

From: Jon Johnson

To: Global Affairs Canada

Date: June 1, 2020

Re: **THE CUSMA CULTURAL EXEMPTION – MINUSES AND PLUSES**

Canadian trade negotiators have always bargained hard to preserve Canada's ability to protect and encourage Canadian culture through ownership or content requirements by exempting cultural industries from the non-discrimination provisions in trade agreements.

Canada secured an exemption for cultural industries under its first major free trade agreement, the Canada-US Free Trade Agreement (FTA). That cultural exemption was preserved in NAFTA through incorporating, through its Annex 2106, not only the exemption, but all FTA provisions relating to cultural industries. Through incorporation into NAFTA, the FTA rules respecting cultural industries still apply, and will continue to apply until CUSMA comes into effect.

CUSMA also contains an exemption for cultural industries. The CUSMA definition of "cultural industry" closely follows the definition of "cultural industries" in the FTA. CUSMA Article 32.6(2) provides that CUSMA does not apply to a measure adopted or maintained by Canada with respect to a cultural industry.

CUSMA Article 32.6(4) provides that a party (such as the US) may take a measure of equivalent commercial effect in response to an action by another party (such as Canada) that would have been inconsistent with CUSMA but for the exemption. FTA 2005(2) contains a similar provision, allowing measure of equivalent commercial effect in response to actions inconsistent with FTA but for the exemption in FTA Article 2005(1).

The "equivalent commercial effect" provision is a self-help provision that appears to bypass normal dispute resolution, although Canada could certainly use the dispute resolution process to challenge whether the measure at issue depends solely on the exemption for its justification and whether the measure taken in response is of "equivalent commercial effect".

However, the FTA provides a double carve-out for cultural industries. In addition to the exemption in FTA Article 2005(1), the FTA services and investment chapters carve out most cultural activities by simply not covering them. The national treatment (non-discrimination) provisions in the FTA services chapter apply only to "covered services" that are set out on a schedule. One of the few "cultural" services that is a "covered service" on the schedule is "wholesale dealing in books, magazines and periodicals."

The FTA investment chapter provides that its national treatment provisions do not apply to the conduct and operation of business enterprises that provide services other than "covered services."

A cultural measure that not subject to the non-discrimination requirements of the FTA services and investment chapters because the measure does not apply to a "covered service" does not depend on FTA Article 2005(1) for its justification and hence is not open to measures of equivalent commercial effect under FTA Article 2005(2).

The CUSMA services and investment provisions are broad in their application and CUSMA follows the same "list-it-or-lose-it" approach to inconsistent federal measures through reservations as in the NAFTA services and investment chapters. The only reservation taken by Canada under CUSMA that relates to cultural industries is a reservation permitting Canada to maintain ownership restrictions respecting telecommunications service suppliers. So the loss of the FTA "non-coverage" is a minus.

However, the CUSMA grandfathering provisions are a plus. The FTA services and investment chapters grandfathered all non-conforming measures existing when FTA came into effect on January 1, 1989. While useful when the FTA came into effect, this FTA grandfathering provision is probably no longer of much practical significance. CUSMA grandfathers all non-conforming provincial and territorial measures existing as of the date that CUSMA comes into effect, currently projected to be July 1. A grandfathered provincial or territorial measure will not depend on the exemption in CUSMA Article 32.6(2) for its justification and the "equivalent commercial effect" provision will not apply.

Jon Johnson is a former advisor to the Canadian government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.

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