

The MAI and the Clash of Globalizations

by Stephen J. Kobrin

The Preamble Collaborative is hardly a household name; it is a small, relatively new, Washington-based nongovernmental organization (NGO) employing three full-time researchers. Nonetheless, its stated mission of promoting “vigorous” public debate about economic problems was accomplished with a vengeance when it came to the Multilateral Agreement on Investment (MAI).

The primary objective of the governments negotiating the MAI was to facilitate international investment by ensuring that host governments treat all foreign and domestic firms similarly. While the 29 wealthy nations comprising the Organization for Economic Cooperation and Development (OECD) were busy negotiating, however, other unexpected—and unwelcome—participants were looking over their shoulders.

The Preamble Collaborative was one of more than 600 organizations in nearly 70 countries expressing vehement opposition to the treaty, often in apocalyptic terms. The collaborative’s extensive World Wide Web site—featuring fact sheets, congressional testimony, position papers, and issue briefs—was part of a tidal wave of electronically amplified public opposition to the MAI. It was cited on more than 50 other Web sites and in 200 news group postings comprising what Guy

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de Jonquières of the *Financial Times* has described as “network guerrillas”—a horde of vigilantes who ambushed the negotiations.

The ambush began in February 1997 when an early draft of the treaty, replete with numerous contradictions, was leaked to Public Citizen, a Washington-based public interest group founded by Ralph Nader, and then immediately published on the Web. Up to that point, negotiations had been conducted in relative isolation—they were not reported in depth in the *New York Times*, *Washington Post*, *Los Angeles Times*, or *Christian Science Monitor*. Suddenly, what had been a working document among 29 parties became available to anyone with a computer and a modem.

And everyone with a computer and a modem got involved. OECD representatives quickly became the targets of unprecedented scrutiny. “If a negotiator says something to someone over a glass of wine, we’ll have it on the Internet within an hour, all over the world,” boasted the head of the Council of Canadians, a citizens’ interest group claiming more than 100,000 members.

The MAI was denounced as a major and immediate threat to democracy, sovereignty, the environment, human rights, and economic development. A coalition of strange bedfellows arose in opposition to the treaty, including the AFL-CIO, Amnesty International, Australian Conservation Foundation, Friends of the Earth, Oxfam, Public Citizen, Sierra Club, Third World Network, United Steelworkers of America, Western Governors’ Association, and World Development Movement. They claimed that the MAI would give corporations the “sovereign power to govern countries,” make elected governments “their compliant puppets,” and “radically limit our ability to promote social, economic, and environmental justice.”

Three years of negotiations on the MAI screeched to a halt in late April 1998 when the OECD announced that talks would be delayed for six months. Negotiators called a time-out to allow for consultation among the parties and “with interested parts of their societies,” including NGOs, business, and labor. Although some newspapers proclaimed that the Internet had sunk the MAI—a triumph of civil society over civil servants—the anti-MAI forces could not take all the credit for tabling the talks; the participants’ inability to agree also played an important role. The short preamble to the treaty, for example, contains 17 footnotes expressing the concerns of one or more delegations. The latest draft contains almost 50 pages of country-specific exceptions. Harmony appears hard to come by.

Yet even the MAI's negotiators concede that the NGOs had an impact. "The growing pressure from civil society further exacerbated the differences of opinion within the OECD," observed Belgium's Foreign Trade Ministry. Indeed, the battle against the MAI was not limited to the Web. Letter-writing campaigns, petition signings, and public protests caught the attention of politicians. As one European official observed, the wave of protest elevated the question of the MAI from the "level of civil servants" to the "ministerial level."

French parliamentarians heeded the cry of intellectuals who claimed that the MAI would permit crude foreign culture to permeate their country. The government of New Zealand pledged not to sign the treaty, as anti-MAI protesters held a mock auction, selling off the country to McDonald's, Pepsi, and Shell outside the Foreign Affairs and Trade building.

Why has the MAI generated such broad, intense, and vehement opposition? What turned this arcane treaty that attempts to institutionalize liberalization of interna-

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tional investment flows into a source of very real concern—indeed fear—among people who normally might confuse FDI with the FBI?

On one level, the story of the MAI is a cautionary tale about the impact of an electronically networked global civil society. The days of negotiating international treaties behind closed doors are numbered, if not over. A much broader range of groups will have to be included in the globalization debate, and much more thought will have to be given to how non-participants will interpret international negotiations and agreements.

On a broader level, the battle over the MAI is a reminder that although the pace and structure of globalization are still open to debate, the phenomenon of globalization is a *fait accompli*. For the past decade, NGOs and politicians—conservative, leftist, and populist—have railed against globalization and sought to promote alternatives. But in doing so, antiglobalization activists and advocacy groups have become transnational actors themselves. Both international investors and the electronically networked opposition to the MAI are manifestations of globalization; both compromise the concept of national sovereignty and local control.

THE TREATY IN QUESTION

Over the last decade, worldwide market liberalization has prompted dramatic growth in foreign direct investment. The global stock of FDI increased fourfold from 1982 to 1994, and annual flows of cross-border investment reached an all-time high of \$350 billion in 1996. Consequently, Western industrialized countries once again began to focus on the governance of international investment. By the mid-1990s, there was general agreement among these nations on the need for a global, multilateral framework to replace the roughly 1,600 bilateral investment treaties in existence.

In May 1995, the OECD began negotiations on the MAI to provide a comprehensive framework for international investment, institutionalizing liberalization while providing for the protection of investment and the resolution of disputes. The MAI was to provide the framework for international investment that the General Agreement on Tariffs and Trade (GATT) provided for international trade. It was intended as a free-standing international treaty open to all OECD members and to accession by non-OECD members.

Although the choice of the OECD as a venue was controversial, proponents argued that since its members represented 85 percent of all FDI outflows, having them negotiate among themselves would produce a better agreement. In practice, this meant shutting out the developing countries.

National treatment and most-favored-nation (MFN) obligations are at the core of the MAI. These two provisions also form the basis for much of the opposition. MFN obligations, which are borrowed from trade agreements, stipulate that benefits extended to investors from one country be extended to all. National treatment requires that foreign investors not be discriminated against by national law and regulation, and that foreign and national firms be treated similarly in like circumstances. (There are a large number of country-specific exceptions to national treatment under discussion.)

In contrast to most other investment treaties, which protect investments only after they are made, the MAI also covers the “pre-establishment” phase of investment. It applies to a country’s framework of law and regulation governing foreign investment, intending both to institutionalize liberalization and protect specific investment projects.

The MAI is complex, incomplete, and very much a “work in progress by committee.” It is replete with arcane language, alternative phrasings,

exceptions, paragraphs that may or may not be included in the final draft, and objections on the part of one or more delegations.

That being said, a reasonably thorough reading of the MAI draft raises some concerns. The treaty appears somewhat one-sided, focusing—as critics note—on the rights of investors and not on their obligations. The provisions banning performance requirements—laws that require investors to meet certain conditions if they want to establish an enterprise in a specific location—appear much too comprehensive.

Rules for Corporations . . .

Major provisions of the Multilateral Agreement on Investment (MAI):

- A broad definition of investment to include investment in stocks and bonds, as well as foreign direct investment and contract rights, intellectual property, real estate, and “claims to money.”
- Very strict limits on “performance requirements”—laws governing such matters as the obligation to have a certain level of local content, exports, local hiring, local research and development, transfer of technology, and domestic equity participation, among others. This provision is still under negotiation and exceptions to protect the environment and secure compliance with local law are also being considered.
- Limits on expropriation subject to the “usual” justifications and conditions: a public purpose; nondiscriminatory application; due process; and prompt, adequate, and effective compensation. The phrasing, however, is quite broad, including both nationalization and “any . . . measures having equivalent effect.”
- Free transfer or repatriation of capital, profits, interest payments, expropriation settlements, and the like.
- Dispute settlement provisions that establish an international tribunal to arbitrate between countries and give private investors the standing to sue a country in its courts for breach of the agreement or to bring action in an international tribunal.
- Provisions that require countries to “roll back” existing laws or regulations that are not in accordance with the MAI and refrain from passing new laws that contradict it.
- Specific application of nondiscrimination or national treatment to privatization, monopoly regulation, and access to minerals and raw materials.

—S.J.K.

Likewise, the discussion of expropriation seems much too loosely worded: It could be interpreted to cover any act of government that affects operations or profits.

Although others will find similar concerns in other parts of the treaty, many observers will probably wonder if three years of negotiations—and the subsequent addition of footnotes, amendments, exceptions, and objections—have diluted it to the point where it is too little, too late. In any event, the MAI does not appear to be the stuff of which revolutions are made. Yet, it has sparked a widespread grassroots opposition taking the form of Web sites, news groups, bumper stickers, newspaper advertisements (“Should Corporations Govern the World?”), and even street demonstrations. It prompted 14,000 people to write the U.S. State Department. What is going on here?

NAFTA ON STEROIDS?

Much of the public concern focuses on five provisions of the MAI: treating foreign corporations as national firms; extending benefits given to foreign investors from any country to all (MFN); the ban on performance requirements; the expropriation clause; and the right of investors to sue governments. The expropriation clause, for example, bars both direct nationalization of assets and “any other measure or measures having equivalent effect. . . .” The clause has been widely interpreted as barring any law or regulation that impedes, or will impede, an investor’s right to make a profit. Thus, opponents argue that environmental, health, or workers’ rights legislation that could threaten profits would be interpreted as “expropriation” and prohibited by the treaty. The Sierra Club, for instance, argues that the MAI might prohibit bans on exports of raw (unprocessed) logs from some national forests.

MAI opponents believe that the expropriation clause, in conjunction with the “unprecedented legal standing” accorded private investors under the dispute resolution provisions of the MAI, will allow multinational firms to sue any government that takes any action whatsoever that might impede their right to make a profit. The U.S.-based Ethyl Corporation’s suit against the Canadian government is widely cited as a warning of things to come: When the Canadian parliament banned a fuel additive produced by Ethyl for environmental and health reasons, the company sued for damages, claiming that Canada violated its North American Free Trade Agree-

. . . or Corporate Rule?

"The MAI [Multilateral Agreement on Investment], if ratified, will serve as a Charter of Rights and Freedoms for transnational corporations against citizens and the earth, and represents a grave threat to democracy in Canada and around the world."

- MAI: The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty, by Maude Barlow and Tony Clarke

"[The MAI is] one of the greatest threats ever to the economic development and national sovereignty of countries of the South."

- Dr. Chandra Muzaffar, director, Just World Trust

"If the OECD gets its way, the British government will never again be permitted to restrain the rapacity of the private sector."

- Environmental advocate George Monbiot, letter to the London Guardian, April 15, 1997

"I'm scared. And no, I'm not scared of the simple, everyday things that Grade 12 students normally fear. . . .What I fear can be expressed in four words. . . Multilateral Agreement on Investment."

- High-school student Alan Slipp, from a speech given at the Annual Lion's Club Speakout in Nova Scotia

"Frances [sic] Fukuyama may be satisfied that the current winning streak of market ideology heralds the 'end of history.' The corporations, however, want to put it in writing."

- Scott Nova and Michelle Sforza-Roderick, Preamble Center for Public Policy

"Under [the] MAI, local, regional, and federal governments could no longer make low-interest loans to local businesses, cut taxes for businesses that hire members of local communities, or give minority-owned or environmentally conscious companies preference in the awarding of public-works contracts."

- Gabriel Roth, San Francisco Bay Guardian, October 15, 1997

"The MAI takes us so much further down [the] road [of corporate dominance] that we might never conceivably return until we are driven to a social and political revolution at a global scale."

- Janice Harvey, Telegraph-Journal, New Brunswick, Canada, April 30, 1997

ment (NAFTA) commitments on expropriation and compensation, performance requirements, and national treatment.

Another widespread concern is that the MFN clause would prohibit boycotts against countries that violate human rights or the environment. The assumption, which is hard to square with 50 years of experience with the GATT, is that since MFN requires treating all investing countries alike, it would bar "discrimination" against any of them. In other words, if the MAI had been in force, apartheid would still be with us, Nelson Mandela would still be in jail, and it would be impossible to single out future South Africas for sanctions.

Moreover, although the central purpose of the treaty is to level the playing field among nations, the issue of equality looms large on the anti-MAI agenda. Developing nations, already seething over their exclusion from negotiations, are adamant that their governments retain the right to regulate FDI. Martin Khor, director of the Malaysia-based Third World Network, contends that the economies of most developing countries were "shaped to the advantage of foreign companies and financial institutions." Consequently, local firms might require special treatment for a long time "before they can compete on more balanced terms" with large foreign companies.

Opponents assume that the MAI will markedly limit national and local governments' abilities to regulate and legislate protection of the environment, health, natural resources, and local firms and citizens. That at a minimum, local firms, investors, workers, and citizens cannot be favored over or protected from foreign investors, even when it is warranted. While some of these concerns do arise logically from the treaty, there are a large number of exceptions being negotiated to deal with specific issues.

Many of the opponents' arguments stretch concepts such as national treatment and MFN to the breaking point. Anti-MAI activists worry that the essence of the democratic process will be violated and any action that interferes with the profits of foreign investors will be taboo. These fears clearly transcend concerns about the impact of specific clauses in the MAI treaty.

In fact, they reflect the reality of globalization. An electronically integrated global economy may not obliterate the nation-state, but it will affect how states are structured and how they function. As many academics have argued, power is shifting from states to the market. There has been a loss of local control over economies and economic actors, and the preservation of democratic processes has become a real concern.

In the midst of such traumatic and systemic change, the MAI serves as a lightning rod. Sometimes described as “NAFTA on steroids,” it has become a visible rallying point for opposition to a global economy.

Although much of this opposition is polemic, it would be a mistake to dismiss it, as a State Department spokesman did when he derided the anti-MAI activists as the “black helicopter crowd.” A number of the concerns about the MAI are tangible manifestations of a more general anxiety about globalization:

- **Economic globalization has gone too far.** The level of liberalization embodied by the MAI is seen as inappropriate, especially for many developing countries. Completely free flows of capital may not be desirable everywhere.
- **The state-market balance of power has shifted and corporations have too much power.** The MAI seems to put business interests above all competing social concerns. Corporations have new rights under the MAI but no corresponding obligations to workers, consumers, or the environment. The MAI will put multinational corporations beyond the reach of national and local economic governance.
- **Globalization compromises national sovereignty.** The MAI is said to be part of a transnational regulatory framework that will override national jurisdiction. This concern was given form by the now-infamous claim of Renato Ruggiero, director general of the World Trade Organization, that “We are writing the constitution of a single global economy.” Not everyone thinks this is a great idea; many see the MAI as “a constitution for the largest corporations to rule the world,” with elected governments acting “as their compliant puppets.”
- **Globalization reduces transparency and accountability, shifting power from elected national (and local) officials to nonelected (trade) bureaucrats and international officials.** There is an assumption here that OECD secrecy was both purposeful and necessary. The MAI, in the words of one critic, is “like a political Dracula, [which] simply cannot survive sunlight.”
- **Globalization limits national and local economic policy choices.** The MAI is seen as strictly limiting national regulation of national economies. It “was developed to enable investors in multinational corporations to discourage any legislation issued by national or even subnational governments that foreign investors perceive as against their profit objectives.”

ADVERSARIES OR COLLABORATORS?

There are important lessons to be learned on both sides of this issue by national governments and international organizations concerned with economic governance in a global age, and by organizations and activists concerned with globalization's impact on individuals, communities, and the environment.

For starters, the opponents of the MAI and, more broadly speaking, of globalization cannot stem the tide by yelling at the surf, by wishing for a counterfactual world where globalization does not exist. They cannot pick and choose, selecting the electronic global village—the emergence of global civil society—as a good thing and increased economic integration or a loss of local control as a bad thing to be unambiguously opposed. It is much easier to talk about secret negotiations where plots are hatched for corporate oligarchies to rule the world than to deal with the complex problems that globalization poses for equality of opportunity, the environment, and the democratic process.

But proponents of economic globalization must also learn the same lesson. As the OECD negotiators found out the hard way, NGOs and other advocacy groups are now electronically networked across national borders. Real secrecy will be hard to achieve when information can be broadly disseminated with the push of a button. National governments and international organizations must assume that news will be leaked and published on the Web, that negotiations will take place in public.

As a corollary, globalization cannot be a top-down or elite-driven project. Policymakers cannot assume that all reasonable people share their assumptions and values. Not everyone believes that a constitution for a new global economy or a new international economic order is desirable. Not everyone believes that an open international economy, with free flows of trade, capital, and direct investment promotes the general welfare.

Consequently, there will be a continuous public referendum of sorts on these issues. Much more thought has to be given to how the phrasing of debates and agreements will be interpreted by nonparticipants. Public affairs have become critical. The secretary general of the OECD now concedes that a “strategy on information, communication and explication” is necessary.

The reason that opposition to the MAI has been so successful is that the treaty has been presented on the Internet in terms that are immediate, meaningful, and threatening to a very large number of disparate

individuals and groups. Download the report prepared by the Western Governors' Association, for example, and you will read a detailed, state-by-state listing of specific laws and ordinances that might be threatened if the United States were subject to the MAI.

Much of the anti-MAI sentiment on the Internet presents barely credible worst-case scenarios as fact. As the OECD discovered, much to its chagrin, there are no controls on the Net over who can "publish" or what they can say. Although some of the arguments—the Preamble Collaborative's, for example—are balanced and reasoned, most of the



If the MAI had existed, would he still be in jail?

rest are neither. The MAI deals with difficult and often technical issues, and considerable disagreement remains among the parties to the treaty. The Internet is a medium where the most extreme statements attract attention; where an argument scrolling down a computer screen may garner authority it does not deserve.

The interwoven nature of the Web—the links and hypertext—also provides an effective dissemination process. Whatever strikes a chord gets picked up and repeated. The Internet allows anti-MAI activists to reach large numbers of people, at little or no cost, who normally would never hear of an investment treaty negotiated in a far away place and would never think that it might affect them directly.

When the OECD realized that anyone looking for the MAI on the Web encountered only hostile sites, it was forced to establish an "official" MAI Web site. But current drafts of the treaty, commentaries, and memoranda were no match for apocalyptic claims of environmental ruin and corporate rule. Not everyone is born with an innate understanding of trade theory or macroeconomics. An open international economy entails costs as well as benefits, and both need to be carefully explained. Generating public support for treaties such as the MAI will be difficult and costly. However, the alternative is now clear.

The Information Age gives new powers, and new responsibilities, to the wide variety of actors forming the core of the new global, electronically interconnected civil society. It is a large virtual community that unites like-minded groups across great distances; some estimates have put the total number of transnational NGOs at 20,000. [See P.J. Simmons' article on page 82.] As one observer of the MAI debate has noted, the NGOs have "tasted blood" and will be back. No longer satisfied with simply opposing whatever proposals the negotiators happen to place on the table, there is growing talk among them that their organizations should play a direct role in drafting the agenda.

But will the process remain adversarial or will it become more collaborative? These two extremes are not viable. It will be increasingly difficult to conduct international negotiations in private, much less in secret, or to impose globalization as an elite-driven project. Yet conducting an "electronic" public referendum on every issue simply will not work. In a global economy, all politics cannot be local. A middle ground must emerge that allows for both broader public involvement and some semblance of efficient and effective global governance. An electronically integrated global civil society and a global economy are two sides of the same coin.

WANT TO KNOW MORE?

For a thoughtful discussion of the impact of an electronic, global civil society on political authority and power, see David Rothkopf's "**Cyberpolitik: The Changing Nature of Power In the Information Age**" (*Journal of International Affairs*, Spring 1998) and Jessica Mathews' "**Power Shift**" (*Foreign Affairs*, January/February 1997). Manuel Castells' three-volume work, *The Information Age: Economy, Society*

and Culture (Oxford: Blackwell Publishers) provides a comprehensive and extended discussion of the impact of the information revolution on our societies, politics, and economies. The last volume, *End of Millennium* (1998), is particularly relevant.

The best single source of information on the MAI and all of the arguments for and against it, is the Web itself. The "official" MAI site of the OECD provides the current draft of the full negotiating text, commentaries, reports, seminars, publications, articles, speeches, and much more. The "MAI Not!" site of the Ontario Public Interest Research Group is a focal point for anti-MAI materials. The site contains links to a vast collection of MAI materials and links to many of the other active anti-MAI groups. Perhaps the most reasoned, balanced, and comprehensive arguments against the MAI are those of the Preamble Collaborative, whose Web site features numerous news briefs, fact sheets, and extensive analyses of the agreement. Tony Clarke's paper "**MAI-DAY! The Corporate Rule Treaty**" can be found on the Canadian Centre for Policy Alternatives' Web site. A number of the major environmental organizations including Friends of the Earth and the Sierra Club have a good deal of anti-MAI material on their sites.

For links to these and other Web sites, as well as a comprehensive index of related articles, access www.foreignpolicy.com.