections and e-commerce provisions will now be key criteria in the selection of further U.S. bilateral FTA partners.[126] Indeed, the USTR has already announced that the objectives of *Table 1* will also be aimed for in the bilateral negotiations that are ongoing or still lie ahead this year (CAFTA, SACU, Morocco and others mentioned in the introduction).[127]

To conclude, these two agreements and the ensuing web of bilateral agreements also have a regional dimension. Singapore must be seen as blueprint for further agreements in the Asian region that will follow by the Enterprise for ASEAN Initiative. Actually, shortly before the conclusion of the FTA with Singapore, the U.S. has already prepared the ground for later legally binding digital trade obligations through the work with 16 Asian countries on an "APEC Understanding on Trade and the Digital Economy".[128] Although this Understanding only entails exerted language on the many specific issues addressed (general objective of trade policy targets for the digital economy and objectives on services, intellectual property, tariffs, etc.) its importance as first important step to more serious trade obligations should not be underestimated.

Finally, the agreement with Chile and the forthcoming agreement with CAFTA must be seen as first initial steps to anchor these trade principles in the FTAA negotiations.[129] The current FTAA negotiations already made some important steps towards these goals. On the one hand, it is fairly certain that the top-down ("negative list") approach will be used

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126 See "USTR Defends Choice Of Free-Trade Agreement - Partners Against Critics", *Inside U.S. Trade,* January 10, 2003.

127 See for example "U.S. and Central American National Launch Free Trade Negotiations", USTR Press Release, January 8, 2003, Internet: http://www.ustr.gov/releases/2003/01/03-01.htm (downloaded January 15, 2003); and "U.S. To Focus On Procurement, Customs For Next Morocco FTA Round", *Inside U.S. Trade,* January 31, 2003.

128 "Statement To Implement APEC Policies On Trade And The Digital Economy", Los Cabos (Mexico), October 27, 2002, Internet: http://www.apec2002.org.mx/index.cfm?action=news&IdNews=81 (downloaded November 10, 2002). The countries already agreed to develop trade policy targets for the "new economy" in their Shanghai meeting in 2001.

129 See CRS (2003) pp. 2f., 15; and GRESSER (2001) pp. 2, 3 and 6 for a similar argument.

for the FTAA services chapter.[130] On the other hand, since their very start the FTAA negotiations are accompanied by a government – private sector committee that addresses even more wide-ranging digital trade topics than described in *Table 1*.[131]

4 Assessing and Qualifying the Parallel Tracks of U.S. Digital Trade Policy

Currently, the WTO Member States are not ready to update the multilateral trade system in the way the U.S. believes is necessary to have a modern trade framework for the digital economy. This holds true despite the efforts of the U.S. and other trading nations to anchor the described digital trade rules in the WTO. The main reasons are, among others, a fragmentation of the different negotiation topics for institutional reasons, the varying interest in digital trade issues among a very heterogeneous WTO membership, and the reappearance of the cultural exemption ambitions in a new context.

At the same time the U.S. has had its first successes in creating a web of preferential trade agreements that corresponds more fully to the American industry's expectations. In the negotiations to come with CAFTA, EAI, etc. the U.S. will – parallel to further tries in the WTO – continue to drive their "model approach" to digital trade. Independently of the trade topic under consideration (digital trade, environmental standards, etc.), this parallel track of multi-level negotiations is a rather new phenomenon for the U.S. Consequently, the question of the malign or benign relationship between the preferential and multilateral trade treaties arises also in the case of digital trade objectives.[132] Furthermore, one must wonder how

130 See "FTAA – Free Trade Area of the Americas", Draft Agreement, Chapter on Services, FTAA.TNC/w/133/Rev.1, July 3, 2001, Internet: http://www.ftaa-alca.org/ftaadraft/eng/ngsve_1.asp (downloaded August 12, 2002); and the "Public Summary of U.S. Position for the FTAA Negotiating Group on Services", Internet: http://www.ustr.gov/regions/whemisphere/services.html (downloaded January 15, 2003). More details can be found on the webpage of the Canadian government under http://www.dfait-maeci.gc.ca/tna-nac/S-FAQ-en.asp (downloaded January 15, 2003).

131 Issues covered were network access and reliability, standards and their interoperability, marketplace rules (open WTO horizontal questions), intellectual property protection, internet governance, taxation and electronic payment, contract law, electronic signatures, etc. See the "Second Report with Recommendations to Ministers" of the FTAA Joint Government-Private Sector Committee Of Experts on Electronic Commerce, FTAA.e-commerce/03/Rev.3, April 9, 2001, Internet: http://www.ftaa-alca.org (downloaded February 2, 2003).

132 This way of thinking concerning the relationship between preferential and multilateral trade agreements has been coined by BHAGWATI (1991). See MATTOO and FINK (2002) for a new analysis concerning service trade agreements.

probable it is that the new U.S. strategy that follows a bottom-up approach (from bilateral to higher levels) will be successful. The author would like to conclude by addressing these two questions.

Concerning the first question of whether the bilateral U.S. digital trade agreements are a "building or a stumbling block" to the WTO, it is fairly safe to exclude the stumbling block hypothesis. Traditionally, preferential trade agreements are seen with suspicion by the economics profession due to ensuing trade diversion effects and vested interests ("the insiders") that have an interest of excluding non-members from the advantages of preferential trade deals.[133] It can be argued that these well-known systemic concerns *vis-à-vis* preferential trade agreements are not warranted with respect to elements of the U.S. digital trade agenda.

Indeed, that is because the pursuit of the U.S. digital trade agenda in preferential trade deals is part of a concurrent strategy that envisages as its final goal the establishment of free digital trade on the global level. To stop short at the conclusion of a few bilateral FTAs is not the intention of the U.S. for two reasons. First, the U.S. knows that a scattered set of bilateral agreements is not satisfactory to do justice to trade conducted via global electronic media. On the practical front, it is also simply impossible to negotiate heterogeneous trade agreements on e-commerce, IPRs, and the like bilaterally with 145 WTO Member States. Second, both the U.S. industry and the U.S. negotiators know that especially with respect to digital trade flows Chile, Singapore, SACU, etc. themselves are still fairly unimportant economies.[134] The greatest digital trade flows are obviously with trade partners like the EC and Japan that the U.S. is unlikely to sign FTAs with in the near future.

All these arguments reinforce the impression that the U.S. perceives these bilateral agreements as a building block to subsequent negotiations and that it regards their strategic value as high initial benchmarks.[135] Seen from this perspective an unprecedented phenomenon of a more direct causal interdependence between bilateral FTAs and regional or multi-

133 See PANAGARIYA (2000a), PANAGARIYA (1998) for an overview of the regionalism debate.

134 Even if supplemented by bilateral FTAs in the upcoming negotiations (CAFTA, etc.), the combined trade flows covered would only be roughly 3.5 percent of total U.S. trade. This figure applies to total and not digital trade. See "Opening Statement" of the Hon. Sander Levin, Hearing before the U.S. House of Representatives on the 2003 Trade Agenda of President BUSH, February 26, 2003 (see Note 3 above).

135 See "USTR Defends Choice Of Free-Trade Agreement – Partners Against Critics", *Inside U.S. Trade,* January 10, 2003.

lateral negotiations comes into play. The digital trade negotiations on the bilateral front simply help the U.S. to build coalitions of like-minded trade partners that – in turn – will make it easier to converge to a consensus that strongly resembles the U.S. approach on the regional or even the multilateral level.[136]

This use of lower level trade fora to achieve consensus on higher levels must be seen in the context of the particular nature of digital trade objectives. Clearly, the adoption of an e-commerce chapter, the agreement to keep new media free of cultural exemptions, and an updated IPR regime are very different from negotiations on tariff reductions. These negotiations can be seen as a struggle of different WTO Member States to establish their regulatory approach ("liberalization blueprint") to digital trade and IPRs in a multilateral setting[137], and as a way to pioneer issues within a setting where agreement is more easily reached. Both the legal language used and its subsequent implementation on the bilateral or regional level can also act as a much more flexible test-bed and laboratory for more important trade agreements that in turn may increase the likelihood of agreement in the WTO.[138] If one assumes that the agreement on U.S. digital trade objectives is desirable on the WTO level, this means that non-members of the current U.S. preferential trade deals also benefit from the U.S. negotiation efforts that overcome logjams in the WTO. In the jargon of the regionalism debate, these preferential trade deals are thus "friends" to the WTO.[139] Moreover, it can be argued that the trade diversion costs of this move on parallel tracks are low and that via an *erga omnes* effect non-members to the preferential trade deals also benefit from these advances on U.S. digital trade objectives.[140]

The fact that trade diversion costs are low has to do with the fact that, in principle, the new rules and obligations are applicable to future rather than current electronic trade flows.[141] Nevertheless, the threat to outsiders

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136 See "Opening Statement" of the Hon. BILL THOMAS, Chairman, Hearing before the U.S. House of Representatives on the 2003 Trade Agenda of President BUSH, February 26, 2003 (see Note 3 above).

137 The Association Agreements of the EC, for instance, also set an interesting precedent of excluding audiovisual services from trade agreements.

138 One can also think of these treaty elements as "modules" that technically still are so close to the WTO Treaties that WTO Member States can resort to them at a later stage. See MATTOO and FINK (2002) p. 3 for points on why for service trade agreements more efficient bargaining may be possible in the plurilateral context.

139 See BHAGWATI and PANAGARIYA (1999) for the categorization of preferential trade agreements in "strangers, friends and foes" to multilateralism.

140 The author would like to thank GEORG KOOPMANN and CATHERINE MANN for very helpful conceptual discussions on the latter point.

141 Consequently, no trade diversion takes place.

that they may not be significant players in future electronic trade flows puts pressure on them to join similar trade arrangements.[142] Trade diversion costs are also low as the elimination of non-tariff trade barriers does not involve a loss of tariff revenues.[143]

The argument that – via an *erga omnes* effect – non-members also profit from current U.S. FTAs is also a new one to the regionalism vs. multilateralism debate. Accordingly, non-members to the U.S. FTAs can – in addition to profiting from a liberalization blueprint for the multilateral level – actually free-ride on the reciprocal commitments made between the U.S. and its trading partners. This holds true despite of the fact that the digital trade rules and obligations are not extended *de iure* to third parties. This argument is again tightly linked to the nature of digital trade rules and obligations mentioned in *Table 1.* These objectives will often trigger domestic laws or changes in existing legislations that will then indiscriminately affect other trading nations in a positive way.[144] Once these changes have been decided upon, they are automatically or easily extendable to third parties. That is because either the trade concessions are not easily confined to the partners of the bilateral trade agreement, or because once principals have settled certain questions politically (e.g., "should the cultural exemption be maintained for all media?"; "should IPRs be protected in an online environment?"), they are also more acceptable on a broader scale.

If, for instance, Chile pledges to avoid domestic e-commerce regulations that are unnecessarily harmful to trade in the FTA with the U.S. this will also benefit other trading partners. The same logic applies to the adoption of sophisticated IPR regimes. Once a U.S. trading partner ratifies and implements the two new WIPO treaties, copyright holders of other trading nations are also better off. If Chile agrees bilaterally to avoid erecting trade barriers with respect to new content delivery technologies (e.g., video-on-demand over the Internet, etc.) or if Chile agrees to freeze its current audiovisual regulations, then third trading nations are also likely to benefit from these (preventive) changes of domestic law. Clearly, it is also very likely that Chile will not treat digital content from the U.S. in a different

142 It may well be that – at the expense of other regions or countries – more future electronic trade flows arise between geographical areas with free digital trade rules. It is assumed here that these "outsiders" are free to join the club of digital free-traders at any point in time.

143 See for a similar argument with respect to preferential service trade agreements MATTOO and FINK (2002) p. 2.

144 Clearly, it is sensible to assume that overall Chile will not establish particular laws that only apply to U.S.-Chile trade flows.

manner than digital content from the EC. Even the 40% local content quota for public broadcasters, for instance, that Chile has established as an upper limitation on its audiovisual policy will probably apply to all foreign content producers. All in all, these examples show that with respect to digital trade objectives bilateral agreements can have a positive effect on third countries.

Concerning the second question of how probable it is that the new U.S. strategy will be successful, the assessment is less clear-cut. To begin with, it is very likely that in the next bilateral negotiations with Morocco and SACU, for example, the U.S. may successfully use its much greater bargaining power to continue achieving the whole spectrum of its digital trade objectives listed in *Table 1*. With respect to traditional topics like the free trade in IT goods and more service liberalization in fields like computer services, the bilateral U.S. strategy will produce much more trade openness from developing countries. The strategy will certainly also succeed in the fostering of a common approach to e-commerce and modernized IPR protection among a large number of countries that will be approached to conclude a FTA (especially from Asia, Central America, and Africa). Undoubtedly, this parallel track of negotiations will produce results that through the multilateral negotiations alone would have been impossible or would have occurred much later.

But it is uncertain if the U.S. bottom-up approach (from success on the bilateral level to success on the regional or global level) will work all the way through. Very soon the U.S. may start to feel the limits of their concurrent negotiation approach and their attempt to build large like-minded coalitions. The U.S. strategy of coalition building around their "liberalization blueprint" will only work if all bilateral FTAs approach the digital trade issues in a rather homogeneous manner. Clearly, the value of many heterogeneous bilateral agreements on digital trade issues with economically unimportant trade partners and no subsequent building block effect would be rather low. But considering the diversity of countries that the U.S. must bring on board and considering also that the U.S. has started with the "easy" negotiations, it will be difficult to maintain this comprehensive list of negotiation objectives. When the U.S. starts approaching partners for preferential trade agreements that are economically more important and that are also very inclined to rank "cultural diversity" high on their agenda the U.S. negotiators will face the same problems as in the WTO (see *Part 3*). In particular the FTA with Australia and the negotiations with Canada in the context of the FTAA will force the

U.S. to make first amendments to their liberalization blueprint as both countries are unlikely to make concessions on cultural services (including digital products).[145] This and a lower willingness of these countries towards a regulatory e-commerce discipline will in turn make it very difficult to reach most of the U.S. objectives *vis-à-vis* an e-commerce chapter. In the end, the U.S. coalition building for solutions on the WTO-level with respect to this aspect may thus be less successful than intended.

With respect to other elements, however, (i.e. IPR protection, service liberalization, and general awareness of free digital trade) the U.S. multitrack initiative for digital trade remains a very promising undertaking that may also foreshadow how majorities can be found among an increasingly heterogeneous WTO membership and how "regulatory best practices" are promulgated via trade agreements.

145 At least Canada has already made it very clear that it excludes the liberalization of cultural products in the FTAA negotiations. The very recently formulated Canadian position on cultural services in the FTAA can be found at http://www.dfait-maeci.gc.ca/tna-nac/S-FAQ-en.asp (downloaded February 27, 2003). The government's position is to seek an exemption for culture on the model of the Canada-Chile and Canada-Israel free trade agreements, and that exemption would apply to the services chapter. As the negative list approach is likely to be adopted in the FTAA negotiations for the trade in service chapter, it will be interesting to see how Canada will technically approach the question of how to build in a comprehensive cultural exemption that also covers items like entertainment games, etc.

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