

The Draft Multilateral Agreement on Investment – some problems and issues

Board for Social Responsibility Uniting Church in Australia NSW Synod April 1998

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Summary and recommendations

The Board for Social Responsibility urges the Treaties Committee to reject the draft Multilateral Agreement on Investment as inconsistent with democratic principles and with the obligations Australia and other nations must fulfil towards their citizens and the environment under already existing international law. It is contrary to democracy for a government to be subject to penalties imposed by an external tribunal for actions taken within its own borders in the interests of its citizens. International capital markets already impose their own disciplines on nations via market mechanisms; the power of investors against nations would be inappropriately enhanced by the MAI.

The MAI is fundamentally flawed. As the negotiating text stands, it would require radical changes in public policy and legislation in Australia. It would fundamentally alter the nature of government, making government accountable to an outside tribunal rather than to the citizens of Australia. If some form of multilateral agreement on investment is necessary, then it should be a new document and should ensure that any rights granted to corporations are balanced by obligations to the nations in which they invest.

At the very least, the Australian government must negotiate radical changes in the text, so that the agreement does not render unlawful Australian public policy that controls and makes conditions on foreign investment. The Australian government must take the view that Australian public policy is to be negotiated with the Australian people, not

controlled by foreigners whose main interest is commercial, not commitment to the good of the Australian people.

The fact that the Australian Government has entered a large number of exceptions¹ shows that it recognises that the MAI is contrary to many aspects of Australian public policy. The MAI's privileging of international capital will be considered normative, leaving nations under constant pressure to change public policy to bring it into conformity with the text or to enable them to compete in a market place operating on the basis of distorted values. Australia should not acquiesce in such a situation.

The issues involved in MAI are not merely a question of current policy. The question is the extent to which the MAI will limit the ability of future governments to act in ways consistent with its human rights and environmental obligations, where these conflict with the interests of foreign investors.

The Australian Government should argue in the international forums that any multilateral agreement on investment should:

- **Require that the MAI incorporate and be subordinate to the already existing multilateral agreements on environment, health, labour, safety and human rights standards.** The MAI should create reciprocal obligations for international investors, and dispute mechanisms give standing to governments, citizens and NGOs as well as

companies. Instruments and agreements to be taken into account, should include at least the following: (a) the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child; the Convention on the Elimination of Racial Discrimination, and the Convention on the Elimination of Discrimination Against Women; (b) other established international agreements such as Rio Declaration, Agenda 21; UN Guidelines for Consumer Protection (1985); the UNCTAD Set of Multilaterally Agreed Principles for the Control of Restrictive Business Practices; the HABITAT global Plan of Action; the Kyoto Protocol on Climate Change, and (c) International Labour Organisation conventions. The clauses supporting these treaties should be legally enforceable against foreign investors.

- Provisions for compensation must make it clear that **compensation cannot be required where governments set environmental, labour, health and safety standards**, or other requirements that are in fulfilment of their obligations under international instruments.
- **Require that international investors trust the workings of the international capital markets to protect their interests.** The MAI should not further enhance the power that international investors already have, as actors in the international capital market, to discipline nations for their internal policies. No rights should be available to foreign investors to challenge governments that are not also available to citizens, non-government organisations and local business.
- **Recognise that business interests of foreign investors must be subordinate to the social and economic goals of the nation in which they invest;** ensure that the right of self-determination of any nation prevails over the rights of foreign investors; and ensure that the internal policy-making processes of the nation remain intact and are not damaged by external bodies. This will require elimination of the special investor-state dispute mechanisms, to be replaced with democratic and transparent mechanisms of investor accountability.
- **Include a code of conduct for investors** based on respect for international and local law, and particularly human rights, business ethics (including consumer rights) and ecological responsibility.

- **Protect the special role and requirements of the community (not-for-profit) sector**, and the right of government to subsidise this sector in its provision of services.

The content of the Multilateral Agreement on Trade at present fails these criteria, and should be rejected as not consistent with the human rights and interests of Australian citizens.

The MAI – a summary of its contents and stated purpose

The actual purpose and effect of the MAI is to restrict government's right to regulate foreign investments. The agreement is binding on governments, and subjects governments to external tribunals bound only by the MAI and not by any other international or national law. Governments will not be able to use the public interest as a defence.

The preamble is notable for its omission of any adequate jurisprudence. It fails to place the MAI adequately in the context of international labour, environmental and human rights law. For example, it notes that the ILO is the competent body to deal with core labour standards, but fails to indicate how the responsibilities of government under the ILO conventions are to be held in tension with the responsibilities of government under the MAI. While it notes that there are OECD guidelines for multinational corporations, it does nothing to improve the situation that these guidelines are "non binding" and "observed on a voluntary basis".

The MAI gives rights to corporations, not only to human persons. It gives individuals and corporations rights in countries to which they have no allegiance. The range of investment covered is extremely wide, covering any type of financial interest in any matter, including intellectual property rights.

The MAI ensures that nations treat foreign investors no less favourably than its own investors and other relevant bodies, in regard to any matter that affects their investment. Some parts of the MAI ensure that foreign investors are treated more favourably. Rights of foreign investors granted by MAI are justiciable in an international tribunal whose findings are binding on governments.

The MAI seems to allow investors and certain of their employees access to nations on the basis of their desire to make and administer an investment, without regard to normal immigration criteria. This reduces the onus on investors to find local

employees for executive, management and specialist positions.

The MAI makes it unlawful for a government to impose performance conditions on a foreign investor, with regard to level of exports, domestic content, purchasing of local goods and services, levels of imports, transfer of technology, location of headquarters, marketing, research and development, employment of nationals, joint ventures, or minimum level of domestic equity.

In summary, nations will not be able to impose any conditions on foreign investors, even where national laws apply conditions to local investors.

Anything that can be construed as discriminating against foreign investors compared to local investors will be unlawful. In the case of privatisation, for example, governments will be allowed to control the initial sale, but not subsequent sales of shares once the company has been privatised. For example, the Australian government will lose its right to limit foreign investment in Telstra. Management/employee buyouts is another example of unlawful practice under MAI.

Public monopolies must not discriminate in the supply of their product. This would seem to preclude them providing a subsidised service or cheaper charges to local companies while expecting TNCs to pay full charges. This limits the ability to use public monopolies to support local industry in the national interest.

While there are proposed amendments to some of the above provisions, those proposals are not part of the text and no discussion of the text can reasonably assume that they will be.

There are major sections on investment protection. These cover expropriation and compensation; protection from strife; transfer of capital, payments, earnings etc; and information transfer and data processing. On the whole, they allow companies to act entirely in their own interests, and severely limit or eliminate the right of governments to impose any obligations on foreign investments even where this would be in the national interest.

A major section is devoted to dispute settlement procedures. These provide for an external tribunal to make binding decisions on complaints against governments. The procedures exist entirely to protect the interests of investors, and do not provide for disputes in which governments have complaints against investors.

Already existing International obligations

The Charter of the United Nations includes the following

In article 1:

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace

The UN Universal Declaration of Human Rights declares

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right to equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

Everyone has duties to the community in which alone the free and full development of his personality is possible.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The UN ICESCR states in Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

That is, it is fundamental to international law that government policy is based on the will of the people and has as its first priority the protection of the interests of its own citizens. It is this obligation that gives government the right to impose conditions on foreign investors so that foreign investment serves the interests of the nation in which investment occurs. It is the people of the nation, not foreign investors, who are best able to determine the interests of their own nation.

In addition to these instruments, there have been a number of agreements that have emerged from recent UN conferences and special international meetings. The Australian Government and many other governments have committed themselves to these agreements, yet they do not seem to be taken into account in the MAI.

The MAI – comparison with other international instruments

Whereas international human rights instruments bind governments to protect the rights of citizens, the MAI binds governments to protect the rights of non-citizens, namely international corporations, at the expense of the rights of citizens. It limits the ability of governments to regulate local operations of international companies. It is not about mutual obligations. Foreign investors gain all the rights, and governments gain all the obligations.

The role of the market

The Multilateral Agreement on Investment seems to confuse the different bases for government and markets. This is particularly evident in its use of the concept of “disciplining” governments, an entirely inappropriate concept in the market context. Governments, under international law, are responsible to their citizens and their sovereignty derives from the will of citizens. International capital markets have two types of participants: those individuals and companies who want to make investments in nations other than their own, and the nations themselves that seek investment. Markets by their very nature depend on the free participation of all parties, so that contracts are determined on conditions which fulfil the needs of each of the parties to the transaction. A free market only operates where nations are free to determine what conditions they want to offer foreign investors in particular industries. The market imposes its own discipline on such conditions, since investors are free to choose to invest where conditions are most favourable. This already gives foreign investors considerable power in limiting the conditions that nations may impose. It should be left to nations to determine the extent to which they should modify their conditions on foreign investors to meet the demands of the market. The MAI reduces the freedom of nations as participants in the market, imposing on them inappropriate and unnecessary legal obligations and undermining their sovereignty and government responsibility to their own citizens.

Current Australian policy

By April 1997, Australia had submitted 29 reservations. However, it is not evident from the material available whether these reservations are matters of principle, or temporary reservations where the Australian government intends to amend local legislation and practice. The problem is that such exceptions are intended, under the MAI, to be of only a temporary nature and Australia will be under strong pressure to bring its legislation into

conformity with the MAI. The Australian Government must insist on more appropriate content for the MAI, and not rely on temporary exceptions.

Patricia Ranald, *Disciplining Governments*, UNSW Public Sector Research Centre and Evatt Foundation, 1998, provides many examples of how current Australian policy is inconsistent with the MAI. The types of policy that would be unacceptable under MAI include: limits on foreign investment in particular sectors; industry development arrangements; community service requirements on public and private corporations, such as cross-subsidies; limitation of foreign investment in some companies (e.g. Telstra); possibly government provision of services; favourable treatment for local companies in regional development; local procurement programs; indigenous rights;

Ranald also indicates that the Australian government has so far taken a very weak stand on environmental issues, has made no comment on anti-discrimination laws, and has opposed legally enforceable labour rights.

The problem is not only that there would be practical and far reaching changes in policy required to conform to the MAI. The problem is that those changes would express a totally different value system from that which has led to the present policies. In accepting the MAI, Australians would have to give up fundamental values and aspirations. The fundamental values of a nation should not be determined by business interests. International corporations operate within a narrowly focused market logic which has nothing to do with fundamental human values and relationships or the aspirations of society. This has been shown in the extensive work of the World Council of Churches on multinational corporations.

It has often been argued that markets can be used in the interests of non-material values, if that is what participants so choose. The MAI would eliminate that possibility, by ensuring that all nations are disciplined by the same, materialistic set of values.

The Treasury paper on the MAI

The Treasury's brief paper "The Multilateral Agreement on Investment" mounted on its Internet site seems totally unsatisfactory. It lacks intellectual rigour and adopts a singularly uncritical view of the MAI. It begs a number of questions. For example, it states that Australia will only sign if the MAI is in Australia's interests, but does not indicate the criteria by which that might be assessed, or the

dimensions of Australia's national interest that will be taken into account. It makes a number of assertions, about Australia's policy not being affected in areas such as environment and labour laws, but does not provide any evidence or argue any clear case for those assertions.

The Treaties Committee should test Treasury's assertions against advice from the relevant departments, such as Workplace Relations, Environment, Health and Family Services, Immigration, and so on. However, as these departments tend to advise in conformity with the wishes of their ministers, there should also be serious attention given to advice from more independent bodies such as the HREOC, the ALRC, Environmental Defenders' Offices, and so on. At an international level, what have the relevant UN bodies had to say about the MAI? For example, does the ILO agree that the MAI will not lead to erosion of workers' rights, or does it have concerns?

Evaluation

The stated purpose of the MAI is to facilitate and protect international movement of capital. Two issues need to be separated. The first is whether there needs to be some sort of multilateral agreement on investment. That question cannot be answered in the abstract. Rather there needs to be a diagnosis of the problems of both investors and the nations in which they invest, to diagnose problems which exist and which an international agreement might solve. Multinational corporations have strongly rejected any proposals to require them to conform to a code of conduct. They show hypocrisy in seeking the MAI. They want rights but no responsibilities.

This means that if it is assumed that some sort of international agreement on investment is necessary, it does not lead to the MAI but to the further set of questions. What should a multilateral agreement on investment cover – whose interests should it protect? Is the real need for corporations to be protected against government, or for government to protect citizens against corporations? The answers to this second question should be based on already existing international law and jurisprudence.

The actual purpose and effect of the MAI is to restrict government's right to regulate foreign investments. It elevates the rights of corporations above the rights of citizens and their governments. The agreement is binding on governments, and subjects governments to external tribunals bound only by the MAI and not by any other international

or national law. Governments will not be able to use the public interest as a defence.

The MAI includes in its preamble a number of highly ideological and unbalanced assertions about the importance of economic growth and foreign investment. This material is inappropriate, since it includes matters legitimately subject to debate and disagreement in terms of its understanding of economics and ethics. It has no place in a legally binding document. The basis of such a far-reaching international law should not be debatable economics, but rather solid jurisprudence.

The preamble is notable for its omission of any adequate jurisprudence. It fails to place the MAI adequately in the context of international labour, environmental and human rights law. For example, it notes that the ILO is the competent body to deal with core labour standards, but fails to indicate how the responsibilities of government under the ILO conventions are to be held in tension with the responsibilities of government under the MAI. While it notes that there are OECD guidelines for multinational corporations, it does nothing to improve the fact that these guidelines are “non binding” and “observed on a voluntary basis”.

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There are two broad areas of concern:

1. Failure to incorporate established international agreements

- The MAI fails to incorporate any of the relevant international agreements such as the Rio Declaration, Agenda 21; UN Guidelines for Consumer Protection (1985); the UNCTAD Set of Multilaterally Agreed Principles for the Control of Restrictive Business Practices; the HABITAT global Plan of Action; the Kyoto Protocol on Climate Change.
- The MAI fails to comply with OECD commitments to integrate economic environmental and social policies.
- The MAI fails to impose any binding, enforceable obligations for corporate conduct concerning environment, labour standards and anti-competitive behaviour, although it

imposes legally enforceable obligations on governments. The MAI is about rights for companies without reciprocal duties.

2. Specific provisions of the MAI.

The most important problem: The MAI matters because governments can be legally forced to comply. **The MAI gives foreign investors legal standing to challenge government regulations on environment, public health etc, but the process will not be accessible to citizens, indigenous peoples, local governments or NGOs. This makes the agreement quite unlike the human rights instruments. The process will involve an international panel of trade experts. The process, by its very nature, subverts national laws and political processes.**

Most international treaties, especially international human rights treaties, have little more than moral force. Yet Australian politicians have often claimed that they undermine sovereignty. The MAI, however, will be legally enforceable against governments, with companies being eligible for compensation awarded by a tribunal. This really will undermine sovereignty, and it is surprising that Australia would contemplate such a move. A government that can be subject to financial penalties imposed by non-citizens for the benefit of non-citizens without regard to the well-being and political will of citizens clearly has lost its sovereignty. **There is an indisputable “democracy deficit”.**

It has been claimed that the MAI will not ban all conditions, only those that treat foreign investors differently from local investors. Even if this is true, there are often very good reasons for nations treating local companies differently from foreign investors who have a larger capital and technological base, e.g. to require joint ventures with local companies, or to do research and development locally, or to employ local people.

The MAI is unacceptable, because it makes governments accountable to non-citizens (foreign investors and a tribunal designed specifically to protect their interests, not the interests of nations) thus undermining the human rights of citizens that, in international law, must be the first priority of governments. That is, the MAI does not merely ignore international law, it contradicts that law.

Some of the problems that have been identified if the MAI is concluded with its current content include the following.

- The MAI limits the ability of countries to determine investment policies on the basis of national needs. This is undemocratic for all countries. It is contrary to OECD policy on developing countries (many of whom are being pressured to join). It is also contrary to the responsibilities of members of the United Nations.
- The MAI opens all sectors of national economies to foreign companies. This has implications for the community sector.
- Nations will have to treat foreign investors at least as well as local companies. They must be eligible for all existing subsidies (apparently even those designed for the community rather than commercial sector). The MAI bans imposing conditions on foreign investors. Nations will not be able to use special measures to protect or support small local businesses against the economic power of multinational corporations.
- Performance requirements designed for foreign companies will be banned (e.g. requirements to hire locally or pay a living wage).
- Many international treaties allow for withdrawal on 6 months notice. The MAI requires 5 years notice, and requires that the MAI continue to apply for 15 years to foreign investors already established at the time of withdrawal. The treaty thus imposes “rigidities” on government policy for at least twenty years. In an age of rapid change that requires flexibility in response, such a rigidity cannot be justified.
- Expropriations – both direct and indirect – will require compensation. In some countries, companies are already arguing under regional agreements with similar provisions that “expropriation” includes regulations such as environmental regulations that restrict the use of property. (E.g. Canada is being sued for banning on environmental grounds a particular toxic chemical). At the very least, the definition of “expropriations” needs to be tightened to exclude legitimate regulation of industry for the sake of consumer and environmental protection and human rights.
- The MAI will ban measures by which many countries protect their economies (e.g. some stock market regulations; developing countries will not be able to stabilise capital flows by requiring that foreign investments be for a minimum set period).

- The dispute resolution mechanisms will place the onus on nations to disprove complaints that companies make against them.
- The MAI would create problems for native title.

Theological Reflection

The basic question the church must ask is: what are the purposes of this agreement and whose interests does this agreement serve? What is the impact on human rights and democracy? The MAI clearly gives foreign investors a privileged position over governments, citizens and local companies. It does not involve reciprocal rights and obligations. Because it bans conditions on foreign investors, it subordinates justice, peace and the integrity of creation to the interests of international capital. It ignores other hard won international agreements that are consistent with concern for justice, peace and the integrity of creation.

The Uniting Church in Australia is committed to justice, peace and the integrity of creation. Commitment to human rights is evident in, for example, the national Assembly statements to the nation in 1977 and 1988, and its unemployment statement in 1994. Its concern for the biosphere is evident in its statement on the rights of nature and the rights of future generations in 1991.

In addition to this, the Board for Social Responsibility takes account of the policy of the NSW Synod to which it is directly accountable. Here again there is a clear commitment to human rights, to justice for workers, active participation of citizens in the policy of government, and an ecologically sustainable economy. Governments are to be assessed by the extent to which their policies are consistent with human rights – civil, political, economic, social and cultural.

From a Christian point of view, the MAI can appear idolatrous, giving international capital rights instead of responsibilities towards workers, citizens of nations, and the environment.

The Board for Social Responsibility therefore decided at its March meeting that a submission should be made to the Australian Government, opposing the Multilateral Agreement on Investment as contrary to the interests of citizens and the environment.

Changes needed

- (a) Ideological basis

The fundamental change required is the ideology on which the MAI is based. The MAI does not merely lack adequate foundations in international jurisprudence. Rather it attacks and destroys the very foundations of international law by undermining the political rights, and hence the other human rights, of citizens, by undermining the sovereignty of governments.

(b) Process

The Board urges that

- the 1998 deadline for finalising the MAI be suspended, so that a more appropriate draft text might be formulated and negotiated. The failure to publish the negotiating text until February 1998 means that there has been insufficient time for community research and debate.
- the government publish the full text of its reservations, the reasons for them, and whether it intends maintaining the situation or changing Australian policy so reservations can be removed, so that there can be public comment;
- the required national impact statement includes examination of the impact on citizens, community sector, national and state legislation to protect environment, workers rights, consumer rights, and so on.
- the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission be asked to comment specifically on the likely effect of the proposed MAI on the rights of citizens and the ability of the Commonwealth to govern in the interests of Australian citizens.

(c) Content

- The MAI must incorporate the already existing multilateral agreements on environment, health, labour, safety and human rights standards. The MAI should create reciprocal obligations for international investors, and dispute mechanisms give standing to governments, citizens and NGOs as well as companies. These should be based on the already existing multilateral agreements.
- The special investor state dispute mechanisms must be eliminated from the MAI and be replaced with democratic and transparent mechanisms of investor accountability.

- Provisions that may require compensation where governments set environmental, labour, health and safety standards must be modified so that compensation is not required in relation to these matters.
- protection of the special role and requirements of the community (not-for-profit) sector.
- change in the withdrawal provisions, especially for developing nations.

The inquiry also needs to look at the specific implications for current policy in areas such as

cultural industries
media ownership controls
regulation of foreign investment
public health care
environmental protection
subsidies to the community sector
the sovereignty of state governments

Prepared by Ann Wansbrough on behalf of the Board for Social Responsibility. April 1998.

¹ Treasury, "The Multilateral Agreement on Investment (MAI) at <http://www.treasury.gov.au>