



Coalition
for the Diversity of
Cultural Expressions

Comments from the Coalition for the Diversity of Cultural Expressions
in the context of the consultation on
A Model Canadian Digital Trade Agreement

Presented to
Services Trade Policy Division (TMS)
Global Affairs Canada

September 13th, 2022

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.

On July 15, 2022, the Government issued a [call for comments](#) on the development of a model Canadian digital trade agreement. The CDCE thanks Global Affairs Canada for holding the current consultation that allows it to communicate its concerns and recommendations on Canada's possible development of a model Canadian digital trade agreement.

Our comments focus on the need for any model digital trade agreement to include a broad exemption for measures intended to support Canadian cultural expression. Absent such an exemption, Canada would be unable to impose measures on digital trade that discriminate in favour of Canadian cultural expression. And given the economic realities of the market, such expression would then be overwhelmed by cultural products and services from other countries. Therefore, a well-worded cultural exemption must be included in any digital trade 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 make specific recommendations regarding the development of this model. We understand that this broad consultation is the beginning of the process towards the development of a model and will follow with great attention the following steps.

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 country 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

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](#)

the presence and availability of local cultural works”³.

In those guidelines, the Conference of Parties also recommends to promote "the consideration of introducing cultural clauses in international bilateral, regional or multilateral agreements, namely provisions that take into account the dual nature of cultural goods and services, including preferential treatment clauses, with particular attention to the status of e-commerce that shall recognize the specificity of cultural goods and services”.

2.3. Why Canadian Cultural Expression need support

Why is it important to support Canadian cultural expression with measures that discriminate in favour of Canadian such expression? After all, some would say, if Canadian expression is popular, surely the market will support it. This question was addressed by the Broadcasting and Telecommunications Legislative Review Panel, which issued its report in January 2020 (emphasis added):

In the last 40 years, Canadian broadcast policy has supported the production of Canadian television drama, although it has never made sense from an economic standpoint. Drama (including scripted comedy) is the most popular genre on television, but it is also the most expensive genre to make.

The Canadian broadcast rights to a US television drama — which may cost \$3-4 million an hour to make and is largely paid for by the US networks — can be purchased for a few hundred thousand dollars. By contrast, a Canadian TV drama in English may cost \$1-3 million an hour to make. But to finance this, the Canadian broadcast network would have to provide a much higher licence fee commitment—one that would exceed any expected ad revenue. The result is that Canadian drama will not be produced by the market unless it is supported by a toolkit of government cultural policy measures.

This example, taken from the audiovisual sector, finds an echo in all cultural disciplines. With the exception of the United States, whose domestic market, influence and philanthropic sector are sufficient to support culture, countries concerned with creating, producing and promoting their talents and their identity must act in support of their culture by adopting different measures. These include both subsidies and regulatory measures, obliging Canadian broadcasters to fund and air Canadian content. Under Bill C-11 these measures would also apply to non-Canadian online businesses.

2.4. 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 exemption⁴, but want to insist: absent such an exemption, cultural support measures might be in breach of provisions requiring non-discriminatory treatment.

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

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.

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 missing⁵.

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. The Article 19.4 of the CUSMA agreement reads as follow :

Article 19.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products. [Footnote 3]
2. This Article does not apply to a subsidy or grant provided by a Party, including a government-supported loan, guarantee, or insurance.

Footnote 3: For greater certainty, to the extent that a digital product of a non-Party is a “like digital product,” it will qualify as an “other like digital product” for the purposes of Article 19.4.1 (Non-Discriminatory Treatment of Digital Products).

This result is all the more encouraging as the United States has sought from Canada cultural concessions, specifically in the chapter on electronic commerce. In the absence of the cultural exemption, non-Canadian digital programming services made subject to Canadian content rules or other requirements to implement cultural policy could argue that they have been subject to discriminatory treatment. Thus a cultural exemption is important.

It goes without saying that for the establishment of a model, the CDCE recommends from the outset to adopt an approach consistent with that adopted for the CUSMA .

2.5. The definition of the Canadian exemption clause

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 services⁶. 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.

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 its [2019 Comments in the Consultations on Holding Negotiations on Possible CPTPP Accessions](#).

⁶ See the definition in [CUSMA's section 32.6](#)

That said, Canada may need to revise this definition. The CDCE is actively considering this issue and, at this stage, is neither in favor nor against such a revision.

However, the CDCE has significant reservations. If the current definition of cultural industries were to be reviewed, it would be essential that it encompass at least what is currently covered by the traditional Canadian definition.

Canada should also be sure to clarify that the new definition does not invalidate or limit the scope of the old definition, even with respect to digital trade.

We insist on the importance of consulting the representatives of the cultural sector in the event that a new definition is discussed within the framework of these negotiations.

2.6 The importance of protecting cultural sovereignty in the field of digital trade

The CDCE has made numerous contributions over the last years⁷ 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 Panel⁸ for a full explanation, as well as to our recommendations for the revision of the *Copyright Act*⁹.

Canada began taking decisive action in 2020 to undertake legislative revisions to address these findings. Bill C-11, currently studied by the Senate, aims to modernize the *Broadcasting Act* so that online undertakings - both Canadian and non-Canadian - contribute to the Canadian system.

The recent 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 in the coming months.

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 development of a model Canadian digital trade agreement

Recommendation 1

That Canada includes a paragraph in any Canadian model digital trade agreement:

“This Agreement does not apply to any measure adopted or maintained by Canada

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

relating to cultural industries.”

The model agreement should also include a footnote containing the Canadian definition of cultural industries as found in CUSMA, section 32.6

Recommendation 2

Canada should ensure that nothing in any Canadian model digital trade agreement 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 3

Canada should also ensure that any Canadian model digital trade agreement 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.

Recommendation 4

Canada should not make commitments under any Canadian model digital trade agreement 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 5

There should be nothing in any Canadian model digital trade agreement to prevent the Canadian government from requiring foreign companies to provide data as part of their public policy obligations.

Recommendation 6

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 7

That Canada refrain from including measures in any Canadian model digital trade agreement that could prevent it from collecting taxes or other contributions, including those aimed at financing cultural content, from companies engaged in digital activities.

Recommendation 8

That in any Canadian model digital trade agreement, Canada it protects its authority to define the conditions of access to any funding for culture.

Recommendation 9

That nothing in any Canadian model digital trade agreement should affect current and future state-owned companies operating in the cultural sector.