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The MAI in Canada: Economic De-regulation Round Four

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Prepared by:

Michelle Swenarchuk
Canadian Environmental Law Association

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The MAI IN CANADA: ECONOMIC DE-REGULATION, ROUND FOUR

Canada is now far down the road of de-regulated trade and investment, having signed three trade agreements with major consequences for this country: The Canada-US agreement, the NAFTA, and the 1994 GATT/WTO agreements. We also have free trade agreements with Chile and Israel, and have signed or are negotiating bilateral investment agreements with 59 countries.[1] Given that approximately two-thirds of foreign direct investment in Canada comes from the US, the most significant investment "treaty" for Canada is the investment chapter of the NAFTA (Chapter 11), the model for the MAI.

However, as the government of British Columbia has noted, Canada does not appear to have benefited from the NAFTA investment chapter. US investment in Canada has steadily declined from 1985, when Canada's proportion of US and Canada direct foreign investment stock was 25.9 percent to 1996, when it was 16.7 percent.[2] Given this NAFTA experience, it is reasonable to question whether further de-regulation of investment through the MAI will provide economic benefits to Canada.

The Current Environmental Protection Context in Canada

The era of de-regulation on trade and investment has been a decade of systematic weakening of green laws; elimination of public rights of participation in environmental decision-making; increasing unwillingness of governments to accept responsibility for environmental protection; and radical cuts to environmental and natural resource ministries budgets.[3] Further, downloading of responsibilities from the federal to provincial governments and in Ontario, former environmental leader of the country, from the province to municipalities, is occurring with no certainty that the receiving jurisdiction will have the will or resources to act. The era of de-regulated trade has been, and remains, the era of environmental de-regulation.

This is not a coincidence. The trade agreements have targeted environmental protection laws and policies by constraining government powers to manage resources and set standards. The constraints are in the FTA/NAFTA limitations on managing the levels of export of resources;

Personal communication from N. Lynn McDonald, Investment Trade Policy Division, Department of Foreign Affairs, December 16, 1997.

Government of British Columbia Submission to the Sub-committee on International Trade, Trade Disputes and Investment, November 26, 1997, quoting World Investment Report: Transitional Corporations, Market Structure and Competition Policy, United Nations, 1997, p.313.

For a review of the staggering pace of removal of environmental laws in Ontario, see Environmental Commissioner of Ontario, Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making, Toronto, April 1997. At the federal level, the 1993 Red Book commitments to improve the Canadian Environmental Protection Act and to adopt an Endangered Species Act have not been kept.

and the NAFTA and GATT 1994 chapters on Technical Barriers to Trade and Sanitary and Phytosanitary Standards. The agreements' designation of international standard setters, including the International Standardization Organization and Codex Alimentarius Commission, further undermine domestic standards. FTA and GATT trade dispute panel decisions on environmental and health issues have all favoured trade over the domestic standards, requiring the standards to be changed or eliminated.

Finally, the "expropriation" clause of the investment chapter of the NAFTA has provided a basis for US-based Ethyl Corporation to sue the Canadian government for $350 million Canadian for its effective ban on MMT, a neuro-toxic gasoline additive.

Environmental elements of the MAI

The MAI undoubtedly further constrains Canadian governments from exercising powers to benefit Canadian communities and the environment.

National treatment

It includes very broad definitions of investor and investment and extends national treatment and most favoured nation treatment to foreign investors.[4] These provisions not only eliminate arbitrary interference with foreign investors' rights, but in the view of the BC government, also restrict "transparent and non-discriminatory efforts to negotiate and enforce local and national economic benefits."[5] The requirement for national treatment for investment incentives (subsidies)appears to require payment of the same subsidies to large foreign corporations as may now be provided to small, local or non-profit community-based health, social service, educators, and the health and medicare sector overall.

Performance requirements

The MAI includes extensive prohibitions against performance requirements for linking approvals or providing subsidies or other advantages to investors regardless whether investors are foreign or domestic. It exceeds the NAFTA provisions in the types that are prohibited and the breadth of scope and application.

These provisions will particularly affect provincial (and federal) rights to require job creation and other benefits for local communities from foreign investors' exploitation of natural resources.

"Expropriation" rights

A most dangerous provision in the MAI is the NAFTA-style "expropriation" clause which

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Investors include human and corporate persons, non-profit and for-profit private and public organizations. Investment covers "<u>every</u>" kind of property, claims to money or performance, contracts, concessions, licenses, permits, etc.

Ibid., p.3.

provides to investors an unconditional right to compensation for expropriation of an investment or for "measures having equivalent effect." It goes beyond national treatment since even measures applied to both foreign and domestic investors could give rise to a claim for compensation by the foreign one. It extends "expropriation" claims beyond what is compensable in Canadian domestic law[6] with no balancing of the public interest in resource conservation, human health and safety, or any other purpose, in determining whether compensable is payable and to what extent.

The BC government identified the issue of native land claim settlements which may require return of land or other resources (fish, forest) now subject to non-native use (investment). Foreign investors could claim full compensation, no matter how tenuous or preliminary their "investment."

This provides an excellent example of the problems of international harmonization without regard to historical, social, or environmental differences. Aboriginal rights are not issues for public policy decisions in European OECD countries, but raise many live and pressing issues in Canada, and other countries with extant aboriginal populations. The federal government has attempted to exempt its aboriginal obligations from the purview of the MAI, but whether that exemption will survive the negotiation process is unknown. No protection for provincial obligations is proposed.

Like NAFTA, the MAI provides for expropriation through private tribunals without public scrutiny, appeals, or interventions. The secrecy and broad powers of trade dispute panels are anti-democratic as the capacity of governments to legislate is squelched. The investment protection expropriation panels add the additional burden that governments must pay huge amounts to act in accordance with domestic public interest policies or even, constitutional law (ie. constitutional aboriginal rights). The "chilling effect" of adding investor compensation payments to every sector of public interest legislation is obviously considerable.

Possible protections

The October 1997 draft text of the MAI reveals that the negotiators are discussing the inclusion of wording to discourage the lowering of domestic health, safety, and environmental standards in order to attract investment. It appears unlikely that the wording, if included at all, will be any stronger than NAFTA Article 1114. The NAFTA wording merely indicates that countries "should not waive or derogate from" standards; it does not prohibit the practice and certainly has not prevented the weakening of standards in Canada since NAFTA was signed. Similarly, such wording in the MAI will not offer much comfort to concerned environmentalists and health advocates.

See discussion in the author's submission on the MAI to the House of Commons Sub-Committee on International Trade, Trade Disputes and Investment, "The Multilateral Agreement on Investment and Environment: Context and Concerns," November 24, 1997, CELA.

The federal government has filed "reservations" to exempt certain policies and sectors from the MAI, but environmental laws are not among them. Nor do the federal reservations refer to provincial measures. If the MAI is to cover provincial measures, as foreign national governments apparently assume but British Columbia disputes, considerably expanded reservations would be required to protect provincial measures in all sectors of provincial jurisdiction. Subnational non-conforming measures were exempted from NAFTA's national treatment and performance requirement terms by an exchange of letters between governments. No such reservations have been introduced into the MAI negotiations.

The Canadian Environmental Law Association has proposed a substantial "carve-out" of environmental protection and resource conservation measures.

Expected impacts

If adopted as currently designed, the MAI will provide European and Japanese corporations with rights similar to those US corporations obtained in Canada under NAFTA. It will also allow them to pressure many Southern countries into signing the MAI.

Meanwhile, the Canadian government is quietly signing similar agreements all over the world, entrenching a lack of balance between rights of corporate investors and the rights of citizens to have governments respond to local economic, social, and environmental needs. Critics of investment agreements need to focus on a broader landscape than just the MAI.

Michelle Swenarchuk
Executive Director
Canadian Environmental Law Association

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