
**CANADA-MERCUSOR FREE TRADE
AGREEMENT:
SUPPORTING CANADIAN CULTURE AND
BUILDING CULTURAL LINKS**

**ACCORD DE LIBRE-ÉCHANGE CANADA-
MERCOSUR : SOUTENIR LA CULTURE
CANADIENNE ET CONSTRUIRE DES LIENS
CULTURELS**



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May 1, 2018

ACTRA recommends the cultural provisions of any Free Trade Agreement between Canada and Mercusor be based on our mutual support for the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* (Convention).

Key elements of this progressive and innovative approach are:

1. The Convention's Article 6 and others confirm that Canada and each member state of Mercusor has the absolute right to support its own artists and cultural producers in every medium.
2. Create opportunities to work with associations and cultural industries to develop more robust forms of cultural cooperation, including cultural exchanges, and touring by artists and performing arts companies.
3. Work with the sector to update the film and television coproduction treaties and invigorate their use.

Who we are

This is the submission of ACTRA (Alliance of Canadian Cinema, Television and Radio Artists) in relation to the negotiation of a Free Trade Agreement with Mercusor.

ACTRA brings to this process the perspective of over 25,000 professional performers working in the English-language recorded media sector in Canada. For 75 years, we have represented performers living and working in every corner of the country who are pivotal in bringing Canadian stories to life in film, television, sound recording, radio and digital media. The ACTRA Performers' Rights Society (PRS) secures and disburses use fees, royalties, residuals and other forms of performers' compensation. The ACTRA Recording Artists' Collecting Society (RACS) administers the royalty and private copying levy due to performers in sound recordings.

Canada's cultural policies have created successful cultural industries

Since the early 1950s, Canadians and their governments of all political stripes have embraced the premise that Canadian governments must play an essential role if Canada is to have a vibrant arts and culture sector. Over the decades, Canada has developed one of the most comprehensive cultural policies in the world.

The objective of our cultural policymaking is to support Canadian artists and cultural producers in their mission to tell our stories and bring our perspectives to audiences. It has never been exclusionary; Canada remains one of the most open markets in the world for the cultural

productions of others. Our cultural policymaking is about ensuring our storytellers have the capacity and opportunity to bring high-quality works to the market; and ensuring audiences, in Canada and abroad, have access to these works.

Even with the challenges of the digital world, our policies remain effective, and Canada's film and television industry is thriving. There is a healthy mix of service and domestic production. People are working. According to Profile 2017,¹ total production activity in 2016-17 reached \$8.58 billion, which represented 171,700 full-time equivalent jobs. There were record levels of activity in every sector and every region. Canadian content production (including in-house broadcaster production) reached \$4.6 billion, up 11.3 per cent from the previous year. Foreign location and service production reached \$3.8 billion, up 42.1 per cent from the previous year.

Canadian television programs are increasingly popular in Canada. *Murdoch Mysteries*, *Motive*, *Saving Hope* and *Rookie Blue* each regularly have drawn more than 1.4 million viewers. The mini-series *Anne* drew 2.1 million people during its premiere episode. *Kim's Convenience*, *Heartland*, *Schitt's Creek* and many others are also well-established on the Canadian landscape.

Many of our television programs have audiences around the world. While our English-language programs have always found markets in other countries, we've seen growing interest in the United States. From *Degrassi*, *Due South*, *Flashpoint*, *Rookie Blue*, *Killjoys* to *Wynonna Earp*, Canadian shows receive significant exposure in the United States. We recently celebrated Tatiana Maslany for the Emmy Award she received for her stunning performances in *Orphan Black*. International successes in children's and youth programming include the *Degrassi* series, *The Next Step* and *Odd Squad*.

According to FilmL.A.'s annual study, 13 of the top 100 highest-grossing feature films released in 2016 were shot primarily in Canada.² While our filmmakers regularly receive international acclaim and major awards for their works, audiences are somewhat harder to find for Canadian movies, particularly in theatres.

Our film and television production industry is underpinned by a balanced range of government policy measures, at the national, provincial and local levels:

- Canadian content rules that require those providing viewers with audiovisual content to ensure Canadian films and television shows are in the mix;
- Direct and indirect funding support that helps to level the playing field for Canadian producers against foreign competitors who have a tremendous competitive advantage. Producers in the U.S., Britain, India and other countries can recoup their investment in their home market: Canadian producers cannot;
- Public institutions. The Canadian Broadcasting Corporation, Telefilm Canada and the National Film Board, the public-private Canadian Media Fund, and others;

¹ [Profile 2017: Economic report on the screen-based media production industry in Canada](#), Canadian Media Producers Association, 2018;

² [13% of top grossing films shot in Canada](#), Jordan Pinto, Playback, May 25, 2017;

- Support for training and professional development, including of the artists and technicians whose skills are essential to the industry;
- Requirements for our highly successful media companies, which have grown under the protection of various preferential measures, to make reasonable financial contributions to Canadian content production;
- Film and television coproduction treaties that encourage partnerships between Canadian producers and those from our treaty partners;
- Investment rules that protect Canadian firms; and
- Preferential copyright rules.

Similar measures have been implemented in other cultural industries, including writing and publishing, music, crafts and design as well as for the visual and performing arts.

While some have used the strong production numbers as support for a deregulatory approach, we do not agree. Our industry is notoriously cyclical. The current global boom in drama production is likely to end when the major players (Netflix, HBO, Amazon and others) have built a large inventory of productions they can market around the world for many decades. There is already talk in the U.S. of “peak TV.” We also believe the current boom in foreign-service production will be significantly and negatively impacted by the recent U.S. tax reforms, which reduce corporate taxes and permit studios to fully expense the capital investment for film, television and live theatrical productions if 75 per cent of the costs are incurred in the U.S.³

Consequently, ACTRA believes if we want to continue to have a wide diversity of vibrant cultural expressions, we will need supportive public policies, even if these must change to adapt to current and future technologies.

Cultural policies come into conflict with trade agreements

ACTRA’s involvement in trade issue stretches back to 1986 when Canada launched free trade negotiations with the United States, and the General Agreement on Tariffs and Trade (GATT) launched its eighth round of multilateral trade talks in Uruguay (this created the World Trade Organization (WTO)). GATT covers trade in goods and, when it was signed in 1947, cinema screen quotas were explicitly exempted from the agreement. But, concerns about the effects of “free trade” on cultural policymaking began to arise more seriously in 1986 as negotiations launched that year included issues related to trade in services and trade-related investment measures.

Trade agreements concluded since 1986 typically establish rules not only for the physical good, including the film, book, CD or magazine, but also for the services contained in that good, whether they are provided by a writer, musician, dancer, performer or director. These agreements also protect foreign investors and some limit what public service institutions can do.

In countries around the world, it is accepted that culture cannot be treated the same as other commodities. If Canada’s cultural industries were treated the same as other industries, the

³ For a more detailed analysis, see [ACTRA submission in CRTC 2017-359-2](#);

results would be devastating to the many government measures so vital to our cultural industries. For example, measures that give preferential treatment to Canadian artists, producers and investors are non-compliant with national treatment obligations. Some broadcasting regulations may be contrary to market access rules. By their very nature, coproduction treaties violate most-favoured-nation provisions.

In the leading international case on cultural policies, Canada's magazine industry support measures were found in 1997 to be in violation of various WTO provisions. The WTO ruled that Canadian and U.S. magazines were "like goods" (despite the fundamental differences in editorial content), and that both the good (the magazine) and the services it contains (the writing, advertising, design, etc.) are covered by the trade rules. Since the ruling, Canada has been forced to limit magazine support measures primarily to financial subsidies for domestic magazines, since subsidizing domestic producers is permitted by WTO and other trade agreements.

Protecting cultural policymaking space

Faced with these challenges, Canada's arts and culture community together with successive Canadian governments, both Liberal and Conservative (and with support from other parties in Parliament), have been at the forefront in efforts to exempt culture from the provisions of trade agreements, both bilaterally and multilaterally. This is essential to ensure we are able to maintain, adapt and implement new cultural policies as required, from content rules to investment measures to funding programs, to help our own artists and cultural industries to thrive and succeed in the globalized and digital world.

Over the past 30 years, we have been reasonably successful in this effort. Canada has negotiated cultural exceptions or exemptions that, while far from perfect, are generally robust, and protect the full-range of existing measures. Exemptions exist in the Canada-United States Free Trade Agreement, the North American Free Trade Agreement and the plethora of bilateral agreements Canada has concluded up to a few years ago. It is generally the case that these exemptions are found alongside other significant public policy issues where states maintain flexibility to act, such as for national security, public health and environmental protection.

While some of the exemptions may limit our flexibility to develop new measures in response to changing circumstances, we have not yet had to seriously confront that challenge. One limitation arises from the fact we have defined cultural industries as only those that existed in 1986 and thus may not adequately protect newer media forms. The second set of limitations arises from specific provisions, such as NAFTA's Notwithstanding Clause, which authorizes retaliation against measures "that would have been inconsistent" with the agreement but for the exemption. This has created a climate where our policymakers often look for ways to solve the problem without running the risk of triggering the Notwithstanding Clause. Thus, they significantly narrow their policy options.

Canadians were also at the forefront of the campaign to develop the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*. Distinguished Canadian actor R.H. Thomson represented ACTRA at important international meetings in 2001-02 where the

Convention concept was developed. The Convention seeks to confirm the right of governments to implement cultural policy measures and to promote international cultural cooperation. Since it was adopted in 2005, 145 states as well as the European Union, have ratified the Convention, which is both extensive and occurred remarkably quickly for what was initially a controversial proposal.

More recent developments are beginning to raise concerns. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union does not have a general cultural exemption and there is an asymmetrical definition of cultural industries. The agreement instead takes a chapter-by-chapter approach to the exemption, but at least these are underpinned by strong mutual commitments to protect and promote cultural diversity, particularly in the “right to regulate” article. ACTRA has also called for NAFTA’s general cultural exemption to be retained and specifically urges that Canada not adopt a chapter-by-chapter approach.

Comprehensive and Progressive Agreement Trans-Pacific Partnership (CPTPP)

The recently re-negotiated Comprehensive and Progressive Agreement Trans-Pacific Partnership (CPTPP) Agreement is not a model the government should replicate in terms of cultural exemption. The agreement falls short of offering genuine protection for Canadian cultural policy-making.

The CPTPP is the successor to the Trans-Pacific Partnership (TPP) Agreement. After the withdrawal of the United States, the remaining 11 countries agreed on certain actions that permitted them to sign the agreement. ACTRA’s submission to Global Affairs Canada laid out a series of concerns about the original TPP text,⁴ and many of these issues were brought forward by Canadian negotiators in the subsequent talks that led to the CPTPP.

One of the issues raised by Canada in this reconsideration process was the need for stronger language to protect our cultural policy space as the language in TPP is weak.

The CPTPP is a new agreement that incorporates the existing TPP text by reference. Canada sought to protect culture through a new preamble provision and a Side Letter it signed with each party. The original text of the TPP thus remains in place in all important areas. Despite the changes, ACTRA still has serious concerns about the potential for the CPTPP to undermine Canada’s ability to set cultural policy:

- The new CPTPP Preamble language is obviously a positive step. But, it is an open question whether it has corrected the core problem of the TPP Preamble. On the one hand, the new Preamble seems to provide that the Parties have a right to regulate in support of cultural diversity, although the use of the words “as well as” leaves some doubt. But, since the new Preamble does not challenge the assumption that “trade and investment can expand opportunities” to enrich cultural diversity, one could argue that the way to

⁴ [ACTRA submission to Global Affairs Canada consultation on the Canada-Pacific Trade Agreement \(formerly the Trans-Pacific Partnership\)](#).

achieve cultural diversity is through market forces rather than regulation. This would be supported by the fact that the TPP's right to regulate and General Exceptions make no reference to cultural diversity. More importantly, a Preamble provision can be used only for purposes of understanding the intention of the Parties. If the agreement's language is clear, that language applies: if the agreement language is ambiguous, unclear or limited, the Preamble may be used to understand what the Parties intended with the specific provision.

- Like a Preamble clause, a Side Letter typically is used as an interpretive tool where the text is otherwise ambiguous, unclear or limited. While side letters would make it difficult for signatory nations to challenge a Canadian measure that provides "discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development" or "that restrict access to on-line foreign audio-visual content," Parties may expect that this reservation remains subject to "standstill and rollback" provisions since this is standard when dealing with reservations.
- The Side Letter also likely does not preclude a foreign investor from challenging such a measure under the investor state dispute settlement provisions since investors have rights independent of governments. ACTRA notes particularly that Sony Entertainment, which remains a major Hollywood player, is owned by a Japanese company.

CANADA-MERCUSOR FREE TRADE AGREEMENT

Considerations and background

ACTRA believes the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* can be the basis for the cultural provisions of a Free Trade Agreement between Canada and Mercusor. In addition to protecting the right of State Parties to implement cultural policies, the Convention can also provide a foundation for an expanded and more robust cultural relationship, one that is based on mutual respect and a shared desire to ensure that citizens in both countries have access to a richer diversity of cultural expressions.

Canada and several Mercusor members were key players in the negotiation and development of the UNESCO Convention. All were strongly supportive of its implementation. Canada was the first State to accept the Convention in November 2005 while Mercusor members Brazil, Argentina, Uruguay and Paraguay all adopted it by May 2008. Suspended Mercusor member, Venezuela, is a Party to the Convention as are five of the six associate Mercusor members: Bolivia, Chile, Peru, Columbia and Ecuador.

Canada has film and television coproduction treaties with Brazil, Argentina, Uruguay, Venezuela, Chile and Columbia. Since 2010, 17 productions have been produced under these treaties, primarily with Brazil, which had 10.

UNESCO Convention provisions can guide the cultural relationship between Member States

ACTRA believes Canada can maintain its flexibility to implement cultural policies, while building a more robust cultural relationship between Mercusor countries and Canada, if we use the

UNESCO Convention as the foundation for that relationship. The following are the key elements of this new relationship:

1. Confirm that Canada and each member of Mercusor has the absolute right to support its own artists and cultural producers.

One of the key objectives of the UNESCO Convention is “to reaffirm the 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 territories.” Article 6 outlines the range of measures a Party may take to achieve the objective, including:

- Regulatory measures;
- Measures that “provide opportunities for domestic cultural activities, goods and services” within the overall market, including “provisions related to the language used for such cultural activities, goods and services;”
- Public financial assistance;
- Public institutions;
- Measures aimed at supporting artists and others involved in the creative process;
- Measures aimed at enhancing diversity in the media, including through public service broadcasting;
- Measures aimed at ensuring access for domestic cultural industries; and
- Measures that promote the “free exchange and circulation” of ideas and cultural expressions, and that stimulate the “creative and entrepreneurial spirit.”

The scope of the Convention is broad; it “shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.” It is importantly not exclusively limited to “cultural” policies. The Convention definitions reinforce the broad scope of cultural policymaking. Cultural activities, goods and services are defined as things that “embody or convey cultural expressions, irrespective of the commercial value they may have.” Cultural policies and measures refer to “those policies and measures relating to culture ... that are either focused on culture as such, or are designed to have a direct effect on cultural expressions ... including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.”

There are some limits to what Parties may do in support of their domestic cultural sector. Importantly, Article 5.1, the general provision respecting the scope of governmental authority, confirms the need to respect human rights and fundamental freedoms. There is also a principle of “openness and balance,” which may act as a limitation.

Overall, by confirming support for the Convention, Canada and the Mercusor members will acknowledge they each have the right to support their own artists and cultural producers in every sector and medium, and how the works may be distributed to consumers. This is a positive understanding of the broad scope of cultural policymaking and is not limited to current media.

Thus, it would provide far more protection for Canada than even the most comprehensive exemption Canada has negotiated in any other trade agreement.

2. Develop more bilateral cultural cooperation agreements in every medium

The Convention does more than just confirm the sovereignty of States to take actions within their own territories to promote cultural expressions. It also seeks to encourage cultural exchanges and international cooperation to promote cultural development based on mutual respect and with the goal of providing greater access to diverse cultural expressions in each of the partner countries. One of the objectives of the Convention is “to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges....” The Convention also establishes the “Principle of openness and balance,” which provides “When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world....”

With this in mind, ACTRA recommends the government convene a high-level meeting of leaders of the Canadian cultural sector to consider how to expand our bilateral cultural relationships with the Mercusor region. It is essential that such a panel include representatives from artists’ associations. Initiatives to consider include:

- Creating more opportunities for Canadian musicians to tour the Mercusor region;
- Encouraging more opportunities for touring by other artists and performing arts companies with the goal of providing greater access to diverse cultural expressions in both of our countries;
- Modernizing and expanding the existing film and television coproduction treaties as appropriate to include video games; and
- Working to expand the use of the film and television coproduction treaties.

3. Consider the potential for collaboration under other relevant provisions of the Convention.

The Convention can provide other opportunities for collaboration if the Canadian government wishes to consider them. Examples include:

- Working with Mercusor to “promote the objectives and principles of this Convention in other international forums,” as provided in Article 21. This could include working together in the WTO to ensure future multilateral trade agreements fully respect the specific circumstances and requirements of cultural goods and services;
- Promoting collaboration between our respective “civil society, non-governmental organizations and the private sector,” as provided in Articles 11 and 12; and
- While it would be extremely delicate, the government could propose collaboration to protect forms of cultural expression that “are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding,” as provided in Articles 8 and 17.

CONCLUSION

Since their election in 2015, the prime minister and several cabinet colleagues have talked a great deal about “gold-standard” and “progressive” trade agreements. Yet, the two agreements currently being seriously considered, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the North American Free Trade Agreement, present challenges for the Canadian cultural sector. In a worst-case scenario, the CPTPP and a potentially weakened NAFTA would seriously erode Canada’s capacity to support its own artists and cultural producers.

ACTRA proposes a new and progressive approach to the cultural trade issues, one that is based on the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*. This approach would confirm the absolute right of partner countries to support their own artists and cultural producers, regardless of the medium or method of distribution. It would also encourage partner countries to develop more robust forms of cooperation and cultural exchanges based on mutual respect, and with the goal of providing greater access to diverse cultural expressions in each of the partner countries.

Such an approach would bring a real gold-standard and progressive agreement for culture.