

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

an investment in its territory cannot be based on the use of local goods or services. Thus a government cannot require, or encourage, a business to purchase locally produced equipment and supplies.

EXPROPRIATION

The MAI forces governments to pay compensation whenever there is an expropriation or a measure equivalent to an expropriation. Under international law, the term expropriation is very broadly applied and applies to any act when governmental authority denies some benefit of property. The government does not need to take title to the property; all it has to do is deny the benefit of the investment to the investor. 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).

Barry Appleton is an international trade lawyer and expert practising in Toronto and New York.

HAS CANADA EXHAUSTED CULTURAL EXEMPTION STRATEGY?

BY KEITH KELLY

Over the past several months, the attention of artists, cultural workers, and concerned Canadians has been focused on the negotiation of the Multilateral Agreement on Investment (MAI). This multilateral project is being led by the Organization for Economic Cooperation and Development (OECD), a body comprised of 29 of the world's most developed economies, and is aimed at creating a broad set of rules which protects international investors and their investments from the vagaries of domestic politics.

The MAI is the latest incarnation of similar efforts which were mounted in the Uruguay Round of GATT negotiations. The TRIMS negotiation table proposed a sweeping package of measures almost identical to the proposed contours of the MAI. The measures failed to make it into the GATT as a result of the vehement protests of the third world nations, which feared that the adoption of these measures would permanently consign their economies to colonial status. Undaunted by this setback, the OECD, which has no third world members, undertook the MAI process.

As the extensive measures being negotiated at the OECD became known to the public, concerns were expressed that the agreement was a major incursion into the political, economic, and cultural sovereignty of signatory states. As proposed, some of the more problematic measures would limit domestic content requirements for foreign investors, eliminate the need to hire nationals or to demonstrate any

benefits to the nation where the investments are made. The implications of these and other measures, including a sweeping definition of investment, which captures profit and not-for-profit undertakings, intellectual property, and state-owned operations, stirred the Canadian cultural sector to seek an exemption for culture within the master agreement.

For many it was clear that the imposition of the MAI would spell the end for policies which have been keystones in the Canadian cultural arsenal, such as limitations on foreign ownership, funding agencies which provide assistance to Canadians only, Canadian content requirements in broadcasting, and the use of the tax system to stimulate private investment in the cultural sector. The cultural sector rallied around the call for carve-out for culture within the MAI. The government responded with a request for clarification: what do we mean by a carve-out?

For government trade negotiators, the obvious reference point was the so-called cultural exemption within FTA/NAFTA. The FTA/NAFTA exemption has been widely criticized within the cultural sector as being too narrow (creation, museums and heritage, and the live performing arts are not included), and the retaliatory provisions within the notwithstanding clause constitute an effective deterrent to major government initiatives in the cultural domain. Yet, despite its many perceived imperfections, it is the only broad cultural exemption within the network of international trade

agreements.

Canada is not unique in its promotion of the "cultural exemption strategy". France, supported by Belgium, has put forward texts which to some degree remove dimensions of cultural expression from the disciplines of international trade agreements. It was France that spurred the European Union to seek an exemption for audio-visual services in the Uruguay Round of the GATT, and they have proposed a broader exemption within the MAI that identifies language and cultural diversity as the key elements of a new exemption. The French MAI text is too narrow for Canadian needs. Language is an important element, but is not inclusive enough to capture the full range of Canadian cultural policies at risk from the breadth of the MAI, such as ownership and control policies and Canadian content requirements.

For those Canadians who support the "cultural exemption" strategy, there are a few benchmarks for a fully acceptable carve-out. Like the General Exemption on National Security within the GATT, a cultural exemption must be self-judging. As with national security, it is up to each state to define what constitutes elements of importance to national security. It also must not be subject to challenge or retaliation from our international trading partners. With these two key elements in place, Canada would be utterly free to craft cultural policy measures consistent with our needs and changing conditions. These two characteristics would give the Government of Canada the latitude it requires to husband our cultural life as it best sees fit.

There is another tool available to signatory states which

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