

REGIONAL MUNICIPALITY OF OTTAWA CARLETON
 MUNICIPALITÉ RÉGIONALE D'OTTAWA CARLETON

REPORT
RAPPORT

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DATE 18 September 1998

TO/DEST. Co-ordinator
 Community Services Committee

FROM/EXP. Deputy Regional Solicitor

SUBJECT/OBJET **CSC INQUIRY NO. 11(98): IMPLICATIONS OF
 MULTILATERAL AGREEMENT ON INVESTMENTS (MAI)**

DEPARTMENTAL RECOMMENDATION

That the Community Services Committee receive this report for information.

BACKGROUND

At the Community Services Committee meeting of 16 April 1998, Councillor D. Holmes made the following inquiry:

What changes in the Region's mandate, responsibilities, and flexibility will result if Canada signs the Multilateral Agreement on Investments?

The Origins and Progress of the MAI

In 1995, Canada, together with other member countries of the Organization for Economic Co-operation and Development (OECD) agreed to launch negotiations towards a Multilateral Agreement on Investment, [hereinafter referred to as the MAI].

The principal aim of these negotiations is to establish a broad multilateral framework of agreed principles and commitments governing the treatment of foreign investment. Such an agreement would also represent an important first step towards the negotiation of truly multilateral investment rules at the World Trade Organisation (WTO), whose membership comprises 132 countries from around the globe.

The OECD brings together twenty-nine of the world's industrialized democracies, including Canada and the United States, most European countries, Japan, New Zealand, Australia, Mexico and Korea. While the MAI negotiations are being conducted under the OECD's auspices, any final agreement will be a free-standing treaty open to all countries to join. Currently, eight non-OECD countries - Brazil, Chile, Argentina, Slovakia, Estonia, Lithuania, Latvia, and Hong-Kong China - are full participants in the negotiations.

The MAI will be the first multilateral agreement to include disciplines in these three key areas of investment rule-making (investment protection, investment liberalization and binding dispute settlement).

Parties in the negotiations had hoped to conclude an agreement by the OECD Ministerial Meeting in April 1998. However, issues of vital interest to Canada and other countries remain unresolved. Accordingly, all countries have agreed to take the time necessary to reach a good agreement. The next meeting of the Negotiating Group will be held in October 1998. No new deadline has been set for the conclusion of the negotiations.

Objectives of the MAI

The MAI will apply to a wide range of investments, including foreign direct investments, portfolio investments and rights under contract. Further work is focusing on intellectual property rights, indirect investment, concessions, public debt and real estate. The aim is to apply MAI disciplines to all sectors and at all levels of government (including municipal governments).

Two principles underpin the MAI negotiations: non-discrimination and fair protection for investors and their investments.

Non-discrimination, or what is called "national treatment", means that governments treat foreign and domestic investors the same way. For example, if a government imposes a requirement on investors, this requirement should not be more stringent on foreign investors than on domestic investors. At the same time, however, foreign investors will continue to play by the same rules when it comes to having to obey the laws of the land.

The MAI will not remove all differences in the way Canada treats foreign and domestic investors. Each country will lodge exceptions to the basic rules of the MAI, for example, to cover situations where a government is not prepared to grant equal treatment to foreign investors, or where it wishes to retain its full freedom of action. By filing an exception, a government ensures that such differential treatment cannot be subject to challenge.

The principal elements of the MAI, as it is emerging, are fully consistent with current Canadian laws, policies and practices affecting foreign investment. As in the NAFTA, Canada will retain, through exceptions, the ability to:

- review large-scale mergers and acquisitions involving Canadian companies under the *Investment Canada Act*;

- preserve and promote its cultural industries;
- maintain its current measures relating to areas such as transportation and financial services, communications, the auto industry, land and real estate, energy, fisheries, government finance, agriculture (including the supply management regime), and the management of natural resources;
- preserve Canada's full freedom of action in sectors such as education, health and social services, programs for Aboriginal Peoples and programs for minority groups; and
- retain the flexibility to set and maintain foreign ownership limits when privatizing Crown corporations.

Binding dispute settlement procedures have been developed to allow settlement of disputes between states, and between investors and states. Most investment disputes that might arise under the MAI should be settled without recourse to formal procedures; accordingly, the agreement provides for consultation arrangements to encourage amicable solutions. The MAI will require that binding arbitration of disputes between states, or between an investor and a participating government, be available to ensure effective recourse in the event of breach of the agreement.

What the MAI Will Not Cover

MAI disciplines will not apply in situations addressed by "general exceptions" or "temporary safeguards", or where individual countries have taken specific exceptions or reservations. Under general exceptions provisions, any country will be able to take measures necessary to protect national security or to ensure the integrity and stability of its financial system. By virtue of country-specific exceptions, negotiated among the parties to the MAI, each country will be able to maintain laws and regulations that do not conform to MAI disciplines.

In agreeing to an eventual MAI, governments will not give away their ability to regulate. The MAI will not exempt foreign investors from national or provincial laws and regulations. Like any domestic investor, foreign investors will have to comply with environmental, labour, health and safety, municipal zoning and all other laws and regulations that affect businesses operating in Canada. Any foreign company that fails to comply with Canada's laws and regulations would be subject to the same fines and penalties that domestic companies face when they break our laws. The enforcement of Canadian laws is fully compatible with the non-discrimination principle of the MAI.

Reservations lodged by Canada under the MAI will not be subject to any type of progressive phase-out ("rollback"). In key areas such as education, health and social services, culture, programs for Aboriginal Peoples and programs for minority groups, there will be no requirement to freeze measures to their existing levels ("standstill"). The MAI will not grant the right to invest where a government has decided that no investment is to be allowed, for example in a wilderness area.

As an investment agreement, the MAI will not cover matters such as cross-border trade or procurement. The MAI will not, therefore, affect in any way Canada's right to prohibit the import or export of certain goods and services, for example, our water resources. The current purchasing practices of Canadian governments will remain equally unaffected by the MAI.

The MAI will not prevent governments from directing Crown corporations to carry out their programs, nor would it affect our current ability to set conditions such as job creation or research and development, when granting incentives to domestic and foreign investors.

Nothing in the MAI will prevent Canada from taking any action in support of its obligations under the United Nations Charter for the maintenance of international peace and security, such as participation in UN economic sanctions against certain countries.

The Negotiating Process

At the request of the Minister for International Trade, the Standing Committee on Foreign Affairs and International Trade conducted public hearings on the negotiations in November 1997. After considering the many views presented, the Committee released a majority report that reinforces the Government's understanding of the interests, concerns and objectives of Canadians and contributes significantly to the further elaboration of Canada's negotiating positions.

The Government tabled its formal response to the report on April 23, 1998. The response replies to all the recommendations of the Committee and reiterates Canada's position in the negotiations.

Sovereignty

Central to the MAI is the principle of equitable treatment of foreign and domestic investors. Foreign firms, like domestic firms, would still be required to comply with all Canadian laws and regulations that affect businesses operating in Canada.

Health Care, Education and Social Programs

The Government has stated that will not accept an MAI unless it contains ironclad reservations, with no standstill or rollback, at both the national and provincial level, that completely preserve Canada's freedom to act in key areas including health care, social programs, education, culture, and programs for Aboriginal peoples and minority groups. Canada will retain its ability to maintain existing measures and to introduce new ones.

Culture

Views diverge on how to address cultural matters specifically in the MAI; different approaches have been proposed including a general exception for cultural measures or country-specific exceptions. The Minister for International Trade has stated publicly that the Government will not accept an MAI unless Canada's cultural industries are exempted from any potential agreement.

Treatment of Foreign Investors

Foreign companies, like domestic companies, would remain subject to all Canadian laws and regulations applicable to businesses operating in Canada. This is fully compatible with the non-discrimination principle of the MAI. Foreign companies failing to comply with Canada's laws and regulations would be subject to the same fines and penalties that domestic companies face when they break our laws.

Under current Canadian law, companies -- whether domestic or foreign-owned -- can already submit claims to Canadian courts if they believe that they have been unfairly treated by the government. As proposed in the MAI, an investor-state arbitration provision would ensure that foreign investors have recourse to fair, transparent arbitration.

Labour and Environment

All corporations, both domestic and foreign will remain required to examine the Canadian labour market when hiring employees.

Investment Incentives

Canada already respects existing international rules that limit performance requirements on either domestic or foreign investors. But the MAI would still allow governments to set conditions, such as job creation or research and development, when granting incentives to domestic and foreign companies.

Extra-territoriality

Canada continues to push hard for clear provisions in the MAI against the extra-territorial application of laws on investment, such as the U.S. Helms-Burton Act. Any resident in a MAI country, or a business owned by that individual can launch a claim against the government of another MAI county. Canadian investors are not eligible to bring disputes against the Government of Canada, however American or Japanese investors can.

As stated earlier, the MAI applies to all levels of government without exception. As currently negotiated the MAI's obligations will directly apply to the acts of all levels of government including municipal governments.

Financial Implications

There are no financial implications associated with this report

Conclusion

In summary, a broad range of municipal functions could possibly be affected by the MAI. To date, no reservations were taken to exempt municipal governments from the obligations of the MAI.

Municipalities across Canada are fearful that the MAI will have an impact on the ability of Canadian municipalities to implement purchasing policies and practices that favour local based businesses and suppliers and that the MAI will stop municipalities from limiting the use of property by foreign companies.

The 29 industrialized countries negotiating the pact under the Organization for Economic Development decided in April 1998 to delay indefinitely the signing of the contentious agreement. Negotiators will meet in Paris again in October to decide what to do next: pursue an MAI through the OECD or abandon it and pursue investment talks through the World Trade Organization or other trade and investment venues. The MAI negotiations need to address the possibility of it eroding labour and environmental standards, as countries may be tempted to loosen regulations to lure new foreign investment.

With respect to the impact of the MAI on municipalities and specifically the Region, a further examination of the MAI will be required after the parties meet again in October of 1998 and the negotiations continue. Until then it is difficult to ascertain exactly how municipalities in Canada will be affected in the event that Canada signs the Multilateral Agreement on Investments.

This report is respectfully submitted.

*Approved by
E.A. Johnston,
Deputy Regional Solicitor*

EAJ/AT-M