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## **The EU-Canada CETA and the diversity of cultural industries: hegemony or resistance? Some notes**

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### **Abstract**

The Comprehensive Economic and Trade Agreement (CETA), between Canada and the European Union (EU), was leaked to the public opinion in August 2014 after five years of negotiations. The consolidated CETA text was not released until the end of last September, raising deeper issues about the secrecy and democratic deficit surrounding the agreement.

As some have already noted (notably civil society organizations), this treaty is about much more than trade. Even though the preamble states that it aims to strengthen economic relationships, the text includes an explicit reference to the commitments of both Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and underlies their right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions and preserving their cultural identity (including the use of regulatory measures and financial support). Beyond these intentions enunciated in the preamble, there are only five chapters containing articles exempting culture (Subsidies, Investment, Cross-Border Trade in Services, Domestic Regulation and Government Procurement). Therefore, the text lacks a general exception clause protecting culture.

The question about the capacity of this free trade agreement to actually protect and promote the diversity of culture is therefore valid because, for example, whereas for the EU the exception applies only to audiovisual services, for Canada it covers all cultural industries (as usually defined in its trade agreements). Is this a missed opportunity for both Canada and the EU to safeguard culture from trade, to reconcile rules of free trade and cultural policies? Can the inclusion of the UNESCO Convention in the CETA text help counterbalance and resist those principles of free trade that undermine necessary and legitimate cultural policies and regulations aiming to protect and promote the diversity of cultural expressions?

This contribution will aim to explore answers to these questions taking the consolidated CETA text as a point of departure. After providing contextual information about the agreement itself and its evolution, key points concerning cultural exemptions will be examined with a political economy perspective to clarify up to what extent there will be room for manoeuvre to actually protect and promote the diversity of cultural industries.

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## 1. Introduction

In May 2009 negotiations between Canada and the European Union (EU) toward a Comprehensive Economic and Trade Agreement (CETA) were launched. Over the years the agreement turned out to be deeper and broader than any previous arrangement (for example, the North American Free Trade Agreement, NAFTA). The word comprehensive that is included in its title refers to the fact that negotiations have been really broad, including all business sectors, and deep, taking into consideration tariff and non-tariff barriers to trade (such as provincial and municipal procurement policy or cultural policy incentives).

Current trade relations between Canada and the EU are guided by a Framework Agreement for Commercial and Economic Cooperation in force since 1976. The EU and Canada meet annually in bilateral summits and in the Joint Cooperation Committee to review a range of issues relating to economic and trade relations. Over the years, a number of additional bilateral agreements designed to facilitate trade have been concluded.

Nevertheless, at the 2007 EU-Canada Summit in Berlin, Canada and the EU agreed to complete a joint study examining the costs and benefits of pursuing a closer economic partnership. The study (Canada-EU, 2008), which concluded that significant benefits could be realized by liberalizing trade between Canada and the EU, was reviewed at the 2008 Canada-EU Summit in Quebec and used as an argument to justify the pursue of further trade liberalization. It was also agreed that necessary steps to obtain negotiating mandates with a view to beginning formal negotiations as early as possible in 2009 were taken. At first, Canadian and EU officials conducted a “scoping exercise” to establish the areas for negotiation of an ambitious and comprehensive economic agreement (Canada-EU, 2009). Such exercise was completed in March 2009, paving the way for the launch of actual negotiations at the EU-Canada Summit on May 6, 2009, in Prague.

According to the European Commission, the EU-Canada trade picture can be characterized as follows:<sup>1</sup>

- In 2013 Canada was the EU's 12<sup>th</sup> most important trading partner, accounting for 1.7% of the EU's total external trade. In the same year the EU was Canada's second most important trading partner, after the United States (US), with around 9.8% of Canada's total external trade.
- The value of bilateral trade in goods between the EU and Canada was €58,8 billion in 2013. Machinery, transport equipment and chemicals dominate the EU's exports of goods to Canada, and also constitute an important part of the EU's imports of goods from Canada.
- Trade in services is an important area of the EU-Canada trade relationship too. The value of bilateral trade in services between the two partners amounted to €26.9 billion in 2012. Examples of services often traded are transportation, travel and insurance.
- The investment relationship is equally important. In 2011, European investors held investments worth €258.0 billion in Canada while Canadian direct investment stocks in the EU amounted to almost €142.6 billion.

For the European Commission, the CETA is a treaty that, once applied, will offer EU firms more and better business opportunities in Canada and support jobs in Europe. It will tackle a whole range of issues to make business with Canada easier: from removing customs duties and ending limitations in access to public contracts, to helping prevent illegal copying of EU

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<sup>1</sup> <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/>

innovations and traditional products. Mirroring this discourse, the Government of Canada assures that the agreement will open new markets to Canadian exporters throughout the EU and will generate significant benefits for its nationals, especially in terms of creating jobs and opportunities in every region of the country.

The Commission's lawyers are currently reviewing the consolidated text, and once it is translated into all EU official languages it will be discussed in the EU Council and the European Parliament. Providing both approve the agreement in 2015, and a similar process takes place in Canada, it could be applied in 2016. While the agreement may undergo some changes during the scrubbing process, both parties consider the text closed. Therefore, no substantive changes are in fact expected.

The secrecy and democratic deficit surrounding negotiations were very much criticized since the beginning, and a consolidated version of the agreement was not actually known by public opinion until it was leaked in August 2014 by German broadcaster ARD, after negotiators of the Commission and of Canada had finalized their work early that month. The text of the agreement was made public when President of the European Commission, Jose Manuel Barroso, President of the European Council, Herman Van Rompuy, and Canadian Prime Minister, Stephen Harper, announced the end of the CETA negotiations at the EU-Canada Summit on 26 September 2014. It is clear that "both sides have committed to sign off on the final text before any meaningful public debate can possibly take place. This take-it or leave-it approach leaves little room for the citizens of Canada or the EU to assess the CETA's potential impacts, let alone advocate for changes" (Sinclair, Trew, & Mertins-Kirkwodd, 2014: 5).

In Canada, unions and civil society organizations issued a declaration in 2011 against ongoing negotiations,<sup>2</sup> and more and better information about the deal has been available during the last years thanks to the efforts of initiatives such as Trade Justice Network or organizations like the Canadian Centre for Policy Alternatives or The Council of Canadians.

In Europe, 300 groups gathered round the Stop TTIP Coalition have filed a lawsuit against the European Commission over its failure to publically review its policy over the CETA and the Transatlantic Trade and Investment Partnership (TTIP), under negotiation with the US. The Coalition proposed that the Commission hold a European Citizens' Initiative, which is designed to make the Commission more accountable to the general public, but the Commission blocked the request to review its policy on the TTIP and CETA deals. Had the initiative been accepted, the Commission would have been obliged to hold a hearing to discuss its negotiating policy<sup>3</sup>. In any case, it is for sure that the European Parliament will scrutinize whether, as the EU's negotiator, the European Commission succeeded or not in striking the right balance between economic liberalization and consumer protection (Bierbrauer, 2014).

In this context, the question about the capacity of the CETA to actually protect and promote the diversity of culture is therefore important, because despite the fact that its preamble states that it aims to strengthen economic relationships, the arrangement is about much more than trade. It is worth noting that it includes an explicit reference to the commitments of both Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter the "UNESCO Convention") and underlies their right to

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<sup>2</sup> <http://stopceta.ca/declaration/>

<sup>3</sup> For further details see <http://www.ibtimes.co.uk/european-commission-served-lawsuit-over-ttip-ceta-negotiations-1474094> and <http://www.attac.es/2014/12/04/la-iniciativa-ciudadana-europea-autoorganizada-contra-el-ttip-y-el-ceta-consigue-un-millon-de-firmas-en-un-tiempo-record/>

preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions and preserving their cultural identity (including the use of regulatory measures and financial support). Nevertheless, the text lacks a general exception clause protecting culture. What has been agreed is that some chapters contain articles exempting culture. Whereas for the EU this exception applies only to audiovisual services, for Canada it covers all cultural industries.

Is this a missed opportunity for both Canada and the EU to safeguard culture from trade, to reconcile rules of free trade and cultural policies? Can the inclusion of the UNESCO Convention in the CETA text help counterbalance and resist those principles of free trade that undermine necessary and legitimate cultural policies and regulations aiming to protect and promote the diversity of cultural expressions? This paper aims to explore answers to these questions taking the consolidated CETA text as a point of departure. After providing contextual information about the agreement and its negotiation, key points concerning cultural exemptions will be examined with a political economy perspective to clarify up to what extent there will be room for manoeuvre to actually protect and promote the diversity of cultural industries.

## **2. What is the CETA really about?**

The CETA is the first trade agreement between the EU and a major world economy and the most far-reaching bilateral negotiation to date because it is not a traditional free trade agreement such as NAFTA, where customs duties (tariffs) on trade in goods and services are eliminated. The CETA is a second-generation trade agreement (Leblond, 2010; Hübner, 2011) where the emphasis is on non-tariff barriers such as standards, procedures and regulations, since they have, for instance, become the main source of trade impediments due to the fact that tariffs are already quite low - especially between rich countries, as a result of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).

What are some of the issues the agreement presents? Public services, for example, face huge challenges because of the “negative list” approach the agreement is based on (Sinclair, Trew, & Mertins-Kirkwodd, 2014). The liberalizing provisions affect all public services unless explicitly ruled out by negotiators. This “list it or lose it” perspective is a serious threat for the future of many public services. Likewise, as regards intellectual property rights, the extension of patents was on the table of negotiations from the very beginning. And although most of the initial EU demands on copyright and related rights have been withdrawn, changes to the Canadian patent protection for pharmaceuticals are expected to delay the availability of cheaper, effective generic drugs for Canadians (Sinclair, Trew, & Mertins-Kirkwodd, 2014).

Undoubtedly, one of the most controversial aspects of the agreement is the investor-state dispute settlement (ISDS) mechanism, which has raised much concern in Canada and many of Europe’s member states (e.g. Germany) and is most probably going to be rejected by a large bloc of parties in the European Parliament. The ISDS mechanism and the Investment Protection section pave the way for foreign corporations to seek compensation for governments, for any measure that may hurt their investments, outside the regular court system. Very briefly, and in Fuchs’ words (2014: 13-14): “foreign investors will be granted the special privilege of suing host governments and claiming compensation for all kinds of state actions, while bypassing domestic judicial systems and their independent courts”; the CETA does not require investors to first resort to domestic courts in solving disputes and it doesn’t clearly and unequivocally confirm the state’s right to regulate.

As Friends of the Earth Europe have recently demonstrated (Geraghty & Cingotti: 2014), after compiling publicly available data on ISDS cases taken against EU member states since 1994, the use of this mechanism has been affecting states for years and it has already cost EU taxpayers €3.5 billion. “Canada’s experience with NAFTA amply illustrates the dangers of investment arbitration. There have been 35 investor-state claims against Canada under NAFTA, and the number continues to grow. So far, Canada has lost or settled six claims and paid damages to foreign investors totaling over C\$171.5 million (€121 million). Canadian taxpayers have also paid tens of millions of dollars in legal costs defending against these claims” (Eberhardt, Redlin & Toubeau, 2014: 5).

Negotiations between the EU and Canada have been criticized not only because of secrecy but also for having been developed closely and almost exclusively in collaboration with industry lobby groups that have had privileged access to negotiation texts (The Council of Canadians, 2013).

### **3. What is the matter with culture and diversity?**

So... what is, more specifically, the treatment given to culture? Even though negotiations failed to include a general exemption, the agreement has an explicit reference to the commitments of both Parties to the UNESCO Convention and it includes articles exempting culture in five chapters. What does this mean? What’s the role assigned to culture, in general, and to cultural industries and diversity, in particular? Before trying to answer these questions the debate about culture during negotiations as well as the presence of the Convention in the preamble of the agreement and the content and scope of cultural exemptions have to be explained.

#### **3.1. The debate: a “general exclusion” vs. a “targeted approach”**

Among those willing to safeguard culture from trade, there have been two main positions: the one identified as the “horizontal” or “general exclusion” approach, opposed to the “flexible” or “targeted” approach. The former, defended by the French Coalition for Cultural Diversity and publicly endorsed in 2013 by people such as Bernard Cazeneuve (then French Minister Delegate for European Affairs) and Louise Beaudoin (former Minister of International Relations and Minister for the Francophonie), demanded the total exclusion of culture from negotiations. The latter, contained in the proposal of Canada and Quebec’s chief negotiators and supported by the Coalition for Cultural Diversity, was presented as a way to reconcile Canadian and European visions via establishing exemptions chapter by chapter (a “negative list” approach).

The rationale behind this perspective, successful up to now in the wording of the text, is that a flexible way of pursuing cultural exemption is the best way to guarantee an agreement between Europe and Canada. Because whereas the EU includes an exemption limited to the audiovisual services, only in the services chapter, in all of its free trade agreements, Canada defends a notion of cultural exemption that covers all cultural industries in all chapters of its trade agreements. During the bilateral negotiations on the CETA, Quebec and France exerted pressure to have a cultural exception explicitly included in the deal. But “although Canadian and European political leaders and negotiators agreed on the principle, leaked documentation showed that the negotiating parties disagreed on the scope of the cultural exemption and on how to fulfill Canada and the EU member state obligations under the UNESCO Convention. This is reflected in the final text” (Maltais, 2014b: 51).

In other words, the CETA wording as regards culture has to be understood as a combination of the Canadian threefold strategy as well as the European Commission's change in policy direction around November 2012. Canada's strategy aimed at: a) express cultural considerations in the preamble, b) include its traditional definition of cultural industries with exceptions limited to selected chapters and c) make reservations on specific cultural sectors and regulations in the annexes. As regards the EU, although the inclusion of the audiovisual sector in trade agreements had systematically been refused ever since the General Agreement on Trade in Services (GATS) negotiations, the European Commission, that pronounced itself in favor of exempting audiovisual services from the negotiations with Canada, ended up supporting their inclusion via the mechanism of building "negative lists".

### **3.2. The wording: between the UNESCO Convention and specific cultural exemptions**

The preamble of the CETA, in a page and half of a 537-page document (1634 with annexes!), contains two references to culture:

RECOGNIZING that the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; and

AFFIRMING their commitments as Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and recognizing that states have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.

Whereas the first reference underlines the promotion and protection of cultural diversity as a legitimate policy objective, the second gives context by referring to the UNESCO Convention and its principles. According to the Coalition for Cultural Diversity (CCD, 2014), this sets a precedent because this is the first time that a reference to the UNESCO Convention is included in a trade agreement. Nevertheless, it cannot be forgotten that although the content of the preamble is supposed to contribute to the interpretation of the agreement and offer context to potential disputes, it is non-binding.

As regards the so-called cultural exemptions, they are limited to five of the nearly three-dozen chapters of the agreement: Subsidies, Investment, Cross- Border Trade in Services, Domestic Regulation and Government Procurement. The chapter on subsidies completely exempts subsidies and government support from any provision of the agreement, but elsewhere, the exclusion is either limited to the chapter or its relevant provisions.

Chapter	Article	Wording
9. Subsidies	X.7 Excluded Subsidies and Government Support – Culture	Nothing in this Agreement applies to subsidies or government support with respect to audiovisual services for the EU and to cultural industries for Canada.
10. Investment	X.1: Scope of Application	3. For the EU, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to Audiovisual services. For Canada, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to cultural industries.
11. Cross-Border Trade in Services	X-01: Scope	2. This Chapter does not apply to measures affecting: (a) services supplied in the exercise of governmental authority; (b) for the European Union, audio-visual services; (c) for Canada, cultural industries; (...)
14. Domestic Regulation	X.1: Scope and Definitions	2. This Chapter does not apply to licensing requirements and procedures and to qualification requirements and procedures: a) pursuant to an existing non-conforming measure that is maintained by a Party as set out in its Schedule to Annex 1; or b) relating to the sectors/activities set out below: For Canada: Social Services, Aboriginal Affairs, Minority Affairs, and the collection, purification, and distribution of water, as set out in Canada's schedule to Annex II, and cultural industries. For the European Union: Health, education, and social services, gambling and betting services, the collection, purification, and distribution of water, as set out in the EU's schedule to Annex II, and audio-visual services.
21. Government Procurement	XII. Limited Tendering	1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VI through VIII, IX (paragraphs 7 through 11), X, XI, XIII and XIV only under any of the following circumstances: (...) (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons: (i) the requirement is for a work of art; (ii) the protection of patents, copyrights or other exclusive rights; or (iii) due to an absence of competition for technical reasons; (...)

In Maltais' words (2014a), the CETA includes a partial and asymmetric cultural exception: partial as it is only applicable in some chapters, asymmetric because for the EU the exception only applies to audiovisual services whereas for Canada it covers all cultural industries, as usually defined in its trade agreements. Such definition is found in Chapter 32, Exceptions



(Article X.01), where a reminder of the scope of the cultural exemption is also included (Article X.08).

Chapter	Article	Wording
32. Exceptions	X.01: Definitions	Cultural industries means a person engaged in: (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; the production, distribution, sale or exhibition of audio or video music recordings; the publication, distribution or sale of music in print or machine-readable form; or 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.
	X.08: Cultural Industries	The parties recall the exceptions applicable to culture as set out in the relevant provisions of Chapters X, Y and Z (Cross-Border Trade in Services, Domestic Regulation, Government Procurement, Investment, Subsidies).

### 3.3. The implications: “list it or lose it!”

The supporters of the “targeted” or “flexible” perspective sustain that advantages are numerous (CCD, 2013), considering that the inclusion of the UNESCO Convention in the preamble clarifies the grounds on which Canada and the EU agree to cultural exemptions:

- The “chapter by chapter” approach establishes with greater precision the perimeter of cultural sovereignty because it reassures that the counterpart recognizes exempting intentions.
- It gives flexibility not to demand a cultural exemption in chapters that are irrelevant or that should not be weakened (e.g. the one about intellectual property).
- And it could be requested in the future by Canada and the EU when dealing with other partners that oppose cultural exemptions.

Contrary to this perspective, critics such as the French Coalition for Cultural Diversity (CFDC, 2012) are of the opinion that “negative lists” do not afford the same protection as a “horizontal exclusion” because listing sectors to be included in annexes will ultimately define and delimit their scope for future application. The ability of states to develop new policies can be hampered while the capacity of trading partners to define listed sectors as narrowly as possible, to limit the scope of protection, is enabled.

In other words, whereas a “horizontal exclusion” helps states maintain autonomy and avoid embroiled negotiations, the “negative list” approach includes, *ipso facto*, all services among those liberalized under the agreement, leaving aside only what is explicitly listed as excluded in the annexes. The risk consists of leaving certain cultural domains under the pressure of trade negotiations and neglecting those sectors that could be very important with the arrival of new technologies (e.g., electronic commerce; Vlassis, 2014).

#### 4. As a way of concluding

What's then the role the CETA assigns to culture, in general, and to cultural industries and diversity, in particular, since negotiations led to the decision of reconciling culture and trade via the inclusion of the UNESCO Convention in the preamble and the specification of some exemptions in a "chapter by chapter" approach? Because a general exemption was ruled out for culture, which means that there's a general and *de facto* inclusion of it, it is here sustained that the role assigned to culture and its diversity is secondary and subsumed to free trade relationships. The fact that exemptions are confined to specific chapters, and that they apply to audiovisual services for the EU and to cultural industries for Canada, reveal different interpretations in the scope of the cultural exception and a partial and asymmetric protection that one may wonder how will evolve. But the problem is not just that existing cultural expressions are partially and asymmetrically protected because there are divergent perspectives about the matter. Worries should also look forward: into the digital era.

With the exception of subsidies, that are completely exempted, cultural exemptions are limited to some chapters and relevant provisions. This means that what is not actually and explicitly included in the articles or the list of specific reservations of each Party is not protected. Take for instance the list of reservations made to Chapter 35 (Services and Investment): words such as "digital" or "internet" are completely absent. In addition, it's worth noting that Canada and the EU have agreed to "import" Article XX of the GATT on General Exceptions and to make it applicable to all CETA chapters (Maltais, 2014b: 53): the problem with this is that Article XX of the GATT includes no "cultural exception" *per se* as the provisions limit its scope to the "protection of national treasures of artistic, historic or archaeological value". While the analogue past might be well served, the digital future of the diversity of cultural expressions is consigned to oblivion.

Some insist on the opportunities that may arise from the inclusion of the UNESCO Convention in the agreement (CCD, 2013) to mitigate, for example, the risks of the logic of partial exemptions. It's not a minor thing that for the first time since its adoption the Convention is referenced in a trade agreement. The CETA preamble is innovative in this respect, expressing the best intentions of the Parties to protect and promote cultural diversity. But as we all know, the road to hell is paved with good intentions. Therefore, the (soft) regulation effect that the UNESCO Convention can have will succumb to the (prescriptive) one that the specific provisions -the chapters- will have. The preamble may contribute to mitigating the negative impact of liberalization measures, because a treaty must be interpreted in light of its object and purpose, but where free trade rules are in contradiction with cultural protection and promotion policies, panelists or arbitrators would be more likely to favor the former (Maltais', 2014b: 51).

From our point of view, the risks of relying on the logic of specific exemptions for existing services to face the digital era greatly surpass the benefits the reference to the UNESCO Convention may provide. Many have already reminded the challenges the Convention poses to face the adaptation of cultural diversity to the new digital environment (e.g. Frau-Meigs, 2012). The inclusion of cultural considerations in the CETA preamble and the reference to the UNESCO Convention are to be applauded (Maltais, 2014a; Vlassis, 2014), but as the sole strategy to protect and promote the diversity of current and future cultural expressions the outcome is uncertain. The inclusion of the UNESCO Convention as an interpretative tool will have a hard time to counterbalance and help resist free trade commitments when they undermine the diversity of cultural expressions. The "list it or lose it" approach will indeed hinder the capacity of states to update and adapt cultural policies to the digital era. The CETA is therefore a missed opportunity for both Canada and the EU to reconcile rules of free trade

and cultural policies.

It is worth noting too that CETA is not just a lost opportunity in this respect. It's also a worrying precedent for future bilateral or multilateral agreements for those who look at the CETA text with the anticipation of finding clues for the TTIP and the Trade in Services Agreement (TiSA; a trade agreement currently being negotiated by 23 members of the WTO).

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