



Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE TREATMENT OF CULTURAL MEASURES IN THE MAI

(Note by the Chairman)

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1. The question for consideration by the Negotiating Group is how the MAI should deal with measures taken to preserve or promote a country's cultural identity or interests. One of the delegations has proposed [DAFFE/MAI/RD(96)26] a specific clause that would allow Parties to implement policies designed to promote cultural and linguistic diversity and to protect and promote industries ensuring such diversity. This clause would provide a general exception from all the obligations of the MAI so that national treatment, MFN, transparency and dispute settlement would not apply.

2. This note looks at the treatment of measures relating to cultural interests in existing investment agreements and raises questions for consideration by the Negotiating Group in relation to the MAI.

I. Existing investment agreements

GATS

3. The GATS does not accord special treatment to measures taken to protect cultural interests. Members can schedule measures inconsistent with market access and national treatment so that those wishing to promote cultural industries can withhold commitments in sectors where they have cultural concerns. Members may also inscribe MFN exemptions based on cultural considerations. These are predominately found in the audio-visual sector. Canada has inscribed an MFN exemption in audio-visual services and has notified an MFN exemption for preferential treatment of some other GATS Members in the framework of film, video and television coproduction agreements concluded by either Canada or by the province of Quebec.

4. The Member States of the European Union have a consolidated list of MFN exemptions based on national and EC measures. France has notified national measures in newsagency services and press agency services and Italy has a measure on publishing services. At the EC level, there is an entry in the list for the Council of Europe Convention on Transfrontier Television, another for European programmes to support television and cinematographic productions, and another for coproduction agreements with third countries. These are based on cultural or regional identity considerations.

NAFTA

5. There is no general exception for cultural measures in NAFTA. Annex 2106 provides that as between Canada and the US, any measure with respect to cultural industries and any measure of equivalent commercial effect taken in response, are governed by the provisions of the Canada-US Free Trade Agreement. That agreement (article 2005) exempts cultural industries from the provisions of the agreement and provides for a right of retaliation (measures of equivalent commercial effect) in response to actions that would have otherwise been inconsistent with the agreement. Annex 2106 of NAFTA further provides that the rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

BITS

6. Most bilateral investment treaties, which deal primarily with investment protection, are silent on the question of cultural industries. However, Canada's model bilateral investment treaty (Article VI) contains an exemption from the provisions of the agreement for investment in cultural industries which are defined as natural persons or enterprises engaged in the activities listed in the agreement.¹

OECD Instruments

7. There is no general exception for cultural measures under the OECD Codes². Canada maintains a reservation relating to direct investment for activities concerning cultural industries. The list of industries covered by the reservation is an open list. No other OECD country has a similar reservation, although several countries maintain reservations on sectors such as press or communications that might be based on cultural considerations. Some measures in Annex E, which are based on reciprocity, might also have cultural motivations.

8. The issue of cultural measures concerning activities by established foreign-controlled enterprises was discussed in the context of the negotiations to make the National Treatment Instrument (NTI) legally binding. The question was whether measures taken to protect or promote certain cultural industries should be exempted from possible standstill and national treatment and non-discrimination obligations.

9. A solution was provisionally worked out (see annex 1) whereby measures could be lodged at the time of adhering to the NTI on condition that the measures were necessary to preserve and promote a Member's cultural identity, that the measures related to areas listed in the instrument, and that the member

¹ Extract from Canadian Bilateral Investment Treaty

“ARTICLE VI

(3) Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- (b) the production, distribution, sale or exhibition of film or video recordings;
- (c) the production, distribution, sale or exhibition of audio or video music recordings;
- (d) the publication, distribution, sale or exhibition of music in print or machine readable form; or
- (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.”

² The Code of Liberalisation of Current Invisible Operations, which pertains to cross-border transactions, contains qualified liberalisation obligations on the "Exportation, importation, distribution and use of printed films and other recordings -- whatever the means of reproduction -- for private or cinema exhibition, or for television broadcasts".

concerned had already notified an exception to national treatment in that area under the 1976 instrument. Members taking such exceptions would be obliged to avoid unnecessary damage to the economic interest of another Member.

II. Considerations for the MAI

10. There may be different views on whether cultural measures should be treated differently from other non-conforming measures in the MAI. Sectors such as audio-visual, press, publishing, and broadcasting may be governed by specific regulations in which linguistic and/or nationality criteria play a central role. Such concerns may be considered to justify a denial of national treatment. However, a general exception with sweeping effect may raise concerns that a potentially significant area of investment would be carved out of the MAI with no possibility of controls to limit abuse.

11. If specific provisions were developed for cultural measures, Delegates may wish to consider how such measures would be defined, the scope and application of such provisions, and whether controls on their use would be appropriate.

12. Country specific reservations would ordinarily not permit the lodging of future measures. The question has been raised in Drafting Group 2 whether some flexibility may be needed for certain sensitive sectors and new economic activities that may emerge in the future [DAFFE/MAI(96)16/REV1]. This might include listing certain reservations in separate annexes or allowing flexibility in the manner in which countries may lodge measures relating to culture interests (i.e., reservations that might be broader than existing measures).

13. If the MAI were to contain a general provision exempting cultural measures from the MAI, its scope and application would need to be defined. Such a provision might contain an "open or closed" list of industries, sectors, or activities. It could be restricted to measures taken in the establishment phase. It could also be required that such measures be limited in time and that there be compulsory consultation in advance of the introduction of measures.

14. The provision could also require that the Party introducing such measures avoid unnecessary damage to the economic interests of another Party. In the case of damage, the provision could require consultations with a view to determining appropriate compensation for an investor. Delegates might consider whether other Parties should be permitted the right to introduce measures of equivalent commercial effect in accordance with an appropriate procedure, although this may be difficult in the investment context.

15. Unless agreed otherwise, the procedures of the MAI including consultations and dispute settlement, periodic review, rollback, and transparency could apply.

III. Questions for consideration

- a) *Should the MAI accord to measures taken to preserve or promote cultural identity treatment different from that accorded to other non-conforming measures?*
- b) *If the MAI contains provisions on cultural measures what should be the nature, scope, and application of those provisions?*

- c) *Can cultural identity be defined for the purposes of the MAI by reference to a specific list of industries? Should this list be open or closed?*
- d) *Should MAI procedures, including dispute settlement, apply?*
- e) *Do Delegates feel this matter is ready for referral to an expert/drafting group?*

ANNEX 1

(EXCERPT FROM DAFPE/IME(91)18, paragraphs 22-23)

"Exceptions for measures to protect cultural identity

The Committee noted that exceptions would be lodged by some Members which were motivated not by strictly economic considerations, but by the need to protect their cultural identity. The Committee recognised that some flexibility was needed to accommodate the concerns of certain Members relating to their cultural identity. The Committee agreed, in view of their specific motivation, that such Members may at the time of adherence to the instrument, lodge such exceptions if the following conditions are met:

- Such exceptions are necessary to preserve and promote a Member's cultural identity;
- They relate to measures concerning foreign-controlled enterprises operating in the relevant areas listed below; and
- the Member concerned has already notified an exception in the relevant area under the 1976 instrument.

Any Member taking such an exception shall do so in such a way as to avoid unnecessary damage which bears especially on the economic interests of another Member. All measures taken in this context are subject to the notification and examination procedures under Articles 1 and 2 of the Revised Decision.

The Committee agreed that the cultural industries in relation to which such an exception could be taken are those involving the publication, distribution and sale of books, periodicals, films, audio and video recordings and radio and television broadcasting."