THE MAI AS A POTENTIAL INSTRUMENT OF POSITIVE REGULATION

BY ANDREW JACKSON

It is abundantly clear that the "new global economy" is one increasingly dominated by the activities of transnational corporations, and that direct investment by such corporations has been a potent driver of global economic integration over the past decade. In this context, it is hard to dispute the abstract argument that the world needs some institutional framework to regulate investment issues, given that they fall largely outside the framework of the World Trade Organization.

While the scope of carve-outs, exemptions, and reservations will almost certainly be inadequate to undo the damage caused by the central guiding principle of "non-discrimination", the point that we need international rules should not be rejected by MAI opponents.

Critics of the draft MAI point out that, as drafted, it is overwhelmingly an instrument of deregulation, intended to rein in the ability of governments to "discriminate" against foreign investors and corporations and to "expropriate" their assets. Through its dispute settlement procedures, the MAI would allow corporations and investors to directly challenge government actions and policies that run counter to the central MAI principle of national treatment. The draft agreement indeed amounts, as alleged, to a "charter of rights" for transnationals, which is consciously designed to limit the role of the state as an instrument of economic and social regulation.

As critics of the MAI have pointed out, the draft agreement as it now stands would jeopardize a country's ability to maintain not-for-profit public and social services, to protect culture and other sensitive sectors, and to regulate in the public interest in areas such as the environment. The poorly drafted expropriation clause in the deal and the very wide definition of investment potentially threaten a host of legitimate regulatory measures.

In this context, it is tempting to oppose the MAI by arguing that it intrudes too deeply upon national sovereignty. However, governments, including the Canadian government, will argue that sensitive sectors and policies can be protected by better language, by exemptions, and by country specific reservations, and that the loss of sovereignty is no greater than that implicit in any other agreement to limit what we can do in return for similar obligations by others. While the scope of carve-outs, exemptions, and reservations will almost certainly be inadequate to undo the damage caused by the central guiding principle of "non-discrimination", the point that we need international rules should not be rejected by MAI opponents.

A deeper question is whether an international investment agreement should be exclusively an instrument of deregulation, or whether it could and should be an instrument for the international regulation of hyper-mobile international capital. It is arguably worth pooling sovereignty if this can be used to rein in transnational corporations, which are manifestly able to play governments off against one another and to surmount national controls.

There is absolutely no reason in logic why a MAI should not oblige member countries to respect core labour rights, in recognition of the fact that there are socially destructive downward pressures flowing from globalization.

In the past, the United Nations and other agencies have prompted discussion of what an international regulation agenda might look like by drafting codes of conduct for multinational—now transnational—corporations. Typically, such codes specify "good corporate behaviour" in areas such as labour relations, environmental practices, and taxation. The existing OECD Guidelines for Multinational Corporations speak to all of these areas, though they are non-binding.

The idea of using the MAI as a positive instrument of regulation has largely been ruled out from the outset. For example, one might imagine that a MAI could and should specify minimum levels and standards of corporate taxation, so that transnationals are limited in their ability to allocate profits to lower-tax jurisdictions. However, tax issues have been carved out completely, and governments, which are fully aware of downward competitive pressures on national tax systems, seem to have barely considered the issue. That said, governments are being forced to confront the need for positive standards in at least two areas—labour and the environment.

The Trade Union Advisory Committee to the OECD (TUAC) has argued that the MAI should incorporate provisions requiring member countries to respect core labour rights, as set out in the key conventions of the International Labour Organization, and should prohibit states from lowering domestic labour standards or from violating core labour rights in order to attract investment. Such a provision would amount to the imposition of a minimum obligation on governments, in recognition of the fact that corporations can and do play jurisdictions off against one another in order to create a "hospitable" climate for mobile investors.

This proposal has won some support from countries such as France and the United Kingdom, and is being actively considered by the Canadian government. The political reality in some countries is such as to require a response to the labour agenda. There is absolutely no reason in logic why a MAI should not oblige member countries to respect core labour rights, in recognition of the fact that there are socially destructive down-

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ward pressures flowing from globalization.

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A parallel provision has been proposed to prohibit countries from relaxing environmental standards in order to attract investment, such as exists in the NAFTA. However, most environmental organizations rightly see the practical impact of such a clause as very limited, and arguably counterproductive. Given that much environmental regulation is site specific, the existence of such a clause might deter governments from setting high standards in the first place.

The broader difficulty is that, in the environmental area, there is no agreed set of core or minimum standards and, even if it existed, it would be regarded by many environmentalists as much weaker than desirable domestic regulations. The core concern of the environmental movement is that the ability of states to regulate not be undercut by the expropriation clauses of the MAI, which could be used by corporations to challenge domestic measures which reduce anticipated profits. This will require, at the minimum, a strongly worded carve-out of environmental regulation from measures subject to challenge under the MAI, and even that is highly likely to be interpreted in the narrowest possible way by dispute settlement panels.

Many critics of the MAI are quite prepared to contemplate positive international agreements rather than just defend national sovereignty in the abstract. However, the current reality is that the entire thrust of the MAI, like the WTO and trade and investment agreements like NAFTA, is deregulatory, prescribing what governments cannot do rather than specifying at least a minimum level or standard of what should be done.

In this context, the MAI should and will be opposed by those who want corporate rights balanced against by corporate responsibilities. States subject to democratic political pressures are still best placed to perform this crucially important balancing act.

Debate on the MAI should, however, be used to advance debate and discussion over international regulation of international capital. We do need new sets of rules to deal with new realities, and progressives should reflect more on how to pool sovereignty in very different kinds of international institutions.

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Walker, the Washington-based Assistant Editor of the *Guardian*, has recently described America's "retreat from internationalism": "Not since the 1930s", he says, "has the United States appeared so ready to turn inwards again, back to that isolationism which President Franklin Roosevelt said had finally been sunk at Pearl Harbor".[1]

Isolationism has long been a core element of America's political culture and, with the end of the Cold War, might resurface as a controlling value as it did in the 1920s and 1930s. Then, after WWI, Americans were determined to avoid involvement in European conflicts ever again. In 1935, FDR warned that if wars occurred in Europe or Asia, "the United States and the rest of the Americas can play but one role—through adequate defense to save ourselves from embroilment and attack". In 1937, Gallup found that three-quarters of the country favored the "Peace Amendment", which provided that unless the U.S. was actually invaded, Congress could not declare war without a nation-wide referendum. The Amendment was defeated in the House by a vote of only 209 to 188.[2] Now, once again, Americans have widely come to believe that the U.S. has few fundamental security interests at stake in the world and that much more attention should be focused on domestic problems.

Americans are deeply ambivalent about trade, particularly about the impact on jobs and income. But while globalization has raised levels of anxiety, it has also created new interests that favour liberalization.

It is true that isolationism is on the rise. But this is not the whole answer. Many political insiders feel that Americans are uninformed and uninterested about the world outside their borders, but research suggests that public opinion has not shifted so sharply towards isolationism—that while Americans are less interested in traditional military or political developments, they are deeply concerned about a wide array of global issues, such as drugs, crime, and threats to health and the environment. Polls find that public support for the United Nations, for example, is significantly greater than for Congress.[3]

There is little enthusiasm for cutting America off from world trade, but there is also profound hostility to anything that might "erode" America's sovereignty.

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