

# The Cultural Exemption and the Renegotiation of NAFTA

## Explanatory note

In the context of the renegotiation of the North American Free Trade Agreement (NAFTA), the Coalition for the Diversity of Cultural Expressions is urging that the global cultural exemption clause be maintained. To date, the Canadian government has made a commitment to preserve it. Following its agreement with Mexico on electronic commerce, the United States asked Canada for some compromises, the consequences of which could be disastrous. This note explains what the cultural exemption is and why it should be maintained, particularly with regard to digital trade.

## Description of the cultural exemption

NAFTA fully incorporates the exemption contained in the Canada-United States Free Trade Agreement requested by Canada in 1987. It should be noted that this exemption applies only between Canada and the United States, and between Canada and Mexico.

To date, cultural industries have been excluded from the application of the Agreement, with a few exceptions granted at the time (for example, customs duties on cassettes and records have been abolished). In return, the treaty allows for the adoption of compensatory measures "of equivalent commercial effect" in response to any cultural measure otherwise incompatible with the Agreement. This right of retaliation was never exercised, but NAFTA contained few commitments applicable to Canadian cultural industries.

The definition of cultural industries ([Article 2107](#)) defines the scope of the exemption. It covers persons engaged in the following main activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- (b) the production, distribution, sale or exhibition of film or video recordings;
- (c) the production, distribution, sale or exhibition of audio or video music recordings;
- (d) the publication, distribution or sale of music in print or machine readable form; or
- (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;

## The need to protect culture

For Canada, identity and cultural sovereignty could not be the subject of negotiations, especially with the American giant whose cultural productions were already well represented on the market. Without this exemption, [many measures](#) to support the creation and dissemination of Canadian content, to ensure its promotion or discoverability, would not have been possible. For example, it would not have been possible to put in place rules requiring [quotas](#) for Canadian and French-language content on the airwaves, or to ensure that companies that derive revenue from cultural content, such as cable companies, contribute to the [funding of Canadian programming](#). Without these instruments for protecting and promoting local content, Canadian culture (film, music, television, literature, theatre, dance, visual arts) would never have enjoyed the dynamism and excellence that it has enjoyed both at home and abroad.

## **An international movement to protect culture**

The negotiation of the Multilateral Agreement on Investment (MAI), which proposed the liberalization of cultural goods and services, led civil society organizations and the governments of Quebec, Canada, France and La Francophonie to take action to protect culture. It is in this context that the [Coalition for the Diversity of Cultural Expressions](#) was created in 1998.

Efforts by all actors in the cultural sector as well as governments led to the adoption in 2005 of the [UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions](#). Among other provisions, the Convention stipulates that “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value”. The Convention also recognizes the sovereign right of signatory states to adopt measures and policies to protect and promote the diversity of cultural expressions on their territory (Article 5). Finally, signatory states must ensure that they make commitments that support the objectives of the Convention (Article 20).

## **A break in the Canadian tradition**

The Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) marked a break in the Canadian tradition by introducing reservations in certain chapters rather than a blanket exemption. In CETA, reservations are [relatively effective](#) in protecting the ability of states to formulate policies to maintain their cultural sovereignty. In the case of the CPTPP, significant concessions have been made, in particular with the introduction of a chapter on digital trade. However, after the withdrawal of the United States, Canada signed [letters](#) with the remaining 10 partners to generate bilateral agreements that specify that “Canada may adopt or maintain discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development and may adopt or maintain measures that restrict access to on-line foreign audio-visual content”. The worst has been avoided, but this risky approach is not satisfactory.

## **What the United States wants in the new NAFTA**

It is now clear that the United States is seeking Canadian cultural concessions, specifically in the chapter on digital trade. Our neighbour has also reached an [agreement with Mexico](#) to prohibit any discriminatory measures on digital products distributed electronically, including digital books, videos of all kinds, music, etc. Such a clause would prevent Canada from demanding in the future that platforms distributing cultural content be required to support creation in Canada, to offer, promote or facilitate discovery of Canadian content to their Canadian consumers, as is the rule in the analogue universe. Currently, the platforms' [recommendation algorithms](#), which derive revenue from Canadian consumers for access to cultural content, operate in an opaque manner according to the choices made by private interests. Moreover, these actors are not required to contribute to funds supporting cultural creation.

However, there is an urgent need to act to support both creation and discoverability. In its [report on The Future of Programming Distribution in Canada](#), the CRTC states that the status quo in the music and audiovisual sectors is no longer acceptable. In the [book](#) sector as well, the changes brought by digital technology, such as piracy, are disrupting the business model. The data needed to assess Canadians' access to local online content is generally not made public by web-based

platforms, while access to cultural content is migrating from television, radio and stores to the web.

Canada has recently undertaken to revise key laws for the cultural sector (broadcasting, telecommunications, radiocommunication and copyright) to address some of these challenges. All the organizations heard during the consultations as well as the briefs submitted to the Government of Canada emphasize the need to adapt our laws to the digital environment in order to ensure the sustainability of cultural industries as instruments to support the creation of cultural content. In this context, it is imperative that Canada [continue](#) to defend the global cultural exemption and that every precaution be taken to ensure that it also applies to digital trade.