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What's the Big Deal?
Understanding the Trans-Pacific Partnership

The TPP and Cultural Diversity

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The TPP and Cultural Diversity

> Supporters of wholesale globalization believe that cultural policies interfere with market mechanisms and competition.... We believe this view falls flat when it comes to culture. Furthermore, we are deeply convinced that only when states and governments respect and promote the principle of cultural diversity can all cultures survive and prosper.[1]
>
> — *Line Beauchamp, former Quebec culture minister*

Summary

Negotiations on the Trans-Pacific Partnership Agreement (TPP) concluded in October of 2015 and the 12 participating TPP countries, including Canada, signed the deal in February of 2016. Though the impact of the TPP on trade and economic growth will be marginal, the deal would place many new restrictions on government policy in areas only tangentially related to trade.

Historically, Canada has sought to shield its cultural industries from constraints in free trade agreements (FTAs) such as the 1994 NAFTA that would otherwise undermine the ability of federal and provincial governments to support domestic artists and cultural producers. Global concern about national cultures being threatened by "wholesale globalization," as Line Beauchamp phrased it in 2005, led to the adoption that year of the UNESCO

Convention on the Protection and Promotion of the Diversity of Cultural Expressions. While this convention does not supersede a signatory country's other international treaty obligations, it does crucially insist on "the sovereign right [of states] to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."[2]

This paper examines the cultural aspects of the TPP, Canada's negotiating efforts to maintain its traditional "cultural exception," and the final outcome as revealed in the February 2016 text. It makes the following three conclusions:

1. The TPP enshrines a neoliberal interpretation of cultural considerations in its preamble that is at odds with the 2005 UNESCO Convention and past Canadian FTAs;

2. The TPP parties have agreed to a conditional and limited general exception on culture based on U.S. government preferences, and

3. While Canada secured additional country-specific cultural reservations from market-opening (liberalization) requirements in the TPP, these are considerably weakened with respect to promoting Canadian content and regulating online access to audio-visual goods and services.

It is clear that Canada faced much stronger opposition to the cultural exception in the TPP than it did during negotiations on the Comprehensive Economic and Trade Agreement (CETA) with the European Union, though the federal government made concessions in that deal as well.[3] As a result, the pacific free trade deal represents a turning away from the values enshrined in the 2005 UNESCO Convention. As Canada considers whether or not to ratify the TPP, the agreement's impact on cultural policy must be front and centre in the public and parliamentary debate.

Why Protect Culture?

During the negotiation of the Trans-Pacific Partnership Agreement (TPP), Canada supported the idea of including a "cultural exception" in the text in order to preserve federal and provincial cultural policies and give effect to Canada's obligations under UNESCO legal instruments, including the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 UNESCO Convention). Canadian laws and regulations for

the protection of cultural identities and promotion of cultural diversity are often based on, or encouraged by, other international legal instruments.

The rationale behind the cultural exception, which can be found in NAFTA and most other Canadian free trade agreements (FTAs), is that market-opening (liberalization) rules in such treaties can seriously threaten or undermine legitimate and essential cultural policy. For example, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) has, on several occasions, ruled against country protections for domestic cultural rights and heritage on the basis of free trade principles. In 1997, a WTO panel agreed with the U.S. that Canadian subsidies for cultural goods such as periodicals, and non-tariff barriers applied to U.S. periodicals, violated several provisions of the General Agreement on Tariffs and Trade (GATT 1994).[4] In another WTO dispute initiated by the U.S., the DSB decided, in 2009, that China's limitations on the importation, distribution and sale of U.S. publications and audio-visual products violated parts of the GATT 1994 and the General Agreement on Trade in Services (GATS) — even while panelists recognized there is a link between cultural products and public morals that is subject to an exception under the GATT.[5]

On top of these disputes launched by states, international investment treaties allow foreign corporations and investors to directly challenge domestic cultural regulations — especially as they relate to historical and natural heritage and other immovable cultural property — as a form of indirect expropriation of capital or as a breach of the investor's so-called minimum standards of treatment. In certain cases, ad hoc investment tribunals have rejected government assertions that expropriations may be necessary to protect cultural sites. For instance, in 2000, an investment tribunal decided that Costa Rica should be required to pay a U.S. investor US$16 million as compensation for the expropriation of a hotel near a UNESCO world heritage site protected by international law.[6] In rich and poor countries alike, even the threat of such costly lawsuits, which take place outside the domestic court system and independently of national laws and customs, could be enough to discourage governments from pursuing cultural or heritage protection measures.

Fifteen years ago, Pauline Marois, then Quebec's deputy-premier, advocated for the adoption of a new international legal instrument for protecting cultural diversity, recognizing that: "the right of States to freely determine their cultural policies is jeopardized by unfettered and unbridled economic and financial globalization. [This right] is being threatened by the dehumanizing 'free-trade-only' philosophy" (author's translation).[7] Marois'

views were not unique in Canada or Quebec; they reflected a general and long-standing consensus among political leaders in much of the world on the importance of national cultural policies and the need to preserve them when negotiating international trade and investment agreements.

It was this global concern over the impact of "wholesale globalization," in the words of former Quebec culture minister Line Beauchamp, that fostered the adoption of the 2005 UNESCO Convention. The legally binding treaty recognizes the "distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning," and reaffirms "sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory."[8] Although many other legal instruments on cultural property have been adopted in the context of UNESCO, the 2005 UNESCO Convention is recognized as the leading treaty. It is the source of the idea, undermined in two recently concluded Canadian FTAs, that there should be a "cultural exception" in trade agreements — that, in other words, culture should no longer be considered as merely another commercial product.

Cultural Exceptions in the TPP, CETA

During negotiations on the Canada–EU Comprehensive Economic and Trade Agreement (CETA), the former Conservative government committed to a broadly worded carve-out (exclusion) for cultural policy. The government's strategy was threefold: to secure expressly cultural considerations in the CETA preamble; to achieve an exception for "cultural industries" applicable to certain chapters of the agreement; and to include a number of reservations on specific cultural sectors, regulations, laws, and institutions in the CETA annexes.[9] The result is not as strong as advocates for cultural diversity had been hoping, but it does not stray too far from Canada's past practice.

Though Canada's strategy was the same in the TPP negotiations, the outcome was quite different — even though Canadian negotiators had many allies at the table. Leaked official documentation shows that Australia, New Zealand, Chile, Canada, Brunei, Malaysia and Vietnam (the pro-exception group) were all in favour of including a cultural exception in the pacific agreement, while the United States and the four other negotiating countries were definitely against the idea (anti-exception group).[10]

According to Gilbert Gagné and Antonios Vlassis, the division has nothing to do with traditional geographical (North vs. South) or ideological div-

TABLE 1 Culture-Friendly TPP

TPP Negotiating Parties (as of January 2016)	In Favour of the "Cultural Exception"	Parties to the 2005 UNESCO Convention[12]
Australia	●	●
Brunei	●	
Canada	●	●
Chile	●	●
Japan		
Malaysia	●	
Mexico		●
New Zealand	●	●
Peru		●
Singapore		
United States		
Viet Nam	●	●

ides; the opposing positions of these two coalitions are based solely on national interest, which I would qualify as "perceived interest."[11] Interestingly, the TPP member states that are also parties to the 2005 UNESCO Convention were not necessarily those in favour of including a cultural exception in the agreement. Likewise, not all non-parties to the 2005 UNESCO Convention were against the idea of a more "culture-friendly" TPP (see Table).

Neoliberal Cultural Considerations in the TPP Preamble

It is tempting to skip the preamble in free trade agreements such as the TPP, since the language tends to be aspirational and is not enforceable via dispute settlement. The preamble can, however, have a mitigating effect on pressures in the agreement to liberalize in sensitive areas of legitimate public policy. This is because international law provides that a treaty shall be interpreted "in the light of its object and purpose." Thus, one could argue that provisions of the TPP — like the CETA, which also includes cultural considerations in its preamble — should be interpreted as more "culture-friendly."

In practical terms, the "international judges" of free trade (i.e., arbitrators on investor–state tribunals, members of the WTO Dispute Settlement Body, etc.) may be more inclined to adopt a harmonious interpretation of seemingly contradictory international trade and investment rules, on one side, and UNESCO cultural obligations, on the other, if the intentions of

the parties are clearly spelled out in advance. For instance, the objective of sustainable development included in the preamble of the Marrakesh Agreement establishing the WTO was a decisive factor in the DSB's interpretation of state obligations under the GATT in the *U.S.-Shrimp* case.[13]

In addition to non-economic considerations, including the importance of environmental protection, labour rights, good governance and respect for the rule of law, TPP negotiating parties agreed to mention cultural considerations in the preamble of the agreement. The relevant paragraph reads as follows:

> The Parties to this Agreement, resolving to: ...
>
> RECOGNIZE the importance of cultural identity and diversity among and within the Parties, and that trade and investment can expand opportunities to enrich cultural identity and diversity at home and abroad.[14]

This language is insufficient to give effect to Canada's obligations under UNESCO treaties, or to mitigate the negative impact of the TPP on cultural policies at the national and provincial levels, for three main reasons. First, it completely ignores all international legal instruments on the protection of culture, including the 2005 UNESCO Convention. We can contrast this with the CETA, which explicitly refers to, and reaffirms state obligations under, that cultural treaty in a fashion that could positively (i.e., in a culture-friendly manner) affect Canada–EU disputes related to cultural policy.

Second, while the preamble foresees opportunities for the promotion of culture and diversity through trade and investment, it fails to acknowledge the threats and challenges in the agreement. The suggestion is that more trade inevitably enriches culture — a typically neoliberal concept frequently contradicted by more pragmatic approaches to cultural protection and diversity.

Third, the TPP preamble misses another opportunity to enshrine cultural considerations in a paragraph on states' "right to regulate," in which parties "resolve to preserve the flexibility...to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals."[15] Here, again, the TPP approach differs from what Canada and the European Union agreed to in the CETA, which explicitly recognizes the "promotion and protection of cultural diversity" as legitimate policy objectives. A trade or investment dispute panel established under the TPP may arrive at different results in a conflict

over cultural policy depending on whether the list of legitimate objectives is treated as exhaustive or descriptive.

Canada has signed other free trade agreements that provide a much stronger commitment to cultural diversity and protection than even the CETA or NAFTA (where the cultural exception was first expressed).[16] For instance, the following language was included in the preambles of Canada's FTAs with Peru (2009), Jordan (2012), Panama (2013), and Honduras (2014):

> Recognizing that states **must maintain the ability to preserve, develop and implement their cultural policies** for the purpose of strengthening cultural diversity, given the **essential role that cultural goods and services play in the identity and diversity of societies and the lives of individuals** *(emphasis added)*.[17]

Other FTAs with Costa Rica (2002), the European Free Trade Association (2009), and South Korea (2015) include a similar paragraph in their respective preambles.[18] It is a clear sign of Canada's historical concern with preserving the right to regulate for cultural protection and promotion.

The TPP preamble, on the other hand, makes no reference to international instruments for the protection of culture, does not explicitly recognize the preservation of cultural diversity as a legitimate policy objective, and takes a neoliberal view of cultural promotion (i.e., that more trade and investment can have only positive impacts on culture). The final text reflects the absence of consensus within negotiating parties split on the cultural exception.

A Conditional and Limited General Cultural Exception

In general, FTAs require states to treat national and foreign goods, services, and investors the same way, but they may also prohibit governments from intervening in the economy in ways that might encourage local development, protect local jobs or industries, or pass public safety regulations. As Stephen Clarkson and others note, FTAs like the TPP are constitution-type documents designed to restrict the policy space of signatory states (their federal, sub-national, and even municipal governments) in the interests of "freeing" or liberalizing trade and investment flows.[19] As such, governments will try to exclude sensitive policy areas, including culture, where they want to maintain some space to govern and regulate in the public interest.

In the past, as noted above, Canadian governments of all political stripes have sought a broad general exception for culture and cultural industries in

Canada's trade and investment treaties. Proximity to the U.S. and its dominant entertainment industry has stoked recurring Canadian concerns about cultural assimilation and the survival of local industries and public institutions capable of nurturing distinctive artistic and cultural expression. Constrained by higher unit costs — the result of a small population in a large country — Canadian cultural industries, from broadcasting to publishing, have consistently advocated for protection.[20]

These efforts have been strongly opposed by successive U.S. administrations. In a climate of increasing globalization, U.S. negotiators have enthusiastically exploited trade and investment agreements to advance one of their most commercially successful export industries.

Article 29.8 of the TPP chapter on Exceptions and General Provisions, regarding "Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources," reads as follows:

> **Subject to each Party's international obligations**, each Party may establish appropriate measures to respect, preserve and promote **traditional knowledge** and **traditional cultural expressions** *(emphasis added)*.

It is interesting that this shows up under Section B: General Provisions, alongside a paragraph on disclosure of information, and not the exceptions section proper. There does not appear to be a good reason why the exception for traditional knowledge and culture should not appear in the same section as the standard exceptions for security policy, temporary safeguard measures (taken to maintain economic order), and the GATT Articles XX (b) and (g), which provide protection (as weak as it has proven to be) for measures "necessary to protect human, animal or plant life or health," and "relating to the conservation of living and non-living exhaustible natural resources."[21]

Beyond its placement in the text, the TPP general exception for culture has two other particularities related to its conditionality and limited scope. In the first case, note the exception is subject to "each party's international obligations." This raises the question of whether it is a true exception at all, since the parties' international obligations presumably include the TPP itself, as well as any cultural treaties they have signed. In other words, the exception may be circular since cultural policy would only be protected to the extent that it complies with the liberalizing pressures in the TPP. In practical terms, the exception is also phrased such that only TPP member states that are party to other international instruments on the protection of trad-

itional knowledge and traditional cultural expressions would be allowed to invoke the exception for the purpose of maintaining cultural policy space.

For example, in the context of a TPP-related trade dispute, Canada could argue its policies for the protection of traditional cultural expressions fulfil obligations in the UNESCO Convention to which it is a party. Similarly, Malaysia could invoke the TPP general cultural exception to justify maintaining its regulations protecting the traditional knowledge of Indigenous people and local communities, as the country is a party to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.[22] On the contrary, the United States could hardly use the TPP exception to justify a national measure aimed at preserving archaeological sites or structures located in the ocean, as it has not signed the 2001 Convention on the Protection of the Underwater Cultural Heritage.

The scope of the TPP cultural exception is also strangely limited. Both concepts (*traditional knowledge* and *traditional cultural expressions*) are included in UNESCO instruments, but are more often used in the framework of the World Intellectual Property Organization (WIPO). Although there is no universally accepted definition of "traditional knowledge," the WIPO suggests the term includes "the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including Indigenous and local communities."[23] With regard to "traditional cultural expressions," the WIPO says it relates to "tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested."[24]

Regardless of their exact definitions, these two concepts are much narrower than the idea of cultural diversity in the 2005 UNESCO Convention, which is defined as:

> the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.[25]

In light of the objective of the 2005 UNESCO Convention to "protect and promote the diversity of cultural expressions," the limited scope of the TPP's cultural exception may not suffice to preserve the integrity of Canada's cul-

tural policies and ensure Canada's compliance with its international obligations under UNESCO legal instruments.

Canada's Insufficient Cultural Reservations

To make up for weaknesses in the TPP's general exceptions related to culture, Canada sought and has secured reservations (carve-outs) to specific TPP chapters in separate annexes to the core agreement. This technique allows Canada and other TPP parties to list (or grandfather) measures, regulations, or laws that appear, on the face of it, to be inconsistent with the agreement on its entry into force, as well as those sectors of activity in which the government would want to maintain policy flexibility (i.e., to take future measures that would otherwise violate the agreement). The drawback, of course, is that a country may forget to include certain cultural protection policies in its list of so-called non-conforming measures, or fail to anticipate new sectors of economic activity a government may one day want to shield from trade and investment disciplines, making future policy measures vulnerable to government-to-government dispute settlement or investor–state arbitration.

Canada's key cultural reservations in the TPP concern particularly the investment chapter, which grants foreign investors or corporations from TPP countries rights to national treatment and most-favoured-nation treatment, as well as more vaguely defined and interpreted "minimum standards of treatment," while also prohibiting "performance requirements" on incoming investment, such as the use of domestic goods or services, export quotas, technology transfer, etc. Many of these investor protections conflict with Canadian cultural policy and the Investment Canada Act generally. Canada's investment reservations in the TPP therefore stipulate the following:

> An investment subject to review under the Investment Canada Act may not be implemented unless the Minister responsible for the Investment Canada Act advises the applicant that the investment is likely to be of net benefit to Canada. This determination is made in accordance with six factors described in the Act, summarized as follows: ...
>
> (e) the **compatibility of the investment with** national industrial, economic and **cultural policies**, taking into consideration industrial, economic and **cultural policy objectives** enunciated by the government or legislature of any province likely to be significantly affected by the investment.... *(emphasis added)*.

Foreign investments in cultural businesses are also subject to specific rules under the TPP. Another Canadian reservation specifies that, "the specific acquisition or establishment of a new business in designated types of business activities relating to Canada's cultural heritage or national identity may be subject to review...in the public interest." It should be noted that two identical reservations were made by Canada in the CETA context.

Other Canadian cultural reservations in the TPP concern trade in services, state-owned enterprises (e.g., to protect the CBC), and government procurement (e.g., to exclude public contracts on services related to culture or cultural industries). For example, with certain exceptions, Canada "reserves the right to adopt or maintain any measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content."

This cultural reservations approach — also used in the CETA negotiation context — is not as effective as would be a broad general exception for cultural policy, which has its own limitations. That is because the more cultural policy is boxed in by agreements like the TPP, the more its definition is legalized in this way, the more culture becomes vulnerable to the "ratchet" effect in FTAs: future governments are free to change their cultural policy as long as the new policy is less, and never more, restrictive to trade and investment.

Even where future policy flexibility is preserved, its exercise must fall within the scope and terms of each party's reservations, which only apply against certain, not all, TPP services and investment obligations. For example, it is not possible to shield cultural laws, policies, regulations and other measures from "minimum standards of treatment" and "expropriation" clauses that are the most often cited by foreign investors in investor–state disputes. This feature of FTAs and investment treaties makes it harder for governments to reform policy so that it more effectively shields culture from free trade disciplines.

Another Canadian cultural reservation (carve-out) from the TPP's chapters on Cross-Border Trade in Services and Investment, included under Annex II covering protection for future policy measures, appears to be a significant concession to the U.S. and a step back from Canada's already insufficient cultural exception policy. The "exception to the exception," as Michael Geist describes it, reads as follows:

> Canada reserves the right to adopt or maintain any measure that affects cultural industries and that has the objective of supporting, directly or in-

directly, the creation, development or accessibility of Canadian artistic expression or content, *except*:

a) **discriminatory requirements** on services suppliers or investors to make financial contributions for Canadian content development; and

b) measures **restricting the access to on-line foreign audio-visual content** *(emphasis added)*.

The origin of this reservation lies in the U.S.-led opposition to an "unreasonably broad" cultural exception in the TPP.[26] In a blog post, Geist writes that while he is supportive generally of a loosening of Canadian content rules and fewer restrictions on streaming audio-video services, "it is shocking to find the Canadian government locking itself into rules that restrict its ability to consider expanding Cancon contributions to entities currently exempt from payment or adopting rules that limit regulatory jurisdiction over foreign online video providers that target Canadian consumers."[27]

However, the situation is even worse than Geist suggests because this is not the first or only "major departure from longstanding Canadian trade policy," as he puts it. In fact, the traditional Canadian negotiating approach would need to have a much larger scope to have any hope of achieving a full exception covering all aspects of cultural heritage, and ensuring compliance with all Canada's obligations under international legal instruments including the UNESCO treaties.

Canada has already made major negotiation concessions in the CETA by agreeing on an asymmetric and limited cultural exception based on cultural reservations at the provincial and federal levels.[28] If the federal government is serious about reviewing the TPP for its potential negative impact on Canadian policy and the economy, it should also take another look at where the previous government's EU deal fails to protect and promote cultural diversity.

Conclusion

There was a fundamental difference in the CETA and TPP negotiating dynamics that ultimately determined the limits of the cultural exception in both agreements. European member states had no opposition in principle to the idea of protecting culture, and both the EU and Canada are parties to the 2005 UNESCO Convention. Divisions between Canadian and EU negotiators in the CETA related to the means of giving effect to UNESCO obliga-

tions and how to express this as a cultural exception in the agreement, as well as the scope of the exception.

In the TPP negotiations, the U.S. and several other countries were radically opposed to the idea of acknowledging a distinction between cultural products and other commercial products, as well as recognizing the legitimacy of state intervention for protecting or promoting national cultural expressions. Though Canada took a similar negotiating approach on culture in the TPP as it did in the CETA, and even had allies at the TPP table, in the end the pacific agreement significantly dilutes Canada's traditional approach in three important ways:

1. The expression of cultural considerations in the TPP preamble makes no reference to any UNESCO legal instruments; instead, it prioritizes a neoliberal conception of cultural promotion through trade and investment, with no clear statement on the legitimacy of cultural policies;

2. The cultural exception in the TPP is conditional on whether or not member countries are parties to other international treaties for the protection and promotion of cultural diversity, and further limited to those related to *traditional knowledge* and *traditional cultural expressions*, concepts that are too narrow to preserve the integrity of Canada's cultural policies; and

3. Relying on limited chapter-specific cultural reservations, which are constrained by the TPP's ratchet effect and circular general cultural exception, will have long-term negative consequences for cultural policy flexibility at the national and provincial levels. This threat is compounded for Canadian-content rules, and with respect to regulating streaming video and audio services, by Canada's problematic "exception to the exception" in Annex II with respect to Cross-Border Trade in Services and Investment Non-Conforming Measures.

In the TPP, Canada fell far short of attaining the moderately effective cultural exception that has been sought by previous Canadian governments in all free trade agreements. Instead, the outcomes far more closely reflect the views and interests of the U.S. government and entertainment industry. This is a setback for Canadian advocates of cultural diversity and their international allies. It is far from clear whether the partial and fragmented cultural exclusions the Canadian government ultimately settled for in the TPP can be relied on to adequately safeguard Canadian cultural identity and industries in the future.

Notes

1 Speech by the Quebec Minister of Culture and Communications for the Informal Meeting of European Union Ministers of Culture, June 2005, Luxembourg. Link: http://www.eu2005.lu/en/actualites/discours/2005/06/27quebec/index.html

2 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005). Link: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

3 Alexandre L. Maltais (2014). Cultural Exceptions chapter in Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (eds.) *Making Sense of the CETA: An Analysis of the Final Text of the Canada–European Union Comprehensive Economic and Trade Agreement*, Canadian Centre for Policy Alternatives.

4 Library of Parliament (1999). "Cultural Exemptions in Canada's Major International Trade Agreements," prepared by René Lemieux and Joseph Jackson. Link: http://www.lop.parl.gc.ca/content/lop/researchpublications/prb9925-e.htm

5 World Trade Organization (2012). Dispute DS363 – China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products. Link: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm

6 Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (ICSID Case No. ARB/96/1)

7 Pauline Marois. "Mondialisation et diversité culturelle – Un instrument international pour préserver la culture," *Le Devoir*, Montreal, July 25, 2002. Link: http://www.ledevoir.com/non-classe/5903/mondialisation-et-diversite-culturelle-un-instrument-international-pour-preserver-la-culture.

8 Article 1(h), Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO, 2005

9 Maltais. Making Sense of the CETA, pp. 49–55.

10 WikiLeaks, "TPP: Country Positions (6 November 2013)," *Second release of secret Trans-Pacific Partnership Agreement documents*, Salt Lake City, November 13, 2013. Link: https://wikileaks.org/Second-release-of-secret-Trans.html?update.

11 Gilbert Gagné and Antonios Vlassis. "Partenariat transpacifique et exception culturelle: rapports de force," Culture, commerce et numérique, Vol. 9:1, February 2014. Link: http://www.ieim.uqam.ca/IMG/pdf/oif-volume9-numero1fevrier-2014ceim.pdf.

12 Ratification or accession.

13 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Decision, 1998, DS58.

14 For this and all references to the TPP text, see version on New Zealand Ministry of Foreign Affairs and Trade, available here: https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/.

15 *Ibid*.

16 NAFTA's cultural exception (Article 2106) was carried over from the 1988 Canada-U.S. Free Trade Agreement.

17 See, for example, the Canada-Peru FTA: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/preamble-preambule.aspx?lang=eng.

18 Interestingly enough, although it was concluded before the adoption of the UNESCO Convention, the Canada–Costa Rica FTA recognizes "that States have the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity."

19 Stephen Clarkson (2002). *Uncle Sam and US: Globalization, Neoconservatism, and the Canadian State*, University of Toronto Press.

20 Garry Neil (2007)."Free Trade and Deep Integration in North America: Saving Canadian Culture," in *Whose Canada: Continental Integration, Fortress North America and the Corporate Agenda*, Ricardo Grinspun and Yasmine Shamsie (eds.), McGill University Press.

21 It is also curious how Article 29.8 lacks coherence, as there is no elaboration in the description of what "genetic resources" refers to.

22 WIPO. "Traditional Knowledge Laws: Malaysia," *Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws*. Link: http://www.wipo.int/tk/en/databases/tklaws/articles/article_0012.html

23 WIPO. "Glossary," Resources. Link: http://www.wipo.int/tk/en/resources/glossary.html#48.

24 *Ibid*.

25 Article 4.1, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, 2005

26 Michael Geist (2013). "The Trans Pacific Partnership and the Fight Over a Cultural Exception," December 10, 2013. Link: http://www.michaelgeist.ca/2013/12/tpp-cultural-exception/.

27 Michael Geist (2016). "The Trouble with the TPP, Day 18: Failure to Protect Canadian Cultural Policy," blog entry, January 27, 2016. Link: http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-18-failure-to-protect-canadian-cultural-policy/.

28 For more detail, refer to this short analysis on CETA's cultural exception: Alexandre L. Maltais, "L'Accord économique commercial et general Canada-Union Européenne: Faut-il célébrer l'évocation culturelle?" Institut de recherche en économie contemporaine (IREC), Novembre 2014. Link: http://www.irec.net/upload/File/lettrecommerceno5novembre2014vd.pdf.

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CENTRE CANADIEN
de POLITIQUES ALTERNATIVES