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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 cultural 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 governments 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 lowballed 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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FEATURES

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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THE MULTILATERAL AGREEMENT ON INVESTMENT IS TEN YEARS OLD

BY ALAN M. RUGMAN

The Multilateral Agreement on Investment (MAI) is being negotiated in Paris at the Organization for Economic Co-operation and Development (OECD). Negotiations started in May 1995 and should have been completed in May 1997; now May 1998 looks like the probable completion date. Despite criticism of the MAI by Canadian economic nationalists, the MAI will not bring any significant economic or political changes to Canada. The reason is very simple: Canada already has a MAI with the United States (it is called the Free Trade Agreement (FTA)).

Despite criticism of the MAI by Canadian economic nationalists, the MAI will not bring any significant economic or political changes to Canada. The reason is very simple: Canada already has a MAI with the United States (it is called the Free Trade Agreement (FTA)).

THE MAI IS BASED ON THE FTA

The investment provisions of the FTA as agreed to ten years ago (in October 1987) are the basis of the draft MAI. The NAFTA investment provisions of 1993 were based upon the FTA and these NAFTA investment provisions are identical in all major respects to those in the draft MAI. For example, both the FTA and NAFTA incorporate the key principle of national treatment, i.e., equal access for foreign (U.S.) investors to the Canadian market (but according to Canadian rules). In return, Canadian investors have equal access to foreign (U.S.) markets, on host country rules. Both the FTA and NAFTA also have exemptions from national treatment for important Canadian sectors, including the big five of health care, education, social services, cultural industries, and transportation.

The MAI is being negotiated along the same lines; countries have already agreed to the national treatment principle but they disagree over the number and type of exempted sectors. The Canadian government has stated that it will continue to insist on exemptions for the five sectors, especially culture, and that the logic of the FTA/NAFTA will be used as a model for the MAI. The underlying structure of the FTA, NAFTA, and MAI is now well understood by Canadians as a clever balance between the pressures of globalization (national treatment) and the need for sovereignty (exempted sectors).

DEEP INTEGRATION

The current challenge in international trade negotiations, somewhat paradoxically, is to negotiate investment rules rather than trade rules. This is because, through seven GATT rounds, and important bilateral agreements such as the FTA, the best known barriers to trade in the form of tariffs have already been reduced to a trivial hurdle, even when calculating effective rates of protection (which takes into account the value-added and labour component of the protected good).

While 54% of Canada's FDI stock is in the United States (and thereby already has national treatment), the MAI will be very useful in setting stable rules for the rapidly increasing stock of Canadian FDI elsewhere, especially in the European Union and Asia.

Today, the bulk of international business is not done by trade in goods, but through services and investments. Over 70% of North Americans work in the service sector, with only 30% in manufacturing. So the new agenda for international agreements is to negotiate rules for trade in services and for international investment. The "shallow" integration achieved by reducing tariff barriers to trade in goods is being replaced by "deep" integration through foreign direct investment (FDI), trade in services, and the international networks of multinational enterprises.

THE CONTENTS OF THE MAI

The structure of the MAI follows that of NAFTA, and is built upon the following platform:

1. Principle of national treatment, with lists of exempted sectors;

2. Transparency, i.e., all regulations on investment are identified as are all exemptions to the principle of national treatment;

3. Dispute settlement mechanisms, to permit individual investors (and companies) to appeal against government regulations and bureaucratic controls;

4. Movement towards harmonization of regulations, although in the areas of competition policy and tax policy not much progress can be expected in the MAI (and none was achieved in NAFTA).

In the draft MAI all of these four areas have been addressed, and a reading of the various drafts shows that the structure of the MAI is based upon NAFTA's investment provisions, as was predictable. The aim of the MAI is to make domestic markets internationally contestable, by providing a basic set of rules for FDI, to which all member countries sign on. The OECD in Paris is the appropriate venue to negotiate the MAI as 98% of all the world's FDI is conducted by multinational enterprises (MNES) based in the 23 member countries of OECD, i.e., all of Western Europe, North America, Japan, Korea, Australia, and New Zealand. There is some opposition to the MAI in a few third world countries, but until the World Trade Organization gets moving on investment issues, there is no practical alternative to the OECD as a venue for the MAI.

THE MAI OPENS DOORS FOR CANADIAN INVESTMENT

The MAI is not a bad-news but a good-news story. The other side of the national treatment coin is that Canadian outward FDI will be encouraged by a MAI. Indeed, as a non-member of the triad (the United States, European Union, and Japan,) Canada is a small, open economy dependent on access to triad markets. Today this access is more often

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achieved through FDI than through trade (although FDI and trade are highly positively correlated). While 54% of Canada's FDI stock is in the United States (and thereby already has national treatment), the MAI will be very useful in setting stable rules for the rapidly increasing stock of Canadian FDI elsewhere, especially in the European Union and Asia. The MAI, in this sense, should help Canada to continue to diversify its outward FDI away from the United States. Of particular relevance in the MAI will be investment rules to ensure Canadian business has stable access to the European Union in resource-based sectors such as forestry products (where there has been a wave of protectionism in the last four years). The MAI should also help to open up the Japanese, other Asian, and Latin American markets for Canadian FDI.

CONCLUSIONS

In general, because investment has a long-term time horizon, business people need to be assured that political risk is low. New and capricious investment regulations deter FDI and thereby reduce global economic efficiency. Canada has mitigated the worst excesses of left-wing economic nationalism through the investment provisions of the FTA and NAFTA. The MAI is the icing on the cake of globalization for Canada. In short, the MAI is a good-news story. The NAFTA is such an advanced trade and investment pact that it is being used as the model for the MAI. Given that Canada has survived quite well for the last ten years under the investment provisions of the FTA, it is well-placed to take on board the MAI. The MAI has the additional advantage of helping to open up markets in Europe and Asia for Canadian investors on the same terms as the U.S. market.

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EDITORIAL

FROM THE HAVANA CHARTER TO THE MAI: INTERNATIONAL INVESTMENT REGIMES

BY DANIEL DRACHE

FIRST THE HISTORY LESSON

The year is 1948. The policy elites from more than fifty countries have come to Havana to put the finishing touches on an all-encompassing proposal to finalize the details of a multilateral investment regime that is the first of its kind. It is comprehensive, forward-looking, and equitable, with "high standards" for the liberalization of investment protection and trade expansion.

Almost all major powers are "present at creation"; those with mixed economies as well as *laissez-faire* ones, the developed no less than the under-developed, the imperialist world as well as the colonized. At the table is a highly diverse group of nations including India, Egypt, China, Mexico, Sweden, Portugal, Canada, and the United States, to name but a few. Only the Soviet bloc absents itself, but it too has been present behind the scenes. When ratified, this legal instrument was to become the Charter for the International Trade Organization, the international institution designated to oversee the world's trading system along with the World Bank and the IMF.

At Havana, the U.S. chief delegate signed the final document; but American investors at home and their Republican allies in Congress opposed its provisions, which gave capital-importing countries rights to control investment flows.

So what happened to the Havana Charter? In a word, its fate was decided by U.S. trade politics. Congress killed the broadest multilateral international investment agreement that had ever been negotiated. At Havana, the U.S. chief delegate signed the final document; but American investors at home and their Republican allies in Congress opposed its provisions, which gave capital-importing countries rights to control investment flows. And that was that. Most experts treat Havana as a failed episode in international relations of little relevance for today. But they are woefully wrong.

TWO CRITICAL ELEMENTS

In the rear-view mirror of history, two ideas stand out. First, at the time there was a solid international consensus that a trade and investment regime had to be more than an abstract set of rigid legal principles to defend investors' rights at any price; rather, it had to be functional, efficient, and practical. Nothing less would "ensure the workability of the new order". So the countries of the world chose non-discriminatory trade and, by the end of the negotiations, decided to make foreign direct investment accountable as the lynchpin of international governance. [See box on p. 25, *Key Dates in the Regulation of Foreign Investment*, for the long-term effects of this decision.]

Secondly, as the framework agreement for a new age, it could not be a system of pure commercial gain designed primarily to advance the free enterprise principle. Instead, investment rights had to accommodate the full employment obligation that all states accepted as the cornerstone of the world trading system. Further, countries had to make an equal commitment to eliminate all forms of arbitrary and discriminatory barriers that the state and market actors routinely erected for public or private profit.

Finally, the theoretical understanding behind the Ha-

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Key Dates in the Regulation of Foreign Investment

In **1948**, the **Havana Charter** is signed by more than fifty countries, affirming the rights of investors to fair treatment, emphasizing the importance of foreign investment flows for development and reconstruction, as well as protecting the host country's right to develop national resources for national ends. Different articles pronounce in favour of countries taking domestic measures against restrictive business practices, including nationalization with compensation, while at the same time requiring states to dismantle barriers to trade.

In the **1960s**, the principle of permanent sovereignty over national resources is declared in **General Assembly Resolution 1803 (XVII) no. 3** (1962). The principle affirms the rights of nations to control their natural resources and represents the high water mark to find common ground between the developed and developing countries. The resolution also provides for appropriate compensation when resources are nationalized.

In **1961**, **Codes of Liberalization of Capital Movements and of Current Invisible Operations** establish binding rules and provides effective machinery for their gradual expansion and implementation by OECD countries.

In **1967**, OECD developed countries negotiate a **Draft Convention on the Protection of Foreign Private Property**; it is approved by the Organization's Council but is never opened for signature.

In **1970**, **Decision 24 of the Andean Pact** imposes stringent controls and screening procedures on FDI and the transfer of technology, including a provision requiring the disinvestment of foreign firms after a number of years.

In **1974**. the **Decade To Establish a New Economic Order** is proclaimed. International activity is focused on host country's demands for economic independence and national control over TNCs.

In **1976**, OECD takes the lead and adopts a **Declaration on International Investment and Multinational Enterprises** that includes a voluntary set of guidelines for MNEs. Among other things, it calls for assurance of national treatment, addresses problems of incentives and disincentives, and proposes an easing of performance requirements on TNCs. This and other instruments provide the key elements of an emerging liberal framework for states in the developed world.

In **1981**, WHO pioneers the **International Code of Marketing of Breast Milk Substitutes** in the area of consumer protection. This is one of several initiatives taken to protect consumers from TNCs and set new standards for corporate behaviour.

In **1983**, an extensive **UN Code on the conduct of TNCs** is proposed but the instrument is never adopted despite agreement on many of its provisions.

In **1985**, World Bank is in the forefront of reversing the early trend set by the developing countries in proposing radical changes in the making of national investment laws. It sponsors the **Convention Establishing the Multilateral Investment Guarantee Agency** that, among other things, leaves investors free to transfer their profits and capital out of the host country.

In **1986**, **ILO Tripartite Declaration of Principles concerning MNEs and Social Policy** is adopted even if only voluntary.

In **1991**, OECD Council of Ministers reviews the **OECD instruments on TNCs** and agrees on a number of changes to strengthen them.

In **1991**, Andean Countries amend their previous instrument on foreign investment and replace it with a **liberal set of regulations** (a major reversal of policy). They now relax rules regarding foreign investment in the host country.

In **1992**, the World Bank prepares and proposes the non-binding **Guidelines on the Treatment of Foreign Direct Investment** that will be a benchmark in augmenting protection for foreign direct investment rights.

In **1993**, **NAFTA** is negotiated, a path-breaking agreement that serves as the prototype for other agreements internationally. **Chapter 11** goes further than anyone anticipated in dismantling barriers to foreign investment, in affirming non-discriminatory pricing practices in the management of resources, and in extending national presence and national treatment to U.S. investors. It particularly limits Mexican and Canadian governments' ability to nationalize or expropriate.

In **1994**, the Uruguay Round is successfully completed with its path-breaking agreement on **Trade-related Investment Measures and Trade-related Property Rights**. Specific commitments cover market access and national treatment. Most developing countries have had little experience with issues related to the liberalization of foreign direct investment and trade in services.

In **1994**, the **Final Act of the European Energy Charter Treaty** proposes new investment rights and protection for private investors.

In **1994**, **APEC's Non-Binding Investment Principles** adopted, supporting foreign direct investment and new protection for investors.

By **1997**, over **1,300 bilateral investment treaties** have been signed but there is still no comprehensive agreement (the goal that eludes the OECD for more than a quarter of a century).

In **1997-98**, the **MAI-OECD Treaty** is negotiated by 28 developed countries responding to the coverage of financial services in the Uruguay Round. It is a framework agreement to promote a liberalized investment regime and provide an effective dispute settlement mechanism. Some reservations are permitted for national security, subnational measures, and cultural protection. But it is the most comprehensive set of measures ever proposed to enlarge investors' rights and has immediate consequences for national governments in many policy domains.

Compiled by Daniel Drache from UN/UNCTAD, International Investment Instruments: A Compendium *(New York and Geneva, 1996).*

vana Charter was that countries would have to make national adjustments to international forces when international trade was expanding rather than contracting. This made impeccable economic sense as well as smart statecraft. When economic growth stalled, few countries would ever accept the dictates of crude market logic to open their economies regardless of costs and despite the consequences. Thus, they had to settle not for the abstract doctrines of free trade but for the more powerful notion of trade liberalization that required the nations of the world to dismantle their tariff walls while restructuring their economies.

For extreme advocates of laissez-faire *internationalism, the Charter transgressed the fundamental notion that trade was principally organized for private gain and profit and that liberal trading principles were incompatible with broader social goals.*

In the imperfect world of the late forties (much like our own), countries everywhere employed export subsidies, quantitative restrictions, and commodity agreements for commercial ends. For instance, the U.S. had its special deal in agricultural products and the U.K. relied on the Imperial Trading Preferences and other "special" relationships, both undermining the global trading system. So the challenge of five decades ago was to adopt principles of conduct such that countries would be able to "establish a system of balanced mutual advantage".

THE CRITERIA OF SUCCESS

Of its six principal objectives, only one concerned directly the way in which trade should be conducted and organized: "To promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce".

One concerned exclusively economic development: "To foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment". Two dealt with the founding principles of the world order: "To further the enjoyment, by all countries on equal terms, of access to markets, products and productive faculties which are needed for [members'] economic prosperity and development; and to enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress".

Finally, Article I had a sixth objective: "To facilitate through the promotion of mutual understanding, consultation and cooperation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy".

The preamble to the Charter provides an Olympian benchmark of setting high standards for this or any subsequent international trade and investment regime. The first set of principles spelled out the relationship between states, the commitment "to maintain full and productive employment" as international concerns, and the need for commercial policies that permit the full development of trading policies and domestic labour standards.

The House of Commons Standing Committee on Foreign Affairs and International Trade in its detailed report urges 17 substantial changes that have to be addressed by Canada's negotiators as a pre-condition for signing, including an effective cultural exemption clause, an open and transparent procedure for dispute resolution, a clear definition of what constitutes expropriation, and the need for a strong statement on ILO core labour standards.

The second set of principles was focused on one sole theme: the importance of international market forces as regulators of international life. Trade barriers had to be reduced and, wherever possible, eliminated. Those that were justified had to be administered in a non-discriminatory manner consistent with most-favoured nation principle.

The third group of principles addressed the issue of protectionism. The final group addressed special circumstances when a country could not implement the principles of the Charter due to a "drastic and sudden change in existing trade practices". It was entitled to relief though negotiation or to a transitional period after which conformity was required.

For extreme advocates of *laissez-faire* internationalism, the Charter transgressed the fundamental notion that trade was principally organized for private gain and profit and that liberal trading principles were incompatible with broader social goals. Williams Brown, who likely wrote the definitive account of these difficult, prolonged international negotiations, makes the critical point that "if there had not been a basic agreement on this fundamental point, agreement on the Charter as it now stands would have been impossible".

The realists of the time, many of whom worked inside the U.S. State Department, believed that such an investment regime could only succeed on the condition that countries both dismantled state-erected barriers and enforced a code regulating the restrictive practices of international business. The two went together. The key was that investors' rights could not be so broad as to limit the host country's responsibilities. In the Havana Charter, no member was precluded from enforcing any national statute to prevent what was at the time called "monopoly" practices (Art. 52).

The term monopoly practices meant something quite

explicit to the Havana negotiators. They were prepared to accept the fact that there were many trade-distorting activities that impaired markets from effective functioning.

Conceptually, the MAI is the extreme opposite of the Charter. It is a prototypical agreement of a corporate age. It calls for transparency in state behaviour but advocates a secret dispute resolution mechanism. It places many new obligations on governments, but does not have many specifics on how it will protect such sensitive areas as culture, the environment, and public and social services at all levels of government. It champions a level playing field across the globe, but advocates its own sui generis *form of beggar-thy-neighbour protectionism for global capital that confers special rights on international business.*

Some were state-centred; many more came from international business. What was needed was a framework for a new investment regime with a strong pro-active capacity to hold foreign direct investors and multinational corporations accountable internationally.

This was a pivotal idea for the times. Even if all their recommendations were not as strong as they might have been, the Havana negotiators went so far as to identify some of the key areas of the economy where monopoly would likely prevent the orderly development of the international system. As in our own day, it was the concentrated financial services sector, multinational business that was connected to capital-exporting activities (telecommunications, insurance, banking, mining, and pharmaceutical sectors). Here too states had to be able to act to defend their interests and use their power to expropriate and pay compensation.

FORWARD INTO THE PRESENT

So what lessons does the Havana Charter hold for the aggressive coalition of forces pressing for passage of the MAI? The legacy of Havana presents a challenge of epic proportions for triumphant liberalism.

Conceptually, the MAI is the extreme opposite of the Charter. It is a prototypical agreement of a corporate age. It calls for transparency in state behaviour but advocates a secret dispute resolution mechanism. It places many new obligations on governments, but does not have many specifics on how it will protect such sensitive areas as culture, the environment, and public and social services at all levels of government. It champions a level playing field across the globe, but advocates its own *sui generis* form of beggar-thy-neighbour protectionism for global capital that confers special rights on international business. Most worrisome is the way it gives foreign firms a leg up over national enterprises. Definitions are so broad that public government faces a serious diminution of its authority in many areas of public policymaking.

In contrast to the Havana Charter, there is no general consensus in favour of the MAI. The legal text is a source of bitter wrangling among scholars and experts. If the overall objective of the new regime is to provide transparent and flexible rules designed to sustain investment flows, the existing text raises many controversial issues about basic principles such as the right of establishment, national treatment, transparency, expropriation, and non-discrimination. If the intent was to produce a model "high standard" agreement on global rules, it has failed.

Elites the world over have rallied around the flag of global free trade and the self-regulating transnational corporation, but support on the ground, where it counts most, is thin. There are so many dark ambiguities that moderates such as Sergio Marchi, Canada's Minister in charge, insist on significant changes to the existing draft. The House of Commons Standing Committee on Foreign Affairs and International Trade in its detailed report urges 17 substantial changes that have to be addressed by Canada's negotiators as a pre-condition for signing, including an effective cultural exemption clause, an open and transparent procedure for dispute resolution, a clear definition of what constitutes expropriation, and the need for a strong statement on ILO core labour standards.

On the Internet, too, there are dozens of anti-MAI Web sites giving round-the-clock analysis of the dangers of the draft Agreement. No one could have anticipated the appearance of the "virtual" global citizen, very local and highly vocal. This highly visible international body of public opinion is insisting on a different kind of international investment regime. They ask one hell of a good question: why are TNCs entitled to so much legal protection?

As states everywhere feel the adaptive pressures from the new international agenda for deep integration, they would do well to take a long hard look again at the Havana Charter for both its strengths and shortcomings. It was a potent international instrument that could have established new standards. It was also a highly normative exercise in trade politics, one which recognized that foreign direct investment was indispensable for the stability of the international economy. But it was resolute that foreign direct investment was not an absolute, but had to be acceptable to the host country.

With capital more mobile than ever, building counterweights has to be at the top of the agenda today. Developed countries have always favoured national controls over their own resources and strategic sectors, and have never abandoned state aids and subsidies to support their home industries. This is why there have been so few successful global efforts to protect foreign investors' rights from the reach of nations. Happy 50th birthday, Havana.

Daniel Drache is Director of the Robarts Centre for Canadian Studies and Professor of Political Economy at York University.

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 dissemination 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.

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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 participate 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).

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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.

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.

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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THE MAI IN CANADA: ECONOMIC DEREGULATION, ROUND FOUR

BY MICHELLE SWENARCHUK

Canada is now far down the road of deregulated trade and investment, having signed three trade agreements with major consequences for this country: the Canada-U.S. agreement, the NAFTA, and the 1994 GATT/WTO agreements. We also have free trade agreements with Chile and Israel, and have signed or are negotiating bilateral investment agreements with 59 countries.[1]

The process of deregulation of trade and investment in the past decade has seen systematic weakening of green laws; elimination of public rights of participation in environmental decision making; increasing unwillingness of governments to accept responsibility for environmental protection; and radical cuts to environmental and natural resource ministries' budgets.

Given that approximately two-thirds of foreign direct investment in Canada comes from the U.S., the most significant investment "treaty" for Canada is the investment chapter of the NAFTA (Chapter 11), the model for the MAI.

However, as the government of British Columbia has noted, Canada does not appear to have benefited from the NAFTA investment chapter. U.S. investment in Canada has steadily declined from 1985, when Canada's proportion of U.S. and Canada direct foreign investment stock was 25.9 percent, to 1996, when it was 16.7 percent.[2] Given this NAFTA experience, it is reasonable to question whether further deregulation of investment through the MAI will provide economic benefits to Canada.

THE CURRENT ENVIRONMENTAL PROTECTION CONTEXT IN CANADA

The process of deregulation of trade and investment in the past decade has seen systematic weakening of green laws; elimination of public rights of participation in environmental decision making; increasing unwillingness of governments to accept responsibility for environmental protection; and radical cuts to environmental and natural resource ministries' budgets.[3] Further, downloading of responsibilities from the federal to provincial governments and, in Ontario, formerly environmental leader of the country, from the province to municipalities, is occurring with no certainty that the receiving jurisdiction will have the will or resources to act. The era of deregulated trade has been, and remains, the era of environmental deregulation.

This is not a coincidence. The trade agreements have targeted environmental protection laws and policies by constraining government powers to manage resources and set standards. The constraints are in the FTA/NAFTA limitations on managing the levels of export of resources; and the NAFTA and GATT 1994 chapters on Technical Barriers to Trade and Sanitary and Phytosanitary Standards. The agreements' designation of international standard setters, including the International Standardization Organization and Codex Alimentarius Commission, further undermine domestic standards. FTA and GATT trade dispute panel decisions on environmental and health issues have all favoured trade over the domestic standards, requiring that standards be changed or eliminated.

The MAI undoubtedly further constrains Canadian governments from exercising powers to benefit Canadian communities and the environment.

Finally, the "expropriation" clause of the investment chapter of the NAFTA has provided a basis for U.S.-based Ethyl Corporation to sue the Canadian government for CDN$350 million for its effective ban on MMT, a neuro-toxic gasoline additive.

ENVIRONMENTAL ELEMENTS OF THE MAI

The MAI undoubtedly further constrains Canadian governments from exercising powers to benefit Canadian communities and the environment.

National treatment

It includes very broad definitions of investor and investment and extends national treatment and most favoured nation treatment to foreign investors.[4] These provisions not only eliminate arbitrary interference with foreign investors' rights but, in the view of the B.C. government, also restrict "transparent and non-discriminatory efforts to negotiate and enforce local and national economic benefits".[5] The requirement for national treatment for investment incentives (subsidies) appears to require payment of the same subsidies to large foreign corporations as may now be provided to small, local, or non-profit, community-based health, social service, education, and the health and medicare sector overall.

Performance requirements

The MAI includes extensive prohibitions against performance requirements for linking approvals or providing subsidies or other advantages to investors, irrespective of whether investors are foreign or domestic. It exceeds the NAFTA provisions in the types of prohibitions and their breadth of scope and application.

These provisions will particularly affect provincial (and federal) rights to require job creation and other benefits for local communities from foreign investors' exploitation of natural resources.

"Expropriation" rights

A most dangerous provision in the MAI is the NAFTA-style "expropriation" clause, which provides to investors an unconditional right to compensation for expropriation of an investment or for "measures having equivalent effect". It goes beyond national treatment, since even measures applied to both foreign and domestic investors could give

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rise to a claim for compensation by the foreign one. It extends "expropriation" claims beyond what is compensable in Canadian domestic law,[6] with no balancing of the public interest in resource conservation, human health and safety, or any other purpose, in determining whether compensation is payable and to what extent.

Like NAFTA, the MAI provides for expropriation through private tribunals without public scrutiny, appeals, or interventions. The secrecy and broad powers of trade dispute panels are anti-democratic as the capacity of governments to legislate is squelched.

The B.C. government identified the issue of native land claim settlements which may require return of land or other resources (fish, forest) now subject to non-native use (investment). Foreign investors could claim full compensation, no matter how tenuous or preliminary their "investment".

This provides an excellent example of the problems of international harmonization without regard to historical, social, or environmental differences. Aboriginal rights are not issues for public policy decisions in European OECD countries, but raise many live and pressing issues in Canada, and other countries with extant Aboriginal populations. The federal government has attempted to exempt its Aboriginal obligations from the purview of the MAI, but whether that exemption will survive the negotiation process is unknown. No protection for provincial obligations is proposed.

Like NAFTA, the MAI provides for expropriation through private tribunals without public scrutiny, appeals, or interventions. The secrecy and broad powers of trade dispute panels are anti-democratic as the capacity of governments to legislate is squelched. The investment protection expropriation panels add the additional burden that governments must pay huge amounts to act in accordance with domestic public interest policies or even constitutional law (i.e., constitutional Aboriginal rights). The "chilling effect" of adding investor compensation payments to every sector of public interest legislation is obviously considerable.

POSSIBLE PROTECTIONS

The October 1997 draft text of the MAI reveals that the negotiators are discussing the inclusion of wording to discourage the lowering of domestic health, safety, and environmental standards in order to attract investment. It appears unlikely that the wording, if included at all, will be any stronger than NAFTA Article 1114. The NAFTA wording merely indicates that countries "should not waive or derogate from" standards; it does not prohibit the practice and certainly has not prevented the weakening of standards in Canada since NAFTA was signed. Similarly, such wording in the MAI will not offer much comfort to concerned environmentalists and health advocates.

The federal government has filed "reservations" to exempt certain policies and sectors from the MAI, but environmental laws are not among them. Nor do the federal reservations refer to provincial measures. If the MAI is to cover provincial measures, as foreign national governments apparently assume but British Columbia disputes, considerably expanded reservations would be required to protect provincial measures in all sectors of provincial jurisdiction. Subnational non-conforming measures were exempted from NAFTA's national treatment and performance requirement terms by an exchange of letters between governments. No such reservations have been introduced into the MAI negotiations.

The Canadian Environmental Law Association has proposed a substantial "carve-out" of environmental protection and resource conservation measures.

EXPECTED IMPACTS

If adopted as currently designed, the MAI will provide European and Japanese corporations with rights similar to those U.S. corporations obtained in Canada under NAFTA. It will also allow them to pressure many Southern countries into signing the MAI.

Meanwhile, the Canadian government is quietly signing similar agreements all over the world, entrenching a lack of balance between rights of corporate investors and the rights of citizens to have governments respond to local economic, social, and environmental needs. Critics of investment agreements need to focus on a broader landscape than just the MAI.

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NOTES

1. Personal communication from N. Lynn McDonald, Investment Trade Policy Division, Department of Foreign Affairs, December 16, 1997.
2. Government of British Columbia Submission to the Subcommittee on International Trade, Trade Disputes and Investment, November 26, 1997, quoting *World Investment Report: Transitional Corporations, Market Structure and Competition Policy* (United Nations, 1997) at 313.
3. For a review of the staggering pace of removal of environmental laws in Ontario, see Environmental Commissioner of Ontario, *Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making* (Toronto, April 1997). At the federal level, the 1993 Red Book commitments to improve the *Canadian Environmental Protection Act* and to adopt an Endangered Species Act have not been kept.
4. Investors include human and corporate persons, nonprofit and for-profit private and public organizations. Investment covers "every" kind of property, claims to money or performance, contracts, concessions, licenses, permits, etc.
5. *Ibid.* at 3.
6. See discussion in the author's submission on the MAI to the House of Commons Sub-Committee on International Trade, Trade Disputes and Investment, "The Multilateral Agreement on Investment and Environment: Context and Concerns," November 24, 1997, CELA.

A BRIEF ANALYSIS OF THE MAI

BY ROBERT HOWSE & JONATHAN FELDMAN

Like the Investment Chapter of the NAFTA, the Draft Multilateral Agreement on Investment (MAI) has at its core the principle that governments must not discriminate against, or among, foreign investors from countries that have signed the agreement. These obligations are subject to reservations to be filed by individual signatories, subject to the principles of standstill and (possibly) rollback.

THE MOVEMENT OF KEY PERSONNEL

One of the areas in which the MAI has made significant progress is with the movement of key personnel. In a globalized economy, it is important for multinational corporations (MNCS) to have the opportunity to exchange managers and specialists between entities in different countries for an efficient development of human capital. While the notion of key personnel is not always precisely defined for the temporary entry of foreign personnel, regulations affecting visas, residence and work permits remain part of the country's immigration policy. A recent OECD survey points out that, despite any potential immigration problems that may arise, most members recognize that the "ability to quickly and easily move key personnel between countries is an important element of investment decisions, technology transfers as well as research and development activities of MNCS".[1]

There have been some attempts (in other investment instruments) to address the issue of key personnel. For example, the NAFTA sets out commitments by its three members to facilitate, on a reciprocal basis, temporary entry into their respective territories of business persons who are citizens of Canada, Mexico, or the United States. Each NAFTA country maintains its rights to protect the permanent employment base of its domestic labour force, to implement its own immigration policies and to protect the security of its own borders.[2] Even though the NAFTA categories are rather broad for business visitors, traders, intra-company transferees, and certain categories of professionals, this agreement has in many ways been able to strike the difficult balance of broadening the category of key personnel while maintaining sovereignty in the area of immigration. For example, the United States and Mexico have agreed to an annual numerical limit of 5,500 Mexican professionals being allowed to enter the United States.[3] In devising the MAI, by contrast, the OECD has borrowed ideas from this treaty and extended its breadth to encompass all of its members.

The agreement demonstrates respect for state sovereignty; key personnel provisions remain subject to "the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons".

The MAI reflects a "wider" and "deeper" conception of the notion of key personnel. First, this agreement will apply to all of the Contracting Parties of the MAI.[4] Although each Contracting Party has made a number of reservations,[5] there is an overall consensus on the importance and necessity of such a provision in the treaty. The agreement demonstrates respect for state sovereignty; key personnel provisions remain subject to "the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons".[6] At the same, time, however, this agreement breaks new ground by covering such broadly defined groups as investors seeking to provide essential technical services to the operation of an enterprise to which the investor has committed,[7] employees working in the capacity of an executive, manager, or specialist,[8] and spouses and minor children of these "key personnel".[9]

INVESTMENT PROTECTION

The OECD subcommittee, which is studying the broad issue of investment protection, concluded early on in the negotiating process that additional protection under a MAI may be of limited interest to MNCS unless it goes beyond the parameters established in existing instruments and domestic laws.[10] This includes finding a definition of investment expropriation that is as broad as possible, namely "all measures adopted by a state whether direct or indirect that have the effect of depriving the investor of its investment".[11]

A major concern with this broad approach to expropriation is that it could conceivably lead to investor claims against signatory states where regulatory changes, whether in environment, safety, or other areas, negatively affect the value of the investment. This could make regulatory reform extremely costly, but is an interpretation of the meaning of expropriation quite common in U.S. domestic takings jurisprudence. Under a similar provision in NAFTA, a U.S. investor is now claiming millions of dollars in damages on the grounds that a ban on international and interprovincial trade in a substance that is produced in Canada constitutes "expropriation" (the notorious Ethyl case).

While most parties agree that negotiated settlement of disputes is preferred, the current draft of the MAI itself has been designed to create the unconditional consent for investor-to-state and state-to-state arbitration.

Thus a sub-committee of Parliament that has examined the draft MAI text in detail has recommended that these provisions be clarified so as not to include liability to investors for losses or costs that occur due to regulatory changes.

DISPUTE SETTLEMENT

One of the most important proposals made in these negotiations has been to establish a binding dispute settlement system for Contracting Parties. While most parties agree that negotiated settlement of disputes is preferred, the current draft of the MAI itself has been designed to create the unconditional consent for investor-to-state and state-to-state arbitration. If the disputants can-

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not agree on a forum, then the ICSID, its Additional Facility, and UNCITRAL rules should be available under the MAI.

The arbitration rules that apply to investor-state dispute settlement under the MAI contemplate a secret process, where neither the pleadings, nor the hearing before the arbitrator, nor the reasons for decision are public unless permitted by both parties.

The arbitration rules that apply to investor-state dispute settlement under the MAI contemplate a secret process, where neither the pleadings, nor the hearing before the arbitrator, nor the reasons for decision are public unless permitted by both parties. This practice might be entirely appropriate in the kind of commercial disputes between private parties for which arbitration was originally designed, or even in investor-state contexts where what is at issue is, for example, the interpretation of a contract between the state and an enterprise. Nonetheless, it seems highly questionable where arbitration is being used to interpret public international law, in whose meaning many parties have a stake. Also, many of the issues surrounding interpretation of the MAI are likely to pertain to the relationship of investor rights to domestic public policies—raising important democratic concerns about the absence of publicity and transparency.

Although there are still some practical difficulties in trying to determine how to ensure adequate enforcement, most delegations are interested in ensuring that any arbitration under the MAI is deemed binding.

In determining how to contend with "forks in the road", many delegations have expressed concern about forum shopping.[12] NAFTA's approach to this issue permits the investor to initiate local remedies but requires the investor to waive its rights to initiate or continue local remedies once arbitration is initiated. Moreover, NAFTA limits arbitral awards to monetary damages and applicable interest.[13] To date, it is not entirely clear how the MAI will deal with this issue.

In the MAI negotiations, several delegations have suggested the creation of a state/state dispute settlement process within the OECD. Such a procedure might evolve in a manner similar to GATT panels.

Although there are still some practical difficulties in trying to determine how to ensure adequate enforcement, most delegations are interested in ensuring that any arbitration under the MAI is deemed binding. For example, the proposed agreement states that, "Each Contracting Party shall recognize an award rendered pursuant to this Agreement as binding and shall enforce the pecuniary obligations imposed by that award as if it were a final judgement of its courts."[14]

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NOTES

1. OECD Committee on Capital Movements and Invisible Transactions (hereinafter CCMIT), "Movement of Key Personnel" (Working Paper), 1994, at 3.
2. *Ibid.* at 12.
3. *Ibid.* at 13.
4. OECD Directorate for Financial, Fiscal and Enterprise Affairs Negotiating Group on the MAI, *Multilateral Agreement on Investment: Consolidated Text and Commentary*, 14 May 1997. Note that the scope of the agreement is quite wide and in Article II(I)(i.) an investor is defined broadly as "a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with its applicable law".
5. For example, Canada, Mexico, and the United States maintained a reservation on the coverage of the article concerning Senior Management [and Membership on Boards of Directors].
6. *MAI: Consolidated Text and Commentary* at 15. This demonstration of respect is found in the Special Topics section under Part I of the sub-section called Temporary Entry, Stay and Work of Investors and Key Personnel.
7. *Ibid.* [Part l(a)(i.)]
8. *Ibid.* [Part l(a)(ii.)]
9. *Ibid.* [Part l(b)(i.)]
10. MAI, *Chairman's Summary Report—Investment Protection*, OLIS, May 1995, at 3-4.
11. *Ibid.*
12. *Ibid.*
13. See NAFTA Article XIX for the provision on Dispute Resolution.
14. Article V(D)(18) of the MAI on Dispute Settlement. (See DAFFE/MAI1 (97)/REV 2 at 67).

THE MAI AS A POTENTIAL INSTRUMENT OF POSITIVE REGULATION

BY ANDREW JACKSON

It is abundantly clear that the "new global economy" is one increasingly dominated by the activities of transnational corporations, and that direct investment by such corporations has been a potent driver of global economic integration over the past decade. In this context, it is hard to dispute the abstract argument that the world needs some institutional framework to regulate investment issues, given that they fall largely outside the framework of the World Trade Organization.

While the scope of carve-outs, exemptions, and reservations will almost certainly be inadequate to undo the damage caused by the central guiding principle of "non-discrimination", the point that we need international rules should not be rejected by MAI opponents.

Critics of the draft MAI point out that, as drafted, it is overwhelmingly an instrument of deregulation, intended to rein in the ability of governments to "discriminate" against foreign investors and corporations and to "expropriate" their assets. Through its dispute settlement procedures, the MAI would allow corporations and investors to directly challenge government actions and policies that run counter to the central MAI principle of national treatment. The draft agreement indeed amounts, as alleged, to a "charter of rights" for transnationals, which is consciously designed to limit the role of the state as an instrument of economic and social regulation.

As critics of the MAI have pointed out, the draft agreement as it now stands would jeopardize a country's ability to maintain not-for-profit public and social services, to protect culture and other sensitive sectors, and to regulate in the public interest in areas such as the environment. The poorly drafted expropriation clause in the deal and the very wide definition of investment potentially threaten a host of legitimate regulatory measures.

In this context, it is tempting to oppose the MAI by arguing that it intrudes too deeply upon national sovereignty. However, governments, including the Canadian government, will argue that sensitive sectors and policies can be protected by better language, by exemptions, and by country specific reservations, and that the loss of sovereignty is no greater than that implicit in any other agreement to limit what we can do in return for similar obligations by others. While the scope of carve-outs, exemptions, and reservations will almost certainly be inadequate to undo the damage caused by the central guiding principle of "non-discrimination", the point that we need international rules should not be rejected by MAI opponents.

A deeper question is whether an international investment agreement should be exclusively an instrument of deregulation, or whether it could and should be an instrument for the international regulation of hyper-mobile international capital. It is arguably worth pooling sovereignty if this can be used to rein in transnational corporations, which are manifestly able to play governments off against one another and to surmount national controls.

There is absolutely no reason in logic why a MAI should not oblige member countries to respect core labour rights, in recognition of the fact that there are socially destructive downward pressures flowing from globalization.

In the past, the United Nations and other agencies have prompted discussion of what an international regulation agenda might look like by drafting codes of conduct for multinational—now transnational—corporations. Typically, such codes specify "good corporate behaviour" in areas such as labour relations, environmental practices, and taxation. The existing OECD Guidelines for Multinational Corporations speak to all of these areas, though they are non-binding.

The idea of using the MAI as a positive instrument of regulation has largely been ruled out from the outset. For example, one might imagine that a MAI could and should specify minimum levels and standards of corporate taxation, so that transnationals are limited in their ability to allocate profits to lower-tax jurisdictions. However, tax issues have been carved out completely, and governments, which are fully aware of downward competitive pressures on national tax systems, seem to have barely considered the issue. That said, governments are being forced to confront the need for positive standards in at least two areas—labour and the environment.

The Trade Union Advisory Committee to the OECD (TUAC) has argued that the MAI should incorporate provisions requiring member countries to respect core labour rights, as set out in the key conventions of the International Labour Organization, and should prohibit states from lowering domestic labour standards or from violating core labour rights in order to attract investment. Such a provision would amount to the imposition of a minimum obligation on governments, in recognition of the fact that corporations can and do play jurisdictions off against one another in order to create a "hospitable" climate for mobile investors.

This proposal has won some support from countries such as France and the United Kingdom, and is being actively considered by the Canadian government. The political reality in some countries is such as to require a response to the labour agenda. There is absolutely no reason in logic why a MAI should not oblige member countries to respect core labour rights, in recognition of the fact that there are socially destructive down-

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THE MAI AS A POTENTIAL INSTRUMENT OF POSITIVE REGULATION *from page 35*

ward pressures flowing from globalization.

The core concern of the environmental movement is that the ability of states to regulate not be undercut by the expropriation clauses of the MAI, which could be used by corporations to challenge domestic measures which reduce anticipated profits.

A parallel provision has been proposed to prohibit countries from relaxing environmental standards in order to attract investment, such as exists in the NAFTA. However, most environmental organizations rightly see the practical impact of such a clause as very limited, and arguably counterproductive. Given that much environmental regulation is site specific, the existence of such a clause might deter governments from setting high standards in the first place.

The broader difficulty is that, in the environmental area, there is no agreed set of core or minimum standards and, even if it existed, it would be regarded by many environmentalists as much weaker than desirable domestic regulations. The core concern of the environmental movement is that the ability of states to regulate not be undercut by the expropriation clauses of the MAI, which could be used by corporations to challenge domestic measures which reduce anticipated profits. This will require, at the minimum, a strongly worded carve-out of environmental regulation from measures subject to challenge under the MAI, and even that is highly likely to be interpreted in the narrowest possible way by dispute settlement panels.

Many critics of the MAI are quite prepared to contemplate positive international agreements rather than just defend national sovereignty in the abstract. However, the current reality is that the entire thrust of the MAI, like the WTO and trade and investment agreements like NAFTA, is deregulatory, prescribing what governments cannot do rather than specifying at least a minimum level or standard of what should be done.

In this context, the MAI should and will be opposed by those who want corporate rights balanced against by corporate responsibilities. States subject to democratic political pressures are still best placed to perform this crucially important balancing act.

Debate on the MAI should, however, be used to advance debate and discussion over international regulation of international capital. We do need new sets of rules to deal with new realities, and progressives should reflect more on how to pool sovereignty in very different kinds of international institutions.

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THE MULTILATERAL AGREEMENT ON INVESTMENT IS LOST IN WASHINGTON *from page 34*

Walker, the Washington-based Assistant Editor of the *Guardian*, has recently described America's "retreat from internationalism": "Not since the 1930s", he says, "has the United States appeared so ready to turn inwards again, back to that isolationism which President Franklin Roosevelt said had finally been sunk at Pearl Harbor".[1]

Isolationism has long been a core element of America's political culture and, with the end of the Cold War, might resurface as a controlling value as it did in the 1920s and 1930s. Then, after WWI, Americans were determined to avoid involvement in European conflicts ever again. In 1935, FDR warned that if wars occurred in Europe or Asia, "the United States and the rest of the Americas can play but one role—through adequate defense to save ourselves from embroilment and attack". In 1937, Gallup found that three-quarters of the country favored the "Peace Amendment", which provided that unless the U.S. was actually invaded, Congress could not declare war without a nation-wide referendum. The Amendment was defeated in the House by a vote of only 209 to 188.[2] Now, once again, Americans have widely come to believe that the U.S. has few fundamental security interests at stake in the world and that much more attention should be focused on domestic problems.

Americans are deeply ambivalent about trade, particularly about the impact on jobs and income. But while globalization has raised levels of anxiety, it has also created new interests that favour liberalization.

It is true that isolationism is on the rise. But this is not the whole answer. Many political insiders feel that Americans are uninformed and uninterested about the world outside their borders, but research suggests that public opinion has not shifted so sharply towards isolationism—that while Americans are less interested in traditional military or political developments, they are deeply concerned about a wide array of global issues, such as drugs, crime, and threats to health and the environment. Polls find that public support for the United Nations, for example, is significantly greater than for Congress.[3]

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bivalent about trade, particularly about the impact on jobs and income. But while globalization has raised levels of anxiety, it has also created new interests that favour liberalization. Many Americans work for foreign firms and many more have jobs in export-oriented industries. There is little enthusiasm for cutting America off from world trade, but there is also profound hostility to anything that might "erode" America's sovereignty. Americans are prepared to use the power of access to their markets to force other nations to conform to what they feel are "fair" trade practices and "higher standards" of environmental protection, human rights, or worker safety.

Within Congress, critical changes have taken place as well. The center has weakened dramatically, and political extremes are much stronger. The internationalist trade-liberal coalition that linked both ends of Pennsylvania Avenue and both sides of Congress is much diminished. Many of the last members of this group left Congress—and the Senate in particular—in 1992 and 1994.

President Clinton is much criticized for failing to lay out a coherent, long-term strategy or vision for foreign affairs and for the *ad hoc*ism that dominates his foreign policy, which is often geared toward satisfying domestic constituencies. The President's leadership can be questioned. But his agenda also poses tremendous problems. Among the urgent foreign policy issues on his desk are UN arrears, the IMF and the Asia bailout, the Middle East, troops in Bosnia, the expansion of NATO, the authorization of fast track and, way down the list, MAI. And his life is scarcely dominated by foreign policy. He has little political capital, and has to make tough decisions on where to bet it.

The President's faults are not as important as other changes now underway. The Cold War provided a critical organizing principle for policy and politics. But the clarity of the struggle between the forces of good and evil in the world, as vivid as a Hollywood western, is gone. The rise of new global issues—from trade and jobs to human rights and sweatshops and the environment—makes developing a coherent international posture far more difficult. The debate over many of these issues cuts across party lines; it reduces party coherence and has made American politics even less manageable.

It is not just that issues are more complex. America's system of government is changing, too. One critical aspect has to do with the President. Strong executive leadership has been associated only with crises in American history, and only during the mid-twentieth century was power centralized in Washington, and there, in the executive. Joseph Califano, a member of Lyndon Johnson's cabinet, reflected on the "imperial presidency": "When we wanted to close post offices, consolidate regional centers or shut down military bases, we did it. L.B.J. stiff-armed Congressional attempts to trim our efforts, vetoing legislation to limit his power to close bases as an unconstitutional intrusion on Presidential prerogatives. When Johnson wanted to step up military action in Vietnam, he had Congress pass the sweeping Gulf of Tonkin resolution which he (and later Richard Nixon) used as authority to wage a full-scale war without asking Congress to declare one".[4]

As America's economy has become more interdependent with those of other nations, and as U.S. firms face greater competition from foreign firms both at home and abroad, trade policy has become increasingly a center of interest politics. Securing passage of NAFTA revealed clearly the new parameters of trade policymaking. NAFTA was not so much sold to Congress as a policy ideal, as bought from individual Congressmen in return for a wide range of goodies.

Now, the era of strong executive leadership in the United States seems to be over. With the end of the Cold War, power has begun to flow away from the center, from the executive to Congress, and from Washington to states and localities, all of which makes the formulation and implementation of foreign policy much more difficult. No one has described these changes better than Allan Gotlieb, one of Canada's best ambassadors in Washington: "Congress now micro-manages many foreign issues", he observes. "For the past decade and a half or so, since the time of Watergate and Vietnam, Congress has asserted this role with increasing vigour and shows no signs of desisting from doing so. Indeed, in my time I heard more about 'the imperial Congress' than about 'the imperial Presidency'."[5]

What is going on, however, is not just a shift but a real fragmentation of power. Gotlieb speaks of "the doctrine of the sub-separation of powers ... a decentralizing process that began with the breakdown of party discipline, changes to the seniority system, and other political reforms in Congress in the post-Watergate era. As a consequence, political power in Congress has become diffused, fragmented, and atomized". Many new players are involved in formulating foreign policy; now state and local governments, non-governmental organizations, and individuals all play in the game.

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Policy today is less often framed by strategic interests than shaped by special interests. America's system based on the separation of powers and federalism has always been highly permeable to interests. Developments from Watergate to the end of the Cold War opened the policy process to interest involvement even more, and the social and economic changes of the past decades have vastly enlarged the number of groups that seek to influence policy and the intensity of their demands. Permeability is magnified in economic and trade policy. As America's economy has become more interdependent with those of other nations, and as U.S. firms face greater competition from foreign firms both at home and abroad, trade policy has become increasingly a center of interest politics. Securing passage of NAFTA revealed clearly the new parameters of trade policymaking. NAFTA was not so much sold to Congress as a policy ideal, as bought from individual Congressmen in return for a wide range of goodies. Califano observes that "while no President in this century has lost a legislative contest over trade, none had to pay so much in the way of tribute to Congress: hundreds of millions in subsidies for fruits and nuts, lower cigarette tax increases and barrels of other pork".

Power in the American government is deeply fragmented; leadership is far more difficult; and what coherence there was in the policy process is much diminished. The President, individual members of Congress, and even state governments, all say different things. The fragmentation of power and the breakdown of leadership have, however, heightened inwardness. Even more than isolationism, however, these developments encourage unilateral actions driven at times by a single member of Congress who can bend policies or hold them for ransom.

Congressman Smith from New Jersey brought down the carefully crafted compromise worked out by the State Department and Senator Helms which would have paid nearly $1 billion in arrears to the United Nations and provided $5 billion to the IMF. What undid the agreement was not isolationism, but rather Smith's determination to deny U.S. aid to foreign groups that perform or advocate abortions—

Democrats in the House have widely opposed President Clinton's trade policies. But if the White House would force worker protection on our trading partners, then, says one, "they could have us" on their side. Use trade barriers or sanctions to force our enemies and friends as well to straighten up, to fight the persecution of Christians, to keep the French from doing dastardly deals in Iran, to overthrow Castro. But in this erratic interventionism, there is little room and little support for multilateral ventures like the MAI.

to use U.S. foreign policy, that is, to achieve very specific and wide-ranging social goals. Democrats in the House have widely opposed President Clinton's trade policies. But if the White House would force worker protection on our trading partners, then, says one, "they could have us" on their side. Use trade barriers or sanctions to force our enemies and friends as well to straighten up, to fight the persecution of Christians, to keep the French from doing dastardly deals in Iran, to overthrow Castro. But in this erratic interventionism, there is little room and little support for multilateral ventures like the MAI. They are seen as restricting America's freedom of action. We prefer to work by thunderbolt. The fate of the MAI? Don't hold your breath.

Stephen Blank is an expert in U.S. trade politics and a specialist in Canadian-American relations and international business strategies.

1. M. Walker, "A new American isolationism?" *International Journal*, Summer 1997.
2. E. May, "National Security in American History" in G. Allison & G. Treverton, eds., *Rethinking America's Security: Beyond the Cold War to New World Order* (New York: W.W. Norton, 1992) at 98; and A. Schlesinger Jr., *The Imperial Presidency* (New York: Popular Library Edition, 1974) at 101, 103-104.
3. See B. Crossette, "On Foreign Affairs, U.S. Public Is Nontraditional", *New York Times*, December 28, 1997.
4. J. Califano, Jr., "Imperial Congress", *The New York Times Magazine*, January 23, 1994.
5. A. Gotlieb, *I'll be with you in a minute, Mr. Ambassador: The Education of a Canadian Diplomat in Washington* (Toronto: University of Toronto Press, 1991).

The Robarts Centre For Canadian Studies Awarded Grant to Establish A Summer Institute for the Canadianist Community in Latin America

The International Academic Relations Division of the Department of Foreign Affairs and International Trade has announced that, for the next three years, it will support a Canadian Studies Summer Institute for Latin American Scholars at the Robarts Centre for Canadian Studies in collaboration with the International Council for Canadian Studies.

This is a major award that provides Latin American scholars with a unique opportunity to work with leading Canadian specialists at York on a range of public policy issues and academic concerns. Half of the time will be spent in seminars and the other half in meetings with different groups and organizations from business, government, social movements, and cultural communities. Excursions to the Toronto region are also part of the program.

The aim of the Institute is to enable participants to acquire a first-hand knowledge of Canada, culturally and socially, as well as a deeper academic understanding of their areas of expertise by attending workshops and lectures conducted by leading York scholars

The participants will be drawn from recipients of the Canadian Government Faculty Research and Faculty Enhancement grants awarded each year by DFAIT. These awards enable Latin American Canadianists to come to Canada to do research and develop projects to further their scholarship on Canada and the hemisphere. It is anticipated that there will be 20-25 participants for the eight-day Institute.

The Robarts Centre will be cooperating with the Canadian Studies Associations and Centres from Mexico, Brazil, Argentina, Uruguay, Cuba, Spain, and Chile in the organization of the Institute. The Institute is another York initiative to develop strong hemispheric ties with leading academics and researchers. The Summer Institute will create a distinctive forum to examine issues particular to the hemisphere.

It is likely that the first Summer School will be held in 1999, but as yet there is no final decision in this regard.

The Summer Institute gives the York University community the uncommon opportunity to meet young scholars who might then participate in other York teaching and research programs.

For additional information, please contact:

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