

CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

a publication of the York University Centre for Public Law and Public Policy and the Robarts Centre for Canadian Studies of York University

SPECIAL ISSUE: FOCUS ON THE MAI

CULTURAL PRESERVATION OR VULGAR PROTECTIONISM? OPPOSITION TO THE GLOBALIZATION OF CULTURAL INDUSTRIES IN MAI NEGOTIATIONS

BY MICHELLE SFORZA

Historically, France (and the other francophone nations) have drawn the line against international economic integration at their cultural borders. They argue that the cultural industries (movies, broadcast and print media, art and literature) do not simply yield tradable commodities but serve as the wellspring of national identity. Therefore, cultural industries and institutions should be protected from market liberalization agreements like GATT and the proposed Multilateral Agreement on Investment (MAI), in the name of preserving cultural heritage.

Yet the United States government claims that protections for domestic culture are nothing more than a mechanism for countries to shield domestic firms from legitimate competition (in violation of the principles of free trade and the free flow of investment).

The setting for the latest fight over liberalization of cul-

tural industries is the Organization for Economic Cooperation and Development (OECD), where the group of 29 mostly industrialized countries is negotiating the MAI. Modeled on the investment chapter of the North American Free Trade Agreement (NAFTA), the MAI would obligate member gov-

ernments to open almost all economic sectors to foreign investment, and would prevent them from placing certain conditions on that access. It would bar governments from treating foreign investors or their products "any less favourably" than their domestic counterparts in terms of regulations or eligibility for government subsidies. It would prohibit any restrictions on the purchase of domestic firms by foreign investors. And the MAI would grant multinational corporations the standing to sue sovereign governments in international courts when they

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THE MULTILATERAL AGREEMENT ON INVESTMENT IS LOST IN WASHINGTON

BY STEPHEN BLANK

Unlike the punch-up over fast track authorization or the Kyoto meeting on global warming, which drew all sorts of interest groups into play, the MAI scarcely tracks on the American radar. It is being low-balled by the President and has barely surfaced in Congress. There is little trace of it in the print media, and a voyage across the World Wide Web finds few U.S. sites, other than those of some of the environmental groups. Not that we are completely oblivious. The U.S. embassy in Ottawa has good MAI references on its

Web site (presumably for Canadian use).

But the MAI is way down on the agenda. A source in a business organization that is working for MAI says that there is no indication it has a high level of support in the Administration. After the rough handling the President received on fast track, it is hard to believe that anyone will risk his or her neck for MAI.

Why? One hypothesis focuses on America's propensity to isolationism. Martin

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feel their rights have been violated.

To the dismay of U.S. negotiators, France, backed by the European Union (EU), Belgium, Italy, and Canada, has proposed a carve-out to the MAI allowing signatories to adopt and maintain laws designed to protect national culture. Supporters of the cultural exception wish to protect their broadcasting, print, and audiovisual sectors and maintain the state's central role in achieving social objectives and guiding economic development in these areas.

In fact, many OECD countries have sought to protect specific cultural sector laws by "reserving" them from the agreement. Some of these include Australia, Czech Republic, Italy, Korea, Netherlands, New Zealand, Poland, Portugal, Spain, Turkey, United Kingdom, and the United States, who have chosen to reserve laws restricting foreign ownership of broadcast/print media. The U.S. reservation is one based on reciprocity: they reserve the right to place reciprocal limits on countries that limit U.S. investment in cable television and daily newspapers.

To proponents of the cultural exception, however, country-specific reservations do not affirm the general legitimacy of cultural protection. And reservations are subject to roll-back either in the form of a sunset clause requiring the country to rescind the law by a certain date, or through a commitment to undertake negotiations in the future. An exception, on the other hand, would for all purposes, analytical and political, separate the realms of culture and commerce.

Without the cultural exception, many strategies to protect and promote domestic cultural products would be considered illegally "discriminatory" against foreign investors under the MAI. Reflective of the high status culture is afforded as a national priority, France doles out approximately US\$250,000,000 per year to its film industry. Australia, New Zealand, and the Netherlands also subsidize domestic artists and their products. The MAI could require those governments to incur the expense of offering the same grants to any foreign investor. And 13 OECD nations maintain ownership restrictions on broadcasting

networks and/or print media, a clear violation of the MAI provision enabling foreign investors to purchase 100% equity in almost all economic sectors.

[The "General Treatment"] provision would create a new standard in international law based on the elusive concept of "reasonableness", giving arbitration panels broad discretion to limit the regulatory role of governments.

In proposing to ban certain "performance requirements", the drafters of the MAI seek to go beyond the goal of equalizing treatment between foreign and domestic investors. Performance requirements prohibited by the MAI include policies that require investors to use domestically produced materials or to create a certain number of jobs locally. This MAI provision concerns the

treatment of domestic as well as foreign investors (by joining the MAI, governments would narrow their options for regulating not just foreign but also domestic businesses to achieve social objectives). For the EU, this could mean sacrificing the "Television Without Frontiers" program, which mandates that EU countries reserve 50% of programming time for shows made in Europe.

Also of concern is the MAI's "General Treatment" clause, which would prohibit governments from impairing, by "unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of investments". This provision would create a new standard in international law based on the elusive concept of "reasonableness", giving arbitration panels broad discretion to limit the regulatory role of governments. Under this provision, France's Toubon law, which forbids corporations engaged in media activities from using English expressions where there is a French equivalent, could be challenged by a wide range of U.S. investors as un-

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justly restricting their marketing strategies by preventing them from capitalizing on intellectual property like brand names and advertising slogans.

MAI opponents argue that questions regarding the scope of markets should not be settled in the marginal realm of international investment law, but should rather be addressed in domestic, democratically accountable fora.

And French artists are concerned that the MAI would ultimately lead to the replacement of the French conception of intellectual property rights with the Anglo-American approach. In France, authors retain some rights concerning the use and dissemi-

nation of their work, even where a publisher holds the copyright. Under the MAI, copyrights would be absolute, as in the United States and the United Kingdom. French artists working for foreign firms could thus be forced to forego the legal rights they enjoy under French law.

The U.S. bases its opposition to the cultural exception on two central arguments. The first is that trade is a friend, and not a foe, of cultural diversity. Proponents of cultural carve-outs in both the industrialized and third worlds counter that local cultural industries could not possibly survive unfettered competition against such global giants as the Hollywood entertainment industry, which already has a substantial global market presence. The long-term effect of the globalization of culture, they argue, will not be diversification, but homogenization.

The second U.S. argument against the cultural exception reiterates traditional *laissez-faire* doctrine (that the market should be the ultimate arbiter

of culture). But while the embrace of the market is reflective of the highly privatized American economic landscape, it is not a universally accepted principle. MAI opponents argue that questions regarding the scope of markets should not be settled in the marginal realm of international investment law, but should rather be addressed in domestic, democratically accountable fora.

The debate over the proposed cultural exception is as much about ideas as it is about money. While the entertainment industry is big money for nations like the U.S. and France, the proponents of the cultural exception have demonstrated a strong resistance to its complete commodification. Given that a way of life as well as a significant source of national income are at stake, a cultural exception appears to be an eminently reasonable request. In fact, it seems like one of the better reasons a country could choose to protect domestic industries.

Under the logic of the

laissez-faire ideas enshrined in the MAI, economic development strategies for nurturing domestic business are viewed as unreasonable "discrimination". Cultural exception proponents, while embracing many of the same pro-market notions as their American negotiating partners, still subscribe to the common sense notion that not everything should be for sale. In seeking a cultural exception to the MAI, they are accepting that governments have responsibilities to their citizens that they cannot necessarily trust the market, or foreign investors, to fulfill. What is at stake in the debate over the cultural exception is not simply one country's business interests over another's, but the moral limits to markets.



Michelle Sforza is a Washington-based analyst and expert on cultural policy, and a member of the Prelude Public Policy Group.

WHAT RIGHTS DOES THE MAI PROTECT?

BY BARRY APPLETON

While the MAI provides broad protections for foreign investment, it does not cover every investor right. Following is a brief description of the most important investment rights protected by the MAI.

NATIONAL TREATMENT

National treatment is fundamentally about preventing discrimination against foreign investors and their investments. However, it broadly restricts how governments may partici-

pate in the economy. For example, differential fees based on the location of the investment likely violate this obligation. The MAI's national treatment obligation provides foreign investors with the best treatment received by any investment in any part of the country. This means that an investor can challenge local government actions that are more burdensome than those imposed in other provinces.

The MAI is a very generous treaty as it provides that investors receive the fair market value of the investment (this can exceed compensation levels established under Canadian domestic law).

MINIMUM STANDARDS OF TREATMENT

MAI governments must provide the minimum standard of treatment as established by international law to the nationals

and investments of other Parties. This establishes a floor for protection even if locals are treated the same as foreigners.

PERFORMANCE REQUIREMENTS

The ability of governments to impose a wide variety of restrictions on business practices is limited. MAI governments are prohibited from requiring the purchase of local goods and services or from forcing investors to export a certain level of locally produced goods or services. Governments cannot regulate the distribution of services within their borders or restrict sales based on the volume or value of exports. Government benefits made in connection with