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IN BRIEF

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CULTURAL EXEMPTIONS IN CANADA'S MAJOR INTERNATIONAL TRADE AGREEMENTS AND INVESTMENT RELATIONSHIPS

Canada has joined the global economy by signing a number of international trade agreements. These agreements include certain cultural provisions allowing Canada to continue to support its domestic cultural industries. For example, the cultural industries were exempted from the provisions of the Canada-United States Free Trade Agreement (FTA). A similar exemption was later incorporated into the North American Free Trade Agreement (NAFTA). This exemption is limited, however, in that if one of the parties uses it to establish measures that would otherwise have been inconsistent with the Agreement, the other party may retaliate with measures of equivalent commercial effect.⁽¹⁾ To date, trade disputes between Canada and the United States involving the cultural industries have been resolved informally, outside the dispute settlement procedure established through the FTA and NAFTA.⁽²⁾

In the realm of multilateral trade agreements, the General Agreement on Tariffs and Trade (GATT) deals with goods and the General Agreement on Trade in Services (GATS) deals with services. For the purposes of these agreements, the products of the publishing and sound recording industries are generally considered goods, and are ruled by the GATT, while the audiovisual services of the broadcasting and film industries are generally considered services, and are ruled by the GATS. Through a complex system of exclusions, exemptions, commitments and qualifications available to all parties, Canada has attempted to shelter its cultural industries from the provisions of both agreements.

This protection has failed, however, in the case of the Canadian magazine industry. In May 1996, the United States used the World Trade Organization's (WTO) trade dispute settlement procedure created under the GATT to challenge four measures promoting the Canadian magazine industry.⁽³⁾ The WTO's dispute settlement Panel (in March 1997) and the Appellate Body (in June 1997) found that these measures violate various provisions of the GATT 1994.⁽⁴⁾ In response, the federal government in 1998 introduced Bill C-55, *The Foreign Publishing Advertising Services Act*. This proposed strict limits on foreign publishers' access to the Canadian advertising services market.

Opposition to the original version of Bill C-55 was widespread, both in Canada and elsewhere, particularly the United States. In May 1999, however, an agreement between the Governments of Canada and the United States was struck whereby Bill C-55 was amended to allow foreign publishers limited access to the Canadian market, provided they establish a majority of Canadian content and new periodicals businesses in Canada. Accordingly, the United States has provided Canada with written assurances that it will not take any trade action under WTO agreements, the NAFTA or section 301 of the U.S. *Trade Act* in response to the amended Bill C-55.

In the area of international investment agreements, Canada, together with other countries from the Organisation for Economic Co-operation and Development (OECD) Council, agreed in May 1995 to negotiations in the OECD aimed at reaching a Multilateral Agreement on Investment (MAI) with its member countries.⁽⁵⁾ From the outset, several

areas were deemed non-negotiable by the Canadian government. In particular, it was considered essential that Canada's ability to regulate in the public interest remain unfettered. Furthermore, foreign investors would have to adhere to existing national and provincial laws, policies and regulations.

Regarding the federal government's position on cultural matters and the MAI, it was made clear that Canada's culture was not open for discussion and that it was the government's intent to seek an exemption for its cultural industries. As the Honourable Sergio Marchi, then Minister of International Trade explained in November 1997: "I can ... tell you what the MAI is not. It is not a charter of rights for multinational companies, nor does it spell the end of Canada's sovereignty. We will retain the right to enact laws in all areas and ... [w]e will still be able to impose restrictions on foreign investment in sectors – like culture."⁽⁶⁾

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- (1) The United States would first have to demonstrate that, were it not for the exemption, a new Canadian measure would be in violation of the FTA. The subsequent United States response would be limited to measures of equivalent commercial effect.
 - (2) Examples are the removal of the American-owned Country Music Television channel from Canadian cable services by the Canadian Radio-television and Telecommunications Commission (CRTC) and the CRTC licensing of Canadian direct broadcasting satellites.
 - (3) The four measures are: Canada's Tariff Code 9958, which prohibits the importation of split run magazines; the 80% excise tax on advertising in split-run magazines (Part V.1 of the *Excise Tax Act*); the postal subsidy (publications assistance program), which allows certain Canadian periodicals to reach their subscribers at lower costs; and the commercial publications mail rates (differential between domestic and foreign commercial publications rates).
 - (4) Panel and Appellate Body findings in short: Tariff Code 9958 violates GATT Article XI and is not justified as an exception under GATT Article XX; the 80% excise tax is inconsistent with GATT Article III:2; the postal subsidy is in violation of GATT Article III:4; and the commercial publications mail rates ("funded" postal rates) do not constitute subsidies under GATT Article III:8(b) and violate GATT Article III:4.
 - (5) The original purpose of the MAI was to: (1) provide a broad multilateral framework for international

In October 1998, senior OECD officials decided to terminate the MAI negotiation process without an agreement. For the Government of Canada, the cessation of the MAI negotiations has brought clarity and closure to the debate. As a Department of Foreign Affairs and International Trade statement explains: "Canada's participation in the negotiations was constructive ... Since the outset, we have maintained our bottom-lines to fully safeguard our freedom of action in key areas, including health care, social programs, culture, labour, environment, programs for Aboriginal Peoples and programs for minorities."⁽⁷⁾ Moreover, given that trade and investment are "twin engines for job creation, prosperity and economic growth," the federal government now feels that future MAI negotiations should be conducted via the World Trade Organisation (WTO).

investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures; and (2) be a free-standing international treaty open to all OECD members and the European Communities, and to accession by non-OECD member countries, which were to be consulted as the negotiations progressed.

- (6) "Notes for an address by the Honourable Sergio Marchi Minister for International Trade to the Standing Committee on Foreign Affairs and International Trade, The Multilateral Agreement on Investment," Ottawa, Ontario, 4 November 1997. www.dfait-maeci.gc.ca/english/news/statements/97_state/97_048e.htm.
- (7) "Multilateral Agreement on Investment (MAI)," Department of Foreign Affairs and International Trade, Ottawa, 1998. www.dfait-maeci.gc.ca/english/trade/backgr-e.htm.