MAI and Canada's Cultural Sector

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1. BACKGROUND

International trade agreements are a cornerstone of economic globalization. The latest in the series is the Multilateral Agreement on Investment (MAI), presently being negotiated through the Organization for Economic Cooperation and Development (OECD). The OECD is a Paris-based agency whose principal public function is the collection and dissemination of a range of economic data concerning the world's economy. The 29 member countries[i] of the OECD are the largest industrialized nations and together account for more than one-half of the world's foreign investment.

The roots of the MAI within the OECD can be traced to its adoption in the 1960s of two instruments on investment liberalization: the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations. While these Codes are binding on member states, they are far narrower in scope than the MAI and enforcement of the provisions is left to moral suasion and peer pressure.

During the Uruguay Round of talks to update and expand the General Agreement on Tariffs and Trade (GATT), which brought the creation of the World Trade Organization (WTO), one of the component parts was an agreement on Trade Related Investment Measures (TRIMS). This was an attempt to liberalize rules governing foreign investment among all member countries of the GATT. The major industrialized nations were dissatisfied with what they perceived to be the lack of progress in TRIMS and formal discussion of the MAI commenced in May 1995, at the OECD.

Negotiations have taken place on a regular basis since that time, involving various Negotiating Groups (NGs in the agreement's text), Expert Groups (EGs) and a Drafting Group (DG). Agreement on the basic provisions was reached in January 1997 and a confidential draft text was circulated. Negotiations were to conclude with a meeting of Trade Ministers in May, however, various disagreements prevented the deadline from being kept. A second confidential draft treaty was circulated in May 1997 and the new timetable anticipates conclusion of an agreement in May 1998. Individual member countries of the OECD would ratify and implement the MAI after that date and other countries would be encouraged to join.

While the basic purpose, structure and provisions of the MAI are agreed, it is extremely difficult to analyze the possible consequences of the MAI on Canada, since the final language of key elements of the Agreement is unknown. And it is the issues still under review that are the most critical for Canada's cultural community.

This analysis is based on the confidential text of May 13, 1997, including the accompanying commentary; the January draft; publicly available documents from various non-governmental organizations around the world and discussion with several knowledgeable individuals.

2. BASIC PROVISIONS

The key provisions of the MAI flow from the following statements of principle contained in its preamble:

Recognising that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards...

Wishing to establish a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures...

The MAI is designed to make it easier for individual and corporate investors to move assets - whether money, production facilities or intellectual property rights[ii] - across international borders.

It seeks to accomplish the objective through the following commitments which nations will make to investors from other signatory nations.

A) Definitions

The proposed definition of **investor** includes both individuals and businesses, whether or not incorporated and whether or not they are operated for profit. The definition of **investment** is equally broad and covers "every kind of asset owned or controlled, directly or indirectly, by an investor..." Intellectual property rights are included as one of the assets listed.

B) National Treatment/Most Favoured Nation Treatment

These are the central provisions of most international trade agreements. **National Treatment (NT)** provides that each country which is signatory to the agreement must treat nationals of other signatory countries no less favourably than they treat nationals of their own country. This applies to laws, rules, regulations and practices and prohibits the adoption of discriminatory policies whether or not such discrimination is intentional. **Most Favoured Nation (MFN)** provisions state that all foreign countries must be treated the same. This prevents the imposition of laws which require companies to cease conducting business in countries which have a poor human rights record. It also prohibits a country from providing treatment to a non-signatory nation which is more favourable than it provides to MAI signatories.

C) Transparency

This obligates a member country to make available publicly all laws, rulings and regulations which relate in any way to the operation of the Agreement.

D) Movement of Personnel

The MAI provides that approval for temporary entry to work will be granted by member nations to the investor and key personnel, including executives, managers and specialists who are "essential to the enterprise."

E) Prohibitions

Performance Requirements

These articles will prevent a country from imposing, in relation to an investment, any measure that requires the foreign investor to achieve certain standards of performance, including levels of export, percentage of domestic content, or purchasing of domestic supplies. This provision is drafted to require member nations to treat investors from non-signatory nations in an equivalent manner.

Uncompensated Expropriation

The MAI provides that nations cannot nationalize or otherwise expropriate, either directly or indirectly, an investment except where it is in the public interest, conforms with the due process of law, is undertaken on a non-discriminatory basis and is accompanied by "payment of prompt, adequate and effective compensation."

Restrictions on Movement of Capital or Repatriation of Profits

This section is designed to ensure that investors can move their capital and profits to and from nations without hindrance and in a currency which is freely convertible at exchange rates established by the marketplace.

F) Privatization

The draft text provides explicitly that National Treatment and MFN treatment will prevail in any case where government decides to privatize a public resource or asset. Canada has specifically reserved its position on this section, arguing that a dedicated provision is unnecessary since the basic NT and MFN obligations would apply in any case.

G) Dispute Settlement

Key provisions of the MAI establish how disputes under its terms will be resolved. Over the past eight years, Canada has become well-acquainted with the dispute settlement regimes of the Free Trade Agreement and the World Trade Organization, sometimes to our detriment, such as the WTO decision concerning the Canadian government's magazine support measures.

The MAI provisions allow both individual investors and states to trigger the process.

Investor-to-State

These provisions permit an individual investor from an MAI signatory nation who has sustained a "loss or damage" as a result of an action of another signatory nation to launch a formal complaint under the MAI. The dispute is submitted to an arbitration panel with one member selected by each of the disputing parties and a chair mutually agreed. In some cases, this creates enhanced rights for a foreign company, since a domestic one would have no access to international arbitration and would be limited to seeking redress through a domestic process.

State-to-State

The agreement also establishes a comparable system for the resolution of disputes between nations. Each party would nominate one person to be on a panel and would mutually agree on

the chair. The process includes the use of experts as required depending on the nature of the economic sector involved.

H) Application to Sub-National Governments/Government Monopolies and Regulatory Agencies

As drafted, the MAI will apply not only to a national government which ratifies and signs the Agreement but to all levels of government in that nation, whether state, provincial, municipal, local or otherwise.[iii] If they are included in the MAI, it creates the potential in Canada for foreign nationals to receive more favourable treatment than residents of other provinces, for example, from one of the film development agencies. Discrimination against foreign investors would be prohibited, but investors from other provinces would not enjoy the protection of the MAI.

As well, the draft text includes two alternative approaches to ensuring that any entity created or delegated by the government to exercise authority shall similarly be covered by the obligations of the Agreement. In the view of the Agreement's proponents, these provisions are critical to ensure there is no circumvention of the basic rules

I) Exceptions and Safeguards

The May 1997 draft text contains only narrow exceptions. These include actions necessary for the protection of "essential security interests" of a nation, temporary measures during balance of payments crises and "prudential measures" with respect to financial services. "Essential security interests" appears to be limited to a physical threat to a nation, including measures taken during a time of war or armed conflict.

In addition to these agreed provisions, the agreement includes bracketed text (indicating final agreement has not yet been reached) in several places concerning measures related to protection of the environment and "maintenance of public order."

Finally, there is no agreement yet respecting taxation, except as it may be used as a means to disguise an expropriation. The text notes that "(t)he vast majority of EG2 delegations was opposed to any carve-in for taxes with respect to National Treatment. These delegations emphasised the need ... of governments to preserve the freedom to introduce new measures especially in the light of economic and technological developments." However, this matter remains contentious and includes a discussion of how the tax system is often used to provide investment incentives.

Country Specific Reservations

Many international trade agreements permit individual nations to maintain specific measures that would otherwise violate the agreement by listing these "reservations" upon signing.

While the scope and nature of country specific reservations to be permitted under the MAI is still being discussed, several matters are firm.

Agreement has been reached that non-conforming measures can be listed, continued if they are renewed promptly and amended if the amendment increases the degree of conformity of the measure. However, agreement has not been reached on a Part (B) which would permit the lodging of reservations for new measures taken in sectors of economic activity that countries

would specify on signing the agreement. This is sometimes referred to as an "unbound" reservation, to distinguish from the "bound" reservation that would prevail in the absence of a Part (B).

The following discussion is noted in the text:

Different views were expressed with respect to Part B of the draft article which would allow new non-conforming measures to be introduced after the Agreement comes into force. One view was that such a provision might undermine the MAI disciplines to which it applied. The opposite view was that Part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their reservations.

The commentary reviews two fundamental principles related to the country specific reservations. The manner in which these principles would apply to the proposed Part B is not agreed.

Standstill

Where a nation lists a non-conforming measure, such measure would be subject to the principle of Standstill. The text provides that " **Standstill** would result from the prohibition of new or more restrictive exceptions to this minimum standard of treatment. From this perspective, a violation of Standstill would be a violation of the underlying MAI obligations (e.g. of National Treatment and MFN), and the dispute settlement provisions would apply to such breaches of the MAI obligations."

Rollback

There is lengthy discussion of how these non-conforming measures can be eliminated over time. Several methods, including peer pressure, periodic review by the governing body and directing future negotiations to remove non-conforming measures are reviewed. The intention is explicit: " **Rollback** is the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place."

J) The Cultural Sector in the MAI Text

In the January draft text, there was no mention of the cultural sector, either directly as a possible exception or inclusion, or indirectly. A review of that text results in the inevitable conclusion that **the cultural sector would be covered fully by the MAI as drafted in January 1997**, except as individual nations may list country specific reservations.

In the commentary attached to the May 1997 draft text (but not in the Agreement's body), France has tabled for discussion a proposed exception clause for cultural industries, to read as follows;

Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity.

This annex states that France has concluded that "the basic principles of this agreement raise application problems for cultural industries (notably the printing, press and audio-visual sectors)." It discusses restrictions on investment in the audiovisual sector and the difficulty of applying them to new technologies under the Standstill provisions; linguistic and other requirements in the sector which violate National Treatment obligations; and the coproduction treaties in film and television.

3. CANADA'S ROLE

Analysis of the text suggests that Canada is a major proponent of the MAI and plays a prominent role in the negotiations. In the text, there are more than 21 references to Canadian proposals. This is not hard to understand when you consider that Canada has a significant stake in the outcome, both as a nation which invests heavily in other countries and as a recipient of foreign investment.

Certain sectors of Canada's economy, including mining, other natural resources, the high tech field and financial institutions have major foreign holdings.

The United Nations Conference on Trade and Economic Development has developed an index of transnationality of individual companies which analyzes the degree to which a company's foreign assets, sales and employment exceeds its home country figures. In this index, Canada has three companies in the top 15, Thomson (2), Seagram (4) and Northern Telecom. Only Switzerland has more.[iv]

Canada has advanced proposals in a number of key areas, including a draft article on "conflicting requirements" which seeks to limit the ability of one nation to impose measures that require an investor to act in conflict with the laws of another nation. While this article addresses Canadian interests in Cuba, it raises the intriguing possibility that even when National Treatment is applied to a foreign investor, such investor may still have access to the dispute settlement mechanism of the Agreement. Canada has also noted its reservations concerning a number of articles in the draft text.

However, the **Canadian delegation has been silent on the question of the cultural sector.** There is no indication in any section of the draft text that Canada has any reservations about the implications of the MAI for the cultural sector. Canada does not even record its support for the proposal from France for a cultural exception.

4. CANADIAN CULTURAL MEASURES AT RISK

At the present time, Canada's press is reporting on the merger between Cineplex Odeon, owned by Seagram Co. Ltd of Montreal, and US-based Loews Theaters, which would transfer effective ownership of the Canadian cinema chain to the Sony Corporation. Canada's Minister of Canadian Heritage said "she has discussed the merger with Industry Minister John Manley - who has jurisdiction over Investment Canada - and the two Ministers agree the deal must be of net benefit to the Canadian cultural industry." The press report discusses how the government will negotiate an appropriate package of commitments from Sony, including such thing as screen time for Canadian films, in return for approving the merger.[v]

Under the MAI as proposed, the policy which underpins the government's action in this case could not be maintained. Canada would be in violation of the MAI's National Treatment

provision, the prohibition on imposing performance requirements and the commitment to the free flow of capital. This is merely one contemporary example of the potentially serious consequences of the MAI on Canadian cultural measures. While the Agreement is incomplete, an understanding of this potential is important both to permit informed input to the final progress of the negotiations and to prepare for its possible implementation.

Canada is the most open market in the world for cultural products. Canadians believe passionately in the free movement of ideas, information and entertainment. But we want to be able to see ourselves reflected in what we watch, hear and read and to be able to choose to view the world from our own perspective, as well as that of others. Faced with the tremendous competitive advantages enjoyed by our southern neighbour, Canada has developed a series of measures which permit our artists and cultural industries to emerge and succeed. The basic objective is to ensure that Canadians have choice in our own country.
One of the fundamental principles behind our measures has been that Canadians are more likely to tell Canadian stories and reflect Canada's world view. Flowing from that principle, we have implemented a range of measures which provide support only to Canadians and thus discriminate against nationals of other countries. To the extent that foreign nationals are "investors" within the meaning of the MAI and these support measures are not covered by an exception, they are likely vulnerable to a challenge under the MAI.

Potentially, the MAI could affect in some way virtually every cultural policy, agency and measure that Canada has implemented.

Some of the more obvious and sensitive areas which are contrary to the commitments in the MAI are analyzed in the following sections.

A) Restrictions on Foreign Ownership

Canada prohibits, limits or restricts foreign ownership in most of the cultural industries.

Such provisions would violate the National Treatment obligation, as well as the prohibitions against performance requirements, uncompensated expropriation and restrictions on movement of capital. Individual foreign firms, some of which have considerable financial resources, and foreign nations could take action against Canada under the dispute settlement provisions. The current policies which are vulnerable to a challenge include:

i) No foreign company can own more than 1/3 of a Canadian broadcaster or distribution undertaking (cable, satellite or other). Similar limitations prevail in the telecommunications field.

ii) The policy in the book trade generally prohibits a Canadian company from being sold to non-Canadian interests and provides that a foreign company is not permitted to establish a new business in Canada. This policy in the past has resulted in the forced sale of assets to Canadians, with the government acting as the buyer of last resort (potentially, an "expropriation" under the MAI). Indirect acquisitions in the book trade are reviewed by Investment Canada and are approved only if they are of "net benefit" to Canada and the Canadian-owned sector. The "net benefit" test typically involves the negotiation of undertakings by the foreign investor to support Canadian authors, acquire Canadian products for distribution and provide jobs to Canadians.

iii) The policy in film distribution prohibits a foreign company from establishing a new business in Canada, except to distribute its own productions. Any increased foreign ownership in film distribution is reviewed by Investment Canada under the "net benefit" test.

iv) Increased foreign ownership in the sound recording business is reviewed by Investment Canada under the "net benefit" test.

v) Ontario's *Periodical and Publications Distribution Act* and several Quebec statutes require Canadian ownership (or provincial ownership) as a condition for establishing a business in certain cultural fields.

B) Funding Programs Limited to Canadian Individuals and Firms

Access to most funding programs is denied to non-Canadian companies and individuals

This is true even if they are producing Canadian content material, publishing Canadian writers or recording Canadian artists. Such restrictions may well be contrary to the MAI's NT provisions.

i) Funding support for film and television production activity through Telefilm, the provincial agencies, Canada Council is limited to Canadian firms. If taxation is "carved-in" to the MAI, the support through the Refundable Investment Tax Credit and the companion provincial schemes are at risk.

ii) The CRTC has mandated the creation of private sector production and talent support programs in both the television and sound recording industries by directing licensees to provide certain percentages of revenues for these purposes. These programs are generally not available to foreign firms, even if they have a Canadian subsidiary and are producing Canadian content records, television programs and movies. The funds have become a critical component of the industries and promote individual artists, actors, technicians, designers, directors, musicians and others by making possible a wide range of production. Under the MAI, access to the funding programs could not be limited to Canadians and the obligatory nature of the funding requirement may be at risk if the ownership restrictions on Canadian broadcasters are removed.

iii) Access to the Book Publishing Industry Development Program, the Block Grant Program of the Canada Council and the Publications Assistance Program is limited to Canadian book and magazine publishers. These programs ultimately support individual writers, editors, artists and others involved in the book and magazine industries, particularly emerging authors. Again under the MAI, while the programs could likely continue to support certain genre of activity, access could not be limited to Canadian firms.

iv) Access to the limited number of funds which support new media productions has been generally limited to Canadian firms.

v) The Cultural Industries Development Fund administered by the Federal Business Development Bank provides assistance only to Canadian firms.

vi) Since the definition of investor in the MAI includes organizations and associations operated on a not-for-profit basis, direct and indirect funding of their activities may be subject to challenge if access is denied to a foreign association or organization having a Canadian presence or asset.

vii) To qualify for funding from the various arts, heritage and museums programs, the institution or individual must be Canadian. Where a foreign national owns a Canadian asset in this field (and remember this may include an intellectual property right), the MAI would require National Treatment for such a foreign "investor" to the extent they might otherwise be eligible to apply for funding support. This has the potential to affect all of the programs of the Canada Council, provincial and local arts councils, the Museums Assistance Program, Cultural Initiatives Program and the Arts Stabilization Projects, although the final language both of the intellectual property rights provision and the exceptions clause will be determinative.

C) Canadian Content Requirements

For a television program to qualify as Canadian Content, the producer of the material must be Canadian.

This requirement would be considered a violation of the National Treatment obligation of the MAI.
Canadian Content rules, such as those in television and radio are an underpinning of the music and audiovisual production industries. In most cases, even if a foreign film and television producer creates a program which satisfies the Cancon definition (6 or 8 out of 10 point), they would not be entitled to the CRTC Cancon number, nor be eligible for the various funding programs. While a foreign record company's Canadian subsidiary which creates a Cancon sound recordings (2 out of 4 elements) can obtain a CRTC number, it is not entitled to other benefits of such designation.

More fundamentally, there is a relationship between Canadian content rules and the ownership of broadcast undertakings. Should the limitations on non-Canadian ownership in the sector be removed as a consequence of the MAI, it would be difficult to maintain **obligatory** Cancon requirements on the new foreign owners of Canadian broadcasters, as these would be in the nature of prohibited performance requirements.

In an MAI world, the CRTC may be limited to **voluntary** commitments, extracted during the licensing process. This would apply both to requirements to fund independent production activity and FACTOR and to achieve Canadian content levels.

D) Other

The *Cultural Property Export and Import Act* in some cases limits the ability of foreign investors to move their assets from Canada.

New measures to encourage production and distribution of new media materials, including such things as the sale of digital rights by museums and galleries, could not be limited in application to Canadians.
As France noted in its intervention, Canada's 36 coproduction treaties which encourage partnerships in film and television would violate NT and MFN obligations.

If public cultural agencies or assets are privatized, foreign interests could be allowed to acquire them. Potentially, this could affect decisions to privatize TVOntario, the CBC, museums, the National Film Board, the National Arts Centre, etc.

The CRTC maintains a range of regulations which discriminate against foreign services. These include the cable substitution rules, the list of eligible foreign programming services and other

policies which provide preferential access for Canadian services to the distribution undertakings. All would be at risk under the MAI as violations of NT obligations.

If taxation is "carved-in" to the MAI, foreign firms may be able to claim that restrictions on advertising placed in US magazines and on US border stations (which are provided in the *Income Tax Act*) are a violation of their right to be treated equally to Canadians (National Treatment).

Canada's immigration regulations could not sustain policies which restrict the flow of foreign performers and other cultural workers into Canada to work on foreign-financed film, television and performing arts productions.

Measures encouraging exports in the cultural industries would be in violation of the NT obligation if they are not available to foreign companies which create Canadian material.

The section of the MAI which provides that government commissions, enterprises and agencies must act in a manner which is consistent with the obligations of the Agreement may have far reaching consequences for Canadian institutions and agencies which have cultural implications, including not only Canada Council, Telefilm, CBC, CRTC, National Arts Centre and museums, but also schools and libraries. This is particularly the case in areas such as acquisition and purchasing of Canadian- produced materials.

5. CONCLUSION

Potentially, the MAI could have a profound negative effect on a range of Canada's cultural support measures and touch all sectors of the arts, culture and heritage community in Canada. It is a more serious threat than any of the other trade agreements to which Canada has acceded in the past decade.

To minimize the threat to Canada's cultural measures, a broad cultural exception must be included in the final text of the MAI.

In dealing with exceptions to trade rules, experience suggests that international panels interpret language narrowly, since they are comprised of individuals who generally support attempts to liberalize trade. In this connection, it is important to note that the language of the proposed French exception clause is itself narrow. It may not cover adequately all of the existing forms of cultural expression, let alone those which will emerge in the next century. If tested before an international panel, it could well be applied only to exempt measures supporting culturally-significant work or works in minority languages.

In Canada's case, this could leave a range of measures vulnerable, including those which are industrially-based and designed to support the development and maintenance of a strong infrastructure. Even worse, it may be possible for an international panel to rule that since Canada already has *cultural and linguistic diversity* a specific measure being challenged is merely an attempt to circumvent the obligations of the MAI.

For this reason, if the MAI proceeds, it is vital that the Canadian government be urged to work actively with France and other nations in the OECD to seek a broad general exception for the cultural industries, arts and heritage, using the French proposal only as a starting point.

If the broad exception is not agreed, the country specific reservations must be "unbound" and permit the implementation of new measures.

If Canada is limited to listing only existing cultural support measures, future policy options would be restricted seriously. Even if the country specific reservations permit new measures, it may be insufficient to protect Canada's cultural support measures since there will be enormous pressure on Canada other the coming years to eliminate its non-conforming measures under the Rollback provisions.

Most particularly at risk in relying on the country specific reservation approach are the new forms of cultural expression which will emerge in the years ahead and by very definition cannot possibly be contemplated today.

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[i] *The current member states of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.*

[ii] *While the definition of investment includes "intellectual property rights" there is no language establishing what obligations nations would assume respecting such rights. Accordingly and given that the CCA has separately commissioned a review of the treatment of intellectual property under all of the trade agreements, including the MAI, this aspect of the agreement is not referred to extensively in this analysis.*

[iii] *Given the sensitivity of the US public to trade issues and the power of the states which resulted in important exceptions for sub-national governments being contained in NAFTA, it is by no means certain that sub-national governments will be included fully in the final agreement.*

[iv] *The Economist , September 27-October 3 Edition, pg. 115*

[v] *The Globe and Mail , Thursday October 2, pg. C-1*