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Potential Implications of Future WTO Negotiations for North American Broadcasting Policies: An Overview

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Discussion Paper
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***Potential implications
of future WTO negotiations
for North American broadcasting***

An Overview⁽¹⁾

A. RESEARCH QUESTION AND SUMMARY

The paper addresses this research question:

- **What is the potential impact of upcoming WTO negotiations for broadcasting in North America, particularly in the areas of trade in services and investment?**

The short answer to this question is that WTO negotiations may lead to expanded trade agreements⁽²⁾ which will further restrict government lawmaking authority over broadcasting. If applied to broadcasting without exception, trade principles would impact very dramatically on a wide range of broadcasting policies⁽³⁾ which presently exist in North America.

1) Direct policy impact

Among the policies that may be directly affected are:

- Foreign ownership restrictions in broadcasting,
- Bilateral co-production treaties,
- Public funding targeted towards domestic production companies,
- Requirements to favour the hiring of disadvantaged groups (i.e. women, aboriginal peoples, disabled persons, and visible minorities),

- Requirements to broadcast minimum levels of domestic content,
- Requirements to contribute to production funds to support domestic content,
- Any definition of domestic content which favours domestic performers, directors, producers, writers, music composers, etc.; in short,
- Any form of preferential treatment for domestic persons or companies.

See Part E for details.

2) Rights to sue for compensation

Importantly, WTO agreements may give new rights for foreign interests(4) to sue governments in front of international arbitration panels or domestic courts for violations of a trade agreement. These rights would likely include the right to seek monetary damages from governments to compensate for an “expropriation of assets”. An “expropriation” could take place directly or indirectly, as a result of a government law, regulation, policy, administrative decision or other measure. “Assets” may be defined more broadly than in current agreements, to include intellectual property rights, license rights, or any tangible and intangible property rights.(5) See Part E(3).

For example, the Canadian federal government might be open to a lawsuit if the CRTC revoked a foreign-owned broadcasting license, or chose to apply broadcasting policies to a previously exempt sector or technology.

3) Other potential implications

Among other potential implications, the WTO agreements may give special rights and protections to foreign interests which domestic persons and companies do not enjoy. See Part F(3).

They could also require the re-opening of broadcast licensing arrangements to foreign companies in “full” radio markets. See Part E(2).

They may “freeze” or apply a time limit to broadcasting policies, thus precluding governments from applying current policies to new technologies. See Part E(4).

Finally, they may include a relatively long “lock in”, such as 15 years. See Appendix One (Note 149).

Fundamentally, this paper seeks to make clear the sheer breadth of the potential impact of future WTO agreements. The paper's assessment is rooted in a review of both current and proposed trade agreements, as well as analyses of these agreements by various legal and academic sources.(6)

B. INTRODUCTION

1) The "Millennium Round" of WTO negotiations

The World Trade Organization (WTO) was created in 1994, at the end of the Uruguay Round of world trade negotiations. The next round of WTO negotiations will begin no later than January 2000. Meetings are already taking place as national governments shape their negotiating strategy in anticipation of this "Millennium Round".

The WTO negotiations promise to address many topics that are relevant to broadcasting, revolving around: (1) the possible expansion of the *General Agreement on Trade in Services* (GATS)(7) and (2) the negotiation of a comprehensive agreement on investment, based on the proposed *Multilateral Agreement on Investment* (MAI).(8) This paper does not directly address a number of other relevant topics likely to be negotiated at the WTO, including: (1) intellectual property rights, (2) subsidies, (3) government procurement, and (4) competition policy.

2) Intent and methodology

The paper provides a broad, speculative assessment of the potential impact of upcoming WTO negotiations on broadcasting. Nothing in this paper represents a legal opinion as the author is a law student and not a lawyer. Rather, the paper represents an informed forecast of the future, based on a review of various analyses of current and proposed trade agreements.

It is hazardous to speculate about the impact of upcoming negotiations of any sort, let alone broad-based multilateral negotiations on international trade. Negotiations are confidential, for obvious reasons, and last minute offers may alter the shape of an agreement dramatically. The task is even more complex in a rapidly evolving sector like broadcasting, given the whirlwind of technological change and industry convergence underway.

However, the sheer breadth of the potential impact of WTO negotiations warrants a careful and informed assessment of the implications for broadcasting. This paper is modeled, in a very modest way, after the in-depth “anticipatory” analysis of the MAI prepared in 1997 for the Western Governors’ Association (WGA), by T. Singer and P. Orbuch. According to the WGA report:

Our approach is to rely not only on the stated intent of MAI negotiators, but to anticipate how the language of MAI proposals might be interpreted by future dispute panels or courts in response to legal claims brought by investors. This approach is necessary because a core purpose of the MAI is to legally empower investors to seek their own remedies and make their own arguments against state laws without mediation by their home governments.(9)

3) Research plan

Based on the above approach, the research plan for the paper was to:

- (a) Review the treatment of broadcasting in the *North American Free Trade Agreement* (NAFTA),
- (b) Review the negotiation of the *General Agreement on Trade in Services* (GATS) during the Uruguay Round of world trade negotiations,
- (c) Review the final decisions of the WTO Panel and WTO Appellate Body in the case of *Canada - Certain Measures Concerning Periodicals*,
- (d) Synthesize various analyses of the potential impact of a *Multilateral Agreement on Investment* (MAI), proposed by the Organization for Economic Cooperation and Development (OECD), and

(e) Assess how trade principles applied in the NAFTA, GATS or the proposed MAI might impact on broadcasting policies in North America.

This research was carried out over a seven-week period. The paper was written during the remaining three weeks of the Fellowship.

4) Sources

The paper relies on academic, legal, government, industry and other non-governmental sources, especially the “anticipatory” legal analyses provided by a number of these sources.

The author also benefited from presentations on trade and broadcasting at a North American National Broadcasters Association (NANBA) meeting in June, 1998;(10) discussions on trade and culture at a recent conference held by the Canadian Conference of the Arts (CCA);(11) and several interviews with representatives of Canadian government and industry during August 1998.(12)

The Ethyl case - An illustration

The Canadian government recently agreed to settle a \$250 million (U.S.) NAFTA lawsuit launched by Ethyl Corporation, a company based in Richmond, Virginia.(13)

Ethyl had sued Canada after the federal government banned the import or inter-provincial sale of the gasoline additive MMT, which is manufactured by the company. The Canadian government claimed at the time that MMT was an environmental hazard because it gums up automobile emission controls. Ethyl responded with a legal challenge under the NAFTA Chapter on investment, seeking compensation for “expropriation” of its assets and damage to its reputation.

Under the settlement, the Canadian government agreed to drop its MMT ban, pay Ethyl \$10 million for legal costs and lost profits, and issue a public statement that the gasoline additive is not a threat to the environment or human health. In return, Ethyl agreed to drop the NAFTA challenge.

NAFTA is the first major trade agreement that allows investors to sue a foreign government directly, and the Ethyl case is the first NAFTA case to have caught the public eye. Other trade agreements require the home government of a company to bring suits on the company's behalf.

The case shows how trade agreements are changing the rules for how a government can regulate foreign companies. Current and future negotiations - such as those at the WTO - may entrench and expand upon the rights and protections put in place under NAFTA.

C. PAST TRADE AGREEMENTS

This section provides a few words on current and proposed trade agreements, namely NAFTA, the GATS, and the MAI, to provide a reference point for upcoming WTO negotiations on trade in services and investment.(14)

1) NAFTA

The *North American Free Trade Agreement* (NAFTA)(15) set a precedent for other multilateral negotiations on both trade in services and investment.(16) It was signed in 1994 between Canada, Mexico and the United States.

(i) Provisions on services

In the area of trade in services, NAFTA's Chapter 12 applies various trade principles, including MFN Treatment, National Treatment, and Market Access [see Part E(1)]. These provisions helped to lay the track for the negotiation of the GATS in 1993-94 [see below].(17)

The U.S. referred to the NAFTA provisions on services when it threatened to retaliate against a 1994 Canadian Radio-television and Telecommunications Commission (CRTC) decision to remove an American specialty television channel from the Canadian airwaves.(18)

(ii) Provisions on investment

In the area of investment, NAFTA's Chapter 11 applies various trade principles, including MFN Treatment, National Treatment, Market Access, a Prohibition on Performance Requirements, and Expropriation of Assets [see Part E(1)]. The NAFTA investment provisions set the stage for the negotiation of a comprehensive multilateral agreement on investment, such as the MAI [see below] or a future WTO agreement on investment.(19)

The recently-settled Ethyl lawsuit against Canada [see above] was initiated under the NAFTA provisions on investment.

(iii) Cultural exception

The NAFTA provisions on services and investment would have a dramatic impact on broadcasting policies in North America, if not for the agreement's "cultural exception".

Annex 2106 of NAFTA establishes the "cultural exception" by referring any question on "cultural industries" to the *Canada-U.S. Free Trade Agreement* (FTA).(20) Article 2005 of the FTA, in turn, exempts "cultural industries" (including broadcasting)(21) from the provisions of the agreement, but with a serious limitation, since it allows an opposing Party to take retaliatory sanctions against any use of the cultural exception.(22)

Thus, the true breadth of the exception remains an open question. According to one commentator, "What Article 2005 says, in reality, is that if a Party is ready to pay the price, it can maintain cultural measures that are incompatible with the Agreement".(23) Neither Canada nor the United States have invoked the cultural exception, and the degree to which it would protect broadcasting policies is unclear.(24)

The NAFTA "cultural exception" only applies between Canada and the U.S., and between Canada and Mexico.(25) Mexico, for its part, was able to negotiate a country-specific reservation for certain government measures designed to protect the use of the Spanish language in radio and television.(26)

2) GATS

The *General Agreement on Trade in Services* (GATS) is the first multilateral agreement to establish comprehensive rules on trade in services (as opposed to goods).(27) The negotiations

towards its completion in 1993-94 demonstrate the controversy which would surround a future push at the WTO to apply trade principles to broadcasting as an “audiovisual service”.(28)

(i) Audiovisual services

Audiovisual services were among the most contentious topics during the GATS negotiation, with a gulf developing between the United States and the European Union/ Canada over the treatment of a number of cultural areas. The U.S. favoured the application of trade principles to audiovisual services, while the E.U./ Canada sought to maintain government lawmaking authority over broadcasting by supporting a general exception for audiovisual services.(29)

(ii) Resolution

The negotiations ended in “a compromise which wasn’t really a compromise”.(30) Thus, the GATS contains no general exception for culture but does allow countries to withhold specific commitments on audiovisual services.(31) The U.S. was one of three industrialized countries to make substantial commitments to National Treatment and Market Access for audiovisual services.(32) Canada, along with the E.U., withheld any specific commitments in audiovisual services.(33)

These divisions over the treatment of audiovisual services will inevitably re-surface during future WTO negotiations, with important potential implications for broadcasting.

3) MAI

The *Multilateral Agreement on Investment* (MAI)(34) is a draft agreement proposed by the Organization for Economic Cooperation and Development (OECD). It is revealing for two reasons. First, it anticipates the future direction which a WTO investment agreement might take. Second, it proposes new trade principles and enforcement mechanisms, which expand the scope of the potential impact of a comprehensive investment agreement on broadcasting.

(i) Origins

The Uruguay Round of world trade negotiations did not lead to a broad agreement on investment, mainly because of opposition from developing countries.(35) Instead, a narrow WTO agreement was concluded, called the *Agreement on Trade-Related Investment Measures* [TRIMS].(36)

After the Uruguay Round, negotiations towards a broad investment agreement were shifted to the OECD.(37) Negotiations among the 29 OECD members(38) began in 1995 towards a MAI. They were slated for completion, but later postponed, in both May 1997 and May 1998.(39) The MAI may yet be signed at the OECD.(40)

(ii) Proposed cultural exception

France proposed a broad exception for cultural sectors (including broadcasting) under the MAI, which reads:(41)

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.

It is not clear how this proposal will fare under continuing negotiations, although the United States has announced its intention to oppose a cultural exception.(42) Canada supports the French proposal and has indicated that if a general exception is not agreed to, it will take a country-specific reservation for culture.(43)

(iii) Relevance

Various commentators have reported that the MAI was a substantially complete work prior to its postponement in May 1998, and that it indicates the broader context and climate of international negotiations towards future trade agreements.(44) I have summarized some key elements of the MAI in Appendix One.

The MAI sheds light on how a broad WTO agreement on investment might unfold. In 1996, the Singapore Ministerial Declaration of the WTO established a working group on investment, and this “is widely regarded as having sown the seeds for the negotiations of an MAI under the domain of the WTO”.(45) I have therefore relied heavily on analyses of the MAI in order to forecast how future WTO agreements may impact on broadcasting, as described below [Parts E and F].

D. CANADA-U.S. DYNAMIC

1) Canadian broadcasting policies

Much of this paper's assessment of the potential impact of future WTO agreements has an unavoidable focus on Canadian broadcasting policies. Why unavoidable?

According to one Canadian commentator, Canada's cultural policies are among the most elaborate in the world, for two reasons. First, Canada's small size means that it is inherently limited in its ability to amortize the cost of domestic programming. Second, this problem is aggravated by the country's proximity to the United States, which means that Canadian content has to compete with a range of well-marketed foreign programming, the costs of which can be amortized in the largest entertainment market in the world.(46) At present, over 60 percent of programs on Canadian television are foreign, the vast majority from the United States.(47)

Thus, the potential impact of trade principles on broadcasting policies promises to be greater in Canada than in Mexico or the United States. Hence the focus on Canadian policies in this paper.

2) U.S. perspective

The United States has pushed hard for trade agreements which would remove broadcasting policies in other countries, viewing them as a barrier to open markets and the free flow of trade and investment.(48) Entertainment products are, of course, one of the most important American exports.(49) In comparison, Canada spends about twice as much on cultural imports than it earns from cultural exports, despite some export growth in recent years.(50)

3) WTO decision on Canadian magazine policies

The 1997 WTO case on *Canada - Certain Measures Concerning Periodicals* demonstrates the divisions between the Canadian and U.S. positions on trade and culture.(51) Canada's policies

had the effect of preventing the import of American magazines which contained “recycled content” from the U.S. market.

According to Canada, Canadian-content magazines would not be able to attract Canadian advertisers if forced to compete with the “recycled content” of imported American magazines, whose costs were already paid for in the U.S. market. This form of competition is unfair, says the argument, and would virtually drive the Canadian magazine industry out of business. The purpose of the policies, for Canada, “is not to protect the production of periodicals in Canada, but to prevent the diversion of advertising revenues to magazines based on content produced for foreign markets, and thus to ensure the production of editorial content for Canadians”.(52) Essentially, this was an argument that a global free market would wipe out domestic content in small countries, thus harming cultural and linguistic diversity.

The United States argued that the benefits of the economies of scale should outweigh any cultural concerns in the era of free trade. As the U.S. stated:

...even if one could somehow credit Canada’s argument that it is seeking... to ensure ‘original content’ in magazines sold in Canada this purpose would be equally illegitimate. If GATT permitted governments to require that imported goods be designed exclusively or primarily for their markets, they could easily insulate their markets from the comparative economic advantages of other WTO Members. Such a result would undermine the foundations of international trade.(53)

These divergent positions illustrate some of the underlying arguments surrounding future WTO negotiations on trade and broadcasting, as part of the debate on trade and culture.

E. POTENTIAL IMPACT

1) Introduction

(i) Basis for the report’s predictions

This paper provides an “anticipatory” analysis of future WTO agreements, based on a review of current and proposed trade agreements, especially NAFTA, the GATS and the proposed MAI.

Current agreements like NAFTA and the GATS contain a general exception and/ or country-specific reservations on broadcasting, thus limiting their policy impacts in important ways. The paper's predictions assume that future WTO agreements would apply the trade principles of NAFTA, GATS and the MAI to broadcasting, *without exceptions*. This is entirely speculative, since it is unclear what kinds of exceptions will be negotiated in future agreements. However, a broad approach is critical to anticipating the full breadth of the potential impact of WTO agreements on broadcasting. In fact, the paper may only reveal the tip of the iceberg of the WTO's potential impact, since it is not based on a full-scale review of broadcasting policies across North America.

(ii) Summary of trade principles(54)

Most-Favoured-Nation Treatment requires that a government treat the persons or the companies of a trade partner no less favourably than those of any other trade partner.(55)

National Treatment requires that a government treat foreign interests no less favourably than it treats domestic persons or companies.(56) Government programs which favour domestic persons or companies are said to be “discriminatory” against their foreign counterparts.

An effects test expands National Treatment by requiring that the effects of a government measure, as well as its purpose, not discriminate against foreign interests.(57)

Uniform National Treatment expands National Treatment by requiring “uniform treatment” of foreign interests within national borders. Thus, if subnational governments (i.e. local, provincial, state, territorial) provide varying standards of treatment within a country, then foreign interests are entitled to the best subnational treatment available, no matter where in the country they operate.(58)

Market Access requires a government to allow foreign interests to enter its national market, free from a number of direct or indirect limitations.(59) This principle is also referred to as the application of National Treatment during the pre-establishment phase of an investment. This is also described as “freedom of entry” and “right of establishment”.

A Prohibition on Performance Requirements prevents a government from placing requirements on foreign interests related to employment; investment; export; transfer of technology; or local sales, content, and production.(60)

Expropriation of Assets provides for the protection of foreign investors from expropriation or “a measure tantamount to...expropriation” of an investment.(61) The principle may be defined broadly in order to “serve as a safeguard against new forms of expropriation in the future”.(62)

General exceptions are negotiated to remove broad areas of government lawmaking authority from the rules of the agreement, for all country-members.(63)

Country-specific reservations are negotiated to remove more narrow areas of government lawmaking authority from the rules of the agreement, for a particular country-member.(64)

A standstill provision(65) freezes any exceptions or reservations to the agreement, by prohibiting any future government measures in the excepted area.

A rollback provision(66) phases out any exceptions or reservations to the agreement over a period of time.

(iii) Summary of potential impact

If future WTO agreements apply currently-recognized or proposed trade principles to broadcasting without exception, their impact would:

- Remove foreign ownership restrictions,
- Prohibit bilateral co-production treaties,
- Require the re-opening of “full” radio markets to foreign interests,

- Prohibit any definition of domestic content which favours domestic actors, directors, writers, producers, musicians, composers, and so on,
- Prohibit requirements to broadcast minimum levels of domestic content,
- Prohibit requirements to contribute to production funds to support domestic content,
- Prohibit public subsidies which are targeted towards domestic companies,
- Prohibit requirements to favour the hiring of disadvantaged groups (i.e. women, aboriginal peoples, disabled persons, and visible minorities),

- Allow foreign investors to sue governments directly,
- Require compensation for an “expropriation” of a broadcasting license,

- Prevent governments from applying current broadcasting policies to new technologies,
- Provide rights to foreign interests which their domestic counterparts do not enjoy,

- Put a freeze (“standstill”) on the future use of exceptions, or
- Put a time limit (“rollback”) on exceptions.

2) Direct policy impact

(i) Foreign ownership restrictions

Most countries have placed strong restrictions on foreign ownership of broadcasting.(67)

The United States, for example, restricts foreign ownership to 20 percent of a company with a broadcasting or carrier license, and 25 percent of a company controlled by such a company. A foreign interest in a company which exceeds 25 percent is subject to review and approval by the Federal Communications Commission (FCC) according to the public interest.(68)

Canada restricts foreign ownership to 20 percent of a broadcasting company and 33.3 percent of a broadcaster's holding company, to a combined maximum of 46.7 percent.(69) Also, the CRTC reviews transfers of ownership of broadcasting companies,(70) and applies a "benefits test" to evaluate whether the transfers "are beneficial to the public... and to the Canadian broadcasting system as a whole".(71)

Impact of National Treatment and Market Access:

Foreign ownership restrictions on broadcasting would violate the principles of National Treatment and Market Access.

(ii) Co-production treaties

Bilateral co-production treaties in television have been signed between a number of countries. Their main purpose is to promote joint productions between the countries by pooling sources of financing and by allowing for reciprocal recognition of domestic content.(72) Canada, as a prime example, has signed co-production treaties with over forty countries.(73)

Impact of Most-Favoured-Nation (MFN) Treatment:

These treaties would conflict with the principle of MFN Treatment, since they give favourable treatment to a trade partner which is not given to all other trade partners. Under the GATS, 27 countries were permitted to take reservations for their film and television co-production treaties in order to escape the impact of the agreement's MFN provisions on those treaties.(74)

(iii) Broadcast licensing

In Canada, the CRTC has the power to issue or amend licenses to broadcasters.(75)

Impact of provisions on Expropriation of Assets:

Under the MAI proposals on Expropriation of Assets, the removal or amendment of the broadcasting license of a foreign investor could trigger a lawsuit against the government, seeking monetary damages to compensate for any valuable assets (broadly defined) which the investor had lost.(76)

Impact of National Treatment and Market Access:

In Canada, the CRTC applies a wide range of policies which give favourable treatment to Canadian television companies and discriminate against foreign interests. First, it limits the U.S. television signals which cable companies may carry (limited to ABC, CBS, NBC, Fox and PBS).(77) Second, it limits the number and type of U.S. satellite services that may be carried by cable television, and the basis on which they can be sold.(78) Third, it gives preference to the licensing of Canadian pay and specialty channels over their foreign counterparts, and allows for new Canadian channels to displace foreign channels which offer the same service.(79)

All of these policies would violate the principles of National Treatment and Market Access because they favour domestic companies over foreign companies.

Finally, in some local radio markets, all of the available station frequencies have been licensed out. The markets have become “full” of domestically-owned radio stations. This licensing arrangement could be challenged under the MAI-proposed “effects test” for National Treatment, since the arrangement has the effect of excluding new market entrants, to the disadvantage of foreign interests. A foreign investor could argue that the market became “full” before it had a chance to apply for a license, and should therefore be re-opened.(80)

(iv) Domestic content policies

Canada requires broadcasters to include a minimum percentage of Canadian content in their programming,(81) and defines “Canadian content” according to the number of Canadians who play key roles in a production. Points are awarded for having a Canadian performer, director, writer, music composer, and so on.(82) Canada also requires private broadcasters to make contributions to production funds which support domestic content, as a condition of their broadcasting license.(83)

Mexico requires broadcasters to feature Mexican nationals in a majority of a day's live programs, and that any broadcast announcer who is not a Mexican national must obtain authorization to perform in Mexico.(84)

Impact of National Treatment and a Prohibition on Performance Requirements:

A requirement to broadcast a minimum level of domestic content, or to favour domestic performers in any other way, would conflict with a Prohibition on Performance Requirements to use a minimum percentage of domestic content, as well as National Treatment.(85) A requirement for private broadcasters to contribute to production funds that support domestic programming would conflict with the principles of National Treatment and a Prohibition on Requirements to give a preference to domestic goods or services.(86)

The policies would likely be prohibited only with respect to foreign broadcasters.(87) This could lead to a comparative disadvantage for domestic broadcasters if they were required to broadcast domestic content while foreign broadcasters were not.(88)

Impact of an "effects test" in National Treatment:

A definition of domestic content which favours domestic persons or companies would violate the principles of National Treatment and Market Access. However, such a definition might survive the national treatment test if "domestic content" was defined in a way that allowed foreign persons and companies to produce it, and was not explicitly discriminatory against foreign interests. Yet, even this type of definition could be challenged under the MAI-proposed "effects test" for National Treatment.(89)

To illustrate, it could be argued under the MAI's "effects test" that a definition of domestic content which somehow required that content be *about* a local or domestic situation would have the "effect" of giving significant advantage to domestic persons and companies, since they are inherently better placed to produce this kind of content. Thus, the definition would be discriminatory, in its effect, against foreign interests and would violate National Treatment.

Under this scenario, it is difficult to imagine any criteria for "domestic content" which would satisfy National Treatment under a broad "effects test".

In this context, it is worth recalling a U.S. argument in the WTO case on Canadian magazine policies that:

If GATT permitted governments to require that imported goods be designed exclusively or primarily for their markets, they could easily insulate their markets from the comparative advantages of other WTO Members. Such a result would undermine the foundations of international trade.(90)

The U.S. argument, therefore, is that domestic content policies could be used as a shelter for protectionism. This argument prioritizes trade liberalization and open markets ahead of state intervention to support domestic content and cultural diversity in broadcasting.

Impact of Most-Favoured-Nation (MFN) Treatment:

Domestic content policies could also violate MFN Treatment, if linked to a bilateral co-production agreement [see section (2)(ii) above]. In Australia, a recent court decision struck down the Australian Broadcasting Authority's television content standard based on the MFN provisions of a bilateral trade agreement between Australia and New Zealand.(91)

(v) "Simultaneous substitution"

Canada requires the "simultaneous substitution" by Canadian cable companies of U.S. television signals with the domestic television signals that are showing the same program simultaneously, so as to protect the owners of Canadian broadcasting rights.(92)

"Simultaneous substitution" could be challenged as a violation of National Treatment and Market Access, since it discriminates against U.S. broadcasters and advertisers, and periodically excludes them from the Canadian market.

(vi) Funding programs

Canada provides substantial funding, both public and private, to support Canadian programming. The respective funds are available only to programs which have a minimum level of Canadian participation and are Canadian-owned.(93) The most important sources of funding are Telefilm Canada and the *Canadian Television and Cable Production Fund (CTCPF)*, as well as provincial funding agencies.(94)

Impact of National Treatment:

These funding programs violate National Treatment. To meet the test of National Treatment, they would have to be made open to foreign persons and companies on a non-discriminatory basis.

Canada also prohibits tax deductions for the cost of advertising on foreign border stations.⁽⁹⁵⁾ In effect, this re-directs the Canadian advertising market to support Canadian broadcasters and has been described as a “central support structure for the [television] industry”.⁽⁹⁶⁾ However this would violate National Treatment, since it gives favourable treatment to domestic stations.

Impact of “uniform” National Treatment:

Led by Quebec, provincial governments in Canada have created a number of funding programs to support the cultural sector, including broadcasting.⁽⁹⁷⁾ These programs would directly violate National Treatment, under the MAI-proposed principle of “uniform” National Treatment, which would require “‘full market access’ in the form of uniform treatment of foreign investors within national borders”.⁽⁹⁸⁾ Under this principle, as an American analysis of the MAI points out:

The ability of laws and regulations to vary among states with regard to foreign investors would like fail to comply with this version of national treatment under the argument that it fragments the national market into as many as 50 regulatory submarkets.

In the Canadian context, the funding programs of Quebec and other provinces would either have to be made available to foreign interests *nation-wide* or be eliminated to provide “uniform” National Treatment.

(vii) Employment equity policies

The CRTC requires broadcasters, as a condition of license, to prepare employment equity plans designed to increase the number of people which they hire from four disadvantaged groups: women, aboriginal peoples, persons with disabilities and visible minorities.⁽⁹⁹⁾

Impact of National Treatment and a Prohibition on Performance Requirements:

These policies could conceivably be challenged under National Treatment and a Prohibition on Performance Requirements.⁽¹⁰⁰⁾ Under the MAI’s proposals to ban performance requirements,

for example, governments would be prohibited from requiring a foreign investor to ensure certain levels of local content or employment.(101)

3) Expansion of enforcement regime

One of the main purposes of the WTO, created in 1994, is to provide an effective enforcement mechanism for world trade agreements.

Thus, future WTO agreements could expand and strengthen enforcement provisions in the multilateral trade regime. The MAI, in particular, includes proposals for expanded enforcement provisions which may anticipate the future WTO agenda. These proposals would expand on the current WTO enforcement process, which is based on a process of trade challenges between national governments.

The MAI proposals grant new rights to foreign investors (mainly corporations) to directly sue the government if a “government measure” harms their investor rights or protections under the agreement.(102) Foreign investors could launch a lawsuit both in international arbitration panels and domestic courts, and would not require the consent of their home governments to do so.(103) According to a report prepared for the U.S. Western Governors’ Association (WGA), the MAI enforcement proposals would “create rights that are not now available to foreign investors through American statutes or case law”.(104) These rights would not be granted to domestic persons or corporations under the MAI proposals.(105)

According to one legal opinion, the MAI proposals are:

likely to result in investors carefully scrutinizing government practices to find a MAI provision on which they can base a claim. Thus, policing of the MAI will move from governmental channels over to businesses with enforcement done through the use of international tribunals.(106)

The MAI proposals expand on the Investor-State enforcement process in NAFTA, which has been described as “an untapped source of extensive private investor rights, including guaranteed access to a NAFTA panel for a private party”.(107) The recently-settled Ethyl lawsuit, discussed above, was initiated under NAFTA [see Part (B) (1)].

A number of sources have expressed their concern that the threat of trade-based legal challenges by foreign corporations will discourage governments from carrying out legitimate domestic regulation in a range of areas, such as health, environment, regional development, as well as cultural diversity. One trade lawyer, for example, has commented that the “very broad terms” of the MAI’s provisions on National Treatment “constrain legitimate government activities to assist their own citizens”.(108)

4) Restrictions regarding new technologies

The treatment of new technologies is one of the most important issues at hand for broadcasters in upcoming WTO negotiations, given the rate of technological changes in broadcasting.(109) Most governments have not yet defined their regulatory approach to new technologies.(110) How will future WTO agreements impact on government lawmaking authority in this area? Most importantly, how will trade agreements limit government authority over the Internet?

First, the definition of broadcasting in future WTO agreements may exclude the Internet. In this case, the Internet would be treated as a telecommunications service, which is already largely subject to trade liberalization in other agreements.(111)

Second, the Internet could be included as part of an exception for broadcasting in future WTO agreements, allowing governments to apply current policies to new technologies. The exception, however, might be limited by “standstill” and “rollback” provisions, as proposed in the MAI [see Part 4(ii) below].

(i) U.S. and Canadian proposals

U.S. proposals have pushed for maximum free trade on the Internet, with government’s limited role being to support and facilitate global electronic commerce, protect intellectual property, and ensure privacy and security.(112)

The Canadian government has not yet decided how it will regulate new technologies like the Internet.(113) For cultural reasons, some sources have expressed concern about “the free flow of digital content across the Canadian border” which might result from trade agreements, allowing them to escape Canada’s broadcast policies.(114)

One could envision a variety of current broadcasting policies which might be adapted to the Internet. For example: restrictions on foreign ownership of domestic Internet content or service providers; government funding programs designed to support domestic new media companies; requirements for Internet providers or users to contribute to a new media production fund to support domestic content; licensing requirements for Internet service providers; or requirements to provide adequate “shelf space” to domestic Internet content. All of these possibilities, however, could be pre-empted by trade agreements.

With respect to content on the Internet, the U.S. Government Administration has stated that it will:

pursue dialogue with other nations on how to promote cultural diversity, including cultural and linguistic diversity, without limiting content. These discussions could consider promotion of cultural identity through subsidy programs that rely solely on general revenues and that are implemented in a nondiscriminatory manner.(115)

In a trade context, these comments suggest that subsidy programs would be limited in their scope, since they could not rely on private funding arrangements or be targeted towards domestic persons or companies, and that any definition of domestic content could not “discriminate” against foreign interests.

(ii) Potential WTO impact

Future WTO agreements may restrict the authority of a government to apply current policies to new technologies.

The proposed MAI provisions on Expropriation of Assets, for instance, aim to protect foreign investors from expropriation or “any other measure having similar effect”.(116) Under the MAI, the scope of this principle is intentionally broad in order to “serve as a safeguard against new forms of expropriation in the future”.(117) Thus, once a government permitted a foreign person or company to establish itself in a new technological area (perhaps by means of a licensing exemption), a later denial of a broadcasting license to the foreign broadcaster might trigger a claim for monetary compensation for Expropriation of Assets.

In addition, country-specific reservations in broadcasting may be subject to “standstill” or “rollback” limitations, as proposed in the MAI.(118) These principles would freeze current

policies, thus preventing their application to new technologies, or put a time limit on any policies which might already apply to new technologies.(119)

F. OTHER OBSERVATIONS

1) Developing countries and the MAI

During the Uruguay Round, opposition to the proposals for a comprehensive WTO investment agreement was led by developing countries.(120) A discussion of the impact of the MAI on North American broadcasting would not be complete without some treatment of the concerns expressed by developing countries.

(i) Purpose of the MAI

According to one trade lawyer, the MAI's purpose is:

to reduce or eliminate obstacles to foreign investment, open markets, eliminate discriminatory treatment (both before and after establishment), reduce “country risk” and reallocate capital to its most productive uses.(121)

In comparison, a former commerce minister from India states that “the main motive of the industrialized countries behind an MAI is the gaining and consolidation of market access opportunities for their business enterprises around the world”.(122)

Says another Indian Government commentator:

Investment policy addresses a host of complex and interrelated matters of national importance: regional disparities, income inequalities, employment, environment, taxation and social justice, to name a few... A multilateral investment framework would take away the right of national governments to regulate and channel FDI [Foreign Direct Investment] in the light of their own national developmental objectives.(123)

(ii) Infant industries

Developing countries have claimed in the past that an MAI would prevent the establishment of their “infant industries”, and preclude state intervention that is needed to channel foreign

investment to where it is economically most beneficial. They risk having their markets flooded by foreign companies due to the “huge competitive gap between their enterprises, particularly small and medium enterprises, and the TNCs of the industrialized world”.(124) According to one source:

Selective and judicious intervention of the government is therefore widely considered necessary to support or protect domestic industry and technology creation, sometimes even to ensure a ‘level playing field’ for domestic enterprises.(125)

One response to this argument, provided by a Canadian trade law professor, is that a country does not necessarily need a strong industrial sector in order to develop. He states that:

In part, the infant industry argument rests on the proposition that an advanced, mature economy cannot be predominantly dependent upon agricultural or natural resources for its exports... However, it bears pointing out that some countries have sustained high standards of living without substantial manufacturing sectors...(126)

(iii) Investor rights versus responsibilities

Industrialized countries have pushed for an MAI that recognizes investor rights and protections after having consistently blocked efforts to establish a multilateral agreement on investor responsibilities, as one developing country commentator has pointed out. Past initiatives at the UN to establish standards of conduct, behaviour and obligations for foreign investors, especially transnational corporations (TNCs), were all made non-binding and voluntary codes, mainly at the behest of the industrialized world.(127)

2) Impact on the CBC

The potential impact of WTO agreements on public broadcasters is complex, and largely beyond the scope of this paper. What follows are little more than early thoughts on the topic, with reference to the Canadian Broadcasting Corporation (CBC).(128)

(i) Public mandate

The CBC is the basis of Canada’s public broadcasting system, dating back to 1929.(129) Two core elements of the CBC’s mandate are to provide programming that is “predominantly and distinctively Canadian” and to “reflect Canada and its regions to national and regional

audiences”.(130) A recent mandate review of the CBC states that: “If anything, the circumstances which gave birth to the CBC are even more pronounced today”.(131)

(ii) Direct impact and exception

It has been suggested that CBC programs would be protected from the impact of trade principles under an exception for state (Crown) corporations.(132) An exception would substantially save CBC programs from the impact of MFN Treatment, National Treatment, a Prohibition on Performance Requirements, and other trade principles which could otherwise have serious implications for the CBC, as an arm of the Canadian government.

Whether future WTO agreements will include an exception for state corporations is uncertain, although some arguments against such an exception have been expressed in the past. In the WTO case on Canadian magazine policies, for instance, the U.S. argued that:

... A WTO Member cannot create a government institution, allow it to take actions inconsistent with the Member’s WTO obligations, and then claim it has no responsibility for the actions of the institution. The market access concessions that WTO Members have negotiated over the years would not be secure if governments could escape their obligation to provide national treatment to imported products by creating government corporation and then claiming that they are not responsible for the discrimination imposed by the entities they themselves created.

Thus, according to the argument, governments should not be allowed to avoid their obligations under trade agreements by creating state corporations which are exempt from trade liberalization. The argument was made regarding Canada Post’s funded postal rate scheme for Canadian magazines. However, it could be applied to the CBC as a state corporation which is specifically mandated to support Canadian content in broadcasting.

(iii) Indirect impact

The impact of trade principles could also be felt indirectly by the CBC, outside of the protection provided by a possible exception for state corporations.

For example, the CBC recently moved to an “all-Canadian” television format.(133) To fulfill this commitment, the CBC relies heavily on both public and private sources of funding which support “Canadian content” co-productions in television. “In this manner”, reports an industry analyst, “the CBC is encouraged to leverage its scarce resources by licensing product from independent

producers, who have a number of private and public sources of financing”.(134) According to a CBC source, these co-productions constitute the “vast majority” of CBC productions, since the corporation generally “can’t afford to do in-house productions”. Without funding support, “the CBC Prime Time schedule would be virtually empty”.(135)

As noted earlier, National Treatment requires that funding programs not be “discriminatory”; i.e. that they be open to foreign persons and companies. For the CBC this could be a concern because it would mean dividing up the limited “funding pie” for co-productions among a much larger number of (mostly American) production companies. Less money would be left to support Canadian productions, as the funds became more and more dispersed among the newly-eligible foreign companies.

3) Treatment of foreign versus domestic broadcasters

Based primarily on a review of the MAI, there are several ways in which future WTO agreements may provide foreign broadcasters with rights that their domestic counterparts do not enjoy.

(i) Performance Requirements and National Treatment

First, a Prohibition on Performance Requirements may protect foreign investors without providing the same protection for domestic investors. This would allow a government to put domestic content requirements on domestic broadcasters, but not foreign broadcasters.

This would not contradict the principle of National Treatment, which is designed to prevent “discrimination” against foreign interests, even though domestic companies are receiving worse treatment than foreign companies. As currently defined, National Treatment requires that foreign interests be treated *no less favourably* than domestic persons and companies, not that they be treated *the same*.

(ii) Expropriation of Assets

Second, provisions on Expropriation of Assets under future WTO agreements may require that foreign investors be compensated for a wide range of government measures which might directly or indirectly reduce the value of their investments. Domestic investors may be granted no such protection, and would have to rely on relevant domestic law, which tends to be much more

limited.(136) An important point is that the MAI provisions on Expropriation of Assets would protect foreign investors even if a government measure was non-discriminatory; that is, if it was applied to domestic investors as well.(137)

(iii) Access to enforcement

Third, foreign investors are provided with access to an Investor-State enforcement mechanism under both NAFTA and the MAI, while domestic investors are not. According to one commentator:

To use the Investor-State dispute settlement process, the MAI requires that there be some international element involved in a dispute. For example, Canadian investors are not eligible to bring disputes against the Government of Canada; however, French or Japanese investors can. A glaring exception to this rule is that Canadian corporations ‘owned or controlled directly or indirectly’ by a citizen of another MAI country can bring a claim against the Canadian government. The term ‘investor’ is defined broadly to include an individual or enterprise.(138)

This practice may be continued and entrenched under future WTO agreements.

***Appendix One:
Elements of the proposed MAI***

The MAI proposes broad restrictions on how governments can treat foreign investors and their investments. It proposes a very broad definition of “investment”.(139) The definition goes well beyond traditional notions of foreign direct investment (FDI) to include portfolio investment, debt capital, intellectual property rights and every form of tangible or intangible assets.(140)

The MAI would apply the trade principles of MFN Treatment, National Treatment, Market Access, a Prohibition on Performance Requirements, and Expropriation of Assets, among others.(141)

These trade principles, and the policy restrictions which they entail, tend to expand on current trade agreements. Among other implications, they would:

- Apply to all “government measures”, including legislation, regulations, governmental policies and practices.(142)
- Apply to both national and subnational (i.e. state, provincial, territorial and local) governments in ways that go beyond NAFTA and the current WTO agreements.(143)
- Apply the principle of National Treatment during the “pre-establishment phase” of an investment, thereby prohibiting any foreign ownership restrictions.(144)
- Create an “effects test” to expand the requirement for providing National Treatment to foreign investors.(145)
- Prohibit performance requirements on local sales, content, and production requirements; employment requirements; and investment requirements. This would expand on similar NAFTA provisions, which contain exceptions relating to economic development or health, safety and environmental standards.(146)
- Allow for foreign investors to sue governments directly, through international arbitration panels or domestic courts, rather than having to rely on actions taken by their home government.(147)
- Put a freeze (“standstill”) or a time limit (“rollback”) on exceptions to the agreement.(148)
- Include a “lock in” of 15 years.(149)

References

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(2)“Trade agreements” refers to bilateral (e.g. the *Canada-U.S. Free Trade Agreement* (FTA)), regional (e.g. the *North American Free Trade Agreement* (NAFTA)) and multilateral agreements (e.g. Agreements of the World Trade Organization (WTO), such as the *General Agreement on Trade in Services* (GATS)) which, in general, aim to liberalize international trade and investment by creating new rights and protections for transnational actors which are enforceable against national and/ or subnational governments,

and which therefore effectively restrict domestic government lawmaking authority as it impacts on international trade and investment.

(3)“Policy” refers to any law, regulation, procedure, requirement or practice which may be impacted by principles recognized in a trade agreement. This use of the term is based on the definition of “measure” in the *North American Free Trade Agreement* (NAFTA), 1992, 32 I.L.M. 296, Art. 201(1).

(4)“Foreign interests” refers to any person or company granted rights or protections under a trade agreement which may be enforced in a country other than their home country, including producers and suppliers of goods and services, holders of intellectual property rights, investors, key personnel, etc.

(5)Based on the proposed definition of investment in the MAI [see Appendix One and Note 138].

(6)“Current” trade agreements include: the *General Agreement on Tariffs and Trade* (GATT 1947), 1947, Can.T.S. 1947 No.27, 55 U.N.T.S. 187; the *Canada-U.S. Free Trade Agreement* (FTA), 1987, Can.T.S. 1989 No.3, 27 I.L.M. 281; the *North American Free Trade Agreement* (NAFTA), 1992, 32 I.L.M. 296; the *General Agreement on Trade in Services* (GATS), 1993, 33 I.L.M. 44. “Proposed” agreements include: Organization for Economic Cooperation and Development (OECD), “Multilateral Agreement on Investment: Consolidated Text and Commentary” (MAI), Draft document dated May 13, 1997.

(7)See Part C(2).

(8)See Part C(3).

(9)T. Singer and P. Orbuch, Western Governors’ Association, *Multilateral Agreement on Investment: Potential Effects on State & Local Government* (Denver: Western Governors’ Association, 1997) at Part IV.

(10)Meeting of the NANBA Legal Committee, CBC Broadcasting Centre, Toronto, Canada (June 25, 1998).

(11)See Canadian Conference of the Arts (CCA), “At Home in the World: An International Forum on Culture and Cooperation”, conference report (June 29, 1998). Available at www.culturenet.ca/cca/.

(12)In particular, with representatives from Canadian Heritage, Industry Canada, the CRTC and Stentor.

(13)Details of the Ethyl case have been summarized from S. McCarthy, “Threat of NAFTA case kills Canada’s MMT ban” *The [Toronto] Globe and Mail* (July 20, 1998) A1; S. McCarthy, “Gas War: the fall and rise of MMT” *The [Toronto] Globe and Mail* (July 24, 1998) A1; and M. Sforza and M. Vallianatos, “Ethyl uses NAFTA to sue Canada” (July/ August 1997) 22(4) *Intervenor* 11 at 11.

(14)Greater detail about current trade agreements is provided in: Coopers & Lybrand, *Broadcasting and Trade: Information and Source Material*, Report prepared for NANBA - Annual General Meeting (February 10, 1998).

(15)NAFTA, *supra* note 6.

(16)See, for instance, Singer and Orbuch, stating that “NAFTA set a precedent for the treatment of performance requirements” in the context of the MAI; *supra* note 10 at Part III(A)(5).

(17)See discussion in I. Bernier, “Cultural Goods and Services in International Trade Law”, Seminar paper prepared for the Centre for Trade Policy and Law, Carleton University, Ottawa (October 1997) at 6.

(18)See K. Acheson and C. Maule, “Copyright and Trade Regimes Governing Print, Television and Film” in M. Dorland, ed., *The Cultural Industries in Canada - Problems, Policies and Prospects* (Toronto: James Lorimer & Company, 1996) 308 at 319-20; and *ibid.* at 9.

(19)M. Hart, “A Multilateral Agreement on Foreign Direct Investment - Why Now?”, Paper prepared for the Centre for Trade Policy and Law, Carleton University, Ottawa, Occasional Paper in International Trade Law and Policy, No.37 (1995) at 29-30.

(20)FTA, *supra* note 6.

(21)According to the FTA, *supra* note 6, Art. 2012:

For purposes of this Chapter:

“cultural industry” means an enterprise engaged in any of the following activities:

...

e) radio communication in which the transmission are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services;

(22)FTA, *supra* note 6, Art. 2005 provides:

1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.

2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

(23)Bernier, “Cultural Goods”, *supra* note 17 at 5.

(24)Coopers & Lybrand, *Environmental Scan - Canadian Television, Final Report*, Report prepared for the Canadian Association of Broadcasters (June 30, 1998) at III-21.

(25)Bernier, “Cultural Goods”, *supra* note 17 at 8.

(26)NAFTA provides exceptions for Mexican government requirements that broadcasters (a) gain authorization for broadcasts in languages other than Spanish, (b) feature Mexican nationals in a majority of live broadcasts, (c) gain authorization for non-Mexican broadcast announcers, (d) use Spanish or Spanish subtitles in advertising, and (e) not distribute foreign advertisements as part of foreign programs retransmitted in Mexico. The exceptions are provided from national treatment and the prohibition on performance requirements; NAFTA, Annex I-Mexico, *supra* note 6 at 477-8.

(27)C. Balassa, Director, Media and Communications Services Trade Policy, Office of the United States Trade Representative, “Broadcasting and the GATS: A Primer” (Washington D.C.) at 1.

(28)I. Bernier, Testimony to The Sub-Committee on International Trade, Trade Disputes, and Investment, of the House of Commons Standing Committee on Foreign Affairs and International Trade, regarding the proposed Multilateral Agreement on Investment (November 20, 1997).

(29)J. Filipek, ““Cultural Quotas’: The Trade Controversy over the European Community’s Broadcasting Directive” (1992) 28 *Stan.J.I.L.* 323 at 343-5; and Bernier, “Cultural Goods”, *supra* note 17 at 2.

(30)I. Bernier, Testimony, *supra* note 28.

(31)Most Favoured Nation Treatment was the only principle which was *generally* applied to culture in the GATS, and 27 countries made provision for the exemption of co-production agreements in film from this principle; Bernier, “Cultural Goods”, *supra* note 17 at 7.

(32)Only 13 GATS members have made “market-opening” commitments in the cultural (essentially audiovisual) sector, including 3 industrialized countries (U.S., Japan, and Israel) and 10 developing countries. However, most of the commitments are limited. *Ibid*; and Balassa, *supra* note 27 at 2.

- (33)Bernier, "Cultural Goods", *supra* note 17 at 6-7.
- (34)MAI, *supra* note 6.
- (35)See, for example, B.B. Ramaiah, "Towards a multilateral framework on investment?" (1997) 6 *Transnational Corporations* 117, which is an article written by the then-Minister of Commerce of India and critical of the OECD-proposed MAI; and A.V. Ganesan, "Strategic Options Available to Developing Countries with Regard to a Multilateral Agreement on Investment" (January 1998), on file with author.
- (36)The WTO TRIMS agreement is limited to a narrow range of trade-related investment measures affecting goods only; Bernier, "Cultural Goods", *supra* note 17 at 22.
- (37)G.T. Neil, "Multilateral Agreement on Investment (MAI) and Canada's Cultural Sector", Report prepared for the Canadian Conference of the Arts (CCA) (October 15, 1997), on file with author, at para.3.
- (38)Canada, Mexico and the United States are all members of the OECD, and have taken part in the negotiations. Mexico is one of two developing countries recently admitted to the OECD, along with South Korea; E. Smythe, "Domestic and International Sources of Regime Change: Canada and the Negotiation of the OECD Multilateral Agreement on Investment", Paper presented at the Annual Meeting of the Canadian Political Science Association (June 8, 1997), on file with author, at 11.
- (39)Ganesan, *supra* note 35 at 26.
- (40)T. Corcoran, "The MAI is dead. Cheers!" *The [Toronto] Globe and Mail* (March 2, 1998) B2.
- (41)See Bernier, "Cultural Goods", *supra* note 17 at 23.
- (42)G.G. Yerkey, "U.S. to Oppose Bid to Exempt 'Culture' from OECD Investment Accord" (May 23, 1995) *BNA Intl. Business & Finance Daily*; cited in Singer and Orbuch, *supra* note 10 at Note 43.
- (43)K. Acheson and C. Maule, "The Culture of Protection and the Protection of Culture - A Canadian Perspective in 1998", Paper prepared for the Centre for Trade Policy and Law, Carleton University, Ottawa (1998) at 14.
- (44)See P. Lyman, Testimony to The Sub-Committee on International Trade, Trade Disputes, and Investment, of the House of Commons Standing Committee on Foreign Affairs and International Trade, regarding the proposed Multilateral Agreement on Investment (November 20, 1997); B. Appleton, "The MAI and Canada's Health and Social Service System", Submission to the House of Commons Standing Committee on Health (December 4, 1997) at para.1; and Bernier, "Cultural Goods", *supra* note 17 at 23-4.
- (45)Ganesan, *supra* note 35 at 1.
- (46)P.S. Grant, "Cultural Diversity and the Global Broadcasting Environment: The Lessons from Canada", Paper presented to the National Symposium on New Developments in Communications Law and Policy, Law Society of Upper Canada (Ottawa: April 26, 1996), on file with author, para.3.
- (47)F. Bertrand, Chairperson, CRTC, Address to the Subcommittee on Communications of the Standing Senate Committee on Transport and Communications (June 3, 1998) at 4; and S. Baldwin, Director General, Broadcasting Policy, CRTC, "Broadcasting in North America - A Canadian Perspective", Presentation to NANBA (April 5, 1997); notes on file with author.
- (48)C. Barshevsky, the U.S. Trade Representative, has described the U.S. position as follows:
We have no objection to the promotion by Canada, or other countries, of national identity through cultural development. But we do object to the use of culture as an excuse to take commercial

advantage of the United States, or as an excuse to evict American companies from the Canadian market.
Cited in G. Fraser, “Barshevsky sees magazine ruling as trade weapon” *The [Toronto] Globe and Mail* (January 30, 1997) B13.

(49)P. Beatty, President of the CBC, has observed that the U.S. entertainment industry is larger than the automotive industry; P. Beatty, “How do we promote Canada’s cultural industry?” *The [Toronto] Globe and Mail* (January 24, 1997) A17.

(50)KPMG, *The Economics of Culture and Canadian Content in the Information Society - An Overview of the Numbers and the Issues* (Toronto: 1997), on file with author, at 17-18.

(51)World Trade Organization (WTO), *Canada - Certain Measures Concerning Periodicals* (March 14, 1997), Report of the Panel, WTO Doc. WT/DS31/R.

(52)*Ibid.* at 3.122.

(53)*Ibid.* at 3.72.

(54)The summary provides general definitions of various trade principles rather than the specific definitions from any particular trade agreement.

(55)Singer and Orbuch, *supra* note 10 at Part III A(3).

(56)*Ibid.* at Part III A(2).

(57)OECD, *Main Features of the MAI* 37; Working Group A, in *OECD Documents* 118; both cited in *ibid.* at Part III A(2).

(58)Working Group A, in *OECD Documents* 119; cited in *ibid.* at Part III A(2).

(59)Adapted from Balassa, who describes Market Access in the context of trade in services as a commitment “to allow foreign service suppliers to enter its market to provide a service through establishment... without imposing certain limitations such as those relating to quantity or form of establishment”, *supra* note 27 at 1.

(60)OECD, *Main Features of the MAI* 44; cited in Singer and Orbuch, *supra* note 10 at Part III A(5).

(61)As defined in the NAFTA, Art. 1110(1), , *supra* note 6. The MAI proposals would apply the principle to expropriation or “any other measure having similar effect”; OECD, *Main Features of the MAI* 20; Working Group C, in *OECD Documents* 138; both cited in Singer and Orbuch, , *supra* note 10 at Part III A(3).

(62)As proposed in the MAI; Working Group C, in *OECD Documents* 138; cited in *ibid.* at Part III A(3).

(63)*Ibid.* at Part III B(1).

(64)*Ibid.*

(65)As proposed in the MAI; Working Group B, New Issues, in *OECD Documents* 129; *ibid.* at Part III A(5) and B(2).

(66)*Ibid.*

(67)See T. Andruszkiewicz and V. Skok, *Cultural Industries Foreign Investment Measures in Selected Countries*, International Comparative Policy Unit, Department of Canadian Heritage (Ottawa: 1990); cited in KPMG, *supra* note 50 at 73-75.

(68)*Ibid.* at 75.

(69)*Ibid.* at 74.

(70)Public Notice CRTC 1983-54, *Transfers of Ownership of Licensed Broadcasting Undertakings*; in P.S. Grant, A.H.A. Keenleyside and M. Racicot, *1998-99 Canadian Broadcasting Regulatory Handbook* (Toronto: McCarthy Tétrault, 1998) at 398.

(71)Public Notice CRTC 1993-68, *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*; in Grant *et al.*, *supra* note 18 at 320.

(72)Acheson and Maule, "Copyright and Trade Regimes", *supra* note 70 at 621.

(73)Coopers & Lybrand, *Environmental Scan*, *supra* note 24 at III-24.

(74)GATS, Art. II, para.I, *supra* note 6; see Bernier, "Cultural Goods", *supra* note 17 at 7.

(75)*Broadcasting Act*, S.C. 1991, c.11, s.9(1); in Grant *et al.*, *supra* note 70 at 36.

(76)According to one legal opinion, under international law, an expropriation "is any act by which governmental authority is used to deny some benefit of property. This denial can be actual or constructive". Under the MAI, the provisions on Expropriation of Assets:
have broadened the types of activity that will be considered as expropriations by including the words a measure having equivalent effect. Any substantial interference with a property right is likely an activity in the nature of expropriation and almost certainly a measure tantamount to expropriation.

Appleton, *supra* note 44 at paras.15-16. On this basis the present author concluded that the removal or amendment of a license could lead to a claim for compensation under provisions on Expropriation of Assets.

(77)Public Notice CRTC 1994-107, *Approval of Cable Distribution of Fox Network Affiliates*.

(78)Public Notice CRTC 1994-60, *Distribution and Linkage Requirements*.

(79)*Broadcasting Act*, s. 9(1), *supra* note 75.

(80)This analysis is based on an interpretation of the MAI's potential impact in the U.S., which suggests that an "effects test" for national treatment could mean the re-opening of fishing licenses in crowded fishing zones "either because they explicitly favour state residents or because they have the effect of excluding new market entrants to the disadvantage of foreign interests"; Singer and Orbuch, *supra* note 10 at Part IV(A)(2).

(81)For television, see CRTC, *Television Broadcasting Regulations, 1987*, s.4; in Grant *et al.*, *supra* note 70 at 237. For radio, see CRTC, *Radio Regulations, 1986*, s.2.2; in Grant *et al.*, *supra* note 70 at 210.

(82)CRTC, Public Notice CRTC 1984-94, *Recognition for Canadian Programs* (April 15, 1984); and *Radio Regulations*; both in Grant *et al.*, *supra* note 70 at 400 and 207, respectively.

(83)For television, see CRTC, *Broadcasting Distribution Regulations*, s.29; and Public Notice CRTC 1997-98, *Contributions to Canadian Programming by Broadcasting Undertakings*; both in Grant *et al.*, *supra* note 70 at 177 and 811, respectively. For radio, see Public Notice CRTC 1995-196, *Contributions by Radio Stations to Canadian Talent Development - A New Approach*; in Grant *et al.*, *supra* note 70 at 703.

(84)Mexico, *Ley Federal de Radio y Televisión*, Título IV, Capítulo III; *Reglamento de la Ley Federal de Radio y Televisión y de la Ley de la Industria Cinematográfica Relativo al Contenido de las Transmisiones de Radio y Televisión*, Título III; and *Reglamento del Servicio de Televisión por Cable*, Capítulo VI.

(85)This is revealed by Mexico's reservation for its broadcasting requirements under NAFTA regarding both National Treatment (Art. 1202) and Performance Requirements (Art. 1106); NAFTA, Annex I - Mexico, *supra* note 6 at 477-8.

(86)NAFTA prohibits performance requirements which require an investor "to achieve a given level of domestic content" or "to purchase, use or accord a preference to goods produced or services provided [a Party's] territory"; NAFTA, Art. 1106(c) and (d), *supra* note 6. The MAI contains similar prohibitions; OECD, *Main Features of the MAI* at 44; cited in Singer and Orbuch, *supra* note 10 at Part 3(A)(5).

(87)Based on the rights provided in both NAFTA and the proposed MAI, *supra* note 6; see Appleton, *supra* note 44 at 22.

(88)This was raised as a concern in a recent report to the Canadian Association of Broadcasters (CAB); Coopers & Lybrand, *Environment Scan*, *supra* note 24 at xvii.

(89)An "effects test", as proposed under the MAI, would expand national treatment by looking "not only at whether the purpose of a law is to discriminate, but also at whether it has a discriminatory effect", to determine if it provides national treatment to foreign investors; Singer and Orbuch, *supra* note 10 at Part III(A)(2).

(90)WTO, Report of the Panel, *supra* note 51 at 3.72.

(91)Other nations such as Japan have agreements with one or both countries which state that they must be treated the same as any third country which receives MFN Treatment from Australia or New Zealand. High Court of Australia, *Blue Sky v. ABA* (April 28, 1998); cited in Coopers & Lybrand, *Environment Scan*, *supra* note 24 at III-22.

(92)CRTC, *Broadcasting Distribution Regulations*, s.20; in Grant *et al.*, *supra* note 70 at 172. Also see Grant, "Cultural Diversity", *supra* note 46 at para.6; and Coopers & Lybrand, *ibid.* at ix.

(93)For example, see Public Notice CRTC 1994-10, *The Production Fund*, s.2(c); in Grant *et al.*, *supra* note 70 at 666, regarding the eligibility of programs for the *Canadian Television and Cable Production Fund* (CTCPF).

(94)Grant, "Cultural Diversity", *supra* note 46 at para.6.

(95)*Ibid.*

(96)*Ibid.*

(97)Coopers & Lybrand, *Environment Scan*, *supra* note 24 at III-24.

(98)Working Group A, in *OECD Documents* 119; cited in Singer and Orbuch, *supra* note 10 at Part III(A)(2).

(99)Public Notice CRTC 1992-59, *Implementation of an Employment Equity Policy*; Grant *et al.*, *supra* note 70 at 595.

(100)I note that, under NAFTA, Canada reserved (1) "the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities" and (2) "the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of

another Party, any rights or preferences provided to aboriginal parties”; NAFTA, Annex II - Canada, *supra* note 6 at 553 and 548, respectively. These reservations referred specifically to the NAFTA principles of National Treatment (Arts. 1102 and 1202) and Performance Requirements (Art. 1106), among others.

(101)OECD, *Main Features of the MAI* 44; cited in Singer and Orbuch, *supra* note 10 at Part III(A)(5).

(102)Appleton, *supra* note 44 at paras.15-16.

(103)OECD, *Main Features of the MAI* 84; Working Group D, in *OECD Documents* 151-4; cited in Singer and Orbuch, *supra* note 10 at Part I.

(104)*Ibid.*

(105)Appleton, *supra* note 44 at Note 22.

(106)*Ibid.* at para.26.

(107)G.N. Horlick and A.L. Marti, “NAFTA Chapter 11B, A Private Right of Action to Enforce Market Access Through Investments” (March 1997) 14(1) *Journal of International Arbitration* 53; cited in Appleton, *supra* note 44 at Note 23.

(108)Appleton, *supra* note 44 at para.8.

(109)See KPMG, *supra* note 50 at 50-72; and Stentor Resource Centre, *New Consumers, New Technologies and New Media: An Opportunity for Canada*, Discussion paper (March 1998).

(110)KPMG, *supra* note 50 at 65-71.

(111)Peter Lyman, Nordicity Group, “Draft - Assessment of Strategic Options for NANBA in Trade Policy”, report prepared for NANBA (September 15, 1997) at 7.

(112)The United States Government Administration, *A Framework for Global Electronic Commerce* (Washington, D.C.: 1997). Available at www.ecommerce.gov/framework.htm.

(113)See, for example, CRTC, *Competition and Culture on Canada’s Information Highway: Managing the Realities of Transition* (Ottawa: Public Works and Government Services Canada, 1995); in Grant *et al.*, *supra* note 72 at 866.

(114)Coopers & Lybrand, *Environment Scan*, *supra* note 24 at III-22.

(115)U.S. Government Administration, *supra* note 112 at 12.

(116)OECD, *Main Features of the MAI* 20; Working Group C, in *OECD Documents* 138; both cited in Singer and Orbuch, *supra* note 10 at Part III(A)(3).

(117)Working Group C, in *OECD Documents* 138; cited in Singer and Orbuch, *ibid.* at Part III(A)(3).

(118)Working Group B, in *OECD Documents* 129; cited in Singer and Orbuch, *ibid.* at Part III(A)(5).

(119)Adapted from the Western Governors’ Association (WGA) report which states that, even with a reservation, “grandfathering existing state law would likely still lead to a ‘standstill’ or freeze of state lawmaking authority in the future, and it may also entail a ‘rollback’ of nonconforming state laws by some date in the future”; Statement by G. Clements, U.S. Department of State, to the Agriculture and Trade Committee, National Conference of State Legislatures (December 12, 1996); cited in Singer and Orbuch, *supra* note 10 at Part III(B)(2).

- (120)*Supra* note 35.
- (121)J.W. Messing, “Towards a multilateral agreement on investment” (1997) 6 *Transnational Corporations* 123 at 126.
- (122)Ganesan, *supra* note 35 at ii.
- (123)Ramaiah, *supra* note 35 at 118.
- (124)Ganesan, *supra* note 35 at 5.
- (125)*Ibid.*
- (126) M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge, 1995).
- (127)Ramaiah, *supra* note 35 at 117-18; and *ibid.* at 4.
- (128)Based primarily on author’s discussions with CBC staff during July-August, 1998.
- (129)Canada, Mandate Review Committee - CBC, NFB, Telefilm, *Making Our Voices Heard - Canadian Broadcasting and Film for the 21st Century* (Ottawa: Minister of Supply and Services Canada, 1996) (*Making Our Voices Heard*) at 32.
- (130)*Broadcasting Act*, s.3(1)(m)(i) and (ii), *supra* note 77.
- (131)*Making Our Voices Heard*, *supra* note 129 at 34.
- (132)Author’s conversation with Perrin Beatty at a June CCA conference; *supra* note 11.
- (133)*Making Our Voices Heard*, *supra* note 129 at 43.
- (134)Coopers & Lybrand, *Environment Scan*, *supra* note 24.
- (135)Discussions with CBC staff, *supra* note 128.
- (136)Singer and Orbuch, *supra* note 10 at Part I; and Appleton, *supra* note 44 at para.19.
- (137)Singer and Orbuch, *supra* note 10 at Part III(A)(3).
- (138)Appleton, *supra* note 44 at para.22. As Appleton notes with respect to NAFTA: “In essence, Canadian companies owned by Americans or Mexicans have better rights here than do Canadian citizens”, *ibid.* at Note 20.
- (139)The proposed definition in the MAI, Part II, *supra* note 6 states:
2. Every investment means:
Every kind of asset owned or controlled, directly or indirectly, by an investor, including:
 - (i) an enterprise...;
 - (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;
 - (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;
 - (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
 - (v) claims to money and claims to performance;
 - (vi) intellectual property rights;
 - (vii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;

(viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

(140)Ganesan, *supra* note 35 at ii.

(141)MAI, *supra* note 6.

(142)Appleton, *supra* note 44 at para.21.

(143)Singer and Orbuch, *supra* note 10 at Part II(A)(2).

(144)Current bilateral investment treaties (BITS) provide for national treatment in the post-establishment phase only and do not place any restrictions on host countries in following their own foreign direct investment policies. This is because the aim of BITS is the protection and equitable treatment of FDI after the investment has taken place in consonance with the host countries' laws and regulations; Ganesan, *supra* note 35 at 9.

(145)The "effects test" proposal would require an MAI panel or court to "look not only at whether the purpose of a law is to discriminate, but also at whether it has a discriminatory effect, to determine if it provides national treatment to foreign investors"; Singer and Orbuch, *supra* note 10 at Part III (A)(2).

(146)OECD, *Main Features of the MAI* 44; Working Group B, New Issues, in *OECD Documents* 129; both cited in Singer and Orbuch, *supra* note 10 at Part III(A)(5).

(147)*Ibid.* at Part III(C)(1).

(148)*Ibid.* at Part III(B)(2).

(149)Under its "Withdrawal" section, the MAI proposes that: "The provisions of this Agreement shall continue to apply for a period of fifteen years from the date of notification of withdrawal to an investment existing at that date"; MAI, *supra* note 6. NAFTA, Art. 2205 provides that "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties..."; *supra* note 6.

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