Coalition
for the Diversity of
Cultural Expressions

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Taking into account the specific nature of culture in the negotiation and implementation of e-commerce commitments

This is not an account but notes on elements that are particularly relevant to the CDCE's concerns.

Richard Ouellet, Université Laval, specialist in economic integration terms

E-commerce trading models are evolving. Some, such as the Comprehensive and Economic and Trade Agreement (CETA – between Canada and the European Union), are minimal and contain few commitments. In recent years, agreements such as the Canada, United States and Mexico Agreement (CUSMA) and the Comprehensive and Progressive Transpacific Partnership (CPTPP) have moved beyond more general, non-binding provisions to incorporate clauses and guidelines with more binding language.

The United States and Japan have signed an agreement dealing exclusively with the issue, with general principles and exceptions. The scope is very broad (including financial services, as life insurance). The United States Trade Representative (USTR) said that it would make this its standard.

The provisions contained therein:

- No tariffs, but nothing that prevents the imposition of taxes
- Non-discriminatory treatment of digital products (domestic vs. international and digital vs. non-digital)
- United Nations Commission on International Trade Law (UNCITRAL) Model Law
- Consumer protection and privacy
- Cross-border transfer rules that permit the transfer of data, including personal information, when it is a commercial activity
- Localization of installations: no requirement for servers in the national territory
- No requirement on source code transfer
- No requirement to disclose encryption methods (US-Japan): private individuals do not have to disclose their method to the government.

Christine Roy, Deputy Director, Services Trade Policy Division (and Negotiator), Global Affairs Canada (GAC)

Her division does not negotiate culture. It is the management, that deals with the institutional chapter, with the legal team, working with them and especially with PCH. But when the other side doesn't want a blanket exemption, that's up to them because they're dealing with Annexes 1 and 2. In the case of the CUSMA, the US did not want a blanket exemption on culture, but rather the CPTPP model (with Schedule 2), so there was a ball game.

GAC is making ongoing consultation efforts.

The current process on e-commerce at the World Trade Organization (WTO) is called the WTO Joint Statement on Electronic Commerce Initiative.

For the first time in 20 years, the timing is right. Negotiations started in March 2018, not multilateral, but plurilateral (82 participants). They are held at the WTO, but they are not official WTO negotiations. The WTO Secretariat participates as an observer.

The objective is to provide a framework for e-commerce to make it more open, transparent, predictable and to include the protection of consumers. Each government comes with its own ambitions, and needs flexibility in certain areas.

GAC has made analyses, submitted text proposals, and two discussion papers. **They know they are going to need flexibility on cultural issues.** Canada wants an ambitious agreement, wants developing countries at the table. Let it be more inclusive, let it help small and medium enterprises.

GAC wants to report frequently on the website. They could publish a summary. The negotiating mandate comes from the cabinet. GAC has worked with cybersecurity experts and PCH. The mandate will guide them, it includes directions on consumer and privacy protection, localization of facilities, cross-border transfers, no tariffs, market access. Canada's proposal is based on the CUSMA definition of electronic products.

Challenges arise in knowing how to combine market access with these clauses, including cultural clauses, at the WTO? It is not obvious, Canada is more comfortable in bilateral negotiations.

Three meetings are scheduled in the short term to make progress, before the WTO Ministerial in June.

The architecture of the agreement, the modalities and the rules of the negotiations are not yet developed. For the time being, little is known about the linkage of this possible agreement with the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade (GATT), whether it will be negotiated by negative or positive list.

How do we see cultural issues in the future? Technology has played a big role in the cultural sector. Greater than that of free trade or e-commerce.

The cultural exemption alone is not enough for the cultural sector. Elements elsewhere in an agreement can strengthen it. For example, the trade agreement also plays a role for companies that have public support and want to go abroad. Several chapters assist exports, protect investments, allow cross-border data flow, facilitate the entry of business people (she gave the example of RodeoFX, which has opened an office in Munich).

They try to get a balance, which is not easy but possible to achieve, between offensive interests and cultural exemption to preserve diversity. She asked what is the future for the cultural exemption? Should it be left as it is? Should it be modernized? Should we use more of the other chapters to make it simpler?

Canada does not yet have the information necessary to consult us effectively, but as soon as it is a little more structured, they will.

Finally, it was noted that much progress had been made in the plurilateral negotiations of the Trade in Services Agreement (TISA), with commitments that go beyond the GATS. The negotiations are suspended until further notice. The GATS covered all four modes of service delivery, while the negotiations on e-commerce did not cover all modes.

Mira Burri, Professor, University of Lucerne

The new digital barriers to trade, which the new trade agreements want to frame, concern data localization, privacy, intellectual protection, cybersecurity and censorship.

Concerning the WTO, China wants a restrictive interpretation for the agreement on e-commerce, to facilitate web-based purchasing, but not all other disciplines. Several developing countries are making commitments on this issue. It is not yet clear whether the alignment chosen will be the US or the EU model.

She is leading a project called Trade agreement provisions on e-commerce and data flows (TAPED). It is a database containing the digital and data provisions in 346 agreements signed between 2000 and 2019.

The CPTPP offers a model, including clauses that prevent data protectionism, but new agreements go further. There are no definitions of data flows in the agreements, but all new agreements have clauses on this in various chapters, including on transborder data flows. Clauses prohibiting requirements for data localization are becoming more widespread, which can be problematic for culture.

The CUSMA innovates by integrating algorithms and creates an environment to foster the development of Artificial Intelligence (AI). It contains some positive principles, references to international standards, General Data Protection Regulation (GDPR) style provisions. But also rules on Interactive computer systems (ICS) which would be very problematic because it limits the responsibility of platforms like Youtube. For example, this clause would be incompatible with the Audiovisual Media Services Directive.

There is generally no awareness of cultural objectives, although exceptions can be mentioned. The agreement between Chile, New Zealand and Singapore (DEPA) goes the furthest, but also contains more nuanced standards that will maintain a domestic regulatory space and measures that extend the cultural exemption to contemporary cultural expressions in the general exceptions.

Céline Castets-Renard, University of Ottawa, specialist in electronic commerce (but not culture)

We should refer to agreements on digital activities; e-commerce refers more to online shopping, although this is still relevant, but the term covers less well free online services, which sell advertising space based on user profiles.

There is a divide between European and other, particularly US, positions on the issue of personal data. European states have been adopting legislation on the subject since the 1970s, the latest being the General GDPR, adopted in 2016. The United States favours the free circulation of personal data. This is a stumbling block for any EU-US negotiation, as the GDPR requires an adequate level of protection in the other country for transborder data flows, which is currently not the case in the US (although there is a fix with the Privacy Shield certification).

Although Canada does not qualify in this respect, it still benefits from the recognition obtained in 2001 for the private actors' data regime. However, Europe will try to impose its model through parallel agreements, as well as the adoption of a standard GDPR regime in order to be able to deal with the EU. Canada would actively consider this. The US is also trying to impose its model. However, it is noted that a footnote in Chapter 19 of the CUSMA states that each party retains its system.

The provisions preventing national siting obligations for data centre and cloud computing facilities put forward by the US are linked to the Patriot Act. The US government can access the computers of all US companies around the world. While Canada was beginning to promote the establishment of cloud computing centres in Montreal, these provisions were added to the CUSMA, with a potential impact on digital sovereignty.

Provisions on source code appeared in the CUSMA (art. 19.16). They prevent the disclosure of source code, or of how algorithms are constructed, the data they have used, etc., from being required. This could be contrary to a strategy of data protection, transparency and development of the responsible AI.

The provisions on transborder data flows could prevent the adoption of legislation similar to the Audiovisual Media Services Directive. In the CUSMA, without the cultural exemption, these commitments could be contrary to obligations of discoverability.

Other provisions requiring particular attention are interactive computer systems and Safe Harbor-type provisions.

Destiny Tchéouali, professor at UQAM

Describes the current process affecting the cultural sector using the terms "plateformisation" and "numérimorphose"[1]. The main threats are market concentration, lack of statistics, fair remuneration of creators, development of AI over which the public sector could lose control.

Local content can be a differentiating factor for platforms, who are not necessarily resistant. For example, Netflix translates Nollywood films into French in order to carve out a place for itself on the French-speaking African market.

Gilbert Gagné, Professor at Bishop's University

Almost all states share Canada's concern and support cultural exemption, but to a lesser degree. Exceptions can be found in almost all trade agreements, for example on the ownership of cultural enterprises. About half of the agreements have exceptions to favour domestic content. There are fewer exceptions on digital. There is a lot of borrowing of clauses between states. He identifies three types of exceptions.

The cultural exemption under the Canadian model relates more to services. It comes with a retaliation clause in the case of the CUSMA, but it's scope is rather political. If a cultural measure is non-discriminatory, it may be acceptable under the CUSMA.

Broad exceptions are a second model. For example, e-commerce rules are often subject to the services and investment exceptions. Or the provisions do not apply to broadcasting and to subsidies, investment and services. In the CETA, cultural industries are exempted from certain chapters (subsidies, investment, services, domestic regulations and government procurement). In the CPTPP, cultural sectors and measures are exempted from certain chapters (goods, services, electronic commerce, Crown corporations, government procurement, subsidies). The EU-Japan agreement contains an exception for e-commerce and market access.

The third model is that of specific exceptions. The US has the highest ambitions for liberalisation. Australia, Colombia and Korea have obtained very limited cultural reserves on digital with the US. Korea has replicated these reserves in other agreements, although it could have sought better protection with other partners.

Elements mentioned during the discussions:

Véronique Guèvremont

It is unclear whether the definition of cultural industries in the cultural exemption is compatible, in legal terms, with the definition of digital products.

Amy Awad (Canadian Heritage)

[1] Would translate as platformization and digimorphosis, or e-morphosis.

In the CUSMA, the provisions on interactive computer systems are synonymous with the Safe Harbor type. It specifies that they apply only to civil liability lawsuits, copyright is excluded from the clauses.

With regard to the cultural exemption, she also considers that the panel, even if its mandate is limited, could look into the question, for example, of the similarity of products. Canada could use the state to state dispute settlement mechanism provided for in the agreement (she will, however, look further into this issue and get back to me on this point).

She also mentions the limits to the protections afforded on the issue of source codes and states that the provisions would not prevent regulatory authorities from having access to them.

Regarding the definition, they are confident in its ability to cover digital products. They fear that changing the definition would invalidate the application of the exemption based on the traditional definition. It is broad enough to cover new realities, for example they consider video games to be videos, and they had never anticipated that this could become an issue.

Richard Ouellet

The definition could be rewritten by adding that the definition specifies the old definitions used. Canada is better equipped with the 2005 Convention to respond to criticisms

Christine Roy (GAC)

People at GAC are looking at how Yale recommendations would interact with trade commitments.