



Coalition  
for the Diversity of  
Cultural Expressions

Comments from the Coalition for the Diversity of Cultural Expressions  
in the context of the consultation on  
FTA negotiations with the United Kingdom and its possible accession to the CPTPP

Presented to  
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## Presentation

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main English- and French-speaking professional organizations in the cultural sector in Canada. It is composed of more than forty organizations that collectively represent the interests of more than 200,000 professionals and 2,000 companies in the book, film, television, new media, music, performing arts and visual arts sectors. The CDCE speaks as a Coalition, after consultation with its members.

Equally concerned about the economic health of the cultural sector and the vitality of cultural creation, the CDCE works mainly to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

It promotes the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* and ensures its implementation to give it full force of application at the national level.

It also ensures that the government's capacity to implement policies to support local cultural expressions is properly preserved and deployed; that trade liberalization and technology development do not systematically lead to a standardization of content and a disruption of local ecosystems in the face of foreign investment; and that the CDCE also provides the secretariat of the International Federation of Coalitions for Cultural Diversity (IFCCD).

### 1. Introduction

The Coalition for the Diversity of Cultural Expressions (CDCE) has been the voice of the cultural sector for more than 20 years to ensure the protection and promotion of the diversity of cultural expressions. Throughout this process, it has been able to rely on the Canadian government's determination to exempt culture from trade negotiations.

The CDCE thanks Global Affairs Canada for holding the current consultation that allows it to communicate its concerns and recommendations on the future of the Canada-UK trade relationship, including the possibility of the UK joining the Comprehensive and Progressive Agreement Trans-Pacific Partnership (CPTPP).

The CDCE has already had the opportunity to outline the gaps in the protection of culture in the CPTPP<sup>1</sup> and we will mention these in the following pages. It also leads us to recommend that the future of the UK-Canada trade relationship must be addressed through an agreement other than the CPTPP.

After a reminder of Canada's commitments to protect the diversity of cultural expressions, we will highlight the importance of protecting culture in the context of digital trade. We will make specific recommendations regarding a possible trade agreement between the UK and Canada. We will then consider the second scenario, that is, the UK joining the CPTPP. We will specifically address the few gaps in the CPTPP and finally present our other recommendations. The reader will find in the appendix the list of our recommendations.

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<sup>1</sup> CDCE (2019), [Comments from the CDCE in the context of the consultation on Future accession negotiations of the CPTPP](#)

## 2. Canada's commitment to the protection of the diversity of cultural expressions in trade agreements

### 2.1. Importance of the diversity of cultural expressions

The adoption in 2005 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which Canada was the first to ratify, was the culmination of efforts by the governments of Canada, Quebec and civil society and was a very important affirmation of the societal importance of culture.

Cultural expressions make it possible to materialize our identity, to share it, to make it known to the world and to make it evolve. They promote social integration, allow us to interpret our past and imagine the future. They inform and entertain. They constitute an invaluable collective heritage. It is for this reason that governments in Canada have adopted cultural policies and laws over the decades that have enabled the development of so many cultural talents and enterprises.

Canadians are committed to Canadian cultural content and applaud with the federal government's support: "78% of Canadians consider content made in Canada to be of moderate or high importance to them personally. In addition, [m]any focus group participants said they support a government role in the development of Canadian content. Some view Canadian content as helping to strengthen unity and shared identity. Others noted that financial support to ensure the production of Canadian content helps to develop talent of actors, writers, and producers and creates employment throughout Canada."<sup>2</sup>

### 2.2. Canada's obligations under the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The efforts of all actors in the cultural sector and governments led to the adoption in 2005 of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Among other provisions, the preamble to 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"<sup>3</sup>. The Convention also recognizes the sovereign right of the Parties to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory (Article 5).

Canada was the first country to ratify the Convention. Today, 145 countries, in addition to the European Union, have ratified it. The Convention does not take precedence over other treaties. Nevertheless, Parties must take the Convention into account when interpreting and applying these other treaties or when committing to other international obligations (Article 20) and must promote its objectives and principles in other international forums (Article 21). These are binding commitments for the parties that adhere to them.

All States are faced with the challenges of adapting laws to the digital environment. In its *Operational Guidelines on the implementation of the Convention in the digital environment*, the Conference of Parties to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions recommends measures to "promote dialogue between private operators and public authorities in order to encourage greater transparency in the collection and use of data that generates algorithms, and encourage the creation of algorithms that ensure a greater diversity of cultural expressions in the digital environment and promote

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<sup>2</sup> CRTC (2018), [Harnessing Change: The Future of Programming Distribution in Canada](#)

<sup>3</sup> [Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005](#)

the presence and availability of local cultural works”<sup>4</sup>.

### **2.3. The Canadian exemption clause**

The cultural exemption appears in Canada with the negotiations of the Canada-U.S. Free Trade Agreement (FTA). We will not repeat here the account of the historical evolution of the Canadian cultural exemption<sup>5</sup>.

However, we must remember that Canada has shifted from its traditional approach when it negotiated reservations in certain chapters of the Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP). In the case of the CPTPP, significant concessions have been made, notably in the chapter on e-commerce for which a specific reservation clause for culture is missing. However, after the withdrawal of the United States, Canada signed side 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"<sup>6</sup>. We will discuss this issue in more detail in the next section.

It should also be noted that a preamble has been added to the CPTPP, the 6th paragraph of which reaffirms “the importance of promoting corporate social responsibility, cultural identity and diversity, [...], as well as the importance of preserving [the] right [of Parties] to regulate in the public interest”<sup>7</sup>. This represents an improvement over paragraph 9 of the TPP’s preamble which, while proposing a similar text, did not include cultural diversity.

Fortunately, as part of the negotiation of the Canada, United States and Mexico Agreement (CUSMA), despite the survival of the retaliation clause, Canada succeeded in obtaining a comprehensive cultural exemption, which applies to the entire agreement, including electronic commerce. This result is all the more encouraging as the United States has sought from Canada cultural concessions, specifically in the chapter on electronic commerce.

### **2.4. The importance of protecting cultural sovereignty in the field of digital trade**

The CDCE has made numerous contributions over the last years<sup>8</sup> that describe the impacts of technologies and models for providing cultural content online, and then propose ways to ensure that the diversity of cultural expressions is protected and promoted.

The developments of technologies and models for the provision of online cultural content have a huge impact on cultural ecosystems at various levels. We refer the reader to the report of the Broadcasting and Telecommunications Legislative Review Panel<sup>9</sup> for a full explanation, as well as to our recommendations for the revision of the Copyright Act<sup>10</sup>.

Canada began taking decisive action in 2020 to undertake legislative revisions to address these findings. Bill

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<sup>4</sup> UNESCO (2017), Operational Guidelines on the Implementation of the Convention in the Digital Environment, [Article 16.2](#).

<sup>5</sup> See [comments submitted by CDCE](#) as part of the Consultations for Possible Negotiations on Electronic Commerce at the World Trade Organization (WTO) on April 25, 2019.

<sup>6</sup> The letters use the same wording and are [available online](#)

<sup>7</sup> [Preamble of the CPTPP](#)

<sup>8</sup> See [CDCE website](#)

<sup>9</sup> [Canada's communications future: Time to act](#)

<sup>10</sup> CDCE (2020), [CDCE's Recommendations for the Review of the Copyright Act](#)

C-10, introduced on November 3, 2020, aims to modernize the *Broadcasting Act* so that online undertakings - both Canadian and foreign - contribute to the Canadian system.

The current consultations on "a Modern Copyright Framework for Online Intermediaries" are intended, according to the government's press release, to ensure "the *Copyright Act* remains consistent with modern realities and that revenues of web giants are shared fairly with Canadian creators"<sup>11</sup>. Other changes to the *Copyright Act* may be considered.

However, some of the recommendations made by the CDCE, or some changes the government may want to make to its own laws, may never materialize unless the government's ability to protect and promote its culture is adequately preserved.

### 3. Considerations for a UK-Canada Trade Agreement

The Canada-UK Trade Continuity Agreement (TCA) could well have taken over from the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA) as the long-term framework for the relationship between the two countries. Clearly, the parties have no intention of doing so. Otherwise, they would not have chosen to incorporate Article IV regarding future negotiations into the TCA<sup>12</sup>.

It would have been useful in the current consultation to know the reasons why the partners were not satisfied with the framework inherited from CETA for continuing their trade relationship. What new commitments do they wish to explore, either in terms of provisions and domains? While conclusions can be drawn from the UK's application to join the CPTPP, more detail would have been appreciated and would have elicited more focused and relevant input from the various stakeholders.

We will therefore make rather general recommendations in the next few lines, assuming that more focused consultations will be forthcoming if the bilateral negotiation option is to be preferred.

#### 3.1. A global cultural exemption

Canadian government must obtain a global exemption clause. We prefer that possible limitations to the cultural exemption, which would be extremely specific and limited, be included in the exemption, rather than providing for cultural reservations in certain chapters or for certain provisions, as was done in the CETA and the CPTPP. This would better protect the culture from applications that do not yet exist. We ask the Canadian government not to agree to provisions that would weaken the global exemption, for example by allowing measures of equivalent effect<sup>13</sup>.

Canada's definition of cultural industries used to exempt them from trade agreement commitments has changed little over time, despite the evolution of cultural industries, products and services. This strategy has advantages.

First, the continuity of this practice demonstrates the Canadian government's commitment to protect its cultural industries. Second, it ensures consistency between Canada's commitments and its many trading partners in separate treaties. Third, in the event of a dispute, an evolutionary interpretation of cultural

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<sup>11</sup> The Government of Canada Launches Consultation on a Modern Copyright Framework for Online Intermediaries, [News Release](#), April 14, 2021

<sup>12</sup> [Canada-UK Trade Continuity Agreement \(Canada-UK TCA\) - Agreement on Trade Continuity](#)

<sup>13</sup> We are thinking in particular of [Article 32.6, paragraph 4](#) of the CUSMA, commonly known as the retaliation clause.

industries could be adopted to include contemporary forms of cultural products and services.

That said, we are not opposed to adopting a new definition that would allow for the inclusion of sectors that are not currently covered and that should be covered because of their potential inclusion in the definition of a digital product. This could be the case for the visual and performing arts, for example, which are increasingly available in digital format. If the current definition of industry is to be reviewed, we can already stress the importance of the new definition covering at least what is currently covered by Canada's definition of cultural industries.

Canada should also ensure that it is clear that the new definition does not invalidate or limit the scope of the old definition, even with respect to digital trade. Finally, we stress the importance of consulting with representatives of the cultural sector should a new definition be discussed in the context of these negotiations.

### **Recommendation 1**

**CDCE recommends that the Canadian government require a comprehensive cultural exemption, and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.**

**Furthermore, if the definition of cultural industry traditionally used by Canada were to be replaced, the government should consult with representatives from the cultural sector and ensure that the definition that will be used for the application of the cultural exemption includes at least the same entities, sectors and activities as the traditional definition:**

**“1. For the purposes of this Article, “cultural industry” means a person engaged in the following 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”<sup>14</sup>.**

**Finally, in order to ensure technological neutrality, the definition should not specifically define the mode of transmission used or the formats employed for the production of and access to cultural expressions and must allow for the inclusion of cultural expressions that make use of new technologies or that are accessible online (virtual reality, augmented reality, artificial intelligence, performing arts, visual arts, etc.) as well as cultural content included in the definition of digital products.**

### **3.2. A Reference to the 2005 Convention**

As explained above, the adoption of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005 was conceived as a tool to protect culture in a context of increasing economic liberalization. Under Article 21 of the Convention, "the Parties undertake to promote the objectives and principles of the Convention in other international fora. To this end, the Parties shall consult each other, as

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<sup>14</sup> Definition in [CUSMA's section 32.6](#)

appropriate, bearing in mind these objectives and principles. Canada and the United Kingdom are both parties to this Convention.

The CETA has included a reference to the Convention in the preamble of the agreement, as well as a passage recognizing the protection and promotion of the diversity of cultural expressions as one of the "legitimate policy objectives" for the implementation of regulations alongside other objectives (public health, environment, safety, public morals)<sup>15</sup>. This seems to us to be an excellent practice since, in the event of litigation, it would allow the 2005 Convention to be taken into account in interpreting commitments under the CETA.

## Recommendation 2

**The CDCE suggests that a possible bilateral agreement refers to the UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Furthermore, the protection and promotion of the diversity of cultural expressions should be clearly identified as legitimate policy objectives for which the state has a right to regulate.**

### 3.3. Exclusions to be made in relation to digital trade

The trade negotiations now include commitments regarding digital trade that must be preserved for the cultural sector, or else new laws to protect and promote our culture will not be adopted.

These include articles on the non-discriminatory treatment of digital products (which include digital books, videos of all kinds, sound recordings, etc.)<sup>16</sup>. It is understood that the global cultural exemption clauses also apply to these provisions. However, given the sometimes explicit reference to cultural content in the definitions of digital products, it would be prudent to make it clear that the article in question does not apply to cultural industries.

## Recommendation 3

**Given the frequently used definition of digital products, which explicitly includes cultural content, the CDCE urges that a paragraph be included stating that this type of provision does not apply to cultural industries<sup>17</sup>.**

### 3.4. Do not make any other commitments that may have an impact on culture

CDCE opposes the inclusion of principles similar to the exception for Network Services<sup>18</sup> in the Canadian *Copyright Act* or the Safe Harbour of the United States<sup>19</sup> *Digital Millennium Copyright Act* in the intellectual property chapters of any trade agreement. In the context of the revision of the Canadian law, this would have created obstacles to the accountability of intermediaries, particularly platforms that distribute user-generated content, for the distribution of content.

In addition, Canada should not agree to enshrine copyright exceptions in a trade agreement, which would prevent it from adopting new measures or modifying existing ones.

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<sup>15</sup> See the text of the [Preamble of CETA](#)

<sup>16</sup> See for instance section 4.1. below.

<sup>17</sup> Or another theme that would be used as a definition related to the cultural exemption.

<sup>18</sup> [Section 31.1](#) of the *Copyright Act*.

<sup>19</sup> Section 512 of the [United States Digital Millennium Copyright Act](#)



Online programming companies collect a lot of data on who subscribes to or uses their services. As we have seen, recommendation algorithms fuel this data and allow companies to guide users to specific content based on particular interests. This wealth of data is jealously guarded by these companies for whom they represent a source of fundamental wealth<sup>20</sup>. However, there may be a case for requiring companies to share anonymized data, for example, to ensure compliance with cultural policy requirements. The purpose of Bill C-10 is to require broadcasting undertakings, including online undertakings, to provide a certain amount of data<sup>21</sup>. Source code provisions could limit this access to information and any privacy strategy while Canada has just created a new Data Commissioner to guide it on the issue of personal data protection<sup>22</sup>.

Other types of provisions could create obstacles to the implementation of digital rights management tools, or technological protection measures, to protect copyright.

#### **Recommendation 4**

**It therefore seems fundamental to us that Canada does not make any international commitments that could affect the remuneration of copyright holders, in particular provisions similar to the exceptions on Network Services or "Safe Harbour", or exception to Copyright. Canada should not make commitments that would limit its ability to protect copyright.**

**There should be nothing to prevent the Canadian government from requiring foreign companies to provide data as part of their public policy obligations. As data and artificial intelligence clauses evolve rapidly, it is imperative that the government consult with the cultural sector on the specific clauses that could be negotiated.**

#### **3.5. Positive list**

Technological developments should not be used as a pretext to further liberalize, now or in the future, a potentially infinite set of goods and services. Indeed, digital products and services are expected to interfere in every corner of people's lives. A piece of music listened to on an online platform remains a cultural content with value and meaning, just as a health service, provided digitally, remains a health service that must be framed as such.

#### **Recommendation 5**

**We therefore believe it is extremely important that the parties to a possible agreement formulate liberalization commitments in the form of a positive list, i.e. the agreement will apply only to the sectors they identify and within the limits that States may wish to formulate.**

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<sup>20</sup> Tch  houali, D.; Plamondon, J. (2018). *Usage Data and Data Usage in the Platform Age: The Need for a Regulatory Framework to Better Assert Our Digital Sovereignty*, Montreal, ISOC Quebec, Coalition pour la Culture et les M  dias (CCM), 32 p.

<sup>21</sup> Bill C-10 (2020), An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, [section 7, p. 7](#).

<sup>22</sup> As created by the Budget 2021, 4.7 Supporting a Digital Economy, [Establishing a New Data Commissioner](#)

### **3.6. Market access and non-discrimination**

National treatment rules (the treatment accorded to foreign products must not be less favorable than that accorded to same or similar domestic products<sup>23</sup>) would most severely limit the ability of the Canadian government to exercise its cultural sovereignty. While Canada wishes to adopt new policies in the digital environment, these rules would prevent it from adopting measures to promote the discoverability of Canadian content, or even requiring a ratio of Canadian works on online platforms.

#### **Recommendation 6**

**It is essential that the rules of national treatment do not apply to culture.**

### **3.7. Subsidies, taxation power and Crown Corporations**

Canada must retain its ability to raise funds from companies involved in digital activities in the cultural sector, whether in the form of taxes or contributions to the financing of cultural content. It must also be able to decide that the funds raised to meet this objective, as well as government subsidies are accessible to Canadians only.

CDCE expects that state-owned companies, particularly those in the culture and media sector such as CBC/Radio-Canada, NFB, Telefilm, etc. will not be affected by possible trade negotiations.

#### **Recommendation 7**

**That Canada may collect taxes or other contributions, including those aimed at financing cultural content, from companies engaged in digital activities.**

**That Canada protects its authority to define the conditions of access to any funding for culture.**

**That nothing in a possible trade agreement affects current and future state-owned companies operating in the cultural sector.**

### **3.8. Telecommunications**

The CDCE would prefer that Canada refrain from lowering the limits on foreign ownership of telecommunications companies. First, the societal scope of telecommunications is growing considerably with the development of digital technology, which is gradually being integrated into all daily activities. Canadians will increasingly have online access to cultural content and many products and services from various sectors (such as health and education). Many other services, such as transport and retail, will increasingly depend on the connected objects that use telecommunications networks.

While the deployment of 5G networks will make it possible to offer a range of products and services, several of which have probably not yet been imagined, it seems prudent to us that States retain as much control as possible over this sector, which is already highly strategic to them, for national security purposes, but also for the control and use of data.

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<sup>23</sup> WTO, Glossary, [National Treatment](#)

## Recommendation 8

**That Canada refrains from lowering barriers to foreign ownership of telecommunications companies.**

### 4. The possible accession of the United Kingdom to the CPTPP

As mentioned in the introduction, we favour the avenue of a bilateral negotiation with the UK. We believe that because of the weaker protections offered by the CPTPP for the cultural sector, this agreement should not become more important, unless it is improved. We will also recall the recommendations we have already made in this regard.

#### 4.1. The loopholes of the CPTPP

The CPTPP should have included a comprehensive cultural exemption clause, applicable to all chapters of the agreement. Instead, Canada has accepted the inclusion of a number of cultural reservations in certain chapters of the agreement. We agree that it could be beneficial not to exempt culture from certain provisions. However, we prefer that possible limitations to the cultural exemption, which would be extremely specific and limited, be included in the exemption, rather than providing for cultural reservations in certain chapters or for certain provisions. This would better protect the culture from practices that do not yet exist.

Following the withdrawal of the United States in January 2017, the Canadian government signed letters of agreement with the other 10 partners to enhance existing cultural reserves. The relevant paragraph of these letters reads as follows:

*Canada and [the other Partner] agree that, in continuing to give effect to the Agreement, notwithstanding the following language in Annex II – Canada – 16 and 17 – under the Cultural Industries Sector, first paragraph under the subheading “Description,” that states “except: (a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and (b) measures restricting the access to on-line foreign audio-visual content”, 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<sup>24</sup>.*

These letters corrected a fundamental gap in Annex II, which exempts cultural industries from the application of certain obligations set out in Chapters 9 (Investment) and 10 (Cross-border trade in services), by cancelling two exceptions to this protection granted to culture :

*Canada reserves the right to adopt or maintain a measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content, except:*

- (a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and*
- (b) measures restricting the access to on-line foreign audio-visual content<sup>25</sup>.*

However, neither Annex II nor the letters of agreement refer to Chapter 14 on electronic commerce, and more specifically to Article 14.4, which we refer to here:

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<sup>24</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) - [Side instruments involving Canada](#)

<sup>25</sup> Consolidated TPP Text – [Annex II – Schedule of Canada](#)

1. No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products. [...]
3. The Parties understand that this Article does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.
4. This Article shall not apply to broadcasting<sup>26</sup>.

As we can see, this article does not apply to broadcasting. But the term broadcasting is not defined in this chapter. It is, however, in Chapter 18 on intellectual protection:

**broadcasting** means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;<sup>27</sup>

If the scope of the term broadcasting for the purposes of Article 14.4 is not clear to us, what is certain is that the definition of cultural industries is much broader. Think, in particular, of books, periodicals and newspapers.

Without a cultural reservation, such a clause could be interpreted as preventing Canada from requiring platforms distributing cultural content to offer, promote or introduce local content to their users in Canada, or to set presence thresholds. It could also prevent Canada from requiring online service providers to make financial contributions for the development of Canadian contents.

Of course, Article 14.2 provides that, generally, the measures in the e-commerce chapter must comply with the obligations, including exceptions and non-compliant measures, of the relevant provisions of Chapters 9 (Investment) and 10 (Cross-border trade in services). Paragraph 5 of this article states:

5. For greater certainty, the obligations contained in Article 14.4 (Non-Discriminatory Treatment of Digital Products), Article 14.11 (Cross-Border Transfer of Information by Electronic Means), Article 14.13 (Location of Computing Facilities) and Article 14.17 (Source Code) are:
  - (a) subject to the relevant provisions, exceptions and non-conforming measures of Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services); and
  - (b) to be read in conjunction with any other relevant provisions in this Agreement<sup>28</sup>.

Indirectly, the cultural reservation in Annex II would apply to Article 14.4 and even to the other provisions of the chapter on electronic commerce. However, in the opinion of cultural exemption lawyers, "uncertainties remain as to the articulation between these non-compliant provisions/exceptions/measures relating to "services" or "investment" and the rules of the chapter on electronic commerce that deal with "digital products"[our translation]<sup>29</sup>.

The actual scope of e-commerce commitments under the CPTPP and their impact on potential Canadian cultural policies applicable in the digital environment thus appears more ambiguous than civil society would have liked.

Moreover, even if the signature of the letters of agreement represented a very significant improvement,

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<sup>26</sup> Consolidated TPP Text – [Chapter 14 – Electronic Commerce](#)

<sup>27</sup> Consolidated TPP Text, [Article 18.57](#)

<sup>28</sup> Consolidated TPP Text – [Chapter 14 – Electronic Commerce](#)

<sup>29</sup> Guèvremont, Véronique, Bernier, Ivan, Otasevic, Ivana et Clémence Varin (2019), [Comments presented by Chaire UNESCO sur la diversité des expressions culturelles in the context of the consultations on Canada’s Future World Trade Organization \(WTO\) Negotiations on E-Commerce](#) (in French).

there can be no guarantee that new partners will agree to sign a letter of agreement with Canada on the issue of culture.

What will happen, in particular, if the United States decides to return to the partnership? Will Canada lose the comprehensive cultural exemption it managed to maintain in the Canada-USA-Mexico Agreement (CUSMA) since the United States will be able to refer to the PTPGP rules?

A cultural reservation directly linked to the chapter on electronic commerce, without any applicable exception, would have completely removed any doubts on the matter. To a lesser extent, the inclusion of a sentence to link the e-commerce chapter directly to the reservation in Annex II would have been more reassuring.

Some provisions of Chapter 18 on intellectual property should not have been included in the TPP. Article 18.66 opens the door to the extension of exceptions to the copyright regime. Section 18.82 and Schedule 18-E are also problematic, the first by significantly limiting the liability of Internet service providers for copyright infringement, the second by restricting derogations to existing measures. Fortunately, the CPTPP suspends the application of some articles, but the parties may decide to reinstate them, while article 18.66 is maintained.

## **Recommendation 9**

**CDCE believes that Canada should pursue its trade relationship with the United Kingdom through a bilateral agreement rather than through the CPTPP.**

### **4.2. Recommendations of the CDCE concerning modifications to the CPTPP in the context of the accession of the UK**

Although we have little information on the scope of the negotiations that will accompany the arrival of new partners, it seems unlikely that negotiations will resume on the agreed texts of the agreement at this stage. If this is the case, we expect the Canadian government to undertake clear consultations on this possibility.

Nevertheless, our recommendations will take into account this eventuality.

Eventually, if the negotiation allows the texts of the agreement to be amended, the Canadian government could try to obtain a comprehensive exemption clause. We prefer that possible limitations to the cultural exemption, which would be extremely specific and limited, be included in the exemption, rather than providing for cultural reservations in certain chapters or for certain provisions. We ask the Canadian government not to agree to provisions that would weaken the global exemption, for example by allowing measures of equivalent effect<sup>30</sup>.

## **Recommendation 10**

**The CDCE recommends that the Canadian government take advantage of any opportunities that may arise to exempt the culture from the CPTPP and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.**

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<sup>30</sup> We are thinking in particular of [Article 32.6, paragraph 4](#) of the CUSMA, commonly known as the retaliation clause.

If a comprehensive exemption can't be obtained, and if the negotiation allows the texts of the agreement to evolve, the Canadian government could add a clause to exempt culture from the provisions contained in the chapter on e-commerce.

#### **Recommendation 11**

**The CDCE recommends adding cultural industries to Article 14.2 (3).**

The CDCE hopes that the revision of the *Copyright Act* in Canada will allow to adapt to the contemporary reality and in particular, to increase the income of Canadian rights holders. Our members agree that the number of exceptions in the *Copyright Act* should be reduced, that digital platforms should pay more to rights holders and that private copying should become technologically neutral. The European Union (EU) has just adopted a directive forcing these platforms to obtain licences for their use of copyright-protected content, which would have been impossible if the EU had made incompatible commitments in trade agreements.

#### **Recommendation 12**

**In order to maintain control over its copyright policies, the Canadian government should require that section 18.82 and Schedule 18-E remain suspended forever, and take every opportunity to eliminate section 18.66.**

If it is not possible to amend the text of the agreement, Canada must sign letters of agreement with all new partners. Moreover, it would seem to us entirely legitimate for Canada to broaden the scope of these letters to ensure the broadest possible cultural exemption. This would allow Canada to sign new letters with already confirmed CPTPP partners.

This expansion must necessarily include Article 14.4 and should not limit Canada's ability to adopt measures other than the two set out in the Letter of Understanding, an excerpt of which we have reproduced in section 4.1.

#### **Recommendation 13**

**The CDCE proposes that the 2nd paragraph of the letters of agreement be replaced by the following text: Canada and [the Partner] agree that, as part of the arrangements for continuing to give effect to the Agreement, this Agreement does not apply to a measure adopted or maintained by Canada with respect to a cultural industry.**

**That Canada signs a letter of understanding with any new partner, including the United Kingdom if it joins the CPTPP; that this letter incorporates the amendment suggested in the previous paragraph.**

## Appendix 1: CDCE Recommendations

### Recommendation 1

CDCE recommends that the Canadian government require a comprehensive cultural exemption, and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.

Furthermore, if the definition of cultural industry traditionally used by Canada were to be replaced, the government should consult with representatives from the cultural sector and ensure that the definition that will be used for the application of the cultural exemption includes at least the same entities, sectors and activities as the traditional definition:

“1. For the purposes of this Article, “cultural industry” means a person engaged in the following 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”<sup>31</sup>.

Finally, in order to ensure technological neutrality, the definition should not specifically define the mode of transmission used or the formats employed for the production of and access to cultural expressions and must allow for the inclusion of cultural expressions that make use of new technologies or that are accessible online (virtual reality, augmented reality, artificial intelligence, performing arts, visual arts, etc.).

### Recommendation 2

The CDCE suggests that a possible bilateral agreement refers to the UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Furthermore, the protection and promotion of the diversity of cultural expressions should be clearly identified as legitimate policy objectives for which the state has a right to regulate.

### Recommendation 3

Given the frequently used definition of digital products, which explicitly includes cultural content, the CDCE urges that a paragraph be included stating that this type of provision does not apply to cultural industries<sup>32</sup>.

### Recommendation 4

It therefore seems fundamental to us that Canada does not make any international commitments that could affect the remuneration of copyright holders, in particular provisions similar to the exceptions on Network Services or "Safe Harbour", or exception to Copyright. Canada should not make commitments that would limit its ability to protect copyright.

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<sup>31</sup> Definition in [CUSMA's section 32.6](#)

<sup>32</sup> Or another theme that would be used as a definition related to the cultural exemption.

There should be nothing to prevent the Canadian government from requiring foreign companies to provide data as part of their public policy obligations. As data and artificial intelligence clauses evolve rapidly, it is imperative that the government consult with the cultural sector on the specific clauses that could be negotiated.

#### **Recommendation 5**

We therefore believe it is extremely important that the parties to a possible agreement formulate liberalization commitments in the form of a positive list, i.e. the agreement will apply only to the sectors they identify and within the limits that States may wish to formulate.

#### **Recommendation 6**

It is essential that the rules of national treatment do not apply to culture.

#### **Recommendation 7**

That Canada may collect taxes or other contributions, including those aimed at financing cultural content, from companies engaged in digital activities.

That Canada protects its authority to define the conditions of access to any funding for culture.

That nothing in a possible trade agreement affects current and future state-owned companies operating in the cultural sector.

#### **Recommendation 8**

That Canada refrains from lowering barriers to foreign ownership of telecommunications companies.

#### **Recommendation 9**

CDCE believes that Canada should pursue its trade relationship with the United Kingdom through a bilateral agreement rather than through the CPTPP.

#### **Recommendation 10**

The CDCE recommends that the Canadian government take advantage of any opportunities that may arise to exempt the culture from the CPTPP and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.

#### **Recommendation 11**

The CDCE recommends adding cultural industries to Article 14.2 (3).

#### **Recommendation 12**

In order to maintain control over its copyright policies, the Canadian government should require that section 18.82 and Schedule 18-E remain suspended forever, and take every opportunity to eliminate section 18.66.



### **Recommendation 13**

The CDCE proposes that the 2nd paragraph of the letters of agreement be replaced by the following text: Canada and [the Partner] agree that, as part of the arrangements for continuing to give effect to the Agreement, this Agreement does not apply to a measure adopted or maintained by Canada with respect to a cultural industry.

That Canada signs a letter of understanding with any new partner, including the United Kingdom if it joins the CPTPP; that this letter incorporates the amendment suggested in the previous paragraph.