

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).

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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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is the "country specific reservation". Here individual states can list those sectors which they wish to remain outside the disciplines of the multilateral agreement. Country specific reservations come in two forms, "bound" and "unbound". Bound reservations mean that the listed sectors or measures are subject to the rollback and standstill rules, which provide that the state agrees to gradually modify and eventually eliminate those measures which do not conform to the obligations contained in the agreement. Unbound reservations allow the state to maintain the measures and exempt the sectors while retaining the right to implement new measures which do not conform to the broader terms of the agreement.

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The country specific reservations only apply to the individual nation which has tabled the reservations, and often the list of sectors and measures contained in the reservation becomes a bargaining issue with other international partners which have not registered similar reservations. As an exemption strategy, country specific reservations are of limited

value in smoothing the way to a broad reference point for the treatment of cultural measures under international trade and investment agreements.

When we look to the General Agreement on Tariffs and Trade, we only find two references to cultural issues. A general exemption in article XX allows Contracting Parties (trade argot for signatory states) to take measures to protect national treasures, and another is found in the original 1947 GATT, which allows for quantitative quotas for imported films. The rest of the agreement is silent on the treatment of culture.

This lack of reference points within the fabric of international trade agreements likely inspired the United States to challenge our domestic magazine industry policy not within the framework of FTA/NAFTA, where it was covered by the cultural exemption, but at the World Trade Organization responsible for the administration of the GATT and GATS. In adjudicating the dispute, the appellate body rendered its verdict using precedents set in traditional durable trading commodities, such as alcoholic beverages and oilseeds. In this context, the central distinction of cultural goods, the content, is completely overlooked.

There is a body of opinion according to which the WTO magazine decision calls into question the efficacy of an exemption strategy within international trade and investment agreements. An exemption, it is argued, merely removes culture from the territory where international rules exist to guide the actions of signatory states and govern the bilateral and multilateral disputes which may arise from time to


time. Proponents of this argument call for a different approach that would see the negotiation of an international set of rules which address the movement and treatment of cultural goods and services. This approach is generally referred to as "rules-based trade".

For the purposes of the MAI, the cultural exemption strategy is a necessary expedient to insulate the Canadian cultural policy framework from the extensive impact of MAI's provisions.

The promoters of "rules-based trade" appear to minimize the resistance of the United States to any special regime which deters them from unfettered access to world markets. The United States made its views clearly known during the dying days of the Uruguay Round, when the European Union was holding out on two key issues, agricultural subsidies and a general exemption on audio-visual services. The two parties reached a compromise on the issue of agricultural subsidies, but the U.S. stated firmly that it could never accept a general exemption based on a cultural rationale. No deal was reached, and therefore the Uruguay GATT did not broaden the cultural measures within the agreement.

The need for an international agreement which affords to signatory states total discretion on domestic cultural

policy is a worthy goal. However, in the negotiation process, the United States can be expected to resist such an approach with all of its resources. Moreover, the desirability and efficacy of a rules-based regime has yet to be demonstrated to the broad satisfaction of the Canadian cultural sector.

For the purposes of the MAI, the cultural exemption strategy is a necessary expedient to insulate the Canadian cultural policy framework from the extensive impact of MAI's provisions. However, the debate must continue about the long-term effectiveness of this approach in the forthcoming round of WTO negotiations scheduled to start in the year 2000, the Asia Pacific Economic Cooperation agreement, and the negotiations on a Free Trade Agreement for the Americas. As the agenda for expansion of these multilateral agreements escalates, it is imperative that the cultural sector, our trade negotiators, and our political leadership resolve this difficult issue. 

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