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To: Global Affairs Canada, Canadian Heritage and the CRTC
Date: November 17, 2020
Subject: **WILL PROPOSED CHANGES TO THE *BROADCASTING ACT* TRIGGER US RETALIATION?**

Bill C-10, an Act to amend the *Broadcasting Act* (sponsored by Canadian Heritage), received first reading on November 3.

If passed, the amendments will subject online streaming services such as Netflix to domestic broadcasting regulation. While “online undertakings” such as Netflix will not be required to be licensed, the Canadian Radio-television and Telecommunications Commission (CRTC) will be authorized to make regulations requiring online undertakings to make expenditures supporting Canadian programming.

Would such regulations expose Canada to US measures of equivalent commercial effect under the CUSMA cultural exemption?

The CUSMA exemption covering cultural industries (which include “television and cable broadcasting undertakings”) is superficially like the cultural exemption in the Canada-US Free Trade Agreement (FTA) that was carried forward into NAFTA. Like the FTA exemption, the CUSMA exemption provides that CUSMA does not apply to a measure adopted or maintained by Canada with respect to a cultural industry. Also like under the FTA exemption, the US may take a measure of equivalent commercial effect in response to an action by Canada that would have been inconsistent with CUSMA but for the exemption.

However, the FTA services and investment provisions did not cover cultural activities such as broadcasting and this non-coverage was carried forward into NAFTA. Hence under the FTA and NAFTA, the exemption was not necessary to justify measures respecting broadcasting because, not being covered, no justification was necessary and the right to take measures equivalent commercial effect did not apply.

The FTA non-coverage has not been carried forward into CUSMA. The CUSMA services and investment provisions cover cultural activities such as broadcasting. None of the reservations to either CUSMA Chapter 14 (Investment) or CUSMA Chapter 15 (Services) exempts broadcasting from the obligations under these chapters.

While CUSMA Chapter 14 expressly prohibits performance requirements that require achieving a given level or percentage of domestic content, online streaming services are subject to Chapter 15, which covers cross-border services, and not Chapter 14.

While Chapter 15 sets out limitations on the measures Canada may adopt respecting the cross-border delivery of services, these limitations are different from those in Chapter 14 and nothing in Chapter 15 squarely prohibits domestic content requirements.

So far so good.

However, CUSMA Chapter 19 that sets out rules respecting digital trade presents a problem. The definition of “digital product” includes “video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.” This definition covers products provided by companies like Netflix.

CUSMA Article 19.4 sets out a national treatment provision requiring that digital products produced in the US receive no less favourable treatment than like digital products.

Domestic content requirements for goods have been found to be inconsistent with national treatment provisions such as those contained in Article III:4 of the 1994 revision of the General Agreement on Tariffs and Trade.

Similarly, regulations requiring expenditures for developing, financing, producing or promoting Canadian audio or audio-visual programs for broadcasting by traditional broadcasters could be found to be inconsistent with the national treatment provision in CUSMA Article 19.4.

The CUSMA cultural exemption would then kick in to justify the measure, with the result that the US could take measures of equivalent commercial effect in response, without having to first proceed through the CUSMA dispute settlement process.

Before Bill C-10 proceeds further through the legislative process, Canadian Heritage and the CRTC should consult with Global Affairs Canada to examine the ways to avoid a potential trade dispute with the US which could hurt Canada’s exports to the United States.

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