NEW SOLUTIONS:

A Journal of Environmental and Occupational Health Policy

editor Charles Levenstein

Volume 8, Number 1-1998

Disorder Through the MAI

Marjorie Griffin Cohen

Baywood Publishing Company, Inc.
26 Austin Ave., Amityville, NY 11701
call (516) 691-1270 fax (516) 691-1770 **orderline** (800) 638-7819

NEW SOLUTIONS, Vol. 8(1)147-156, 1998

Documents

DISORDER THROUGH THE MAI

MARJORIE GRIFFIN COHEN

Presentation to the Canadian House of Commons Sub-Committee on International Trade, Trade Disputes and Investment, Hearings on the Multilateral Agreement on Investment Panel on Corporate, Consumer and Social Implications, November 26,1997, in Ottawa.

The Multilateral Agreement on Investment (MAI) is frequently presented by its proponents as a vehicle for providing "rules" to govern international investment. The implication is that investment is now either ungoverned or unfairly governed and this agreement would provide some order and security for all [1]. This line of reasoning is a fiction which serves as a justification for an agreement which will result in considerable disorder in the control of international corporate activity. While it will provide security for international investors, the MAI will have a destabilizing effect on all levels of government.

The supporters of the MAI focus on its non-discriminatory language, implying that the main issue is one of treating foreign and domestic corporations the same. But, in fact, it goes far beyond equal treatment and provides for different and better treatment for all corporations in the interests of international investors. The special status which will result will force substantial changes in public policy and actions at all levels of government.

The point of the MAI is to limit the ability of nations to regulate capital. This is not a trade agreement, but an investment agreement which gives extraordinary rights to international corporations to challenge the actions of national and sub-national governments. The challenges which are likely to result from the new rules will mean many of the ways in which governments are able to design programs to meet distinct needs of people in Canada will need to be changed. The results initially will necessitate re-writing of legislation and quick changes in long-accepted practices, although ultimately it is likely that self-censorship by governments to conform to the MAI will inhibit governments' scope of action in the future.

One of the main problems with the MAI is that "investment" has been defined so widely that it covers a great many activities which go far beyond what are normally considered investments-that is, actions which acquire assets within the country. The MAI meaning of investment is inflated to cover all kinds of activity, even when there is no commitment of capital. The wide scope of the definition means that understanding precisely what impact various parts of the document will have on public policy and economic activity will only really be known through challenges to existing law and practice, a process which will provide considerable instability in economic and social systems.

There will be no net benefits for Canadians as a whole as a result of this agreement. Its major beneficiaries in this country will be a small minority of international investors who want greater freedom to move their money outside of this country.

One of the assumptions of the agreement, as stated in its preamble, is that international investment is invariably good for the parties to the agreement and "has considerably contributed to the development of their countries" [2]. This is an idea very frequently expressed, but it is one which deserves careful examination, particularly because Canada appears willing to become party to a new agreement which will shape the entire nature of our economy as though this assumption is true.

The contrary evidence to the assumption of the benefits of liberalization in international investment is striking. For example, the liberalization of international investment rules in Canada both through the Canada/U.S. Free Trade Agreement (FTA) and the North American Agreement on Free Trade (NAFTA) has not improved the net flow of investment in this country, but, rather, seems to encourage the outflow of both direct investment and portfolio investment. The outflow of total business investment is growing at an alarming rate. This outflow was about 3 percent of total business investment in Canada in 1993, but grew steadily year-by-year, and is now about 14 percent of total investment [3].

Direct foreign investment in Canada is considered by many to be a positive development because it is thought to provide an increase in production capability and, therefore, contributes to more jobs and a higher national income. The reality is somewhat different. Canadian investors spend considerably more outside Canada than do foreign investors in Canada: in 1996 the net outflow was about $3 billion in direct foreign investment and more than $8 billion in portfolio investment. Even when direct investment occurs, it does not necessarily improve the productive capacity or employment levels in Canada-the very benefits which are supposed to flow from increasing foreign investment. This is because foreign direct investment most often takes the form of acquisition of existing corporations. These take-overs are frequently financed by carving up the business, selling-off its most profitable aspects, and downsizing the labor force.

AREAS IN MAI FOR PARTICULAR CONCERN

Privatization

Privatization is defined as the sale or other disposal by a contracting party, in part or in full, of its equity interest in or assets of an enterprise or government entity. American-based multinational corporations are specifically calling for the right for foreigners to bid on all stages of all privatization initiatives. Current investment rules do not cover this subject.

The provision on privatization could be a very serious limitation on the ability of Canada to shape privatization measures to benefit people in the country. It appears unclear exactly how privatization will be treated in the MAI because of lack of agreement among the parties. But its vagueness at this stage should not be ignored: there are very serious issues at stake for Canada.

Frequently the sale of public assets in Canada has been developed to meet specific public objectives and involve specific types of ownership arrangements: with special rights given to foreign investors, anything other than a sale available to the entire international community of the OECD would no longer be permissible. This is particularly problematic for privatization measures which might occur in order to increase competition in an industry or which are designed to involve the general public in special share arrangements.

These provisions on privatization in the MAI are particularly important to Canada in the near future because of the very real possibility of massive deregulation of electricity markets which could result in at least the partial disposal of assets by provincial governments. Governments may prefer to do this through the distribution of shares to the general public, employee buyouts, or a distribution of certain assets to local or municipal governments. This kind of control over public assets could be challenged by the very broad and sweeping language in the MAI.

Canada has reserved its position on the privatization clauses in the MAI, but the vulnerability of reservations and their inability to hold over a long period is of considerable concern. Also, it is unclear what type of reservation Canada is proposing. According to the note accompanying the text, Canada is reserving its position because "dedicated MAI provisions on privatization are unnecessary, since the basic NT/MFN obligation would apply to privatization" [2, p. 24). Apparently Canada sees these privatization measures as something which can be enforced elsewhere in the agreement, so does not feel a need for a special clause here. Canada's reservation, then, is no protection against the power of the MAI to control future privatization measures in Canada.

Provincial Jurisdiction

This agreement touches on issues of provincial jurisdiction in ways which will prevent provinces from managing their economies and social sectors. In particular, the new rules defining the extent of what constitutes "investment,"

coupled with the very inclusive provisions for what is defined as "expropriation" could inhibit a province's control over the use of crown resources. The term "expropriation" is not used in its legitimate and normal sense of expropriation of a physical or monetary asset, but rather covers, in addition, both direct and indirect measures which are deemed as "having equivalent effect" of expropriation. This term, according to the commentary accompanying the text of the agreement, is designed to cover "creeping expropriation," which could occur through tax measures and virtually any government regulation [2, p. 121].

The implications of this definition of "expropriation" are quite extraordinary. Any investor could claim that a tax increase or a change in policy regarding rights to use resources, for example, could cause loss or damage and, therefore, would be in a position to charge that the "investment" has been expropriated. It is important to note that an expropriation will be deemed to have occurred to foreign investors even if the government measure is non-discriminatory and applies to all domestic investors as well.

An example of the havoc this could occasion in British Columbia (B.C.) would be the changes which the province periodically makes to tree farm licenses, usually for conservation or other environmental reasons. Under current procedures, if the province decides the allowable cuts should be reduced, this is not deemed an "expropriation" and the province decides the extent of compensation to be awarded. Under the MAI this type of decision could be challenged and subject to claims of "expropriation," and any compensation granted would be under the scrutiny of the MAI.

Environmental laws will be open to challenge through any one of the new privileges granted to corporations. Another example related to B.C. deals with B.C.'s recent ban on bulk water exports. Investors could claim that water licenses they hold are "property" as defined in the MAI and that the ban ,interferes with the "expectation ... of economic benefit," and therefore could constitute an expropriation. Or, a contract between private firms for water export could be argued to take precedence over the provincial prohibition and that a foreign corporation which entered into a contract with a potential exporter in the province has "rights" as an investor, even though this investor is not located in the country and has committed no capital to it.

In a similar vein, the decision to use wilderness for park land rather than mines, is open to arguments about "expropriation," given the wide claims which private parties can exert as investor rights.

Several state governments in the United States have been alarmed about the implications of the MAI for their states' sovereignty [4]. Most specifically they focus on the following limits the agreement places on state power:

- Limits on the ability to favor local business
- Limits on investment incentives for economic development, pollution prevention, and recycling

- Limits on performance requirements for corporations
- Limits on economic, land use, and environmental regulation
- Limits on general exceptions and country-specific reservations which will result in bringing many more state practices within the scope of the MAI than was permissible under NAFTA.

MAJOR DISTINCTIONS BETWEEN MAI AND NAFTA

All of these concerns of the states' governments apply equally to Canadian provinces. While some defenders of the MAI will point to similar wording on issues of national treatment and other issues in NAFTA and argue that the MAI does not, therefore, signal anything specifically new, I will argue that there are major distinctions in the MAI which will place this agreement in an entirely different category. These distinctions are listed as follows and examples of some of the effects on social and economic policy will be explained in subsequent sections:

1. The definitions of investment and investor are more inclusive and most decisively extend this agreement's scope.
2. MAI covers sub-national governments, including those at the local level, in a more expanded way.
3. There are no reservations for environment and culture.
4. The reservation in social services (health and education) is confined to the federal jurisdiction and, therefore, places all aspects of health and education under provincial jurisdiction under the sweeping changes initiated by the MAI.
5. National Treatment includes government incentives at all levels of government.

NATIONAL TREATMENT AND GOVERNMENT POLICY

The following are some specific examples of current federal; provincial, or local government policies which could be targeted as policies which undermine foreign investment under the MAI.

Fishing Fleet Restriction

Any restrictions on commercial fishing could violate MAI standards for national treatment. An initiative which links fishing licenses or quotas to local job creation in B.C.'s fishing communities could be seen as a. violation of investor rights. So too could be any moratorium on salmon licenses in order to limit the size of the fleet. This action could be interpreted as excluding new entrants to the market to the detriment of foreign interests.

Job Creation Initiatives

The B.C. government's "Jobs and Timber Accord" could be challenged through the MAI. Under this accord, the government has set employment targets as conditions for receiving timber licenses. This type of performance requirement directly contravenes the requirement in the MAI that no government may demand that a foreign firm "achieve a given level or value of production, investment, sales, employment or research and development in the territory" [2, p. 19]. While the note to the text says this section is not intended to interfere with legitimate government employment programs, the tendency in international law is to strictly adhere to the wording of the legislation.

Canada has proposed no reservation for this section. This means that there would be no protection for a province that wants to use its resources in ways to promote domestic development and employment.

Social Services

All of the issues affecting government policy to provide a decent and more equitable society are important for all Canadians but are particularly significant to those who have been disadvantaged in our society. Disadvantaged women and minority groups have relied on government programs to redress discrimination and to provide conditions to encourage the full participation in the economic and social life of the country. Many programs provided by governments at all levels are now subject to substantial change-change which will make them less accessible in the future.

The national treatment provisions in the MAI are particularly intrusive for a country like Canada which has a mixed system of public, private, for-profit, and non-profit delivery of services like health and education. As the federal government's responsibility in health and education diminishes, changes in ownership and delivery of services are in question. Provincial jurisdiction is not protected through Canada's reservation on social services, since this applies only to those which remain in federal jurisdiction.

The worrisome feature about the MAI is that its provisions will accelerate the trajectory in these areas toward privatization. This can occur in the following ways:

1. The outright sale of assets will be shaped by expropriation measures and will permit access to assets currently in the public sector to foreign investors.
2. Limits are placed on government's ability to provide incentives and subsidies to non-profit and/or local providers of services.
3. Requirementsto define "investors" vary widely and a definition of "enterprise" to include for profit, non-profit, and government-owned can place currently secure public institutions under the provisions of the MAI.

The Example of Universities

Since a university is now defined as an "enterprise," any government grants to the university, or even research grants to specific instructors or researchers could be challenged. For example, the Social Science and Humanities Research Council requires that research recipients be citizens or have immigrant status in Canada. Under the provisions of the MAI, it seems likely that a visiting professor from a foreign country could claim this discriminates against his/her right as an investor. It also appears possible that any grant to a college or university would have to be equally available to for-profit (or even private non-profit) institutions from a foreign country.

As education becomes increasingly privatized in Canada, it is unlikely that governments will be able to sustain funding to public institutions under these conditions.

Other Examples

The threat to public funding is not confined to education, but is equally problematic in any areas where the private sector provides services which are also provided in the public sector. The main problem is that while subsidies from government to service providers will still be permitted, these subsidies will also have to be available to for-profit institutions from foreign nations. Any kind of subsidy to non-profit child care centers, for example, would be illegal unless it were also extended to cover profit-making centers. This kind of requirement, as stated above, would almost certainly eliminate government funding to non-profit centers.

Medicare is threatened in the same way. When governments are required to provide the same kinds of funding to both local non-profit health care providers and huge for-profit medical care firms, the ability to continue public health care will be impossibly expensive.

THE LOGIC OF GLOBALIZATION

The great advantage of the new international rules of trade and investment to multinational corporations is that it increases their ability to escape regulation of nation states. The investment and trade agreements work in tandem toward establishing one giant global market, while, at the same time, they limit the nature of the supranational institutions to actions which support market-creating activities.

At the international level, market-creating activities focus mainly on actions designed to create greater capital mobility and to expand international markets in general.

Unlike the work of nation states, which over time have developed institutions either to correct the economy when the market did not function in an optimal way (such as during times of depression), or to control business, such as through labor

or environmental legislation, the international replacements that are being created neither exert discipline on the market nor function as instruments of market correction. The new international institutions are designed solely to discipline nations in the interests of the one class which enjoys world citizenship-the international investor.

The functions of controlling corporate behavior are still the responsibility of nations and subnational governments, but as multinational corporations become more mobile, the ability of corporations to escape the regulation of states increases. As nations compete with each other to have businesses locate in their own countries, the ability to control corporate activity comes into direct conflict with the increased mobility of these corporations. Unless all nations agree to behave in the same way with regard to corporate behavior, the corporations will not be disciplined at all. Any one nation, by insisting on greater standards of corporate behavior, will be disadvantaged and its corporations will claim that they are being made uncompetitive relative to other corporations in the international markets.

Since there is no mechanism for the nations to act collectively, individual state action is critically weakened. The new international trade and investment agreements have facilitated the creation of a single market without a single state to regulate it. In this sense the growth in power of the corporate sector places nations in about the same stage of control over capital as they had at the dawn of the industrial revolution. Our national institutions are not equipped to cope with the nature of the changes which have taken place.

NEW MEASURES NEEDED TO SAFEGUARD PEOPLE

As most of us suspect, the inclusion of labor and environmental clauses (such as has been proposed by some parties, although not yet agreed by all, in the preamble to the MAI) are primarily window dressing to assuage the social conscience of nations. The corporations within their own national boundaries increasingly are escaping regulatory control through the deregulation process. The very vague requirements of the labor and environmental sentiments in the preamble do not provide specified behavior for international corporations.

While I respect the sentiments of some champions of social clauses who hope that sometime in the future these clauses could provide a route to side-agreements on these topics, I do not have faith that the side-agreements will provide real discipline over corporate behavior. The labor and environmental clauses cannot lead to more meaningful measures within the agreements themselves because there is a fundamental incompatibility between the agreements and their ability to regulate corporate behavior

In saying that social clauses in the trade investment agreements will be inadequate to control the power of international capital, I am not implying that attempts

to control international corporations are futile exercises. In what follows I will briefly sketch approaches which should be pursued by the Canadian government in the future to counter some of the worst aspects of internationalization of our political economies.

NEW INSTITUTIONS NEEDED

At the international level, three main inter-related initiatives should be the focus for action by the Canadian government at international forums.

First, is the need to initiate action to demand the creation of international institutions to control capital. The current unwillingness or inability of nation-states to assert the kind of control over capital which is necessary to protect employment levels, the environment, and conditions of life, reflects the power which corporations have to intimidate or otherwise gain the cooperation of national governments.

The focus for discipline in international institutions must shift from the nation to the international corporation. The very rationale for capital mobility is to take advantage of the economic climate in countries which are either politically corrupt or too weak to protect their people or their environments. International institutions which disciplined corporations, rather than countries, would begin to replicate some of the work of national institutions which was effective when nations exerted more power over corporate behavior.

Second, in addition to designing international institutions to control capital, there is also a need to imitate the redistributive functions of the nation-state at the international level.

As long as the enormous disparities which exist worldwide continue, the corporate sector will be able to blackmail nations into submitting to their demands for a "favorable" climate for business. This redistributive function requires an ability for an international governing institution to raise money, and to decide where that money should go.

The recent interest in developing a tax on international financial speculation (the Tobin Tax) in order to both discourage excessive speculation and to raise money could be the starting point for new international institutions to control and redistribute capital.

Third, there is an urgent need to recognize economic pluralism in international trade and investment agreements. A tolerance for economic pluralism requires the recognition that different goals, conditions and cultures throughout the world require very different solutions to problems. One system, the Western system based on a U.S. kind of economy and social system, will not serve the needs of all people in all circumstances.

The attempt of international investment and trade agreements, like the MAI, to impose uniform economic and social policy worldwide creates impossible positions for people in countries which have vastly different problems and resources,

in addition to different values and goals. We in Canada have devised an economic and social system which is different from the United States because, in part, we have needed to accommodate the conditions of relatively few people living in a huge and often hostile geographical area. Canada is being forced to change many of these systems as a result of investment and trade liberalization. However difficult these changes will be for many groups in this country, the problems arising from conformity are infinitely more serious for poor countries with very different types of social and economic organizations.

ENDING

The rights of people are undermined through the MAI in ways which are going to be difficult to confront in the future, once this becomes codified under the OECD. The OECD is not an international government, although it is now behaving like one. While member nations belong, it is, mainly, a think-tank for the twenty-nine richest nations in the world.

The international rights of corporations are the only interests of the OECD. It is time to create, at the international level, institutions which will provide meaningful discipline over corporate international activity and protection for people, the environment, and labor. It is time that international law mirror national ones and address more than only corporate needs.

Canada could show leadership internationally by not simply supporting the needs of only international business, but the needs of the' people of the world as well.

ENDNOTES

1. See, for example, Y.E.S. to MAI, *The Globe and Mail,* November *15, 1997.*
2. All references are to the document *Multilateral Agreement on Investment: Consolidated Text and Commentary,* May *13, 1997.*
3. Statistics Canada, *Canadian Economic Observer,* October *1997.*
4. Western Governors' Association, *Multilateral Agreement on Investment: Potential Effects on State and Local Government,* Denver, *April 1997.*

Direct reprint requests to:

Matjorie Griffin Cohen
Chair, Women's Studies
Simon Fraser University
Burnaby, British Columbia V5A I S6
Canada

A **Journal of Environmental** and Occupational Health Policy

Editor: Charles Levenstein
Assistant Editor: Mary Lee Dunn
University of Massachusetts Lowell

Preamble:

New Solutions is the only peer-reviewed journal you can read that explores the growing, changing common ground at the intersection of health, work, and the environment. The *Journal* makes plain how the issues in each area are interrelated and set forth progressive, thoughtfully crafted public policy choices. It seeks a conversation on the issues between the grassroots labor and environmental activists and the professionals involved in charting society's way forward.

This joint publication of the University of Massachusetts Lowell and Baywood Publishing, *New Solutions* delivers authoritative responses to perplexing problems, with a worker's voice, an activist's commitment, a scientist's approach, and a policy-maker's experience.

ISSN: 1048- 2911

yr ucr i yr rrc

Qty	Title	Price	Postage	Total
	New Solutions	$	+	

Name

Address

Payment Enclosed MasterCard VISA

Account # Exp. Date

Signature

RATES: $75.00 Institutional, $40.00 Individual (must be prepaid by personal check, credit card, or money order). Please add $6.50 postage & handling U.S. & Canada, $11.75 elsewhere.

TERMS: Subscriptions sold by volume only (4 issues per volume). Prices subject to change without notice. Prepayment in U.S. dollars, drawn on a U.S. bank. Printed in U.S.A. **Sample *Journal* issue available upon request.**

Baywood Publishing Company, Inc.
26 Austin Avenue, Box 337, Amityville, NY 11701
call (516) 691-1270 **fax** (516) 691-1770 **toll-free orderline** (800) 638-7819
e-mail: baywood@baywood.com • **web site:** http://baywood.com