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Executive Summary

Through the governments of the developed world, the largest corporations are hoping to accomplish in one bold move what normally requires constant lobbying. They hope to pass the Multilateral Agreement on Investment (MAI) in May 1998. If they succeed, the governments of the twenty-nine industrialized countries of the Organization of Economic Co-operation and Development (OECD) will be severely constrained when making regulations affecting corporate behaviour.

The MAI would establish a whole set of investment rules that favour transnational corporations.

The MAI is much more intrusive on the power of government than the North American Free Trade Agreement (NAFTA). It includes provinces and municipalities. It has very broad definitions of "investment" and "expropriation". Almost all corporate behaviour is included and "protected" from government measures. Legislation, such as environmental protection or conservation of the fishery, could permit an investor to declare a lost "opportunity" to profit from a planned investment. That means government could be forced to pay potentially huge sums in compensation.

Like NAFTA, disputes will be adjudicated by appointed panels of trade lawyers whose decisions are unaccountable, made in secret, are binding, and cannot be appealed. The MAI grants corporations the right to sue governments directly. Finally, this agreement goes far beyond NAFTA in duration. Canada can give six months notice to withdraw from NAFTA. With the MAI, we would have to wait five years to give notice of withdrawal. In the meantime, investments made in those five years would be governed by the MAI for an additional fifteen years.

The MAI, if signed, would have a dramatic impact on British Columbia. According to a recent OECD policy brief, "The MAI aims to cover 'measures' taken at all levels of government: central, federal, state, provincial and local." Some of the provincial policies that could be found in violation of the MAI include:

- The government's efforts, through agreements like the Jobs and Timber Accord, to ensure s forest companies provide jobs and local benefits in return for the privilege of logging our forests;
- The government's efforts to protect youth and children from tobacco company advertising and promotion could be challenged and the government forced to pay compensation;
- If Ottawa fails to get a reservation excluding fishing licenses from the MAI, there's nothing we could do to stop American fishers from acquiring licenses to fish BC waters;
- Dozens of community-based, non-profit agencies providing health and social services could suddenly face competition from American corporations demanding, under MAI rules, equal access to government funding;

- Municipalities could no longer give preference to local contractors, suppliers and service providers as this would be seen as "discrimination" against foreign investors;
- Because health and education services are not entirely publicly provided, foreign private health and education enterprises could demand equal treatment and even equal financing from government;
- Cultural policies in support of British Columbia's artistic community could be threatened because the MAI prevents governments from giving preferential advantages to local citizens;
- The context in which First Nations' land claims are negotiated would change drastically, as corporations claim "expropriation" should they lose access to resources or land.

It is difficult to predict with complete certainty what will happen to British Columbians if the MAI is signed. However, there is no doubt the agreement will put at risk many of the programs and policies which British Columbians cherish. By surrendering our sovereignty to transnational corporations, our democracy is certain to be further constrained. The question is, why would we pursue the MAI with its inherent risks?

Signing Away Democracy:
The MAI and its Impact on British Columbia

Introduction

The Multilateral Agreement on Investment is an international treaty designed to promote the interests of international investors. The treaty is currently being negotiated by the twenty-nine industrialized nations, including Canada, who are members of the Organization for Economic Cooperation and Development (OECD). These nations are hoping to complete their negotiations by April, 1998.

The MAI would be another in a series of agreements affecting Canada and British Columbia. The Free Trade Agreement, NAFTA, the GATT/World Trade Organization, the APEC process, and the NAFTA-style interprovincial trade deal that BC has resisted expanding, all contain provisions that constrain public policy making. They operate like an ever-tightening belt that cannot be loosened - only tightened more. If the MAI that is signed is substantially the same as the current draft, it may well turn out to be the most important, far-reaching international agreement ever negotiated. It is an agreement of truly global implications, with sweeping consequences for how transnational corporations do business and how governments conduct themselves. It goes beyond the North American Free Trade Agreement (NAFTA), both in terms of how much power it gives to corporations and how many countries it affects. The MAI has been described by the Director General of the World Trade Organization as "the constitution of a single world economy."

The MAI threatens to transform Canadian democracy by putting extensive, legally binding limits on what governments can do, regardless of what citizens elected them to do. The MAI would take precedence over all domestic law. A significant feature of the draft MAI that extends beyond NAFTA is its application to "sub-national" governments; that is, to provincial governments and municipalities. That means measures designed to benefit communities at the local and regional level could be disallowed under the MAI.

This study outlines the risks the MAI poses to British Columbia if it is adopted as drafted. This is done with the recognition that the final draft of the treaty is still being negotiated and the Canadian government is still seeking changes. Furthermore, although the advice of international trade lawyers has been sought in the preparation of this study, no one can say with absolute certainty how international trade tribunals will rule when corporations challenge government programs using the MAI. Nevertheless, while it is impossible to make categorical predictions about the future of the province under the MAI, the motivation guiding this project is that British Columbians should at least be aware of what is at stake.

This study is in two parts. The main text focuses on the particular ways in which the MAI could effect British Columbia and its communities. A detailed appendix provides explanations of the language and terminology of the MAI. The world of trade and investment treaties is replete with arcane language, and even commonly understood terms have very different and often narrow definitions in the realm of international law. Those who wish to explore these terms further should turn to this section of the study.

Application of the MAI to British Columbia

The MAI as currently drafted applies to "all land, territory, internal waters and the territorial sea of a contracting party [country]." [1] In effect, this means that the MAI is intended to apply to all governments with any jurisdiction over any of these territorial elements. The Vienna Convention on the Law of Treaties makes it clear that internal laws of a country signing an international treaty cannot be used to "obviate" or avoid the terms of an international treaty. Since the MAI is an international treaty, the MAI will apply to provinces and municipalities unless they are specifically excluded. The draft MAI contains no specific exceptions for these levels of government.

Throughout 1997 and even as late as January, 1998, the federal government, through its chief MAI negotiator William Dymond, insisted the MAI would not apply to "sub-national" levels of government. [2] However, the House of Commons Sub-Committee on International Trade, Trade Disputes and Investment, which held hearings on the MAI in the fall of 1997, assumed the provinces were included and called on the government to finalize "its list of reservations affecting...the jurisdiction of sub-national governments." [3] The OECD's Secretariat has also made it clear that its mandate is to conclude an agreement that embraces all levels of government. In its Policy Brief, the OECD states "The MAI aims to cover 'measures' taken at all levels of government: central, federal, state, provincial and local." [4]

Canada's provinces have significant constitutional authority to make laws, including those which regulate investment. In the US, the federal government has constitutional supremacy and has much greater authority to bind states to any agreement it signs. Canada's federal government does not enjoy such constitutional authority. While it has the authority to sign treaties and trade agreements, it does not generally have the authority to implement them in areas of provincial jurisdiction.

In fact, there is little explicit federal jurisdiction over foreign investment. Even with Investment Canada or the old FIRA (Federal Investment Review Agency), Ottawa would only coordinate the application process. The approval of the actual investment in question was always done provincially.

Because it is the federal government that has the authority to negotiate the MAI but the provinces who have jurisdiction over what the MAI covers, the agreement could precipitate a constitutional crisis. As soon as Ottawa implemented the agreement, it would pose a fundamental challenge to Canadian federalism and the constitution. The federal government, by signing the MAI, would grant foreign investors rights under international law. The conflict then becomes one between the division of constitutional powers and the force of international law. In 1937, a Privy Council ruling established that the federal government cannot go around the constitutional division of powers by making international agreements in areas outside its jurisdiction.

If the MAI is signed, one possible approach that the federal government might take to sidestep these constitutional concerns would be to persuade the provinces to pass implementing legislation, agreeing to the terms of the MAI as they apply to provincial laws and measures, and imposing them on municipalities. Ultimate approval by all provinces, however, is by no means assured. The BC government opposes the MAI, the Yukon legislature passed a motion calling on Ottawa to cease all negotiations, and the Prince Edward Island legislature has passed a resolution asking the federal government not to sign the agreement until public hearings are held in the province and across the country. [5]

If the MAI is signed without an exemption for the provinces, the federal government will be

legally obligated to force their compliance. There may well be some final horse trading through which Canada will attempt to name some provincial measures in its list of reservations to the MAI. Even if this is successful, these reservations would be affected by the "rollback" terms of the treaty, which state that non-conforming legislation must ultimately be pared back (see appendix).

Provinces in Canada have very significant powers and authority, particularly when compared to the states in the US The most important areas of government programs for average citizens are the constitutional responsibility of the provinces. Environmental protection, health care, public education, social welfare and other social programs like child care are primarily provincial responsibilities. The MAI has implications for all these areas.

Virtually every area of public policy and every economic sector in BC could be affected by the MAI. It is impossible to examine all these areas. Presented below are some of the most important areas of public policy and some of the most important economic sectors that would almost certainly be affected.

Much of what follows presents scenarios that might take place and laws and regulations that might be challenged. The argument presented here is that if the MAI is implemented it would put at risk many of our most cherished programs and a significant measure of our sovereignty, but achieve no discernible benefits for British Columbians in return. The crucial question that arises, even if the worst does not happen, is why would we put all these programs and measures at risk? In particular, why would we risk them by placing their fate in the hands of unelected, unaccountable trade lawyers making binding decisions in which we have virtually no input and which we cannot appeal?

Job creation

The neo-liberal ideology that guides most Canadian governments claims that governments can't create jobs but only the conditions for the private sector to create them. The BC government has bucked this trend and made job creation a key aspect of its social and economic policies. The MAI represents a frontal assault on any government's ability to create jobs because of its strict ban on "performance requirements" – special conditions, such as job creation targets and local purchasing requirements, that are placed on corporate investors. Performance requirements have been used to varying degrees by all governments to help create jobs.

The highest profile example of performance requirements in BC is the Jobs and Timber Accord which provides for a combination of incentives and sanctions to ensure that forest companies create jobs in return for access to the forest resource. The Jobs and Timber Accord could not stand up to the provisions of the MAI. The agreement is very clear in its definition of investment that investors have the "...rights to search for, cultivate, extract or exploit natural resources." [6] In combination with the ban on performance requirements, this amounts to a powerful position for corporations to resist any demand that they create or maintain jobs.

The Island Highways Agreement could also be challenged under the MAI because it requires contractors to hire a certain percentage of workers from among groups historically under-represented in the workforce. This, too, is a performance requirement and as such would be prohibited under the MAI. The financing promised by the BC government for the refurbishing of the Lions Gate Bridge also contains requirements regarding hiring which would likely be in violation of the MAI. It is possible that legislation requiring government construction projects to use unionized labour would also run afoul of the performance

requirement ban if it could be argued that it favoured local workers over others.

One of the key job creation tools available to governments at all levels are "investment incentives." These can be anything from business subsidies, job training geared to a particular project, government investment in equity, low interest loans, or cheap electrical power. Unlike NAFTA, all of these measures would be subject to national treatment under the MAI.

Efforts by governments to create jobs by attracting investment are vulnerable to situations in which jurisdictions compete by offering ever-greater incentives. This almost always involves lowering labour, tax or environmental standards and constitutes what has been called a "race to the bottom." While the MAI extends national treatment to investment incentives, prohibiting governments from favouring domestic firms, it does nothing to impose disciplines on unfair incentives aimed at attracting investment – and jobs – from one country to another. In this way, the MAI could actually increase the likelihood of bidding wars and job poaching. In BC's case, where provincial government policies promote high-paying jobs, relatively vigorous environmental standards and a tax scheme sufficient to pay for public services, such bidding wars would undermine the province's ability to pursue such policies. As we will see, the provision in the MAI discouraging countries from lowering labour and environmental standards is not enforceable and provides only for "consultations" between parties in dispute.

All these efforts could be jeopardized by the MAI's provisions on "Monopolies/State Enterprises/Concessions." Nothing in the MAI prevents governments from maintaining or creating a monopoly or state enterprises but other provisions apply strict conditions on how these enterprises can operate. Crown corporations would be required to act "solely in accordance with commercial considerations." [7] In other words, the provincial government could not use BC Hydro as a tool for public or social policy but only as a commercial producer of electricity, as if it were a private corporation.

In practice, BC Hydro could not subsidize certain economic development projects with lower power rates. Currently BC Hydro's Power for Jobs Initiative commits companies to create a specific number of jobs in return for lower electricity rates. This would be defined as an "advantage" under the MAI and other corporations could demand the same power rates regardless of their job creation record.

Public enterprises are targeted for "anti-competitive" practices, which means that they would be prohibited from what is called "cross-subsidization." This refers to preferential pricing rates to help meet certain social policy objectives, such as providing economic support to local businesses or remote rural communities with below-market prices. Such measures indirectly support job creation by providing a measure of stability to small enterprises and vulnerable communities.

Government procurement, the purchase of goods and services, is a major engine of job maintenance and creation. In 1985 Canadian governments at all levels spent $68 billion on goods and services, accounting for one million jobs, or 12 per cent of the total, in the private sector. While NAFTA exempts all provincial and local government procurement measures, there is no clear protection in the MAI. The prohibition of performance requirements (section 1-c) includes any commitment by governments "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory." [8] Thus, much of the money spent by BC governments and directed to local businesses could end up going to foreign corporations with no obligation to produce goods and services in BC

The BC government has a variety of other job creation policies and programs that would be vulnerable to the MAI. BC Ferries Corporation purchases ferries only from BC shipyards. The government maintains a broad policy for public enterprises to assess bids for contracts on the basis of BC value-added criteria and not just on price. The government signed a multi-year, $200 million agreement with General Electric which commits the corporation to investing one dollar in BC for every dollar of GE goods purchased by the province. BC Transit has a similar arrangement with Bombardier regarding the purchase of transit vehicles. All of these arrangements are directly contrary to the intent of the MAI and are vulnerable to MAI provisions if not specifically exempted.

Environmental protection

Currently, Canada has made no efforts to make specific reservations regarding environmental protection. According to the analysis of the Canadian Environmental Law Association (CELA), environmental regulation has fared very badly in international disputes even when agreements have on paper seemingly accommodated environmental concerns. Article XX of the General Agreement on Tariffs and Trade (GATT), for instance, appears to allow for environmental reservations.

However, according to CELA, "In every case the domestic standard that was at issue has been found incompatible with GATT (or the Free Trade Agreement) leading to a requirement that it be rescinded." [9] The MAI does not even contain a general exception like that in GATT. Whatever its final version, any interpretation of environmental measures will be based on the same restrictive logic that applied under the GATT. In addition, unlike NAFTA, the MAI will take precedence over international environmental agreements. NAFTA (article 104) listed five such agreements, on matters from ozone depletion to the trade in endangered species, that took precedence in the case of inconsistency.

The MAI's provisions create a very rigid regime restricting environmental protection measures and demanding "like treatment" such measures must be the same everywhere. Yet an environmental regulation that could be seen as unreasonable in one geographic location, where there is no water source, might be very reasonable in another location adjacent to a fish-bearing river.

The Preamble to the MAI states that the agreement will be implemented "in a manner consistent with environmental protection and conservation." [10] But items in the Preamble are not enforceable. In Article III, Treatment of Investors and Investments, "The Parties recognize that it is inappropriate to encourage investment by lowering...environmental [standards]." [11] Similar language in NAFTA does not actually prevent such action and the MAI does not allow binding dispute resolution if any government does so. The MAI will include the OECD's Guidelines for Multinational Enterprises that are intended to establish minimum international labour, social and environmental standards. However, these are voluntary guidelines and have no legal status nor any binding effect on the interpretation of MAI provisions.

British Columbia has a wide variety of environmental responsibilities, from the regulation of fishing, mining and forestry to land-use planning, monitoring of industrial waste and the management and conservation of energy. All are exposed to challenge if it can be shown they violate the terms of the MAI. The combined provisions of the MAI stipulate that countries must treat "like" products of all countries equally and that quotas or bans imposed for environmental reasons can be challenged as forms of unacceptable trade protectionism.

Under Chapter IV, Investment Protection, Article 6, Protecting Existing Investments, the agreement

makes the provisions of the MAI retroactive. This could mean that even those foreign corporations who have negotiated agreements with the BC government incorporating conservation measures could challenge them successfully or simply quit complying with them.

Consider a case in which BC gave a special concession to a forest company based on conservation commitments and then withdrew it because it determined the company was violating the terms of the agreement. Under the MAI definition of expropriation, the company could challenge the cancellation of the concession. In addition, another foreign corporation could challenge these environmental concessions as discriminatory "advantages" and demand equal treatment. BC could still offer environmental incentives, but it might end up paying huge penalties.

One consequence of the MAI (in combination with the WTO and NAFTA) is the chilling effect it will have on BC law-makers. The clearest example of what might happen is the current Ethyl case. Ethyl Corp., a US multinational corporation, is the only North American manufacturer of the gasoline additive MMT. Concerns about the environmental and health impacts of MMT led the Canadian government to ban the additive. Ethyl responded by invoking provisions in NAFTA that, like those in the draft MAI, allow foreign corporations to directly sue the Canadian government for compensation of a loss in real or potential profits because of any regulation or action taken by government. Ethyl filed a suit claiming $350 million in damages on the basis that Canada's ban on MMT is tantamount to "expropriation" under NAFTA.

The Ethyl case illustrates how governments are likely to avoid creating any law which might provoke a challenge potentially costing hundreds of millions of dollars. The dispute settlement mechanism makes this chill even more likely as the government cannot intervene directly in the process nor do sympathetic parties have the right to intervene. If there were even a 10 per cent chance of losing a case with penalties in the hundreds of millions of dollars even a relatively wealthy province like BC would surely be cautious in passing new legislation. Over time, policy makers would simply begin censoring themselves regarding the kind of laws and regulations they developed.

Any future decision by a BC government to enact stringent land-use measures whether with respect to mining, forestry or industrial use could be challenged under the MAI because the agreement has no general exception for the environment. International arbitration panels have often expanded the protection for investors contained in agreements by imposing unrealistic criteria. A future trade panel would be obliged to conclude that the omission of an environmental exception in the MAI is "purposeful" – was the actual intent of the negotiators – and that the agreement should apply to land use rules that a corporation claims have the effect of "taking" its property. It could even apply to conservation efforts applied to the fishing industry as we will see below.

These possibilities are reinforced by the broad definition of investment which includes "rights...such as concessions, licenses, authorizations, and permits," [12] which confer "...rights to search for, cultivate, extract or exploit natural resources." [13] Nowhere in the agreement is there any reference to an obligation by investors to sustain these resources or exploit them in a manner protective of the environment.

The list of British Columbia's environmental laws and regulations at risk from the MAI is long and varied, from protection of sensitive habitats, wetlands, wilderness areas, and endangered species, to limits on the conversion of agricultural land, mining reclamation, water and energy conservation measures, or incentives to prevent

pollution or promote recycling. All of these could be subjected to challenge as expropriation or "measures of equivalent effect."

Health care

Canada's attempts to exclude social services from the MAI are inadequate to protect provincial health care because the term "social services" has no internationally recognized definition. It is clear how American trade officials want to define the term. In guidelines to the state governments on the matter as it involved NAFTA, the US administration claimed that where such services are not directly provided by government, they were not provided 'for a public purpose' and were not protected by the NAFTA exemption. Also, for the purpose of national treatment of investments, the agreement defines "enterprise" as including government-owned and non-profits. [14] This opens the door to incursions by foreign corporations into British Columbia's health sector because of our mixed public-private system.

A strong trend in Canadian health care is provision of services through community-based agencies. BC provides many subsidies for organizations and agencies providing non-profit health services. For example, BC's cancer agency provides grants to a non-profit agency doing genetic mapping. Under the MAI a foreign, for-profit company could demand the same grants because there is no distinction between for-profit and non-profit services in the agreement. The government could not favour community-based health care without incurring huge costs in compensation to private corporations demanding similar treatment. Obliging corporations to behave in any manner favouring local content or ensuring a local benefit would constitute a "performance requirement" that is banned in the MAI.

In the area of health protection the MAI will make it very difficult to introduce safeguards against hazards posed by various products. The Ethyl case, noted above, is just one example. Another is Canada's and BC's efforts to control the use of tobacco and the targeting of young people by tobacco advertising and marketing. According to Cynthia Callard of Physicians for a Smoke-Free Canada, few tobacco control measures would stand up to the national treatment and expropriation provisions of the MAI even if these measures could be shown to serve a public purpose. Callard has said, "Restrictions on advertising are an expropriation of MAI-protected trademark rights. So are restrictions on sponsorship promotion or requirements for plainer packaging. Restrictions on how and where cigarettes are sold are an infringement on licensing rights." [15]

The government of BC has embarked on a particularly comprehensive anti-smoking program. In January, 1998 the province announced legislation that would oblige tobacco companies to list the key ingredients (including arsenic, lead, cadmium, ethylene glycol) in their cigarettes on packages. Anti-smoking groups are asking BC to take measures that the federal government has backed away from, including plain packaging. This measure could be challenged under the MAI as an infringement of trademark rights and equivalent to expropriation. In 1994, former US NAFTA negotiator Carla Hills told the House of Commons that if Canada required that cigarettes be sold in plain packages then it would be liable under NAFTA's investment chapter to pay "hundreds of millions of dollars" in compensation to US tobacco companies.

Health care commentators on the MAI also point out that the federal government's commitment to a Pharmacare program would be prohibitively expensive if the MAI were in place. To be affordable, and to reduce the escalating cost of drugs, the government would likely have to favour generic drugs in its plan. But MAI rules could be used by the giant pharmaceutical companies claiming discrimination and demanding compensation for the lost opportunity to profit from their investment.

The BC government already has a program of generic drug purchasing, called the Reference Drug Program which has come under ferocious attack from brand-name drug companies. The program, which the government estimates will save the province $44 million in 1998, would likely be challenged by multinational drug companies as a lost opportunity to profit from an investment.

Education

The cuts to education budgets have put tremendous pressures on schools and school boards. Funding reductions are opening classroom doors to corporations, incursions which will be made easier if the MAI succeeds. The more education becomes a mixed public and for-profit system, the more the MAI will apply.

Already, corporations are making every effort to target education. They want to create brand-name identification at the youngest age possible and they have their eyes on what is, from the private sector perspective, a $60 billion "industry." From grade schools to universities, educational institutions are desperate for funding and are accepting corporate "partnerships" as a way of replacing government funding. There are now 20,000 such partnerships in Canada with technology and communications firms peddling computer and information systems, and with food and beverage companies which pay cash for exclusive product access to children in schools.

School boards and post-secondary institutions have attempted to regulate these partnerships with codes of conduct and guidelines. But under the MAI's national treatment and expropriation provisions these institutions, as agents of provincial governments, might not be able to apply strict limits on the marketing and advertising of foreign corporations. If foreign corporations bid on contracts for curriculum materials, college and school boards would be similarly hard-pressed to deny them access. The mere threat of a suit might be all that was needed to persuade educational institutions to give for-profit firms access equivalent to that now enjoyed by community-based non-profit organizations.

Under the MAI, universities are defined as enterprises, which means that private research institutes or colleges could demand equal access to government grants. Even individual foreign researchers could claim discrimination on the basis that the Social Science and Humanities Research Council, the largest academic funding agency in Canada, requires that grant recipients be Canadian citizens or landed immigrants.

It is even conceivable, according to Maude Barlow, co-author of the book *The MAI*, that school boards would be pressured by private corporations to grant them charter school licenses (publicly funded, privately run schools that are a new and growing feature of the American public system). In BC, the provincial government provides 50 per cent of the per-pupil funding for private schools. American education corporations would be entitled to demand the same level of funding for charters and perhaps even equal access to the public finances received by public schools.

If the MAI is enacted, corporations already entrenched in the public education system would be almost impossible to expel. Once a service is mixed public and private, the rights of corporations to access the market is that much stronger. As well, national treatment would make it very difficult for the BC government to favour community colleges over similar, foreign-owned institutes offering worker-training programs.

Social Programs and Child Care

As with health and education, social services are not well protected under the reservation that Canada has proposed. The reservation only covers social services "established or maintained for a public purpose." As note above, the terms "public purpose" and "social services" remain undefined

in the MAI and in international trade law. They do not necessarily reflect the common understanding Canadians have of these terms. In the view of the US, once a private company provides a given service, that service (and possibly similar ones) are seen as being provided for a commercial – as opposed to public – purpose. If this distinction becomes the operating principle of MAI dispute panels it could open up the provision of social services in Canada to competition from foreign corporations.

The national treatment provisions of the MAI provide protection from both formally discriminatory actions and unintended, but de facto, discrimination. For example BC's common practice of providing subsidies to non-profit service providers in the area of social services could be challenged. The de facto discrimination in this case would arise from the fact that Canadian non-profit providers are predominantly community-based and private sector providers are primarily foreign-owned. Therefore, subsidies directed to non-profit providers in day care, social services, care for the elderly and a host of other services could be challenged as discriminatory, even if no American non-profits sought a subsidy. Given that Canada is next door to a country with a predominance of for-profit providers, the potential for challenges could be considerable.

The MAI's Impact on Culture

Specific clauses within the MAI as well as the overall thrust of the treaty are fundamentally at odds with Canadian cultural programs provided by all levels of government. A major feature of the MAI is the intent to ensure that foreign investors are treated no less favourably than local ones. At the core of most provincial and federal cultural programs is a desire to grant locally-based cultural products preference over those of foreign companies in order to promote the development of Canadian culture. This runs directly counter to the language in the MAI which states that "Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords to its own investors." [16]

The MAI, since it is focused on fostering foreign investment, promises only to aggravate the problems Canada's cultural producers face in finding room for expression. In an analysis of the MAI commissioned by the Canadian Conference of the Arts, Garry Neil described the extent of the MAI's threat to cultural programs, and concludes that it would affect every aspect of Canadian cultural policy:

> One of the fundamental principles behind our measures has been that Canadians are more likely to tell Canadian stories and reflect Canada's world view. Flowing from that principle, we have implemented a range of measures which provide support only to Canadians and thus discriminate against the nationals of other countries. To the extent that foreign nations are "investors" within the means of the MAI and these support measures are not covered by an exception, they are likely vulnerable to a challenge under the MAI. [17]

The cultural sector in BC has benefited greatly over the years from policies designed to promote Canadian culture, the preferential air play given BC musicians by the CBC. being just one example. However, the MAI's National Treatment provisions mean that any foreign investor could challenge federal laws restricting foreign ownership in the areas of broadcasting, book publishing, film distribution, and sound recording. In contrast with the NAFTA, which does not cover government subsidies, the MAI would allow foreign investors to sue governments if they are not given equal treatment in the granting of subsidies, putting at risk all institutions established to support the arts.

With the MAI's very broad definition of "investor," individuals as well as firms could sue the Canadian government if the Canada Council,

Telefilm Canada, and the National Film Board did not consider them for grants. The Public Lending Rights program, which gives Canadian authors payments when their works are borrowed from libraries, would be jeopardized. The MAI's broad prohibitions on performance requirements would mean that foreign investors would not have to comply with Canadian content regulations. The *Monopolies and State Enterprises* section of the MAI states that "crown corporations will be required to act solely in accordance with commercial considerations," a provision that appears to challenge the CBC's legislative mandate, which includes a commitment to Canadian programming, often in disregard of commercial considerations, particularly in radio. The same conflict could arise with the mandate of BCs Knowledge Network.

If provincial and municipal cultural programs end up being covered by the MAI, agencies like the BC Arts Council or British Columbia Film would have to consider applications from foreign producers. Restrictions in grant programs that limit eligibility to BC residents, such as the following one stipulated by BC Film, would be open to challenge: "The Eligible Applicant must be a British Columbia Resident Entity which is actually, as well as technically, majority owned and genuinely controlled by one or more British Columbia Residents."

In addition, programs specifically established to encourage regional cultural development like BC Film's Regional Incentive program are at odds with the MAI's National Treatment provisions. Even the threat of a challenge from a large US entertainment transnational might lead all agencies and commissions set up by governments to administer cultural programs to make their decisions in conformity with the MAI. Municipal cultural programs could also be pressured to conform. For example, the City of Vancouver might have to make its annual $6.4 million assistance programs to non-profit arts groups open to commercial, foreign applicants. Schools, libraries, and museums could not pursue policies that favoured the purchase of Canadian-produced materials.

The federal minister responsible for MAI negotiations, Sergio Marchi, and Canada's MAI negotiator, William Dymond, said they are negotiating to have the exemption for culture as drafted by France included in the treaty. Whether this effort can succeed in providing complete or even partial protection for cultural programs depends on a number of factors, including whether or not culture is a "deal breaker" for the federal government - in other words, would it cause the government to walk away. Such an action seems extremely unlikely.

According to Alan Rugman, the University of Toronto professor who was one of the original proponents of the MAI, the Canadian government has taken a leadership role in promoting the agreement. Many of the clauses in the draft treaty are identified as having been submitted by Canada's negotiators. Sergio Marchi has put the importance to his government of signing an agreement in the following terms: "I don't think we should be walking around the (negotiating) table threatening we're going to walk on this, we're going to jump on that, we're going to dive on that...We need to continue to signal that we want investment, as we must continue to protect Canadians' investments abroad. That is what the (agreement) is all about." [18]

In describing the MAI as a "signal that we want investment," Marchi appears to be saying that the MAI should be regarded not in terms of whether specific investment issues it resolves outweigh the risks to national sovereignty, but as a necessary condition for attracting foreign investment. The priority Canadian officials have assigned to reaching an agreement suggests that Canada will not ultimately refuse to sign the MAI if culture is not exempted.

At a meeting with government representatives on January 15, 1998 the Business and Industry Advisory Committee to the OECD specifically raised the cultural protections sought by France and Canada as endangering corporate support for an MAI agreement. Business representatives suggested that from the corporate perspective, exemption of culture would be a "deal breaker." American corporations would not support passage through the US Congress of an MAI that exempted culture. Steve Canner, a US representative on the committee, reported that OECD governments were receptive to the committee's complaints: "We are encouraged with the way our remarks were received." [19]

Representatives of cultural organizations at the MAI hearings expressed concern that policies to preserve and promote cultural and linguistic diversity could be interpreted as applying to a very narrow range of Canadian cultural programs. Another major concern was that unless culture was "carved-out" or excluded entirely as a sector from the agreement (as opposed to be specific cultural measures being reserved), Canadian cultural policies could become subject to the provisions obliging governments to continuously rollback policies that conflicted with the treaty and to never take new cultural initiatives. Even with the most careful wording intended to reserve culture, the experience with international trade tribunals indicates they would tend to rule against the Canadian government in any challenge to its cultural programs since the treaty's main provisions are fundamentally antithetical to these programs.

First Nations: Land Claims and Governing Powers

The provisions in the MAI dealing with investor rights and the broad definition of expropriation would have a major impact on the BC government's efforts to negotiate and implement land claims agreements. The recent Supreme Court of Canada ruling confirming first nations land claim rights reinforces the importance of this area of public policy.

The term "expropriation" is left undefined in the MAI and thus will reflect international case law which gives it an extremely broad definition. This would wreak havoc with land claims by potentially multiplying the costs of deals in BC If a land claim involves depriving foreign individuals or corporations of property interests as defined in the MAI, they could seek full compensation. That is, using the very broad definition of expropriation, a foreign-based owner could be entitled to compensation for any lost return on investment, including a planned investment, such as a multi-million dollar tourist resort.

Foreign investors would have access to the binding international arbitration of a dispute panel through the investor-state provisions of the MAI. Negotiations involving First Nations land claims are already a complex and politically sensitive issue, in part because of costs. The MAI could add dramatically to both the complexity (by adding an international dimension to the political mix) and the potential costs to the federal and provincial governments. This issue is arguably far more important for BC than for any other province because of the number and size of outstanding land claims.

The impact on First Nations people doesn't end there. The recent Supreme Court of Canada decision regarding the Delgamuukw establishes in law that First Nations in BC have clear and unextinguished aboriginal rights. This decision goes a long way towards establishing that First Nations have governing powers. These powers would apply to how a First Nations government would deal with its resources. First Nations may have the authority to stop any company from using their resources. But this could also trigger the expropriation articles in the agreement and the user of the resource could sue for compensation.

Similarly, if a First Nations government required an investor to hire band members, it would be a prohibited performance requirement. If it provided an advantage in return for participation in a co-determination process for resource development, the national treatment provision would apply. The agreement appears to prohibit any government from requiring an investor to establish a joint venture. However, joint ventures between the provincial government and Indian bands regarding management of resources are a fundamental tenet of the treaty negotiations.

In effect, First Nations governments would be treated the same as any other "sub-national" level of government. As with provincial and municipal authorities, the First Nations government could still pass these laws and regulations to protect their culture, create jobs and protect their resource base. But by having to pay compensation they would in effect be forced to rent back the jurisdiction they have been fighting for, for decades, paying foreign and in some cases domestic corporations for the right to make laws as a legitimate First Nations government.

Canada has submitted a reservation on matters affecting aboriginal peoples and a similar reservation was included in the NAFTA. But it will likely be much more difficult to get this reservation in the MAI as all but six of the OECD countries have no experience with first nations. Even if this reservation is accepted, aboriginal governments would still be subject to the national treatment and performance requirement provisions – they would be subject to claims related to expropriation.

BC's Forest Industry

The forest industry is key to the present and future prosperity of BC and its citizens, but that prosperity depends on how that resource is used. Who gets access to it, the obligations they have to ensure that BC benefits, the sustainability of the resource, and the stability of the development, are all important aspects of public policy. But there is no exception in the MAI for public policy; so a great many of the efforts by the BC government to ensure that the province benefits from the resource that it owns are put at risk.

One of the most well known BC initiatives to create jobs from provincially owned natural resources is the Jobs and Timber Accord. Referred to above, the Accord ties investor access to the forest resource directly to the creation of jobs. The Accord set a target of 20,400 direct and 17,400 indirect jobs to be gained in part from the production of higher value wood products.

The Accord involves a whole series of projects and innovative practices which were agreed to by the forest companies through negotiation. In return for taking part in these projects and practices, companies get access to certain benefits including: access to Forest Renewal BC funds; eligibility for an exemption from the 5 per cent reduction in the annual allowable cut with the purchase or sale transfer of a license; and preferred access to unallocated provincial timber if it becomes available.

All of the benefits arising from the Accord defy the intent of the MAI and could be challenged by the forest companies either immediately or later through the roll-back provision. They amount to an advantage given to certain firms and thus companies not complying with the Accord could demand equal treatment. The MAI guarantees investors "rights conferred pursuant to law or contract such as concessions, licenses, authorizations, and permits." [20] The agreement further defines them as "...rights to search for, cultivate, extract or exploit natural resources." [21] Specifically, the MAI also states that no government can demand that a foreign firm achieve a given level of domestic content, give preference to local goods and services, transfer technology or hire locally.

The Accord also includes measures to increase the supply of wood through innovative practices and increased efficiency, and contains a joint commitment to "environmental sustainability." The Accord set up an agency to assist displaced workers and to oversee the government-industry commitment to "support workers and their unions as partners..., to create high-value jobs...,to ensure a priority hiring system" [22] for laid off workers and first-nations people. The way in which these objectives are to be carried out is through negotiation between the government and the companies.

Even this voluntary agreement is no protection against the ban on "performance requirements" in the MAI. Any company wishing to take advantage of the MAI could either quit complying and force the government to act, thus triggering a complaint, or it could sue the government directly, claiming illegal performance requirements.

Even under NAFTA, which afforded some restrictions on the export of raw logs, the Canadian ban on raw logs exports was declared an unfair subsidy because Canadian companies could make more profits on their value-added timber. The MAI's impact on BC forests would go far beyond nullifying the Jobs and Timber Accord or prohibiting the ban on raw log exports. It would handcuff Canadian governments in their efforts to preserve forests in the future.

According to Elizabeth May of the Sierra Club, if Canadians demanded that their governments move decisively to protect their dwindling forests by changing cutting practices, raising stumpage fees, or implementing strict environmental regulations to protect fish-bearing streams, the MAI would make it very difficult. All these measures could be challenged as "expropriation" of foreign companies' anticipated profits. The measures could still be passed, but the cost could be horrendous if the dispute panels ruled in favour of the companies. In effect, Canadians would be paying for the privilege of enacting laws to protect their resources.

The Fishery

The salmon dispute with the US underlines dramatically how important regulations are for the protection of natural resources. The lack of an effective treaty threatens the resource and throws the lives of fishers and their communities into a state of insecurity. However, the MAI enshrines in law the principle of greater deregulation. Even if the fishery is reserved from some measures, it would be subject to standstill and rollback provisions in the treaty. While a detailed analysis of the impact of the MAI on the fishing industry remains to be done some observations are possible.

While the federal government has no direct jurisdiction over investment it does have substantial authority over fish and under the Federal Fisheries Act has considerable authority over the environment of the waterways. The Fisheries Act has been called Canada's strongest piece of environmental legislation as it makes it illegal to introduce any substance harmful to fish into fish-bearing water. As Maude Barlow and Tony Clarke point out, this law is unevenly enforced across the country. This opens the door to foreign companies refusing to comply on the basis that they are being discriminated against because some Canadian companies are granted exceptions. [23]

Governments also manage the fishery through export controls. However, these measures may be challenged under the MAI. This was demonstrated in 1986 when the US successfully invoked the GATT to challenge a 1908 regulation in the federal Fisheries Act, which prohibited exports of unprocessed salmon and herring. According to the Sierra Club, "the regulation was part of our long-standing fisheries management regime which included habitat protection, catch limits,

international agreements and monitoring, and enforcement standards. The overall effect was conservation." [24] Despite the conservation thrust of the regulation, a GATT panel ruled that the commercial effect could not be justified under the resource conservation exception of the agreement. This decisions allowed US packing ships to operate in Canadian waters with the same rights as Canadian vessels.

Canada responded by passing a regulation requiring that all salmon and herring be landed for inspection and biological sampling. Another trade panel, this time under the Free Trade Agreement, ruled against Canada. It concluded that a resource conservation exception could only be used if the measure was "undertaken for conservation reasons alone" and if there were no less trade-distorting means by which it could be accomplished. In effect, if the measure had a de facto impact on trade, even if its intended purpose was conservation, the measure was in violation of the FTA.

While Canada has applied for an MAI reservation on fishing licenses to preserve exclusive access for Canadians there is no guarantee they will get it. Without a reservation there is nothing Canada or BC could do to prevent an American (or Spanish for that matter) fisher from acquiring a salmon fishing license. The MAI essentially says that there can be no law that is based on where you are from. If you are a legitimate fisher in the US you would have the right to a license in Canada.

In addition, according to Simon Fraser University's Marjorie Griffin Cohen, any government initiative to link fishing licenses or fish quotas to support for local coastal communities could be seen as violating investors' rights. A moratorium on salmon licenses in order to limit the size of the fleet could be challenged as an exclusion of new entrants to the market, de facto discrimination against foreign investors. [25]

Currently BC fish quotas for some species can be traded like a commodity. Under NAFTA, Canada established a reservation to ensure that quotas can be traded amongst Canadian fishers only. Canada is not seeking a similar reservation in the MAI. The draft agreement stipulates that anything for sale in Canada must also be for sale to foreign investors on the same basis. The current exclusive right for Canadian fishers constitutes an advantage under the agreement, and as such must be provided to "investors" from all parties unless explicitly reserved.

Provincial Parks and Wilderness Areas

The issue of land-use regulation comes into play when the rights of the government to establish new provincial parks come up against the MAI's expropriation provisions. Unless there is an explicit exception or a reservation for such public policy the establishment of new wilderness areas, provincial parks or protected areas where commercial developments (such as mines and forestry) are restricted could become prohibitively expensive. The creation of such parks or wilderness areas from land on which foreign investors have mineral or logging rights would be a violation of investors' rights for which compensation would have to be paid.

The recent creation of the Muskwa-Kechika wilderness park in the Northern Rockies set aside over one million hectares of protected areas and an additional 3.24 million hectare "special management area" where resource development must be undertaken with government approved environmentally-sensitive management. The decision was based on extensive community negotiations and the involvement of corporate stakeholders including Petro-Canada, Westcoast Energy and Amoco. An industry trust fund would be the basis for research that would contribute to local economic development. Nothing in the MAI would prevent such agreements from being made

in the future. Nevertheless, there might be less incentive for companies to do so if the provincial government's authority to legislate or enforce land-use decisions were weakened by the MAI. As well, given that the MAI provisions are retroactive, it is possible that any one of the above corporations could change its mind and challenge aspects of the agreement or use MAI provisions to pressure the BC government to change them.

British Columbia has made a commitment to double the amount of territory designated as protected areas, and it made a undertaking to negotiate compensation with all affected interests. A political commitment to negotiate compensation, however, is a very different matter from giving a legally enforceable right to compensation to foreign investors alone.

Small Business and Labour Protection

Small and medium size businesses would likely be big losers under the MAI since the agreement primarily benefits large multinational corporations. Aspects of the MAI that will have a negative impact on smaller firms include: the prohibition of job creation measures, special subsidies and investment incentives, cross subsidization by crown corporations; prohibitions on municipal procurement practices; and the "national treatment" provision, which permits large foreign investors to gain preferential treatment.

As foreign corporations use their new freedoms to become ever-larger and develop their abilities to penetrate smaller markets, the potential for local entrepreneurial activity will fade. The proposed merger between the Royal and Montreal banks reflects the international focus of Canadian financial institutions in the era of the borderless world. The stated objective is to foster "international competitiveness". This implies that the new mega-bank will focus on providing services to transnational corporations. The result will be even fewer lending options for small and medium Canadian companies.

The protection of workers through labour regulation is clearly at risk in the MAI. In fact, the only mention of labour rights is in the preamble and is unenforceable. Efforts to have the International Labour Organization "core" standards made binding have been resisted because they conflict with the idiosyncrasies of national labour standards. Several countries, though not Canada, have supported the idea of a binding provision on not lowering domestic standards. The majority, however, does not support any binding measures either within the agreement or in any so-called "side agreement" which might be reached. When faced with the high enforcement standards of MAI investment protection measures, non-binding labour standards leave workers, in the longer term, at the mercy of jurisdictions competing for investment.

The Impact on Municipal Governments

Municipal authorities, like provincial governments, are "sub-national" governments and as such would be covered by the MAI. Municipal governments have far fewer powers than senior levels of government. Nonetheless, they still pass by-laws and make regulations that have a major impact on the daily lives of citizens.

In Canada, the right of municipalities to establish zoning by-laws and amend them when circumstances change has always been maintained when challenged by those seeking compensation for expropriation. Under current Canadian law there is no right to compensation due to changes in land-use regulation. The MAI's broad definition of expropriation signals there is high risk that municipalities' authority to make zoning laws could be successfully challenged.

The "standstill" and "rollback" provisions of the

MAI might easily be applied to many local "state monopolies." For example, if a municipality decided to privatize its transit system and later decided it wished to re-establish a public system, the MAI would make it extremely difficult. The agreement commits all governments to a "ratcheting" down of any non-trade-liberalizing measures. That would prevent any local government from establishing a new monopoly.

If a local government decided to privatize a service such as garbage collection and wished to show preference to local contractors or to a buy-out plan by its employees, the MAI could be used to prevent such a measure. The agreement calls for the application of the national treatment provisions to "all kinds of privatizations, irrespective of the method of privatization." [26] Unless such measures are reserved by Canada, foreign investors would have equal access at all stages of privatization.

One of the most important and most highly utilized economic tool of municipalities is their purchases of goods and services. These purchases range from the construction of roads and sidewalks, to the purchase of police cars and fire trucks. Municipalities and school boards purchase supplies and services. Most municipal governments engage in preferential purchasing by which local businesses are favoured in an effort to stimulate, and provide stability to, the local economy. All of these practices would be open to challenges from foreign suppliers who would not even be required to have an office in Canada, let alone a presence in the community in question. There could be no enforceable performance requirements attached to any contract for goods or services. Even if a municipality earmarked an incentive for small business, under the MAI these incentives must be offered on a "non-discriminatory" basis to foreign companies. The impact on local economies could be considerable.

Investment incentives would be subject to national treatment under the MAI, making it extremely difficult for local governments to encourage local small and medium investors to invest in the community. Enterprises are defined as including government-owned, for-profit, and non-profit entities. Municipalities could therefore be prevented from pursuing policies favouring non-profit groups. Many local governments use such measures to create jobs and control costs of services. A foreign investor could even demand equal treatment if a municipality provided a grant, subsidy, or any non-tax advantage (such as free land) to a local non-profit recreational group.

There are many other non-economic measures routinely implemented by municipal councils that would be at risk under the MAI. As described above, the expropriation measures could make the declaration of heritage sites prohibitively expensive.

Local governments would find it difficult to impose environmental regulations on businesses if the MAI becomes law. There is no exception with respect to environmental regulations in the MAI. If a civic government took action – for example, to shut down a local filling station whose gasoline storage tank was leaking into the local water supply – the civic government might be exposed to liability for compensation. In Mexico, under the less demanding expropriation terms of NAFTA, the refusal of a local government to license a highly polluting waste facility triggered a $50 million claim by the company. [27]

In Mission BC, the municipal council raises money for arts and cultural groups by harvesting trees from a ten thousand hectare forest, most of which it leases from the province. The provincial tree farm license that Mission holds was provided on favourable terms because of the city's sustainable logging practices. There are at least nine other community forest operations in BC, and forty municipalities have lined up for three pilot projects planned by the provincial government under its Jobs and Timber Accord. Such projects may violate the principle of non-

discrimination in the MAI, and foreign investors could demand equality of treatment and equal access to those leases when they came up for renewal. If a foreign-based forest company succeeded in getting one of the leases, it could use the MAI's prohibition on performance requirements to avoid maintaining the logging methods practiced by the municipality.

Vancouver's city council in the past changed the city's charter to allow it to impose a special levy for large buildings in the city's south downtown, the proceeds from which went into a fund to help finance park space, child care and other public amenities. Such a policy could be prohibited under the MAI's ban on performance requirements. The down-zoning of areas to prevent previously permitted kinds of development, such as that imposed on the north shore of False Creek some years ago, could also be challenged as expropriation.

Overall, municipal governments will be particularly vulnerable to the "chilling" effect of the MAI because most lack the financial clout and the professional expertise in the area of international investment law to deal with investor claims and threats. The likely outcome is that local governments would choose to modify their policies rather than face the high compensation awards that panels might assess.

Conclusion

Given that Canadians and their communities give up so much sovereignty, so much of their ability to make laws and regulations to govern the activity of large corporations, what is it that we get in return? The promises made for the MAI are usually very general in nature with proponents referring to the benefits from increased foreign investment. However, there is no protection from bidding wars between countries trying to attract foreign investment. Even if we get more foreign investment, we are expressly prohibited by the terms of the agreement from making any attempt through our governments to ensure that we will benefit from it.

It is clear that what we usually expect from investment – jobs, strengthened communities, responsible use of natural resources – are all explicitly identified in the MAI as things that investors don't have to provide. Moreover, the record of foreign investment resulting from the FTA and NAFTA shows a worsening situation. According to Simon Fraser University economist Marjorie Griffin Cohen, these agreements have encouraged an outflow of investment. In 1993, that outflow was 3 per cent of total business investment in Canada, but since NAFTA has steadily increased to 14 per cent in 1997. [28]

The assumption underlying the MAI is that foreign investment necessarily leads to increased productive capability, more jobs and a higher national income. But none of these things have resulted from NAFTA's relaxation of investment rules. Canadian investors taking advantage of liberalized trade invest far more outside Canada than foreign investors invest in Canada. The net outflow of capital in 1996 was $11 billion. [29]

The MAI is about capital investment and the rules by which it takes place. It covers not just private investment, but even sets rules for many forms of public investment. The potential far-reaching effects of the MAI are rooted in the importance of investment to the kind of society we have. Today, when government is still involved in so many activities, it is hard to imagine just how dominant corporations were at the turn of the century. Every aspect of an individual's life was tied to the decisions of private companies. The MAI charts a course back to those days of unfettered corporate power.

The importance of regulating investment is demonstrated by the hundreds of laws passed by governments to ensure that investment serves a broad public purpose, not just the narrow interests

of shareholders. Out of this careful regulation of investment have come industrial policies, job creation strategies, urban planning, protection of the environment, laws insuring that employees are treated fairly, and corporate taxes to pay for (among other things) educating workers and ensuring their health. The MAI threatens all such policies.

The MAI may well be "the constitution of a single world economy," but it is an extremely unbalanced constitution. It enshrines the rights and interests of just one sector of society – corporate investors – to the exclusion of the others whose interests will be affected. In short, the MAI is a constitutional bill of rights for the thousands of transnational corporations that will use this agreement to run the world economy in their interests. Democratically elected governments, which should represent the interests of citizens, will sign away their responsibility to do so if they sign the MAI.

Appendix: Key Terms and Concepts of the MAI

In the world of liberalized international trade and investment agreements, there are a number of key concepts and principles which define their scope and power. Only by understanding these concepts and principles can Canadian citizens concerned about their economic well-being, social programs and democratic institutions fully appreciate the potential impacts of the MAI.

Underlying the MAI is the ideology of investment liberalization. The terms *liberal* and *liberalization* are often confusing because "liberal" has been used to mean moderate, and even progressive. But in the world of trade and investment, "liberalization" means freedom from all government regulation. Neo-liberalism of this kind argues that if the market is left alone to function without any interference, then everyone will be better off.

This view has its roots in classical liberal theory, which referred to the "invisible hand" of the market place that shaped the exchanges between hundreds of thousands of individual entrepreneurs. That idealized competitive marketplace, however, has disappeared completely. The so-called "invisible hand" of the market place has long been overshadowed by the market power of large corporations. Today, 40,000 transnational corporations (TNCs) dominate the world-wide allocation of resources. The 200 largest control 28.3 per cent of the world's GDP; of the 100 largest economies, 51 are corporations. [30]

National Treatment

As with the FTA and NAFTA, the MAI applies the principle of "national treatment" to corporations. Simply put, corporations of all countries signing the MAI will be treated the same as Canadian corporations. The agreement states "Each Contracting Party shall accord to investors of another contracting party and to their investments, treatment no less favourable than the treatment it accords to its own investors and their investments." [31] Treating foreign corporations in the same ways as Canadian ones may sound fair at first blush. However, the kind of "equality" contained in the MAI goes beyond formal equality to effective equality. Discrimination in the agreement includes both *de jure* (formally discriminatory) and *de facto* (discriminatory in effect) which means if it can be proved that a measure has the effect of harming a foreign investment even if that harm was incidental or unintended, it could be challenged.

While the national treatment provision means that Canadian governments cannot treat foreign firms less favourably than domestic ones, there is nothing in the MAI that says foreign firms cannot be treated more favourably. In short, a government might set conditions for Canadian firms – such as requiring them to use local suppliers – but it could not apply such conditions to foreign ones.

Unlike NAFTA, the MAI's provisions for national treatment also apply to "investment incentives." Any incentive offered to a domestic "enterprise" (defined as government-owned, non-profit, and for-profit) would have to be made available on an equal basis to foreign firms. A foreign company could also challenge an incentive even if it was non-discriminatory if it could claim that the incentive was having "a distorting effect on capital flows." [32] In other words, if an incentive encouraged investment in a particular geographic area in need of economic development, it could be challenged.

The effect of national treatment and most favoured nation also means that governments would be prohibited from putting any restrictions on corporations from countries which violate human rights, or corporations which themselves have bad records.

Most Favoured Nation

Related to national treatment is the "most favoured nation" (MFN) principle, which requires signatories to give to all other signatories the most favourable treatment extended to any other trading partner. MFN will apply to all investors of the OECD countries that sign the MAI. It guarantees their equal treatment and access to Canada regardless of their record on human rights, environmental protection, or labour standards.

Whereas NAFTA simply required that a foreign corporation be given the best treatment provided in the province in question, the MAI goes further. While the issue remains unresolved, some parties argue that foreign investors be given the best treatment available anywhere in Canada. If this occurred, it would mean that the policies of one province - the one with the most liberalized policies and regulations - could set the standard for all the rest.

Performance Requirements

Governments have for decades obtained agreements from corporations to create a certain number of local jobs or other benefits for the local community in exchange for gaining access to publicly-owned resources. In the arcane language of trade and investment agreements, these conditions are called performance requirements. These include such things as domestic content, local hiring, employing Canadians as senior executives and board members, transferring technology, and exporting a minimum level of products. These requirements can be seen as the responsibilities of corporate citizens – the flip side of the rights of "investors."

The MAI eliminates virtually all performance requirements or standards. It includes a list of twelve categories of banned requirements. Significantly, the prohibition of performance requirements applies to all investors, including those from Canada and non-MAI countries.

The MAI contains many of the same restrictions on performance requirements as the NAFTA but extends that list considerably. The listed restrictions are also extended in their application to "the establishment, acquisition, expansion, management, operation or conduct of an investment." The MAI's provisions are retroactive. Chapter IV, Article 6 states: "This Agreement shall apply to investments made prior to its entry into force." [33] Even a contract entered into years before the agreement was signed could be challenged if any of its terms were inconsistent with the MAI.

The prohibition of performance requirements applies to all investors regardless of their origin, that is whether or not they are foreign, domestic and irrespective of whether they are signatories to the MAI. As indicated above, performance requirements are important tools used by the government of BC to lever jobs and other benefits from investors for British Columbians. The MAI, by extending NAFTA's restrictions, would eliminate many of these development tools and guarantee investors fewer constraints and obligations to the citizens in the communities where they operate.

Investors

A natural person or a "legal" person – that is, an entity legally organized to do business. In the MAI this includes for-profit, non-profit and government owned enterprises. In practical terms an "investor" will usually be a large shareholder or corporation and has rights and status in the MAI equal to that of nations, including the right to sue governments directly.

Investment

One of the features which makes the MAI such a powerful tool for corporations is the extremely broad definition of investment. As with the list of what constitutes a performance requirement, the MAI is much broader than NAFTA. Among the extensive list of items covered under the definition of investment (In Chapter II - Scope and Application) are "claims to money and claims to performance," which means the agreement would apply to simple commercial transactions that have not in the past been considered investments because there is no commitment of capital within the country's territory. [34]

Investment includes transactions that are normally understood as trade or the simple ownership of property, foreign direct investment and portfolio investment. The MAI encompasses every kind of asset owned or controlled, directly or indirectly, by an investor.

It would also apply to "rights conferred pursuant to law or contract such as concessions, licenses, authorizations, and permits," [35] and "rights to search for, cultivate, extract or exploit natural resources." [36] In other words, it could give foreign investors the "right" of access to fish and forest resources in BC

The MAI's definition of investment also includes "any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges." [37] It would therefore apply to all speculative investments including those types which have caused currency chaos in Mexico and the Asian countries.

The definition of investment and investor is extremely broad. Anyone having a contractual relationship with an investor in Canada would automatically be given investor rights. As well, the term "enterprise" is given a similarly broad definition to include for-profit, non-profit and government-owned entities, placing currently secure public institutions under the provisions of the MAI. [38]

Investment Protection and Expropriation

Protection of investment is the core of the MAI and the agreement goes a long way to guarantee protection for investors at the expense of every other interest in society. For decades government regulation has been a normal cost of doing business, a risk of operating in complex societies with changing needs and changing attitudes. The MAI aims to change that permanently, declaring on behalf of corporations that they are no longer willing to accept government regulation - that is, the obligations that accompany rights - as a normal part of doing business.

The investment protection provisions of the MAI go far beyond existing protection for investors and exceed the requirements for "non-discrimination." It should be noted that investors already have considerable protection in Canadian law. However, the MAI's protective measures provide an unprecedented level of protection.

Expropriation is not defined in the MAI and is therefore by default defined by case law relating to international disputes and by the very large volume of US law. By not explicitly defining the term, the MAI negotiators have given an extremely elastic meaning to expropriation just as they have for investment. They broaden it further in the language they use: "A Contracting Party shall not expropriate or nationalize directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect" [39]

The combination of broad definitions for both investment and expropriation has very serious implications for all levels of government in Canada. Expropriation in the area of international disputes has a very different history and meaning

than it does in Canadian case law. Under domestic Canadian law, there is a continuum of property interests that enjoy different levels of protection because the interests of the investor are by law balanced against the various interests of the community. In general the courts have decided that a property owner must not only prove that their property has been taken but also that the authority doing the taking has benefited. The owners of a property declared a heritage site, for example, are not entitled to any extraordinary compensation even though they are restricted in what they can do with the property.

International definitions of expropriation, like that in US constitutional law, are based on the doctrine of "regulatory taking" whereby governments are prohibited from taking private property "without adequate compensation" and valid public purpose. The MAI expropriation clause includes the phrase "or measures of equivalent effect" [40] so that compensation would have to be paid not only for property taken directly, but also indirectly if it decreased its potential value. Internationally, tribunals have consistently interpreted expropriation very broadly.

Over time, the internationally accepted definition of expropriation has become broader, to the point where it now is tantamount to simple deprivation. When determining compensation the "fair market value" rule applies, which effectively means the price is determined as if someone were buying a going concern, including future profitability. This will be the basis for US-based Ethyl Corporation's case. Ethyl is suing the Canadian government for $350 million based on future expectations of sales of, and profits from, Ethyl's gasoline additive MMT, which the government banned as a health hazard.

It is worth noting that the provisions in the MAI regarding expropriation in effect contradict what the federal and provincial governments negotiated in the 1980s regarding the Canadian constitution. Property rights were deliberately excluded because they were seen to contradict the Canadian tradition of making property rights subordinate to the public good. The MAI, with its near total emphasis on private property rights and closed-door state dispute system, could ultimately have a far greater impact than if property rights had been enshrined in Canada's constitution.

Reservations, Standstill and Rollback

In order for there to be any areas of government policy that can still have a significant regulatory impact on investment, there must be explicit exceptions or reservations to agreements like NAFTA and the MAI. In other words, the agreements apply to everything unless specifically *reserved* (for a particular country) or generally *excepted* (for specific sectors in all countries). Under NAFTA there are a number of general exceptions. These include local government measures, government procurement, and performance requirements to meet health, safety, and environmental requirements. None of these general exceptions exist in the draft MAI. The only general exceptions are for national security, public order, and commitments to international peace and security. [41]

Any exclusions to the agreement, beyond these three areas, must be achieved through what is called "country specific reservations." Currently, it is unclear what reservations Canada is seeking. The OECD secretariat has nevertheless made it clear that these reservations will be kept to a minimum and will be very narrow. Unlike NAFTA, there is no indication in the MAI by what rules reservations will be made. In NAFTA, "measures" to be reserved were broadly defined as "laws, regulations, procedures, requirements or practices", but in the MAI there is no definition of measures.

It is clear, however, that the MAI will use a "list-it-or-lose-it" approach to reservations. That is, governments will only be able to reserve measures

that otherwise violate the MAI by naming them in their list of reservations. All "non-conforming measures" that are not listed will be subject to the full force of MAI provisions. Moreover, under this specific listing approach, governments will lose the ability to freely adopt new measures in the future which may violate the MAI.

The effectiveness of reservations for things like culture and health care are critically undermined by two aspects of the MAI, one general and one specific. First, reservations are interpreted very narrowly in international treaty law. In addition, the MAI contains "standstill" and "rollback" clauses, which provide for the gradual elimination of these reservations through subsequent negotiations. Reservations are explicit violations of treates, and have been interpreted in the narrowest possible terms by dispute settlement tribunals. Reservations must therefore be written carefully. Negotiators may think they have made a broad reservation only to find, upon interpretation, that it is quite limited in scope.

For example, Canada is proposing a sectoral reservation regarding "the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care." [42] Unfortunately, there is no accepted definition of a social service in international treaty law. The US government's position on NAFTA declared that social services delivered by commercial providers were not social services at all, but rather "commercial services." If such a definition prevailed in subsequent treaty interpretation, it would make Canada's reservation for health, public education, and child care ineffective.

Even if Canada manages to achieve broad reservations on culture and social services, the MAI contains standstill and rollback provisions. Standstill is defined as "the prohibition of new or more restrictive exceptions." [43] In other words, a reservation protects only existing services and explicitly prohibits a government from expanding the service in the future. The rollback provision is intended to further liberalize a country's laws and regulations after the MAI is signed. The agreement states "rollback is the liberalization process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place." [44] Non-conforming measures will include all reservations.

The standstill and rollback provisionsof the MAI, at best, provide only temporary protection for reservations. The reservation list provides foreign corporations and governments with what has been dubbed a "hit-list": a convenient catalogue of that can be immediately targeted for attack. By reserving any measure, Candada will draw attention to it and acknowledge that it violates the agreement.

The rollback provision means taxation policies might be considered expropriation. The MAI "carves in taxation" [45] so it can be defined as expropriation after the agreement is signed. In the agreement, taxation is specifically identified as "creeping expropriation," [46] which means that any new tax measure "unreasonably" affecting corporations, or even existing ones that conflict with measures in other countries, could be challenged.

The Dispute Settlement Process

All multilateral agreements have some form of dispute settlement mechanism. Generally, that process requires a corporation with a complaint to persuade its government to launch a challenge on its behalf. NAFTA broke with that tradition on certain investment claims and introduced an investor-to-state dispute settlement process which allows corporations to directly challenge government laws and regulations.

The MAI entrenches and builds upon the NAFTA model. Any large corporation with sufficient

resources can sue democratically-elected governments. The broad definition of investment demonstrates just how easy this would be.

The section of the MAI dealing with the dispute settlement process explains what it would take to launch a claim for compensation, and indicates just how powerful a tool this would be for corporations. The negotiators understand that even "a loss of opportunity to profit from a planned investment" [47] would be sufficient to initiate legal action.

The investor-to-state dispute process provides foreign corporations with a number of options: use of domestic courts, international panels, or the International Center for the Settlement of Investment Disputes in Washington. In any of these fora, the case would be decided strictly on the basis of the agreement's provisions. Domestic law would not enter into the proceedings unless it was consistent with the MAI. Panels would meet in secret, and only their final decisions would be made public. Panels would have the power to award compensation damages, which would be binding.

The extent to which all interests other than those of the investor are excluded in this process are unprecedented. Canadian law already provides for high standards of investment protection and compensation in the event of an expropriation. But these court cases are held in public with full public disclosure, other interested parties can intervene, there is a right of appeal, and citizens, through their legislatures, have the ultimate option of creating new laws in the public interest as circumstances change. None of these things prevail under the MAI. Even the option of passing new laws is prohibited by the roll-back provision which allows for the "ratcheting" effect in one direction only, toward greater liberalization.

Locked in for a Generation

The effect of trade and investment treaties, agreements, and forums such as the FTA, NAFTA, APEC (Asian Pacific Economic Co-operation), the WTO, and the MAI is to permanently constrain the abilities of democratically elected governments to regulate the behaviour of corporations by implementing social and economic policies. With its retrictions on performance requirements and its broad definitions of expropriation and investement, the MAI goes much further than any other multilateral agreement.

It is also unprecedented in the conditions it places on withdrawal. Unlike the FTA and NAFTA, which Canada can cancel with six month's notice, the MAI is locked in place for twenty years. A signatory cannot even give notice of withdrawal until five years after signing on. The agreement states that even after notice is given, its provisions "shall continue to apply for a period of fifteen years." [48]

Notes

1. OECD, *Draft of the Multilateral Agreement on Investment, Consolidated Text and Commentary*, Paris, May 13, 1997, II - Scope and Application - Geographical Scope of Application, p.12. (All future references cite *MAI Text* or *MAI Commentary*.)
2. Bill Dymond, Chief Negotiator for Canada on the MAI*, Presentation to the Sub-Committee on International Trade, Trade Disputes and Investment*, Ottawa, Nov 5, 1997.
3. *List of Recommendations, Canada and the Multilateral Agreement on Investment, First report of the Sub-Committee on International Trade, Trade Disputes and Investment*, Dec. 1997, p.9.
4. OECD, *MAI: The Multilateral Agreement on Investment*, Policy Brief, date unknown.
5. Hansard, *Proceedings of the P.E.I. Legislature*, Dec 18, 1997.
6. *MAI Commentary*, p.101.
7. *MAI Text*, p.34.
8. *MAI Text*, p.18.
9. Canadian Environmental Law Association*, The MAI and the Environment: Context and Concerns*, prepared for the House of Commons Sub-Committee on International Trade, Trade Disputes, and Investment, Nov 24, 1997, by Michelle Swenarchuk, Ottawa, Nov 24, 1997.
10. *MAI Text*, p.9.
11. *MAI Text*, p.48.
12. *MAI Text*, p.11.
13. *MAI Commentary*, p.101.
14. *MAI Text*, p.11.
15. Cynthia Callard, "How the MAI would save tobacco firms," *Toronto Star*, Dec 30, 1997.
16. *MAI Text*, p.14.
17. Garry Neil, *The MAI and Canada's Cultural Sector*, (Ottawa: Canadian Conference on the Arts), October, 1997.
18. *Toronto Star*, October 31, 1997.
19. *Journal of Commerce*, January 16, 1998.
20. *MAI Text*, p.11.
21. *MAI Commentary*, p.101.
22. BC Government, *British Columbia Jobs and Timber Accord*, Victoria, 1997.
23. Tony Clarke and Maude Barlow, *The MAI* (Toronto: Stoddart, 1997), p.94.
24. Sierra Club, *Presentation to the House of Commons Sub-Committee on International Trade,Trade Disputes and Investment*, Hearings on the MAI Panel on Corporate, Consumer and Social Implications, Ottawa, November 1997, p.7.

25. Marjorie Griffin Cohen, *Presentation to the House of Commons Sub-Committee on International Trade, Trade Disputes and Investment*, Hearings on the MAI Panel on Corporate, Consumer and Social Implications, Ottawa, Nov 26, 1997, p.4.
26. *MAI Text*, p.24.
27. Barry Appleton, *Municipalities and the MAI*, Paper based on an address to the Annual Civic Night Dinner for the Simcoe County Kiwanis Club, January 19, 1998, p.6.
28. Cohen, *op. cit*.
29. *Ibid.*
30. Sarah Anderson and John Cavanagh, *The Top 200: The Rise of Global Corporate Power*, (Washington, D.C., Institute for Policy Studies, 1996).
31. *MAI Text*, p.14.
32. *Ibid*, p.45.
33. *Ibid*, p.53.
34. *Ibid*, p.11.
35. *Ibid*., vii.
36. *MAI Commentary*, p.101.
37. *MAI Text*, p.11.
38. *Ibid*, p.11.
39. *Ibid*, p.50.
40. *Ibid*, p.50.
41. *Ibid*, p.68.
42. Canada, *Draft Reservations to the MAI*, Feb 1997, p.45.
43. *MAI Commentary*, p.151.
44. *Ibid*, p.153.
45. *Ibid*, p.146.
46. *MAI Text*, p.79.
47. *MAI Commentary*, p.129.
48. *MAI Text*, p.94.