THE MULTILATERAL AGREEMENT ON INVESTMENT: IMPLICATIONS FOR MAORI

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A discussion paper, revised 3 October 1997

Democracy, Partnership and Economic Agreements

In recent years the government of Aotearoa/New Zealand has participated in the development of international agreements which undermine the rights and security of all New Zealanders. The OECD **Multilateral Agreement on Investment** is the latest international economic agreement which has been developed behind closed doors without consultation with, or information being disseminated to the general public. Initiated as the result of lobbying by the US Council for International Business and others, the Multilateral Agreement on Investment (MAI) Draft has been developed by the Office of the US Trade Representative and the State Department[1] and has been being negotiated since mid-1995. Originally to be completed by April 1997, negotiations of the final details are now to be completed by May 1998[2]. Until the leaking of the January draft of the MAI a few weeks ago very few people outside Cabinet and the Foreign Affairs and Investment Select Committee had knowledge of this agreement and its terms.

The potential impact on Maori as the Treaty partner and indeed on every New Zealander, of economic agreements which are designed to remove any remaining trade protections and barriers to market liberalisation is extremely significant particularly when such agreements enable the sale of or trade in almost all such assets and enterprises as remain in New Zealand ownership. The potential to reinforce the negative positioning of Maori across all social, health and educational indices is particularly strong. Given the extent to which such agreements have the potential to impact, the lack of consultation with either Maori as Treaty partner, or the public at large signifies a change of direction for 'democratic leadership' which must be of concern to both Maori and non-Maori.

[1] http://www.citizen.org/gtw/factmai.html
[2] Mandate for the Committee for Enterprise, Industry and the Environment for Negotiation of New Zealand Reservations for the MAI.

The limiting of state sovereignty in the global arena in favour of the global economy, reflected in agreements of this nature has severe implications at the level of international conventions and agreements such as the ILO, the Declaration on Human Rights and most certainly, the Draft Declaration of the Rights of Indigenous Peoples. In the current framework of economic globalisation, attempts to legislate in the international arena for the protection of the rights of indigenous peoples and other minority groups are reduced to mere tokenism. It can be argued that under the current economic regime of market liberalisation and unfettered free trade, democratic government no longer exists at the economic level. Instead, the perceived need of global corporations to profit as, when and where the highest economic gains are to be made, has become the standard for decision-making at local as well as national levels.

Democracy is being reshaped in ways which promote minimilist government as meeting the needs of real democracy by 'allowing the government to govern' and separating out human and social issues from the economic. The removal of human rights, environmental concerns and the rights of indigenous peoples from trade and economic agreements signals a clear commitment by the government to a form of democracy in which citizenship needs and community aspirations regarding the national economy are subordinated to the needs of outside forces, in this case, the global market. This raises issues about what kind of democracy exists within Aotearoa/New Zealand as well as constitutional issues concerning the processes by which decision-making does, or should, occur. It also highlights concerns regarding the constitutional position of Maori in terms of governance and decision-making. For Maori, the participation of government in international agreements without full consultation with, and consent of, their Treaty partner is untenable and surely unconstitutional. Current methods of consulting with Maori through the offices of Te Puni Kokiri for example, are demonstrably inadequate, functioning to co-opt Maori employed by the state as well as Maori elites and conveying an illusion of partnership which in real terms is far from equal. In the context of international agreements, effective Maori participation as an equal partner in political and economic decision-making is almost non-existence.

One significant aspect of the way in which economic decisions are being negotiated today is the right of cabinet to endorse secret decision-making processes and the negotiation of binding agreements that have the potential to drastically impinge on the lives of all New Zealanders is accepted as 'natural'by both Maori and non-Maori alike. New Zealand has moved dramatically towards a form of democracy in which external factors, primarily the global economy, are the driving force shaping the agenda of the government[3]. So successful has the market force rhetoric been that the citizens of Aotearoa are well on the way to taking for granted the fact that they have no input regarding major decisions that will bind not only this generation, but also generations to come. The notion that the privatisation of social services and the sale of state owned assets functions to improve governance and enhance opportunities for the person-in-the-street has been demonstrated in countries such as Mexico to be palpably incorrect. Privatisation has functioned overseas in the same way that it functions and will increasingly function within Aotearoa, which is to increase the wealth of those at the top and to hugely increase the numbers of those at the bottom of the socio-economic indicators. And it is in this group that Maori are already enormously over-represented.

The Multilateral Agreement on Investment is the latest development in a plethora of economic and trade agreements aimed at liberalisation of the economy and the removal of trade protections. The rapid increase in bilateral agreements during the 1980s which has been followed in the 1990s by multilateral agreements saw a number of common themes emerge all of which were designed to facilitate the liberalisation of the global economy (Kelsey, lecture 27 August 1997). Concepts such as National Treatment and Most Favoured Nation provisions have been common themes within both bilateral and multilateral treaties as have mechanisms for the settlement or adjudication of disputes (Kelsey, ibid). Designed to fill any gaps remaining in the trade and economic liberalisation programme, it could be argued that the MAI does not represent any departure from current economic policy.

What is new and significantly different is the introduction of the binding and enforceable nature of the agreement. Whereas previous treaties and agreements have been voluntary

[3] Barry Hindess, 1997, pp 83-84

and non-binding, relying on 'best endeavour' principles, the MAI provides mechanisms for non-complying participatory governments to be taken to court at either an international or national level. 'Best endeavours' will no longer be an acceptable measure for implementation of the provisions of the agreement. The explicit intention of this particular agreement is that the principles and provisions that it contains be legally binding and enforceable within any limited reservations that may be agreed for individual governments. Any reservations made by individual governments and agreed upon by members are all subject to provisions which prevent those reservations from being enlarged upon or added to in any way and further and perhaps more importantly, require them to be 'rolled back' that is removed, over time.

The Ministry of Foreign Affairs and Trade's insistence that the New Zealand government will not be required to rollback its reservations is based on the belief that New Zealand's already open trade regime will somehow protect it from having to comply with rollback and standstill provision. In fact, as has been frequently demonstrated and again this week in regard to the Coalition Agreement, such beliefs are erroneous and have no foundation whatsoever. The rhetoric of New Zealand being protected against further compliance is underpinned by a need to co-opt opposing parties and gain consensus amongst Maori in particular. Despite protests by the government and its negotiating party the Ministry of Foreign Affairs and Trade, that Maori interests and enterprise will be protected, the reality is that there is no guarantee whatsoever that this will be the case. And as the Prime Minister has currently demonstrated in a public forum, any such agreements are always subject to being re-negotiated or even to being thrown out altogether[4]. This is the environment in which economic agreements and safety provisions for Maori are being negotiated.

MAI and the Treaty of Waitangi

Under the provisions of the MAI, the Treaty of Waitangi may well be considered a hindrance to the free movement of capital and investment. As the MAI allows corporations the right to enforce the agreement's terms against countries[5], existing regulations such as

[4] Morning Report Interview on National Radio, 3 October 1997
[5] Section V. D. Dispute Settlement. Investor-State Procedures 1, 2

those which provide for protection of resources for Maori under Treaty rights, and which may be viewed as a violation of the rights of investors, may be legally challenged[6]. While the government claims to have provided protection for its Treaty partner in the form of a general reservation to protect Maori enterprise, in reality the reservation is sufficiently non-specific as to protect very little. As the Cabinet papers released under the Official Information Act state, to provide full protection for its Treaty partner would mean that the New Zealand government was in breach of the MAI. Clearly then, and by its own admission, there are a number of ways in which Maori will not be protected under the terms of the MAI. While existing and future Maori enterprise is protected in the reservations, there is no protection for resources and assets which are not used commercially either now or at any time in the future. The inference is that current resources and assets being applied commercially are protected only for as long as they are deemed a commercial enterprise. Once that condition no longer exists, Maori owned resources including land and other taonga, are subject to the provisions of the MAI. Ultimately this may very well mean that future as well as existing Treaty claims and settlements may be threatened on the basis of prejudicing a potential investor's access to investment in resources and enterprises. For Maori, any possibility of this situation either now or in the future must be completely abhorrent.

The List of Provisional New Zealand Reservations specifies that Ministry of Fisheries approval is required for foreign ownership of fishing quota. There is no guarantee that this approval will not be given at some point in the future, particularly as the roll back requirement is aimed at rolling back reservations over time. Not only do the gains of the last two decades stand to be completely lost but there is also a very strong likelihood that Maoridom will lose all rights to taonga, resources such as whenua, flora and fauna, artefacts and of course, airwaves and other enterprises such as fishing[7]. Economic agreements that have the potential to threaten all existing and future Treaty rights and settlements including taonga or resources not yet returned to Maori should be vigorously opposed, as should agreements that may potentially see vast areas and resources of Aotearoa as well as enterprises eventually come under foreign ownership.

[6] c.f. http://www.citizen.org/gtw/factmai.html
[7] c.f. Moana Jackson, June 1997

Clauses of the MAI: Significant Aspects for Maori

The draft Multilateral Agreement on Investment makes preferential treatment of New Zealanders regarding investment in New Zealand enterprise illegal. It is not possible for local investors, that is New Zealand investors, to be given priority over foreign investors in New Zealand-based enterprises, with a minimal amount of exception (subject to rollback) in the case of Telecom and Air New Zealand[8]. Nor is it possible to have minimum requirements of foreign investors and owners of enterprises regarding local employment, management or shareholding.

Further, previous negotiations and legislation such as Treaty settlements and fisheries allocations, if deemed to be a hindrance to the freedom of foreign investors to invest in any matters relating to intellectual and other property rights, stocks and shares or enterprise[9], can be required to be removed or 'rolled back' over time to conform with MAI measures[10]. The definition of enterprise includes any legal person or any other entity appropriately constituted or organised, "whether or not for profit, and whether private or government owned, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation, and a branch of an enterprise"[11]. According to the Consolidated Commentary on the MAI Draft[12], the definition of investment includes in addition to these, intellectual and other property rights[13]. (The list of provisional New Zealand reservations refers to a possible need to enter a reservation covering the New Zealand position on intellectual property rights.)

Under the regime of international economic agreements now being put in place, contracting countries or in APEC terms 'economies', can not be required to disclose information in circumstances which may 'threaten security' or which may be contrary to their own

[8] The exception to those listed in the List of provisional New Zealand Reservations to the MAI include a reservation requiring Crown approval for foreign ownership exceeding 49.9% in the case of Telecom and 49% in the case of Air New Zealand. This provides for a only fractionally less than 50% of foreign ownership in either enterprise, and that amount can be increased subject to approval.
[9] as defined in Part One, Section 11. Scope And Application. Definitions. Paragraph 2 (a) (I)
[10] Part Two, Section VIII. 2. Implementation And Operation. Rollback.
[11] Part One, Section 111. A. Key Personnel. 6
[12] Part Two, Section 11. Scope And Application. Definitions. Item (I)21
[13] Part One, Section 11. Paragraph 2 (a)

practices and policies regarding confidentiality[14]. Trade sanctions of any sort cannot be imposed. As with the World Trade Organisation agreement, countries can not give preferential treatment, for instance, to countries whose products are known to be environmentally less damaging than those of other countries. Neither can they refuse to trade with countries or investors known to be in violation of international conventions in a third country. In this environment Treaty rights as well as basic human needs for employment, health, housing and a minimum standard of living, have no relevance. Of even less relevance is the preferential treatment of national citizens, including Maori, over the requirements of foreign investors.

Under the terms of the MAI Draft, governments who chose to withdraw from the Agreement are prevented from doing so for at least five years from the time of signing, and even then, liberalisation measures already undertaken will be locked into place for a further 15 years[15]. At the very least, that provides a minimum period of 20 years during which foreign investors may have unlimited access to investment and ownership of any and all resources and enterprises within Aotearoa/New Zealand. During a 20 year period, the potential for the removal of ownership of assets, enterprise, intellectual and other property rights from the hands of New Zealanders into foreign ownership, is enormous. The scope for foreign ownership is unlimited, as is the provision for employing non-New Zealanders, provided that they meet requirements for visas and work permits. Under the terms of the MAI these provisions may be considerably relaxed.

Jane Kelsey, associate professor of law at Auckland University has summed up some of the essential aspects of the MAI[16]. These include employment, immigration, privatisation, rights of local companies, movement of capital, secondary boycotts, and enforcement.

The draft MAI **restricts the rights of local companies** by prohibiting any requirements for employing a minimum number of locals, prohibiting limitations on the nationality of managers and creating different voting rights for local and foreign shareholders[17]. In other words, local companies will have no rights in determining the mix of local and foreign

[14] Multilateral Agreement on Investment (MAI) Draft distributed January 13, 1997, Part One, Section III, 2.3
[15] Part One, Section IX. Final Provisions
[16] Kelsey, op.cit
[17] Part One, Section III, Special Topics. Key Personnel. B. Employment Requirements

employees, managers or investors. This means that local companies will no longer be able to choose to employ a number of New Zealanders, or in fact, any New Zealanders at all. This has severe implications for employment. It means, in effect, that local companies may have no New Zealanders whatsoever as employees, as managers, or as shareholders. Employees may be selected on any basis whatsoever, as long as it does not prefer locals over non-locals.

Immigration restrictions will be removed for a period up to 3 years for investors (and their spouses and children who are minorities) who have or are in the process of investing "a substantial amount of capital". There can be no labour limits, economic need tests, or quota limits[18]. It means that New Zealand may accept an unlimited number of immigrants for a period of up to three years at a time provided that a family member is making a "substantial" capital investment in New Zealand. It cannot, however, be argued that such capital investment will necessarily be of benefit to New Zealand, as the following point makes clear.

No limits on investors in terms of moving capital, profits, and proceeds of sale or compensation, out of or into the country, are permitted. Foreign investors cannot be required to use local content, hire a minimum number of local employees, achieve a minimum level of investment, employment, research and development, or production. No requirements, commitments or undertakings in connection with the establishment, expansion, acquisition, management, operation or conduct of an investor can be imposed[19]. The MAI is designed to maximise economic benefits to the investor regardless of any impact on the domestic economy.

Restrictions on secondary boycotts prevent companies who, for example, may be in gross violation of human rights in other countries from being discriminated against in terms of investment[20]. Trade sanctions such as those previously imposed on South Africa as a means of bringing pressure to bear on behalf of human rights, are not permissible under the terms of the draft MAI.

[18] Part One, Section III, Special Topics. Key Personnel. A 1, 3, 4 & 5
[19] Part One, Section III, B. Performance Requirements. Paragraphs 1 & 3.
[20] Part Two, Attachment 2. Draft Article on Secondary Investment Boycotts

Under the **National Treatment and Most Favoured Nation** (MFN) provisions countries are required to treat foreign investors from all countries *at least as well* as it treats investors from its most favoured investment partner, regardless of its human rights practices or other domestic and international policy[21]. National Treatment provisions mean that foreign investors and owners have *at least* equal rights as local investors and owners. This applies to all categories of enterprise as outlined above. The current list of provisional New Zealand reservations includes under Reservations to National Treatment a right to maintain measures and to implement new measures providing more favourable treatment to the Treaty partner. However there are two problems with this. Firstly, as the Mandate for Negotiation of Reservations states, "any form of special treatment offered to the Treaty partner touching on investment would constitute a beach of National Treatment" so it is likely that this reservation may not be acceptable to other countries[22]. Secondly, the rollback provision requires that countries undertake to rollback reservations as quickly as possible. This means that this reservation will therefore not be permanent and may be removed at any time.

Privatisation provisions, under National Treatment and Most Favoured Nation treatment, allow for the right of contracting parties to invest in or own any government-controlled enterprise which is privatised, irrespective of the method or the timing[23]. The rights of foreign investors apply to all privatisations. The provisions may potentially apply to any Maori- based, government controlled enterprises in areas such as education and health.

Enforcement provisions within the MAI give foreign investors the right to sue countries in order to overturn any legislation which they believe violates the agreement and hinders their ability to investment or ownership. This may be done either through international courts or through domestic courts. Existing and future legislation will be required to comply with the terms of the MAI. Despite refutations by the Department of Foreign Affairs and Trade who have been negotiating this Agreement, it is quite clear in the

[21] Part One, Section 111. National Treatment And Most Favoured Nation Treatment. Articles 1.1, 1.2, 1.3
[22] Multilateral Agreement on Investment: Mandate for Negotiation of Reservations, Executive Summary, p 6, Item 28
[23] Part One, Section 111. Performance Requirements. Paragraph 2.

existing provisions that the MAI has the potential to override laws at local and national levels[24].

The removal of restrictions upon immigration for investors combined with lack of any restrictions regarding operations, conduct, expansion and so forth, is designed to remove any remaining barriers to free trade and market liberalisation. As stated in the MAI Draft[25], the objective is to ensure the free flow of foreign exchange, or the value or volume of an investor's exports. While benefits will certainly accrue to the investors and their companies, there are no provisions in the form of gate-keeping or protection measures, for ensuring that any portion of the benefits, either in terms of the reinvestment of capital or profit or in terms of employment, will accrue to the citizens of Aotearoa/New Zealand. There are no requirements that overseas investors return any of the profits back to Aotearoa/New Zealand, or that its citizens benefit in any way, through employment, through development, or through the profits of investment. Under the terms of the secretly negotiated draft agreement New Zealanders have nothing to gain but the potential to lose a great deal. The likelihood of the New Zealand government representatives requesting amendments to protect the employment or investment rights of New Zealanders in New Zealand enterprise is very little.

MAI - The Face of the New Right

The Budget Speech and Fiscal Strategy Report of the Coalition Government's Treasurer, Winston Peters (June 1997) states clearly the government's support for the development of the Multilateral Agreement on Investment on the grounds that participation in the MAI will bring strong economic benefits to New Zealand. The Report further states that the government of Aotearoa will ensure the protection of national interests within the framework of the MAI. What is omitted is that signatory OECD countries will be forced to comply with requirements which ensure that national interests do not take precedence over the interests of foreign investors. While provision exists for each country to submit a list of reservations, it is extremely unlikely that reservations which contradict the spirit of the MAI will be accepted in the negotiations, and where reservations are permitted, there is an

[24] c.f. http://www.essential.org/monitor/mai/contents.html
[25] Part One, Section 111, Paragraph 1 (d) & (e)

absolute requirement that they be reduced and removed as quickly as possible. The entire rationale for the Multilateral Agreement on Investment is the removal of any protections whatsoever, particularly those which may be seen as favouring national interests or the interests of particular groups, such as the indigenous peoples of the land. The Multilateral Agreement on Investment is yet another measure designed to enhance the global economy without any recognition of the potential social and economic cost to national citizens.

The present about-face by the Coalition government regarding the sale of some of the remaining SOEs despite the opposition of the public is a clear indication of how far the government is prepared to go to support the economic agenda of transnational corporations to the detriment of (and despite the expressed wishes of) its own people. Assurances by the elected party and later by the Coalition Government, that privatisation would be resisted and that strategic state-owned assets would not be sold, have proved to be false. It has now been clearly signalled that there will be further sales of state-owned enterprises and that these sales will include strategic assets that had been protected in the Coalition Agreement. Once they leave state ownership there is absolutely no guarantee that state-owned enterprises any more than any other enterprise will remain in New Zealand hands and under the terms of the Multilateral Agreement on Investment Draft, very little likelihood that they will do so. Given the National Treatment and Most Favoured Nation provisions and the climate of market competitiveness and economic liberalism, there is a strong likelihood that many of these assets will leave ultimately leave New Zealand ownership, if not immediately then in the future.

In the current economic climate even the limited amount of social and economic well being that accrues to ordinary New Zealanders is under threat. Far from being the economic success that the government pretends, the introduction of economic liberalism in this country has resulted in a gross decrease in living standards for an increasing number of people, an equal increase in debt levels, and the plummeting of a number of our social indices including health, housing and youth suicide, to an all-time low. Economic policies which benefit an elite minority while devastating a rapidly-widening group of poor, which result in the sale of enterprises and assets which New Zealanders thought they collectively owned, and which will shortly remove all protections for employment, investment and

ownership by New Zealanders, should be strongly objected to at every level.

At the time of writing it has only now belatedly, been decided to carry out consultation with Maori regarding the draft Multilateral Agreement on Investment. To date no Treaty analysis whatever has been carried out.Until now, consultation with Maori was not deemed necessary. Until now the Multilateral Agreement on Investment has been negotiated in the absence of any analysis of the potential impact on Maori and despite commonly heard rhetoric about Treaty principles. And even now, consultation is being planned only as a result of loud objections having been raised in some quarters. It is now essential that Maori come to grips with the wider context within which MAI is but one aspect of a wider agenda which threatens to diminish the rights and welfare of all New Zealanders and Maori in particular. Otherwise very shortly the only aspects of New Zealand remaining under the control or ownership of New Zealanders may be those that have currently been returned to Maori ownership. And under the provisions of the draft MAI any limited protection for Maori assets will also be rolled back over time.

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