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Canada–Asia-Pacific Trade Consultations
Global Affairs Canada
Trade Policy and Negotiations, Asia Division (TCA)
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ACCESSION OF NEW ECONOMIES TO THE CPTPP GLOBAL AFFAIRS PUBLIC CONSULTATION PROCESS

Section 1: INTRODUCTION AND SUMMARY

ACTRA welcomes this opportunity to contribute to the public consultation process concerning the conditions under which new economies may become Parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

ACTRA (Alliance of Canadian Cinema, Television and Radio Artists) brings to this process the perspective of over 25,000 professional performers working in English-language recorded media in Canada. For over 75 years, ACTRA has represented performers living and working in every corner of the country who are pivotal to bringing Canadian stories to life in film, television, radio, sound recording and digital media.

From its earliest days, ACTRA has actively contributed to public policy development processes to ensure Canadians are able to see our stories, our lives and our perspectives reflected in arts and cultural expressions, including those shown on our screens. For ACTRA members, telling Canadian stories is not only our livelihood, it's our passion. Canada has an open market for cultural expressions from other countries and our policies are not exclusionary. Rather, they are designed to ensure there is an adequate supply of high-quality Canadian alternatives in the mix. ACTRA supports this approach.

Over the decades, Canada has developed comprehensive cultural policies in every cultural sector, and our successes in television, in music and in literature are a direct consequence of these policies. While funding for artists and producers of cultural content is a core component of the policy toolkit, structural measures, such as content rules and ownership restrictions, are even more powerful because they are

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not subject to the current state of public finances nor the political whims of the day. Public cultural institutions are also important to our ability to tell Canadian stories in every medium.

Concurrently with the emergence of digital technologies that have fundamentally changed how cultural expressions are produced and distributed, Canada's cultural policymaking has faced pressure, and been restricted and narrowed in bilateral and multilateral trade agreements. *Prima facie*, many structural cultural policies violate "principles" of "free" trade, such as National Treatment, Most-Favoured Nation Treatment, prohibitions on performance requirements, and others. State-owned Enterprises are increasingly covered in agreements and required to operate in accordance with commercial principles. And we have agreed, formally and informally, to change a number of specific cultural policies in the negotiating processes.

Canada's cultural policies remain essential, and ACTRA believes they need to be wielded in the digital space if we are to continue to see our stories on all of our screens. We are working hard to achieve this objective. Simultaneously, ACTRA has also advocated to ensure that Canada's bilateral and multilateral trade and investment agreements do not restrict our right to develop and implement whatever policies Canadians need. ACTRA participated actively in the campaign that led to the adoption of the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* in 2005. The Convention seeks to preserve the sovereign right of states to support their own artists and cultural producers.

With respect to the current process, ACTRA notes that we are members of the Coalition for the Diversity of Cultural Expressions and we endorse the submission CDCE has filed. ACTRA also endorses the submission filed by Garry Neil, President of Neil Craig Associates. These two submissions highlight:

1. The cultural provisions of CPTPP do not constitute a broad cultural exemption. Therefore, our cultural sovereignty is put at risk, particularly in relation to implementing policies which can ensure the production and discoverability of a broad range of high quality Canadian content in the digital environment.
2. The government should use every opportunity, including this accession process as appropriate, to transform the CPTPP cultural provisions into a comprehensive cultural exemption.
3. Canada should require that each state seeking to join CPTPP execute a cultural Side Letter with Canada as a precondition for accession. As a new Party can be accepted into CPTPP only if all existing Parties agree (more technically, in the absence of opposition of any of them), Canada can block the entry of any new Party unless there is a satisfactory agreement. This Side Letter should explicitly provide that, notwithstanding the CPTPP provisions, the relationship between them with respect to the cultural industries or cultural expressions shall be governed exclusively by:
 - a) the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* for those states which are Parties to it, or;
 - b) NAFTA 2019 (United States-Mexico-Canada Agreement) for the United States, or;
 - c) analogous provisions for any state that is not Party to the Convention or to NAFTA 2019.

Since it endorses the detailed submissions of CDCE and Mr. Neil, in the next sections ACTRA will provide only a summary of its views. Additional analysis and recommendations about Canada's trade and investment agreements can also be found in previous ACTRA submissions, most recently the April 29, 2019 submission to Global Affairs on the possible WTO E-commerce negotiations.

Section 2: CULTURE AND TRADE AGREEMENTS

Beginning with the 1987 Canada-United States Free Trade Agreement (CUSFTA) and continuing to the negotiation of the Comprehensive Economic and Trade Agreement (CETA) with the European Union, Canada's approach in trade negotiations had been to obtain a broad exemption for the cultural industries and to define them as we did in 1987. While the formal and informal agreements to change certain policies in some negotiations, the antiquated definition, and CUSFTA's notwithstanding clause authorizing U.S. commercial retaliation against cultural policy measures are all problematic, overall this approach has been reasonably effective.

CETA's approach was new, but the commitment of both the EU and Canada to cultural sovereignty means that agreement provisions are also reasonably effective in securing this sovereignty. CETA has strong preamble provisions, including support for the UNESCO Convention, the "right to regulate" includes for the purpose of promoting and protecting the diversity of cultural expressions, and **EU and Canada have mutually exempted culture** ("cultural industries" for Canada and "audiovisual services" for the EU) from certain chapters.

CPTPP does not have a cultural exemption

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership is an agreement that incorporates the provision of the Trans-Pacific Partnership Agreement (TPP) by reference. The 11 Parties remaining after the United States withdrew from TPP agreed to a new preamble, to "suspend" 22 TPP provisions and to make changes in the institutional arrangements necessitated by the U.S. withdrawal.

The mechanism Canada uses to try to preserve our cultural policy space in CPTPP-TPP is to **list existing non-conforming measures and to take a reservation for cultural industries against the obligations in specified chapters**. In international trade law, such provisions are subject to limitations. Generally, a state may only maintain existing non-conforming measures or make them weaker. There is also an assumption that non-conforming measures and reservations eventually will be eliminated since by definition they are contrary to liberalization commitments. While Canada's CPTPP reservations seek to preserve future policy space for the cultural industries, this could be problematic since a reservation is taken only by one Party, whereas an exemption is mutually agreed by both or all Parties, as we see most clearly with CETA. Finally, Canada's reservation does not apply to all measures that may affect the cultural industries. Rather, these measures must also have "the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content." While this cultural purpose clause may, on its face, seem benign, any qualification contemplates that a particular measure could fall outside and this could lead to a dispute.

Not only did Canada negotiate very weak protections, our own reservations limited future policy options by committing they would neither "discriminate against foreign services" nor "restrict access to foreign online audiovisual content." What Canada achieved in the final hours of CPTPP negotiations were Side Letters with each partner country removing these limitations on Canada's own reservations.

Importantly, **Canada did not take a reservation against the Electronic Commerce Chapter**. There are important considerations and some degree of exception in Chapter 14. The key obligation is: "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.” The Chapter states it does not apply to subsidies or grants, nor to broadcasting. This establishes an exception for these activities and this sector. While the Chapter prohibits imposition of customs duties on cross-border electronic transmissions, it provides this “shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.”

There is no doubt that **CPTPP provides the weakest protection for Canadian culture of any of the bilateral and multilateral trade and investment agreements entered into by Canada**. We have listed non-conforming measures and taken reservations rather than having a broad cultural exemption. Further, “broadcasting” is a term that is narrow, undefined and could be problematic as technology continues to develop. While it presumably would cover policies related to Netflix and other foreign OTT services (since they define themselves as film/television program suppliers), it would definitely not cover measures related to publishing, performing arts, visual arts or crafts, and may not apply to music. Cultural expressions in all of these sectors are increasingly digitally-based.

Section 3: ACCESSION TO CPTPP

Given the challenges to Canadian cultural policymaking presented by the Agreement and the 11th hour deal to execute a Side Letter on cultural industries with each other Party when the TPP became CPTPP, the critical issue for culture in the accession process is the nature of the Side Letter that each prospective Party to CPTPP will be asked to sign.

Why use the UNESCO Convention for states seeking to join CPTPP?

Adopted in 2005, the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* came into force in 2007. There are 145 Parties to the Convention.

The Convention is an important instrument which recognizes the sovereign right of states to maintain, adopt and implement cultural policies. This right is acknowledged in the Preamble, Guiding Principles and in the core Rights and Obligations. It confirms that cultural goods and services have both a cultural and commercial value. The scope of the Convention is very broad as it applies to the policies and measures adopted by the Parties “related to” the protection and promotion of the diversity of cultural expressions. Under Article 21, the Parties commit to “undertake to promote the objectives and principles of this Convention in other international forums (sic).”

Why use NAFTA 2019 for the United States?

The United States was one of only two states to vote against the UNESCO Convention and it is not a Party. Importantly in international law, NAFTA 2019 is the most contemporary agreement the U.S. and Canada have concluded with respect to cultural industries. And fortunately, Canada’s cultural exemption has been strengthened in it.

Previously, the exemption provided that Canada’s relationship with the United States with respect to the cultural industries was covered by CUSFTA, and our relationship with any other Party would be identical. In NAFTA 2019, there is a direct and explicit cultural exemption from the entire agreement, including the chapter on Digital Trade. It does not require that a policy have a cultural purpose.

While NAFTA 2019 retains the “notwithstanding” clause, it allows Parties to resolve disputes if there is retaliation against a Canadian cultural policy measure. A panel may be established, but it can only make a finding about “whether an action to which another Party responds is a measure adopted or maintained with respect to a cultural industry for purposes of this Article,” and whether the retaliatory action is of “equivalent commercial effect.”

Section 4: RECOMMENDATIONS

The negotiations that could begin to allow new partners to join the CPTPP represent an opportunity for Canada to further improve the agreement by increasing the protection to its culture, which is why ACTRA recommends:

1. The government should use every opportunity, including this accession process as appropriate, to transform the CPTPP cultural provisions into a comprehensive cultural exemption; and
2. Canada should require that each state seeking to join CPTPP execute a cultural Side Letter with Canada as a precondition for accession. As a new Party can be accepted into CPTPP only if all existing Parties agree (more technically, in the absence of opposition of any of them), Canada can block the entry of any new Party unless there is a satisfactory agreement.

This Side Letter should explicitly provide that, notwithstanding the CPTPP provisions, the relationship between them with respect to the cultural industries or cultural expressions shall be governed exclusively by:

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Respectfully,



Marie Kelly
Executive Director
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