Confidential

The Proposed Canada-European Union Comprehensive Economic and Trade Agreement

A Note on the Potential Impact on Canada's Cultural Policies

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June 29, 2010

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Introduction

This memorandum addresses the potential impact of the proposed Canada–EU Comprehensive Economic and Trade Agreement (CETA) on Canada's cultural policies. Negotiations for this agreement were first announced at a Canada-EU summit in May 2009.

The European Union (EU) has 27 member states and is the world's largest single market, foreign investor and trader. As an integrated block, the EU is Canada's second largest trading partner in goods and services. In 2008, Canadian goods and services exports to the EU totaled $52.2 billion, and imports from the EU amounted to $62.4 billion.

Status of Current Negotiations

The negotiations for the Canada-EU CETA are moving on a tight schedule. Last December, the parties made formal "requests" to each other for liberalized trade rules in particular sectors. Progress has also been made in mapping out the general terms of an agreement.[1] By the end of this year, the parties are expected to make formal "offers" in response to these requests. There is a negotiating meeting between Canada and the EU planned for Brussels in July 2010, then a meeting in Ottawa in October 2010. If all goes well, the parties are hopeful they may be able to finalize a deal sometime in 2011.

The Chief Trade Negotiator for Canada on this agreement is Steve Verheul, working out of the Department of Foreign Affairs and International Trade in Ottawa. His number is 613 944-5880. The key official at the Department of Canadian Heritage is René Bouchard at 819 997-9370.

Because of the importance of this agreement for matters under provincial jurisdiction, the provinces have also been brought into the process. Quebec has appointed former premier Pierre-Marc Johnson to be its negotiator in this regard. Ivan Bernier, a former dean of the Faculty of Law at Laval University, and an expert on trade law and cultural policy who was heavily involved in the process leading up to the UNESCO Cultural Diversity Convention in 2005, is also advising the Quebec government.

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[1] A copy of the draft consolidated text as of January 13, 2010, was leaked and then published on April 29, 2010, by the "Trade Justice Network" a group of environmental, labour, farmer, cultural and social justice organizations that have come together to challenge the CETA negotiations. For details, and links to the draft text, see www.canadians.org/trade/issues/EU/index.html.

In a report in the current issue of *Maclean's*,[2] it is pointed out that "anything in the draft text should be taken with a mountain of salt." An EU insider is quoted as saying that "the real horse trading has not even started."

EU Requests

The focus of the European pressure for trade liberalization with Canada has reportedly come in three areas: government procurement, agriculture, and intellectual property rights.[3] Government procurement issues are particularly sensitive because the provinces are responsible for 75% of state contracts, and the provinces therefore need to be part of the negotiations. In regard to agriculture, the Conservative government has sought to assure both the dairy and poultry industries that supply management is off the table.

In regard to intellectual property rights, the EU has sought protection for geographical indicators for certain wines and agricultural products and has expressed concern with Canada's lax copyright enforcement, although the recent introduction of Bill C-32 may allay some of these concerns.

Treatment of Cultural Industries in Other Agreements

Before analyzing the Canada-EU proposed agreement in regard to cultural policies, it may be useful to review our current position.

The first major multilateral treaty dealing with trade was signed in 1947. Called the *General Agreement on Tariffs and Trade* (GATT), it focused only on trade in goods, not services, and contained a number of key principles:

- *tariff reduction* (reducing customs duties on the importation of goods)
- *most favoured nation* (treating imported goods from one country no differently than like products from another) and
- *national treatment* (treating imported goods no differently than like products of national origin in respect to laws affecting their internal sale, distribution or use).

Trade in cultural products back in 1947 was a tiny fraction of what it has become. However, a number of European countries were concerned with the dominance of Hollywood films and had imposed quotas for local films in their cinemas. Such quotas would be inconsistent with the principle of "national treatment" and so Article IV was added to the GATT permitting countries to reserve screen time for "films of national origin." Only one other provision in the GATT addressed cultural products. Article XX stipulated that nothing in the agreement prevented the enforcement of measures "necessary to protect public morals" or "imposed for the protection of national treasures of artistic, historic or

[2] Thomas Watson, "Wanted: free trade activists", *Maclean's,* July 5, 2010, pp.58-59.
[3] Jonathan Montpetit, "Can-E trade talks look good but face 3 potential sticking points: Spanish envoy," *Winnipeg Free Press*, June 1, 2010.

archaeological value." But there was no "cultural exception". The GATT therefore applied – and continues to apply – to trade in cultural *goods* such as books, newspapers, magazines, sound recordings and film (subject only to the provision allowing domestic screen quotas in theatres).

However, the GATT does not apply directly to cultural *services* such as film production, the performing arts, broadcasting, or the dissemination of cultural works by satellite or cable. In the 1960s, the United States tried unsuccessfully to argue that the national treatment principle in the GATT should apply to strike down European scheduling quotas for local content in television. Although it did not succeed, the issue did not go away. In the 1970s, Canada introduced a number of tax and regulatory measures to reduce the adverse impact on its domestic broadcasting system of the U.S. television stations along the Canada-U.S. border. The U.S. border stations then commenced what has been called the "border broadcasting war," attacking the Canadian measures in the Canadian courts, and seeking retaliation by U.S. regulators and legislators. While their efforts largely failed, the dispute underlined the vulnerable state of the Canadian cultural sector in the face of threatened trade retaliation.

In 1988, Canada and the United States negotiated a bilateral free trade agreement. The *Canada-U.S. Free Trade Agreement* contained a "cultural exemption," although there were also a number of concessions given to the U.S. in the cultural field.[4] When the Agreement was expanded to include Mexico in 1994 with the *North American Free Trade Agreement* (NAFTA), Canada maintained its cultural exemption.

By 1995, however, the move towards free trade took a major step forward with the completion of the Uruguay Round of multilateral trade negotiations. The agreements entered into created the World Trade Organization (WTO), set up a binding dispute resolution process, reconfirmed the terms of the GATT, and added a new *General Agreement on Trade in Services* (GATS). In the latter agreement, a number of European countries led by France had pressed for a "cultural exception." The United States, intent on rolling back the television broadcast quotas in Europe, refused to countenance this approach. In the end, the GATS was silent on the matter of cultural services. However, the national treatment provisions in the GATS only applied to those service sectors for which each country made affirmative commitments. To the dismay of the Motion Picture Association of America, the United States agreed to go forward with the agreement even though almost all countries refrained from making national treatment commitments in regard to audiovisual services. However, the GATS also called for future negotiating rounds in which further trade liberalization would be expected.

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[4] Canada agreed to zero-rate its customs tariffs on imported cultural goods (copies of books, records, magazines, films and tapes). It also agreed to require cable distributors to pay royalties for the retransmission of distant signals, as well as agreeing to certain investment disciplines in regard to its book publishing policy. Canada also agreed that if it took any measures that would, in the absence of the exemption, breach other terms of the FTA, the United States would be entitled to retaliate with measures of "equivalent commercial effect". It should be noted, however, that Canada made no national treatment commitments in the audiovisual services sector in the 1988 FTA, Properly read, it is therefore free to introduce new measures affecting such services, including broadcasting, without triggering a right of retaliation.

The Uruguay Round gave teeth to the GATT and within a year, Canada found itself on the defence in a U.S. complaint to the WTO concerning its measures to protect its domestic magazine industry. For decades, Canada had protected Canadian magazines from competition from foreign "split-run" magazines by prohibiting their importation. (A "split-run" magazine would be a Canadian edition of a foreign magazine, using editorial matter that had already been amortized in the foreign market, and stripping in Canadian ads. Canada freely allowed foreign periodicals into the country provided they did not try to "cream-skim" the Canadian ad market with split-run editions.) In 1993, Time Warner had proposed to avoid the customs tariff on a new split-run magazine by sending the page proofs by satellite to a printing firm in Canada. After Canada introduced legislation to tax away any profits from such activities, the United States brought its complaint. In the end, the WTO sided with the United States, ruling that Canada's measures breached the provisions of the GATT. Canadian arguments that U.S. magazines were not "like products" to Canadian magazines fell on deaf ears. Following its defeat, Canada introduced a new services-oriented measure that it felt would pass scrutiny at the WTO, since it would fall under GATS not GATT. However, the United States threatened immediate trade retaliation and the two countries eventually settled their differences in mid-1999, with Canada agreeing to allow split-run editions of foreign magazines with up to 18% Canadian ads.

Following the Canada-US FTA precedent, Canada has sought and obtained a cultural exemption clause in all of its bilateral free trade agreements, but without the retaliation clause. FTAs. A good example is the *Canada-Colombia Free Trade Agreement*, which was recently approved in the Canadian House of Commons. Article 2206 of this agreement reads as follows:

> Nothing in this Agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article 203 (National Treatment and Market Access for Goods – Tariff Elimination).

Article 2208 in the *Canada-Colombia FTA* defines the term "cultural industries" as follows:

> **cultural industries** means persons engaged in any of 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;
>
> (f) production and presentation of performing arts;

(g) production and exhibition of visual arts; or
(h) design, production, distribution and sale of handicrafts.

This is in fact a wider definition than appears in the *Canada-US FTA*, which does not include the last three paragraphs. It is also wider than the definition of "cultural business" in subsection 14.1(6) of the *Investment Canada Act*, which reads as follows:

> "cultural business" means a Canadian business that carries on any of the following activities, namely,
> (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,
> (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) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services;…

Reference should also be made to the adoption in October 2005 of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. This Convention has now been ratified by some 110 countries, including Canada and the member countries of the EU, but not the United States. The UNESCO Convention declares 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." A key objective of the Convention is "to reaffirm the sovereign right of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expression in their territory." At the same time, the Convention notes that cultural diversity can be protected and promoted only if freedom of expression, information and communication are guaranteed.

Article 6 elaborates on the kinds of measures that each Party may adopt to protect and promote the diversity of cultural expression. These include measures that "provide opportunities for domestic cultural activities, goods and services among those available within the national territory," measures to aid "artists and other cultural professionals," measures to provide access to the means of production and distribution for "domestic independent cultural industries," and "measures aimed at enhancing diversity of the media, including through public service broadcasting."

While the word "trade" is not to be found in the UNESCO Convention, it is obvious that many measures endorsed by the Convention would be inconsistent with the national treatment and most favoured nation principles set out in trade agreements. So a crucial question is how does the Convention interrelate to other trade agreements, and in particular

to the WTO agreements? The answer is found in Article 20 of the Convention, which was the subject of much heated debate.

Article 20, paragraph 2, states that "Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties." So as it stands, the Convention does not roll back existing obligations that countries may have under WTO or other trade agreements. However, Article 20, paragraph 1, states that "without subordinating this Convention to any other treaty, parties shall foster mutual supportiveness" between this Convention and other treaties, and when interpreting and applying the other treaties or when entering into other international obligations, parties "shall take into account the relevant provisions of this Convention." Accordingly, the Convention would appear to stop any *future* WTO agreements that would be inconsistent with cultural policies. It would also provide an avenue to interpret existing trade obligations—at least where they are ambiguous--in a way that recognizes the specificity of cultural goods and services.

The Canadian and European Positions on a Cultural Exception

In the leaked draft text of the *Canada-EU CETA*, Canada has proposed a cultural exception in the following terms:

> [This Agreement does not apply to a measure adopted or maintained by a Party with respect to a person engaged in a cultural industry except as specifically provided in Article X (National Treatment and Market Access for Goods – Tariff Elimination).]

Canada has proposed that the term "person engaged in a cultural industry" be defined as follows:

> [**Person engaged in a 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, except when printing or typesetting any of the foregoing is the only activity;
>
> (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;]

The following is the commentary by the European Commission on this proposed exception:

> [EC comment: this exception seems very broad. We understand it as allowing for example IPR infringement, discrimination or complete import or sales ban of foreign cultural products. Is this the intention? In any event, the clause should explicitly state that it is without prejudice to the parties' rights and obligations under the WTO]

The fact that these clauses appear in square brackets indicates lack of agreement.

To evaluate the impact of the Canadian proposal for an exception, it is necessary to review the other provisions of the draft CETA, since these might apply to the cultural sector if the exception was removed or cut back. This is not an easy exercise, since the leaked text is 367 pages long. Moreover, that text has alternative EU and Canadian text for a number of chapters, and the proposed trade or investment obligations are often tied to specific sectoral commitments to go in annexes which are not yet provided.

Within that framework, however, some preliminary observations can be made.

First, the EU would explicitly exempt audio-visual services from any services and investment obligations. This would presumably include broadcasting. However, under the EU approach, no such exception is proposed for other cultural sectors, e.g. book, magazine, and newspaper publishing, retailing of books, and sound recordings. Absent a general cultural exemption, therefore, Canada's existing investment measures in these sectors could be offside unless those sectors were excluded from the list of "covered sectors" or the measures were specifically identified and grandfathered.

The measures that would need to be carefully examined in this regard include Canada's investment policies regarding book and magazine publishing, book retailing, and its discriminatory tax regime for newspaper publishing. The application of the *Foreign Publishers Advertising Services Act*, S.C. 1999, c. 23, to split-run magazines would also need to reviewed to ensure that it is not overridden by the provisions on the importation of goods. However, Canada's investment rules for film distribution may not be as vulnerable, assuming the sector falls under audio-visual services which the EU appears prepared to exempt.[5] Nor would Canada's investment rules for broadcasting undertakings be affected.

In looking at these sectors, it is worth noting that the European Union, unlike the United States, does not have a number of large multinational enterprises adversely affected by Canadian cultural policies. The only truly large player is German-based Bertelsmann, which owns the world's largest book publishing firm (including Random House, Doubleday and Knopf) as well as RTL, the largest privately owned broadcaster in Europe. Its publishing investments in Canada have been grandfathered, however, so it is not likely to be a *demandeur*.

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[5] In that connection, it should be recalled that in the late 1990s, Polygram – a Dutch-British firm -- caused the EC to bring a complaint against Canada's film distribution policies, arguing that the grandfathering of the Hollywood film distributors in 1987 by Canada violated the MFN provisions of GATT. The complaint fell to the ground when Polygram's parent decided to exit the film business.

A key issue in any discussion of impact on cultural policies is the effect of the agreement on subsidies to the cultural sector. Canada currently subscribes to the WTO *Agreement on Subsidies and Countervailing Measures,* which imposes some disciplines on subsidies of manufactured goods, but direct subsidies of producers of cultural goods are permitted as long as they are not tied to exports, or contingent on the use of domestic over imported goods. The agreement is limited to goods, and no restrictions are imposed on subsidies of services.

The draft Canada-EU CETA agreement would go farther than this and includes an annex that states that "in principle, other subsidies related to trade in goods and the supply of services… should not be granted by a Party when they affect, or are likely to affect, the trade of either Party." An exception is granted for "subsidies to promote culture and heritage conservation where these subsidies do not affect conditions of trade of either Party and competition between the Parties."

This clause could be problematic but for the general cultural exemption, since in the absence of such an exemption, it would put limits on subsidies to cultural producers that could be hard to measure or evaluate.

Adding a Cultural Protocol

There has been some discussion about the concept of adding a "Protocol on Cultural Co-operation" to the Canada-EU CETA. Such a protocol appears in the recent EU free trade agreements with Chile and South Korea. The introduction of such a protocol has been suggested by Quebec, but has not been put forward by the EU. In fact, it appears that there has been some dissension in Europe with the inclusion of that protocol in the EU agreement with Korea. In the table of contents in the draft CETA, it is noted that for certain subjects, the draft chapter structure "will be reviewed as negotiations progress" and that separate or additional chapters might be included "for instance for subjects such as movement of persons, telecommunications, e-commerce, financial services and *cultural cooperation*." (italics added).

The potential ambit of a cultural protocol can be judged by looking at the EU-Korea FTA. The "Protocol on Cultural Co-operation" is a 9-page document. The preamble specifically refers to the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, and incorporates many of its definitions. The expressed intent of the protocol is to foster "cultural exchanges and dialogue". To this end, it sets up a "Committee on Cultural Co-operation" and states that the parties shall "endeavour to facilitate" entry into and temporary stay of artists and other cultural professionals in their territories. The Protocol has a detailed section dealing with audio-visual co-productions, i.e. works produced by producers in both Korea and the EC Party into which those producers have invested in accordance with the terms of the Protocol. These co-productions can then benefit from certain schemes for the promotion of local/regional cultural content, subject to certain conditions, although this entitlement is subject to review in 3 years. The rest of the Protocol talks about cooperation in other ways, e.g. promotion of each other's works in festivals and seminars, temporary importation of equipment, promotion of contacts between

performing artists, promotion of publications at fairs, etc. Although the Protocol has provision for dispute resolution, the provisions in the Protocol seem to be largely non-binding. No specific monies or resources are set aside and the rules on co-productions are reviewable and either party can suspend their application.

Given this precedent, would there be value in having such a Protocol added to the Canada-EU CETA? There certainly may be merit in having a specific reference in the agreement to the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.* This could serve to help underline the general principle of each country's cultural sovereignty. Since the protocol appears to lack any real legal force, it would not appear to jeopardize any of Canada's cultural policies.

On the other hand, the appearance of a cultural co-operation protocol in a trade and investment agreement may raise some questions of optics. The inclusion of such a protocol may be seen as inconsistent with the notion of a cultural exemption and the idea of keeping culture "off the table."

It might be added that a large part of the Korean-EU protocol is devoted to the terms of a co-production agreement. But in Canada's case, it already has co-production agreements with most of the EU countries. Many of these agreements are dated and may be overdue for renegotiation. However, that may be best done on a country by country basis. If a protocol like the Korean-EU protocol was included in the Canada-EU deal, the co-production terms would need to be carefully examined to see if they are an improvement over the existing arrangements, or even whether they would take precedence over them. This analysis has not been done.

As noted above, Quebec has pushed for the inclusion of such a protocol in any Canada-EU deal. The EU itself is divided on the matter, with some of its members reportedly unhappy with the Korea protocol. The Department of Canadian Heritage sees such a protocol as relatively benign, particularly if it has no real legal force, but is concerned with the optics. This concern would presumably go away if the cultural and arts community supported the notion of such a protocol.

Intellectual Property

The draft Canada-EU CETA contains a chapter on intellectual property, with subchapters on copyright, trade marks and patents. In general, as noted earlier, the EU has reportedly expressed concern with Canada's lax copyright enforcement, although the recent introduction of Bill C-32 may allay some of these concerns. The draft sub-chapter on copyright reaffirms Canada's existing obligations and includes provisions on TPMs taken from the WIPO treaties. The EC has also sought to include specific provisions on the liability of intermediary service providers, e.g. for caching or hosting. A significant new element is the EU request that Canada extend the term of copyright from life + 50 years to life + 70 years.

For its part, Canada has proposed adding an article protecting encrypted program-carrying satellite signals, presumably based on section 9(1)(*c*) of the *Radiocommunication Act*.

Telecommunications

Before concluding this memorandum, a few words should be added regarding the telecommunications sector. The draft Canada-EU CETA contains a chapter on telecommunications which appears to be largely based on the WTO *General Agreement on Trade in Services Annex on Telecommunications*. It sets out principles of the regulatory framework for telecommunications services, including voice telephone, packet-switched data transmission, and mobile and personal communications services and systems. The definition of telecommunications services excludes "broadcasting" which is defined as "the uninterrupted chain of transmission required for the distribution of TV and radio programming signals to the general public, but does not cover contribution links between operators."

The draft Chapter also includes the following statement:

> "This Chapter does not apply to any measure of a Party affecting the transmission by any means of telecommunications, including broadcast and cable distribution, of radio or television programming intended for reception by the public."

This may be contrasted with the wording of section 2(b) of the WTO *GATS Annex on Telecommunications*, which reads as follows:

> "This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming."

The provisions of the Chapter are largely concerned with regulatory matters, including access to networks, interconnection standards, licensing regimes, competitive safeguards, allocation of scarce resources (e.g. frequencies, rights-of-way) and regulatory transparency. The Chapter does not deal with investment rules for telecom carriers.

Conclusion

Taking the foregoing into account, what conclusions can be drawn?

First, it is clear that a general cultural exemption in the form sought by Canada should be a key negotiating requirement. In the absence of such an exemption, a number of Canada's key cultural investment measures and subsidy programs – particularly in regard to books, magazines and newspapers – would be at risk, unless they were specifically exempted or grandfathered. Canada's measures relating to the audiovisual sector, including broadcasting, do not appear to be at risk, given the EU acceptance of the cultural importance of that sector.

Second, the EC request that any cultural exemption be without prejudice to the parties' rights and obligations under the WTO is probably acceptable. A broader reservation appears in Article 20, paragraph 2, of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.* If that reservation were added, it would also assuage any EU concerns over the potential for copyright discrimination arising from a broad cultural exemption.

Third, the inclusion of a Protocol on Cultural Co-operation could be beneficial, provided the co-production provisions are made consistent with our current arrangements with EU members. The benefit of embedding such an agreement in the Canada-EU CETA is that it specifically refers to and imports the principles of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* into the agreement.

As the negotiations proceed, some of the issues identified above may become more concrete. It is vitally important, though, that cultural groups make their views known so that their concerns can be taken into account.

Who to Contact

Any submissions or concerns can be made by writing to the Minister, with a copy to the department. The relevant addresses are as follows:

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