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The Multilateral Agreement on Investment (MAI) and Public/Social Services

Introduction

The Multilateral Agreement on Investment (MAI) is currently being negotiated by officials from the 29 member countries of the Organization for Economic Co-operation and Development (OECD) in Paris. It had been expected that the agreement would be concluded for ratification at the May 1997 OECD Ministerial Council meeting, following two years of negotiations. However, there has been no agreement on a final text due to the complexity of the process and major unresolved differences between countries. Negotiations will continue and a new deadline has been set for May 1998.

The MAI is being negotiated by member governrnents of the OECD to remedy the supposed weaknesses of the World Trade Organization (WTO) agreement with respect to investment issues. The MAI agreement as proposed by the OECD Ministerial Council in 1995 would "provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures." The basic intent is to prohibit all 'discrimination' against foreign investors through the key principle of national treatment, and to make government decisions to regulate or control foreign investment subject to appeals by foreign governments, and foreign investors and companies.

The proposed MAI builds on the North American Free Trade Agreement (NAFTA) and the treaties which have created the European Union, both of which are much more than' free trade' agreements and have extensive 'WTO plus' provisions regarding national treatment for investors and companies. Drafts show that the MAI is a comprehensive and far-reaching set of rules restricting what governrnents can do to regulate foreign investment and corporate behaviour, and creating new rights for corporations to challenge government decisions. The MAI is intended explicitly to go well beyond the rules which already exist in the World Trade Organization and even in the more extensive North American Free Trade Agreement and European Community (EC) agreements.

The investment provisions of NAFTA are the broad template for the draft Multilateral Agreement on Investment. But the MAI draft goes beyond NAFTA in a number of significant respects, such as broadening the definition of investment and extend-

ing the principle of national treatment to subsidies. The weaknesses of NAFTA and the additions of the MAI together pose a clear threat to the maintenance of nonprofit public and social services. The MAI could give foreign investors the right to establish for-profit enterprises in social services and health care – particularly in areas of mixed public/private delivery. Moreover, the MAI could allow foreign investors to challenge government support of nonprofit providers of public and social services.

General principles

Both NAFTA and the MAI are based squarely on certain key norms with respect to government regulation of investment. Provisions regarding national treatment and most-favoured nation treatment mean that a state must extend to investors of another state the same treatment it accords to domestic investors or to investors of any other state. Same treatment provisions extend to the establishment, acquisition, expansion, operation, management, maintenance, and sale or disposition of investments. (The MAI adds "use and enjoyment.") NAFTA and the MAI further prohibit trade-related performance requirements and local management requirements – i.e., approval of foreign investment cannot be made conditional with respect to these areas.

The definition of investment in the MAI is broader than that in NAFTA and specifically includes government concessions, licences, authorizations and permits. NAFTA Article 1108.7 excludes government procurement, and subsidies and grants from these key norms. (Government procurement was dealt with outside the provisions of the investment chapter. Canada, but not the US, excluded government procurement of health and social services.)

By contrast, the exclusion of government procurement is still bracketed in the MAI, and the current intent of the MAI is to prohibit discrimination with respect to the granting of 'investment incentives,' such as subsidies and grants in support of the establishment or operation of an enterprise. Some countries still want the MAI to take more drastic action against the extension of subsidies. Both NAFTA and the MAI recognize the right of governments to maintain and establish monopolies and state enterprises, but stipulate that these enterprises should not discriminate in the purchase or sale of the monopoly good or service.

Application to public and social services

Annex II of NAFTA sets out reservations for future measures against the normal application of provisions regarding investment and cross-border trade-in services. Unlike Annex I reservations, Annex II reservations allow for continuing government action in a non-conforming area, not just for the 'grandfathering' of a specific non-conforming measure.

All three countries have a broad reservation for social services which reads as follows: "Canada (the US, Mexico) reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and 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."

The Government of Canada filed a comparable draft reservation in the MAI. As it now stands, the MAI has no general exclusion for social services – though there is a cryptic, undefined exclusion for actions "necessary for the maintenance of public order."

Canadian experience under NAFTA

Both in the debate over NAFTA and subsequently, fears have been expressed that NAFTA could lead to the undermining of Canada's system of public and mixed public/private delivery of health care and social services. The concern arises from the far greater extent of public and nonprofit service

delivery notably health care – in Canada compared to the US, and the fact that US corporations delivering health care and social services have expressed interest in obtaining greater access to the Canadian market.

Canadian health services – physician and hospital care – typically are delivered by independent doctors and by nongovernmental (but nonprofit) hospitals, with the costs being covered by public health insurance funded largely through general taxes. In short, health care is financed publicly by the federal and provincial governments and regulated by provincial governments, but is not delivered directly by governments. Many significant areas – e.g., dental care and drugs outside hospitals – are delivered primarily outside the framework of publicly-funded medicare. Several components of health care are contracted out to private firms (e.g., diagnostic testing; some hospital operations).

Large US health care corporations, such as insurance companies and health care management organizations, occasionally have expressed interest in entering the market, but generally have been excluded up to this point. These corporations are confined to selling supplementary health insurance and some specialized and non-medicare services to physicians, patients and hospitals.

The pattern of mixed public/private delivery also extends to social services such as elder care, child care and home care. Often, government and public agencies contract for services from both commercial providers and nonprofit agencies and/or subsidize nonprofit operations which compete with commercial providers.

The Government of Canada long maintained that the general exclusion in NAFTA was sufficient to protect medicare and social services from challenge by US corporations and investors that are either excluded from the Canadian market or denied subsidies and support on the same basis as Canadian nonprofit or commercial service providers. The issue has not been tested by NAFTA dispute settlement panels. However, it did arise in the context of the required listing of non-conforming provincial government measures.

Canadian provinces and US states were given a grace period to reserve all existing non-conforming measures under Annex I through a process of detailed enumeration and listing – a process ultimately intended to lead to the application of NAFTA investment disciplines to lower levels of government and to further negotiations to roll back non-conforming measures.

In April 1996, the NAFTA countries agreed to protect indefinitely from challenge all existing sub-federal investment (and trade in non-financial services) measures, meaning all non-conforming measures in place as of January 1, 1994. However, this general reservation under Annex I does not cover *future* provincial initiatives in the social services area. Both new measures and measures designed to reverse changes made after NAFTA came into force, such as privatization and deregulation of a once-protected service, are not covered.

This outcome arose largely because of growing Canadian concerns about the inadequate Annex 11 exclusion for social services, expressed particularly forcefully by the government of British Columbia and by public interest groups and unions. While the federal government argued initially that the general exclusion in Annex 11 made it unnecessary to list non-conforming provincial measures in social services and health, critics argued that the general exclusion was vague, that it was interpreted differently by the US government and that it was vulnerable to challenge. Ultimately, the blanket exclusion of non-conforming provincial measures in Annex I reflected at least limited federal acceptance of the critics' case.

In the process of advising states on the listing of sub-national reservations, the US Trade Representative expressed the view that the general exemption covered only services delivered *directly* by governments, and not services characterized by a mix of public, private and nonprofit delivery. A

letter to the State of Oregon noted that a reservation could not cover government services "if supplied by a private firm, on a profit or *nonprofit* basis."

An extended legal opinion prepared by Dr. Bryan Schwartz of the University of Manitoba for the Canadian Union of Public Employees and the Canadian Health Coalition argued that the social services exclusion is ambiguous and rife with grey areas. In a context of government withdrawal from direct funding of at least some services, deregulation and partial privatization, he argued that it is far from clear what a NAFTA dispute panel would find to be "a social service delivered for a public purpose."

While Schwartz thought the US Trade Representative's view likely would be found extreme, he argued that the "for a public purpose" provision would be undercut by significant privatization, extra-billing for services and private delivery. He further argued that extending subsidies only to non-profit providers does not ensure a shield from challenge. The key conclusions reached were that the vagueness of the general exclusion creates hazards, and that funding cuts and deregulation potentially undermine an exclusion on the basis of public purposes.

To summarize, while *existing* non-conforming measures at the provincial level have been reserved, and while there is a general reservation in Annex II, it is questionable whether mixed public/nonprofit delivery of public and social services lies outside the application of NAFTA disciplines regarding national treatment.

Implications of the MAI

At a minimum, the NAFTA example shows the need for a general or country-specific exclusion for social services if public and nonprofit delivery of services are to remain unchallenged as 'discriminatory' by corporations. There is no such exclusion in the draft MAI.

The general exclusion in NAFTA is not a good model because it is too vague and fails to take adequate account of the complexity of the systems delivering public and social services. The fact that the MAI extends the principle of national treatment to subsidies and has left unresolved the area of government procurement of services creates significant additional grounds for concern that the principle could be a lever for privatization and commercialization of public and nonprofit services.

Potentially, the MAI could allow transnational corporations to challenge as 'discriminatory' national systems for delivering public and social services which fall between direct government delivery of a monopoly service and delivery of services on a fully commercial basis. Social services in most countries are delivered by a wide range of agencies and bodies, including both commercial and non-commercial providers. The draft MAI takes little or no account of the complexity of this reality.

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