Comments from the Coalition for the Diversity of Cultural Expressions

in the context of the consultation on

Canada's possible accession to the Digital Economy Partnership Agreement

Presented to

Services Trade Policy Division (TMS)

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Presentation of the CDCE

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 Canada’s possible accession to the Digital Economy Partnership Agreement.

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 then look at specific sections of the Digital Economy Partnership Agreement (DEPA) and make specific recommendations regarding Canada's eventual membership in this agreement. The reader will find in the appendix the list of our recommendations.

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.”[1]

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"[2]. 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 the presence and availability of local cultural works”[3].

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[4].

However, we must remember that Canada has shifted from its traditional approach when it negotiated

[1] CRTC (2018), Harnessing Change: The Future of Programming Distribution in Canada

[2] Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005

[3] UNESCO (2017), Operational Guidelines on the Implementation of the Convention in the Digital Environment, Article 16.2.

[4] 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.

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[5].

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.

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

That said, Canada may need to revise this definition and we will make specific recommendations in Section 3.1.

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

The CDCE has made numerous contributions over the last years[7] 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[8] for a full explanation, as well as to our recommendations for the revision of he *Copyright Act*[9].

Canada began taking decisive action in 2020 to undertake legislative revisions to address these findings. Bill 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"[10]. Other changes to the Copyright Act may be considered.

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[5] CDCE has commented extensively on this issue in the recent consultations on the UK FTA negotiations and its possible accession to the CPTPP, as well as in it's 2019 Comments in the Consultations on Holding Negotiations on Possible CPTPP Accessions.
[6] See the definition in CUSMA's section 32.6
[7] See CDCE website
[8] Canada's communications future: Time to act
[9] CDCE (2020), CDCE's Recommendations for the Review of the Copyright Act
[10] The Government of Canada Launches Consultation on a Modern Copyright Framework for Online Intermediaries, News Release, April 14, 2021

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. CDCE's Recommendations concerning the possible accession of Canada to DEPA

DEPA is an agreement covering three countries, New Zealand, Chile and Singapore, also parties to the CPTPP, which applies only to measures "that affect trade in the digital economy" (Article 1.1).

The agreement includes relatively few binding provisions, while the potentially more prescriptive articles do not "create any rights or obligations" between the signatories[11]. Moreover, the provisions of Module 16 provide for a very simple mechanism for amending the DEPA, by written agreement between all parties. These limitations on the scope of the agreement can therefore be easily removed and will not restrict our comments.

3.1. DEPA's cultural exception

DEPA's Module 15 contains the various exceptions granted by the Parties, including a cultural exception in Article 15.1 (4):

> *For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national treasures or specific sites of historical or archaeological value, or to support creative arts of national value.*

Footnote 21 defines the creative arts as follows:

> *"Creative arts" include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative online content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.*

Three conditions for exception have been included in paragraph four of Article 15.1:
"subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade"

We have five problems with this exception. First, there are three conditions attached to it. Canada does not have the habit of conditioning its cultural exemption clause, that is, of accepting that the use of the clause to exclude cultural industries from the scope of its agreements be subject to compliance with certain conditions. This is why we call it an "exception" rather than an "exemption".

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[11] As set out in Annex 1, these provisions are as follows: Article 3.3: Non-Discriminatory Treatment of Digital Products; Article 3.4: Information and Communication Technology Products that Use
Cryptography; Article 4.3: Cross-Border Transfer of Information by Electronic Means; and Article 4.4: Location of Computing Facilities.

Second, the creative arts in question must have national value. This implies that creative arts that do not have such value will not be protected.

Third, the exception is for "measures necessary […] to support the creative arts". We are concerned that the use of the term "necessary" creates uncertainty as to what measures are permitted and opens the door to challenges. Indeed, the necessity test, in WTO jurisprudence for example, implies the respect of several conditions that are sometimes difficult to meet. We also question the scope of the term "support" and wonder whether this would not limit the measures that could be deemed admissible. Consider, for example, measures to promote the creative arts.

Fourth, while the definition of creative arts includes creative online content and expands the families of art covered by the exception compared to the definition of Canadian cultural industries, which is a good thing, it leaves out some of the activities set out in the Canadian definition (such as production, distribution, publication, sale). In short, the definition is both broader and less precise.

Fifth, this clause has never, to our knowledge, been interpreted by a judge. It would therefore be very difficult to provide assurances regarding the limitations we have noted above.

Accordingly, Canada could request that a new paragraph be added to Article 15.1: " This Agreement does not apply to any measure adopted or maintained by Canada relating to cultural industries". This request should include the addition of a footnote containing the Canadian definition of cultural industries.

The evolution of case-law regarding the definition of creative arts as well as the exception language used in DEPA will certainly inform the approach that Canada may undertake to review its definition of cultural industries.

The CDCE is 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, especially 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 cultural 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 traditional definition.

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.

Finally, the definition of digital products in Article 3.1 is the same as that used in the CPTPP and include cultural contents:

> "digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically"

Given this definition and our doubts about the scope of the general exception, it would be important to specifically exclude Canadian cultural industries from the scope of Article 3.3 regarding the non-discriminatory treatment of digital products.

Recommendation 1

That Canada requests that a new paragraph be added to Article 15.1:

> "This Agreement does not apply to any measure adopted or maintained by Canada relating to cultural industries"

As well as the addition of a footnote containing the Canadian definition of cultural industries[12].

Recommendation 2
That Canada requests the addition of a new paragraph to Article 3.3:

> "This Article does not apply to a measure adopted or maintained by Canada relating to cultural industries"

As well as the addition of a footnote containing the Canadian definition of cultural industries[13].

3.2. Other commitments that may have an impact on culture

DEPA includes other provisions that may have an impact on the protection and promotion of the diversity of cultural expressions.

Article 3.4 concerns products using cryptography. Paragraph 5 appears to allow Parties to require service providers to transmit "unencrypted communications". This should allow, for example, a government to require the transmission of information as part of a cultural policy, as in the case of Bill C-10, which seeks to require broadcasting undertakings, including online undertakings, to provide a certain amount of data[14]. The Canadian government should ensure that neither article 3.4 nor any other article of the DEPA prevents it from making such requirements, including the transmission of information resulting from the work of algorithms or other technologies.

Canada should also ensure that Article 3.4 will not create obstacles to the implementation of digital rights management tools, or technological protection measures, that could block the free flow of digital products to protect copyright.

Recommendation 3
Canada should ensure that nothing in DEPA precludes it from establishing requirements for companies to comply with any measure requiring the transmission of information, including the transmission of information resulting from the work of algorithms or other technologies.

Recommendation 4
Canada should also ensure that Article 3.4 does not create barriers to the implementation of digital rights management tools, or technological protection measures, that could block the free flow of digital products to protect copyright.

3.3. An uncertain evolution

In its current state, the other provisions of the agreement do not seem problematic to us. However, we are concerned about the ease with which the agreement can be amended, as it addresses sensitive issues for the cultural sector. We will provide two examples.

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[12] See the definition in CUSMA's section 32.6 .
[13] Idem.
[14] 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.

Article 8.2 addresses the issue of artificial intelligence and other emerging trends and technologies. The need for a framework for AI governance is recognized, but it does not go further. Given the increasing interactions between AI and copyright, states must ensure that copyright protection is provided in the context of the development of artificial intelligence and the increased demand for access to data. Instead, reference is made to "internationally recognized principles or guidelines".

Some provisions of the agreement emphasize the benefits of data sharing, notably to "facilitate the dissemination of information, knowledge, technology, culture and the arts"[15]. The current text does not seem problematic to us. But it is also silent on the pressing issues of data governance and data ownership, while provisions in Module 9 of the DEPA[16] are part of a trend toward data altruism.

This evolutionary aspect is of concern to us, especially since the background paper accompanying this consultation states that " Overall, the DEPA has been designed to complement and support the ongoing WTO negotiations on e-commerce, and to build on the digital economy work underway within Asia-Pacific Economic Cooperation, the Organization for Economic Cooperation and Development, and other international forums"[17].

We are concerned that significant changes could be made to the agreement without the government having to consult with stakeholders or follow the parliamentary mechanisms provided for the ratification of a new trade agreement.

Recommendation 5
That Canada makes a formal commitment to consult with stakeholders on any new commitments for Canada resulting from an amendment to the text of DEPA, and that these amendments be subject to the same process as the ratification of a new trade agreement.

Without going into detail, we will repeat some of the recommendations we have already made with respect to other trade negotiations that identify commitments that Canada should not make should it decide to join DEPA and explore the options for new commitments under that agreement.

Recommendation 6
Canada should not make commitments under DEPA that could adversely 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.

Recommendation 7
There should be nothing to prevent the Canadian government from requiring foreign companies to provide data as part of their public policy obligations.

Recommendation 8
As data and artificial intelligence clauses evolve rapidly, it is imperative that the government consult with the cultural sector if new commitments are to be negotiated.

Recommendation 9
That Canada refrain from agreeing to measures that could prevent it from collecting taxes or other contributions, including those aimed at financing cultural content, from companies engaged in digital

[15] Article 9.4(2) b), Data Innovation
[16] Article 9.5, Open Government Data and the above mentionned
[17] [Background: Canada's possible accession to the Digital Economy Partnership Agreement]

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

Recommendation 10
That nothing in a possible trade agreement affects current and future state-owned companies operating in the cultural sector.

Recommendation 11
That Canada refrains from lowering barriers to foreign ownership of telecommunications companies.

Appendix 1: CDCE Recommendations

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