Multilateral Agreement on Investment

The Multilateral Agreement on Investment (MAI), which is currently being negotiated under the auspices of the OECD, seeks to establish a comprehensive framework for international investment. This draft treaty is attracting an increasing amount of criticism from many constituents and non-governmental organisations. This Paper sets out the main features of the MAI and summarises the views of the British Government and a selection of non-governmental organisations. The current state of the negotiations is briefly outlined.

Mick Hillyard

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I Executive Summary

If agreed, the Multilateral Agreement on Investment (MAI) will be a wide-ranging treaty that seeks to extend the principles of non-discrimination and transparency to all forms of investment. The MAI will also establish settlement procedures to deal with disputes between MAI signatories and investors and governments.

The MAI is currently being negotiated between the 29 members of the Organisation of Economic Co-operation and Development (OECD). While negotiations are being conducted among industrialised countries, some non-OECD members have been involved as observers at the negotiations. The MAI will be open to any country that is willing and able to abide by its disciplines. These new signatories, including developing countries, will be able to negotiate the terms of their accession. The UK Government warmly supports the general aim of the proposed MAI and is working to achieve a successful outcome to the negotiations in time for the OECD Ministerial meeting on 28 and 29 April 1998.

The MAI has been criticised by opponents and proponents of international business. On one side, some non-governmental organisations (NGOs) are generally very hostile to the MAI, in part reflecting their general hostility to globalisation. NGOs are concerned that the agreement will, amongst other things, further impoverish developing countries.

In a joint statement on the MAI, a coalition of development, environment and consumer groups from around the world, with representation in over 70 countries, agreed:

There is an obvious need for multilateral regulation of investments in view of the scale of social and environmental disruption created by the increasing mobility of capital. However, the intention of the MAI is not to regulate investments but to regulate governments. As such, the MAI is unacceptable.

On the other hand, major businesses, especially those in the US and Europe, have expressed concerns that the agreement may dismantle few international barriers while creating costly new ones relating to environmental and labour standards.

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1 Argentina, Brazil, Chile, Hong Kong, China and Slovakia are observers with others apparently keen to join. Source: HC Deb. 23 Feb. 1998 c153W
2 Joint NGO Statement on the MAI, Consultation on the MAI Paris: 27 October, 1997
II Latest State of Negotiations

The original deadline for completing negotiations on the MAI was May 1997. However Ministers from OECD countries unanimously agreed to extend the deadline to the following OECD Ministerial meeting on 28 and 29 April 1998. The intention was that the MAI would be signed at the April meeting and would then enter into force in late 1999, after a sufficient number of signatories had ratified it. Negotiating sessions have taken place in Paris approximately monthly.

However, during the relatively high level meeting comprising leading officials and junior Ministers in Paris during 16–17 February negotiations became somewhat stalled when the US delegation, led by the under-secretary of State, Stuart Eizenstat, expressed reservations that the work could be finished in time for the Ministerial meeting in late April.4

According to some press reports, the negotiations were brought to an end by a “stand-off between France and America.”5

The talks fell, however, on American laws that impose sanctions on US subsidiaries of foreign groups whose parent companies trade with Cuba, Iran or Libya.

America argued that these laws fell outside the MAI. But you can see the point. If executives of foreign groups are barred entry to the US, it looks discriminatory. Other countries could use equivalent laws to discriminate against foreign firms.

By then, the main parties seem to have gone off the idea anyway. EU countries routinely give special deals to promote inward investment that any decent MAI would rule out. And the playing field within the EU is far from even.

America has routinely discriminated against foreign companies at national level in anything from air travel and media ownership to nuts and bolts.6

Another press report stated:

On the politically charged issue of Europe's insistence that cultural trade be excluded, officials said there was never any intention of going back on the agreement that had been reached on this issue in a 1993 world trade agreement excluding the cultural area.

As for Europe's insistence that any agreement would have to include language that inhibited unilateral declarations of laws to be applied internationally, European officials said these negotiations were never intended to resolve the dispute over the extraterritorial reach of US laws regarding investments in Iran and Libya or the use of expropriated property in Cuba.

But ’a solution to these issues seems necessary to ensure a successful outcome of the negotiations,’ the communiqué issued at the end of the meeting said.7

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3 As at 2 March 1998
5 Good riddance to a deal no one wants; Analysis; Opinion: *The Times*, 19 February 1998
6 ibid.
The main areas of disagreement at the High Level Meeting on the MAI are outlined in the following extract from the Chairman’s Conclusions:

The High Level Meeting made progress on the outstanding issues of political importance. Discussions focused in particular on three areas: labour and the environment, liberalisation and exceptions, and conflicting requirements.

a) Labour and Environment

There is growing convergence of views on the need for the MAI to address social concerns and particularly environmental protection and labour issues. Most Delegations believe that the MAI should contain a strong commitment by governments not to lower environmental or labour standards in order to attract or retain investment. Delegations agree to make it clear that the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation. They also agree to associate the OECD Guidelines for Multinational Enterprises which highlight investors’ responsibilities in the fields of labour and environment.

b) Liberalisation and Exceptions

Delegations confirmed that the MAI is to be an ambitious comprehensive agreement covering, in principle, all sectors and economic activities. Exceptions will nevertheless be needed for overriding and widely-shared policy reasons, such as national security, and to respect political sensitivities and priorities, taking into account other international agreements. The discussion focused particularly on the treatment of measures taken for reasons of national security, public order, regional economic integration organisations, culture, subsidies and government procurement. In judging proposed exceptions, Delegations agreed to be guided by the need to preserve the quality of the Agreement and to achieve a satisfactory balance of rights and obligations among the Parties.

c) Extraterritoriality

Delegates discussed the issues arising from conflicting requirements, secondary investment boycotts and illegal expropriations. A solution to these issues seems necessary to ensure a successful outcome of the MAI negotiations.8

The break in negotiations may not be irretrievable. There still seems to be widespread support among governments for concluding the agreement. All OECD countries accepted that they would “intensify their efforts” to resolve outstanding issues, with a view to making as much progress as possible by April. At that Ministerial meeting there will be some stocktaking before a decision is made on what to do next.9 However, even allowing for the usual brinkmanship that accompanies international trade talks, especially during their final

9 Mrs Barbara Roche, HC Deb 23 February 1998 c151W
stages, the probability is that the agreement will not be signed in April but sometime in the autumn, if at all.
III International Investment

International investment has become an increasingly important part of the world economy. It includes investment in portfolio and intangible assets as well as foreign direct investment. Cross border portfolio investment occurs when a resident in one country buys shares or debt securities in another country. Foreign direct investment (FDI) occurs when an investor seeks a significant voice in the management of an enterprise operating outside his or her country of residence. Other forms of international investment would include assets such as loans, currencies and deposits.

The OECD estimates that the flow of foreign direct investment world-wide reached almost $350 billion in 1996. In October 1997, Donald J. Johnston, secretary-general of the OECD described the importance of FDI as follows:

The OECD countries collectively account for a large part of foreign direct investment flows world-wide: some 85% of outflows and 60% of inflows. Portfolio investments are increasingly important too as institutional investors representing pension funds seek new opportunities to raise financial returns and diversify their investments in overseas markets. Accordingly, OECD countries -- their investors, consumers and pensioners- have a major stake in the rules that govern international investment.

Non-OECD countries are becoming more important too, mainly as host countries, but increasingly as sources of foreign investment as well. Foreign direct investment is now widely recognised as an essential means to raise living standards, and to combat social, economic and environmental ills. Five years ago, Agenda 21 stated that investment - foreign as well as domestic - "is critical" for developing countries to achieve economic growth to improve the welfare of their populations, and recognised foreign direct investment as an important source of resources for achieving Agenda 21 goals.

In a survey of literature, the OECD described the importance of FDI to developing countries as follows:

The scale of global FDI has increased rapidly in recent years. In 1990, private investment in developing countries totalled US$ 44 billion; by 1995, this had grown to more than US$ 167 billion (World Bank, 1996). During the same period, Official Development Assistance (ODA) fell slightly, but remains a very significant financial flow toward the developing countries (US$ 55 billion in 1996) (OECD DAC, 1996).

Most FDI is still occurring within the OECD area. Only 10% of total world capitalisation exists in the developing countries and emerging markets (IFC, 1996). Nearly 75% of global FDI flows in recent years have gone to industrialised countries. On the other hand, the developing world is receiving an increasing share of these investments. In 1995, developing countries took in approximately US$ 90 billion (38%) of the US$ 240 billion total of world-wide FDI (World Bank, 1996).

Only a few countries receive most of the capital flows going to the non-OECD countries. On a regional basis, 60% of the FDI going to developing countries between 1989 and 1994 went to Asia - especially to China, India, and Indonesia (UNCTAD, 1995). Latin America received 27% of the total, 6% went to central and eastern Europe, and a mere 6% went to Africa.

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10 For further information on definitions, see Balance of Payments Manual, IMF
Similarly, the weight of ODA in total financial flows to developing countries differs widely by country (OECD DAC, 1996).\textsuperscript{12}

In recent years, flows of foreign direct investment (FDI) have been growing faster than trade flows. The \textit{World Investment Report 1997} states:

The global FDI stock increased fourfold between 1982 and 1994; over the same period it doubled as a percentage of world gross domestic product to 9 per cent. In 1996, global FDI stock was valued at $3.2 trillion ($3,200, billion). Its rate of growth over the past decade (1986-96) was more than twice that of gross fixed capital formation indicating an increasing internationalisation of national production systems.

A number of studies have underlined the importance of FDI.

A recent Government of Canada study shows that for every C$1 billion of foreign investment in that country, 45 000 new jobs are created over five years. According to the New Zealand Government, foreign investors in New Zealand reinvest 90% of their profits, employ New Zealanders in over 99% of the positions they create and pay New Zealanders on average 28% more than domestic firms.

A World Trade Organisation's study reports that "low levels of trade and inflows of Foreign Direct Investment (FDI) are symptoms rather than causes of the plight of many of the poorest countries. Without an increased inflow of FDI in these countries and increased trade, it is difficult to imagine how a major improvement in their economic prospects can be achieved. FDI brings with it resources that are in critically short supply in poor countries, including capital, technology and such intangible resources as organisational, managerial and marketing skills".\textsuperscript{13}

\textsuperscript{12} OECD, DAFFE/MAI(97)33, \textit{FDI and the Environment -- An Overview of the Literature}, (Note by the Secretariat), http://www.oecd.org/daf/cmis/mai/environ.htm
\textsuperscript{13} OECD, http://www.oecd.org/publications/Pol_brief/9702_pol.htm
IV The Scope of the MAI

A. Overview

The OECD has described the MAI in the following terms:

The scope of the MAI is to be comprehensive, covering all forms of investment coming from MAI investors, including the establishment of enterprises and the activities of established foreign-owned or controlled enterprises. It extends beyond traditional foreign direct investment to encompass portfolio investment and intangible assets. The treatment protection of investors and investments includes a broad definition of investor and investment, fair and non-discriminatory treatment for foreign investors, high standards of investment protection, and an effective dispute settlement mechanism.

Special topics or matters dealt with in the MAI include performance requirements and investment incentives, temporary stay and work of investors and key personnel, and privatisation and monopolies. Environment and labour issues and the OECD guidelines for multinational enterprises also figure in the current negotiations.

Final agreement will depend on achieving a satisfactory scope and balance of commitments among the negotiating parties, including agreement on exceptions, derogations and national reservations. The negotiations will take into account other developments in international investment rules. The MAI should be compatible with other international agreements, including the IMF and WTO, and should not create obligations on Parties that conflict their obligations under those agreements. It will also have its own institutional arrangements.

The MAI is to be a free standing treaty, open to accession by non-Members who are willing and able to meet its obligations. Considerable effort has been made to inform non-Members and to provide first-hand opportunities for discussions as the MAI negotiations have progressed. Activities included regular briefings of embassy representatives in Paris, and regional meetings for Latin America, Asia, and Baltic countries.¹⁴

The MAI does not propose a total and unconditional liberalisation of all international investment. The MAI proposes certain limits. As in the rules governing international trade, the presumption seems to be that unconditional liberalisation could lead to economic destabilisation and would ultimately be counterproductive. The MAI negotiators have therefore been negotiating certain limits on how far the disciplines promoted by the MAI should be applied in practice. These limits can take a number of forms. For example, some forms of investment such as real estate are likely to be “carved out” of the agreement altogether whereas other sectors such as financial services may have less demanding rules. The MAI will also contain “general exceptions” or “safeguard clauses” and “country specific exceptions”.¹⁵

B. The Main Features of the MAI are:

1. Non-discrimination

Non-discrimination is a major principle of the MAI. Governments that sign the MAI agree not to discriminate between national and foreign investors (i.e. National Treatment) or between different foreign investors (i.e. Most Favoured Nation Treatment). The MAI requires signatories to offer the better of “national treatment” and “most favoured nation” treatment to foreign investors. The MAI also includes market-access or rights of establishment and uses a very wide definition of investment that includes intangible assets such as intellectual property and portfolio investment. The principle on non-discrimination will extend to all tiers of government.

2. Transparency

Each contracting party shall promptly publish or make available its laws, regulations, procedures and policies relating to international investment. Public dissemination of measures affecting foreign investment is considered essential to the operation of the MAI.

3. Special Topics

The MAI includes special topics, which provide a further element of liberalisation that go beyond non-discrimination. For example:

**Key personnel:** the MAI will allow for key personnel to be given temporary entry to a country (provided they have a valid permit). There will also be prohibitions on the requirement to include any particular nationality on the board of companies.

**Performance requirements:** such as the proportion of local content or any requirement to export will be prohibited under the MAI even if these requirements are non-discriminatory. The MAI will build on the World Trade Organisations’ (TRIMS) Agreement. However, some performance requirements can continue to be imposed on investors in return for an “advantage” such as a government grant or regional assistance subsidy. If the investor does not wish to claim the “advantage” then the requirement cannot be imposed on the investor. The UK’s regional assistance policy would be compatible with this.

**Privatisation:** is not obligatory under the MAI but if it occurs, then it must be conducted in a non-discriminatory manner except that some people (e.g. employees) may be given special opportunities to buy shares. The principle of transparency must, however, apply. Negotiations are continuing on special shares.

16 See Agreement on Trade-Related Investment Measures (TRIMs), Final Act embodying the results of the Uruguay Round.
Monopolies: are allowed by the MAI provided they do not breach the principle of non-discrimination. Competition policy is not meant to be covered by the MAI but some negotiations may touch on anti-competitive behaviour. One of the UK’s country specific exceptions relates to Mergers and Takeovers and the Fair Trading Act 1973.

Concessions: such as running a public transport system must be awarded and maintained in a non-discriminatory and transparent way.

Investment Incentives: if provided, these must be on a non-discriminatory basis.

4. Investor protection

Signatories to the MAI will agree to treat investments fairly and to give them full protection. In the event that the investment is expropriated, signatories agree that there will be prompt and adequate compensation. This is a standard feature of existing investment protection treaties and currently covers UK investors in more than 80 countries that have bilateral investment treaties. Investors must be allowed to transfer income and capital out of the territory into a convertible currency.

5. Conflicting requirements and secondary investment boycotts

The MAI may contain measures against extra-territorial laws (e.g. the US Helms-Burton Act that is directed at anybody with interests in Cuba). However, this may be resisted by the US. The MAI may also contain provisions dealing with illegally expropriated property.

6. Dispute settlement

The first stage of the MAI dispute procedure involves consultation, conciliation and mediation. If the dispute is still unresolved, then state-to-state arbitration procedures may be invoked and a tribunal panel formed. The MAI allows investor-to-state disputes to be dealt with at international tribunals. Although this is a common feature in bilateral investment agreements, the Energy Charter Treaty and North American Free Trade Agreement (NAFTA), it is not found in World Trade Organisation (WTO) procedures.

7. General Exceptions

General exceptions to the Agreement would be provided on grounds of national security and international peace and security. Given that the US uses national security as a justification for its actions against Cuba (e.g. sanctions and Helms-Burton Act), the “national security” exception is a potential loophole. There may be moves to extend exceptions to “culture” and
the need to protect public order. A clause has been proposed on Regional Economic Integration Organisations (REIOs) which would allow the EU (and other REIOs) to liberalise internally without being required by Most Favoured Nation (MFN) disciplines to extend the liberalisation to other non-REIO MAI signatories. The US may resist this. Negotiations are continuing.

8. Environmental and Labour Standards

The aspect of the MAI relating to environmental and labour standards has attracted a great deal of criticism, especially from NGOs. This is considered in some detail later. It is proposed that the MAI shall contain strong language against states lowering environmental and labour standards in order to attract foreign investment. The UK is pressing for the inclusion of this as a legal requirement. However, the UK does not believe that it would be appropriate for particular environmental and labour standards to be imposed on members. The UK argues that the MAI will not conflict with UK environmental, labour and developmental objectives. In short, non-discriminatory environmental regulations will not be affected by the MAI.

9. Financial Services

Although financial services will be covered by the Agreement, there will be special provision to allow individual signatories to take necessary prudential measures, such as reserve requirements.

10. Taxation

Tax is covered by a network of double taxation agreements and is likely to be “carved out” of the Agreement, although this is still under negotiation.

11. Country Specific Exceptions

Signatories will be allowed to derogate from the provisions of the MAI if they notify the other parties by means of country specific exceptions. Almost all countries will want to be allowed some exception to the non-discrimination rule in particularly sensitive areas. The negotiating parties have two lists, previously known as List A and List B but now known as List A and “Future non-conforming measures”. List A identifies those areas where the provisions of the

17 Canada, France, Spain, Australia and Belgium are reportedly strongly in favour of retaining legislation that limits foreign investment in cultural industries. The US has historically opposed sweeping measures to safeguard cultural industries. See Financial Times, 20 October 1997.
18 Standard letter from Lord Clinton-Davies.
19 These are termed “non-conforming prudential measures.”
20 Previously called Country Specific Reservations.
MAI conflict with existing laws in the particular country. List B (“Future non-conforming measures”) simply identifies those areas where future laws or actions in defined areas may conflict with some provisions of the MAI. By making this information available, the parties will provide greater transparency to potential investors and allow themselves a certain degree of protection. Much of the current negotiations are taken up with agreeing these lists. A summary of the UK’s A list is annexed to this Paper. Once these lists have been decided in principle, there will be a standstill whereby states will not be allowed to add to their country specific exceptions. The aim is to reduce these reservations over time (rollback)\textsuperscript{21}. According to an official quoted in the\textit{Financial Times}\textsuperscript{22}, some 80 per cent of the exceptions tabled focus on the transport, financial services and telecommunications sectors. The wide agreement to limit foreign investment in these industries may result in the three sectors being excluded from a final accord. Negotiations are continuing.

12. Future Timetable

The next meeting is expected to take place in the week starting 16 March, followed by another on April 14-17. The Ministerial Meeting will take place on April 27 and 28. The Chairman’s draft text of the final agreement is likely to be available during March, or at the latest in time for the first meeting in April\textsuperscript{23}. Agreement of the MAI, however, may be further delayed by political developments in the US or by technical obstacles, such as needing to tidy up the draft agreement. Of course, there is also a risk that a political agreement can not be reached between the various parties and that the MAI will not be agreed at all. As with other international agreements, the parties may face the dilemma of having to choose between a few countries signing a strong agreement with a coherent set of core principles or a greater number of countries signing a looser and lower quality agreement. If the parties are faced with such a choice there is a strong case for taking the first option with relatively few countries agreeing the MAI in the first wave. This option would avoid the risk of agreeing so many loopholes that the agreement becomes largely meaningless and having to re-negotiate the core principles and definitions later.

13. Future Members

The MAI will be open to non-members of the OECD who are willing and able to abide by its disciplines. These new signatories will negotiate the terms of their accession. A number of non-OECD members are observers at the negotiations. The clear message is that if a prospective member does not accept the basic principle of non-discrimination, it should not sign the MAI. No country will be under pressure to sign the MAI if it is unwilling to do so. In the view of the UK Government, investment flows are influenced more by economic fundamentals than investment rules. Consequently, so the argument goes, the MAI will not

\textsuperscript{21} There is no time limit for these exceptions to be rolled back. However, these exceptions will be subject to review during which the parties will be persuaded to engage in a process of rollback.

\textsuperscript{22} US pressed on Helms-Burton, \textit{Financial Times}, 20 Oct 1997

\textsuperscript{23} The procedures are likely to be similar to those used by Arthur Dunkell, secretary general of the GATT, when concluding the Uruguay Round.
divert investment flows away from those countries that do not sign but will lead to an increase in global FDI flows.

C. Availability of Information

An early version of the draft agreement was “leaked” on the internet some time ago. Subsequently the draft was made available from the DTI. A revised consolidated text of the MAI has been deposited in the Library for consultation by Members.\(^\text{24}\) A copy is also available on the OECD web-site.\(^\text{25}\)

The OECD and its member governments have been active in different ways, hosting workshops around the world, participating in conferences, consulting domestic constituencies and non-member governments, conferring with business and labour organisations through the Trade Union Advisory Committee and Business and Industry Advisory Committee, and with international organisations like UNCTAD and the WTO.\(^\text{26}\) Information has also been provided through publications and internet sites. Indeed the OECD has a web site dedicated to the issue of the MAI.\(^\text{27}\)

NGOs have also produced material of varying quality on the MAI, some of which is available on the internet. Extracts are provided in section VI.

\(^{24}\) Deposited Paper 3/6060
\(^{26}\) United Nations Conference on Trade and Development and World Trade Organisation.
V The MAI and the UK

A. UK Government’s view

The Labour Party Manifesto contained very little that related to the MAI. However, it did contain the following commitments:

- We accept the global economy as a reality and reject isolationism.
- Labour believes the international environment should be safeguarded in negotiations over international trade.

During Prime Minister’s questions on 18 February 1998, the day after the negotiations on MAI became stalled, the Prime Minister set out the Government’s policy toward the MAI. He said:

- The multilateral agreement on investment is supported not just by the United States, but by Britain. Indeed, we have been active in promoting it, for a very good reason. Contrary to some of the things that are being said, it does not prevent decent regulations, either on labour standards or on the environment. What it does prevent is means of discriminating against foreign companies, and it is actually very important for British business and British exports that we prevent countries using regulation as a backdoor means of discriminating against foreign investment.
- We are people who gain, in Scotland and elsewhere, from free trade. We want to promote it as much as possible, and an agreement such as this does not, in any shape or form, prevent us imposing decent minimum standards for our workforce. It does mean that we, in common with other countries, cannot use that as a back-door method of discrimination. I think that, once that point is understood, people will support that investment agreement.\footnote{HC Deb 18 February 1998 c1077-1078W}

The UK Government is aiming for a comprehensive, multilateral and legally binding agreement providing high standards of investment protection and liberalisation of investment regimes. In response to criticism, the UK Government has described various ways in which the MAI will not prevent governments from pursuing certain policies. In a standard letter to MPs setting out the Government’s position, Lord Clinton Davies, the Minister for Trade, stated:

- The key principle is non-discrimination against foreign investors: signatories will be required to offer foreign investors treatment no less favourable than they offer national investors and other foreign investors.
- However, this does not prevent government from implementing policies that favour small firms or particular industries or regions. Furthermore if a government wishes to offer subsidies to firms to employ local people, or the long-term unemployed, the MAI will not stand in its way. It is important to realise that, more generally, MAI obligations will not affect a country’s right to
maintain its own internal regulations, nor will the Agreement prevent governments holding companies accountable for their actions. 29

Clare Short, Secretary of State for International Development, made the following comment on the MAI in a speech in July 1997:

Negotiations are now under way on the Multilateral Agreement on Investment (MAI). Our overall objectives are clear - to achieve high standards of investor protection which reflect our commitment to sustainable development, environmental protection and core labour standards. We are aware of the concerns of NGOs that the MAI should cover not only the rights of investors but also their responsibilities. I share this concern. The developing countries must not be marginalised. We would welcome views from business as well as NGOs on how this can be achieved in the negotiations up to next April. 30

When asked in a written question what terms the Government require to be met before signing up to the Multilateral Agreement on Investment and what safeguards the Government would require for developing countries, Clare Short replied:

The Government will be seeking a Multilateral Agreement on Investment (MAI) with a satisfactory balance of commitments from each negotiating partner. The MAI is not designed for poorer developing countries but it could become a model, and we are supporting consultation with them on how their needs can be taken into account. My Department is commissioning a study to look at any implications the MAI may have for these countries. 31

The results of the DfID study are expected to be published around 23 March 1998. At present it is uncertain how the DfID review will be conducted and how the results of the DfID review will feed into the multilateral negotiations before the crucial negotiating sessions. In short, the negotiating parties probably do not expect the DfID review to throw up anything surprising or significant that has not already been considered. According to Barbara Roche, Minister for Small Firms and Industry:

The UK Government will be determined to ensure that the agreement does not damage the interests of the poorest countries. If possible it should offer opportunities to the developing countries as a whole. 32

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29 Standard letter from Lord Clinton-Davies
30 Speech by Clare Short, Secretary of State for International Development, Institute of Directors, Tuesday 8 July 1997.
31 HC Deb 12 January c86W
32 HC Deb 23 February 1998 c153
B. UK Government and Environmental and Labour Standards

Mrs Roche said that environmental and other regulatory issues and labour standards were some of the most important outstanding issues for the UK.33

On environmental and labour matters, there has been a distinct change of policy by the UK. This Government have been taking the lead in ensuring that the MAI will not undermine regulation in those sectors as some people claimed it might. It is essential that we avoid that and I am confident that we shall, as all participants in the negotiations recognise the need to do so.

In addition, we have pressed hard for unambiguous reaffirmation in the MAI of commitments to sustainable development and core labour standards: for close association with the MAI of OECD guidelines for multinational enterprises, which are collective recommendations by OECD governments to multinationals on good corporate behaviour; and for a strong and binding provision on not waiving environmental or labour standards to attract particular investments.

It was this UK Government who proposed a review of the MAI and environmental policy. The first part, an overview of the literature on foreign direct investment and the environment, is on the internet. The second part on the relationship between the MAI and multilateral environmental agreements is under discussion and should be available shortly.

In short the Government are absolutely determined to ensure that there is no risk that the MAI will undermine environmental protection and labour standards.34

The government’s view is that the International Labour Organisation (ILO) and the World Trade Organisation (WTO) are the fora where labour and environmental standards should be addressed. Indeed the Government states that using the MAI as an instrument by which certain environmental and labour standards are imposed would simply deter potential members from joining, without leading to an improvement in standards.35 The UK Government is pressing, however, for the MAI to include a requirement that countries do not lower environmental or labour standards in order to attract specific investments.

C. Effect on the UK

Given that the UK does not generally discriminate on the basis of ownership of an investment, the MAI is unlikely to have much effect in the UK. This reflects the UK’s relatively liberal policy towards foreign investors. In those limited areas where the UK wishes to retain the ability to discriminate, it will seek to negotiate country-specific exceptions. These exceptions, which must be notified in advance, are summarised in annex 1. In general, the UK Government does not expect the MAI to impair the UK’s ability to attract high value-added investments.

33 HC Deb 23 February 1998 c151
34 HC Deb 23 February 1998 c151-2
35 ibid
UK firms that invest overseas should gain from the Agreement in a number of ways such as greater and fairer market access and rights of establishment and not being subject to various “performance” requirements unless willing to do so. UK firms should also benefit from free transfer of capital and the removal of the risk of expropriation without compensation. The MAI will be backed by state-to-state and investor-to-state dispute settlement procedures.

D. Parliamentary Scrutiny

The President of the Board of Trade has primary responsibility for the MAI and as such will be responsible for presenting it to Parliament.36

The MAI, like the agreements that concluded the "Uruguay Round" of the General Agreement on Tariffs and Trade (GATT) and set up the World Trade Organisation, spans the competencies of the European Community and of the member states individually. The GATT Agreement was signed both by a representative of the European Commission and by representatives of the member states. The MAI is likely to be treated in the same way.

One form of parliamentary scrutiny of the MAI is its consideration by the House of Commons Select Committee on European Legislation. Two Explanatory Memoranda on the MAI have been put before Select Committees by the DTI (dated 31 March 1995 and 6 March 1997). The Select Committee is required by its terms of reference to report whether such proposals or other documents raise questions of legal or political importance and to make recommendations for the further consideration of such proposals and other documents by the House. In practice, the Committee rarely comments in detail on draft external agreements with other countries.

Another form of parliamentary scrutiny is provided under The Ponsonby Rule, whereby any treaty subject to ratification is laid before Parliament for at least 21 days before ratification is carried out.37 The following extract from a Library Factsheet provides a useful explanation on the opportunity for a debate:

There is no presumption that Parliament will debate every treaty laid under the Ponsonby Rule, but once Parliament has been presented with the text of an important or controversial treaty it is difficult in practice for the Leader of the House to resist a debate on it. Indeed Ponsonby’s original announcement included the promise that, if there is a formal demand for discussion forwarded through the usual channels from the opposition or any other party, time will be found for the discussion of the treaty in question’. On occasions when the opposition front bench does not make a formal request for a debate, it is sometimes possible for

36 HL Deb 12 Jan 1998 : Column WA156
37 Ratification being by executive power under the prerogative - in effect merely a written confirmation of willingness to be bound, and the attachment of the Great Seal to a facsimile of the treaty.
backbenchers to secure a debate in private members’ time. Consequently, it may be said that, despite the lack of a formal mechanism, most politically controversial treaties which require ratification are as likely to be debated in the House of Commons as in other comparable parliaments.  

Adjournment debates on the MAI were held on 23 July 1997 and 23 February 1998. Up to the 3 March 1998 107 parliamentary questions had been asked on the MAI. By 3 March 1998 15 Members had signed Early Day Motion (833) on the MAI.

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38 Treaties and the House of Commons, Library Factsheet, Number 57
VI Views of Non Governmental Organisations (NGOs)

As noted above, NGOs involved in development issues and the environment are generally very hostile to the MAI, in part reflecting their general hostility to globalisation. In a joint statement on the MAI, a coalition of development, environment and consumer groups from around the world, with representation in over 70 countries, agreed:

There is an obvious need for multilateral regulation of investments in view of the scale of social and environmental disruption created by the increasing mobility of capital. However, the intention of the MAI is not to regulate investments but to regulate governments. As such, the MAI is unacceptable.  

NGOs criticise a number of aspects of the MAI and argue that it will be highly detrimental to developing countries. This view is summed up (in an extreme way) by the following item:

At this moment the governments of the Northern industrial countries are working in secret in Paris to craft what may be the most anti-democratic, anti-people, anti-community international agreement ever conceived by supposedly democratic governments. It's called the Multilateral Agreement on Investment (MAI). More accurately known as "The Corporate Rule Treaty," it is being written by and for corporations to prohibit any government or locality from establishing performance or accountability standards for foreign investors. In essence it says that foreign investors have the right to buy, sell, and move assets without restriction, and to challenge in special courts — in which they will have standing comparable to that of nation states — any measure that limits their freedom of action or deprives them of profits to which they feel entitled. In short if this agreement is approved the rights of corporations will trump the rights of people.

[...]

So let us be perfectly clear as we proceed with our deliberations. If we chose to reject the capitalism of the G-7, the World Bank, the WTO, the OECD, the IMF, and the Multilateral Agreement on Investment it does not mean we are against markets and democracy. To the contrary, we are rejecting their capitalism, because it is anti-market and anti-democratic.

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A. **World Development Movement (WDM)**

The World Development Movement (WDM) also takes a hostile position in its briefing paper on the MAI.\(^{41}\)

On 27 April 1998 ministers from 29 governments will probably sign the first world’s international agreement on investment. Yet few people have even heard of this historic agreement. Most will only find out when its provisions come into effect:

- Citizens will lose long-standing and fundamental democratic rights, while multinational companies will be sweeping new powers, including the ability to sue governments and local authorities.
- The world’s poorest countries will be locked into poverty and under-development
- Social and environmental laws in all countries could be progressively dismantled
- Regional development agencies and local authorities, including those in the UK will lose important powers to control and influence local economic development
- Local-level initiatives to promote sustainable development and the local economy will be undermined
- British companies, especially small businesses, will be put at a competitive disadvantage.

The WDM’s campaign is summarised on a document posted on its website.\(^{42}\)

The MAI espouses three central freedoms for investors:

**Freedom from restrictions on investment.** Signatory governments will not be able to place restrictions on foreign investment in any sector except defence. So, for example, it would be illegal for a government to prohibit a foreign take-over of their domestic broadcasting or fishing industries.\(^{43}\)

**Freedom from discrimination.** Signatory governments will not be able to give preference to domestic companies over foreign investors (although the reverse does not apply - they will be able to give preference to foreign investors over domestic companies). So, for example, it will not be possible for a country to protect its fledgling industries from foreign take-overs, a policy South Korea has used for many years with considerable economic success. Similarly, local authorities in the UK would not be able to favour local businesses over foreign investors.

The freedom from requirements on foreign companies to support the local economy. Governments will not be able to impose any restrictions on a foreign investor, such as requiring that they employ a particular number of local workers or use local materials or export a proportion of their production.

\(^{41}\) *A Dangerous leap into the Dark: Implications of the Multilateral Agreement on Investment*, November 1997.

\(^{42}\) Source: [http://www.oneworld.org/cgi-bin/babel/frame.pl](http://www.oneworld.org/cgi-bin/babel/frame.pl)

\(^{43}\) This is not strictly true since governments can exempt certain sectors from the MAI. For example, the UK draft list of exemptions is attached. Coincidentally, the list includes broadcasting indicating that the UK wishes to exclude this sector from the provisions of the MAI and reserves the right to discriminate.
Although UK Government officials are at pains to repeat that this agreement only extends to OECD countries, the multinationals pushing the MAI are clear that their main aim is to liberalise investment in developing countries. The MAI is already being spoken of as a "stamp of approval" for investors. The threat is that countries that do not sign up will not receive foreign investment. The poorest countries will have no choice but to sign.

The campaigners' demands

"Developing countries must reject this proposal. Otherwise they will be colonised by the Western world. That is what the developed countries intend.”

*Dr Mathathir Mohamad, Prime Minister of Malaysia*

Full negotiations on the MAI begin in two weeks time with a view to signing in May 1998. The World Development Movement is calling on the British and other governments to refuse to sign up to the MAI unless there is:

- Full participation by developing countries
- Full democratic consultation within the UK
- A binding agreement on multinationals that will establish responsibilities for multinationals rather than strengthen their rights.

**B. Oxfam**

Oxfam (UK and Ireland) takes a more moderate approach in its briefing paper. The following is an extract from the Executive Summary.\(^{44}\)

Oxfam is concerned that if agreed in its current form, the deal will:

- greatly increase the rights of investors vis-à-vis states and citizens without a parallel transfer of social and environmental responsibilities. The strongest provisions in the agreement are those which protect investors' rights. These are legally binding, and are backed by a right of direct access to international arbitration. This represents a far-reaching move to bring international law into the service of the powerful and economically strong, while entirely neglecting the interests of the poor and the economically weak. As such it fails to balance the granting of rights with any acknowledgement of responsibilities for social improvement, human rights or the protection of the natural resource base on which the poor depend.

- seriously limit the ability of governments to regulate investment in the public interest and transfer control over investment decisions from governments to unaccountable companies. This will particularly affect developing countries, preventing them from pursuing the kind of policies adopted by the successful OECD and East Asian Economies which has involved a significant degree of state intervention.

- contribute to growing job insecurity and downward pressure on labour, environmental and consumer standards by increasing the freedom of investors to buy, sell, and move their operations wherever and whenever they want without government restriction. This in turn contradicts the spirit and content of voluntary codes of conduct and may indirectly undermine them.

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\(^{44}\) Source: http://www.oxfam.org.uk/policy/papers/mai.htm
continue to allow richer countries to provide substantial financial and tax incentives to attract foreign investment. This makes investment increasingly expensive, which penalises poor countries and limits government funds available for home grown employment measures. It also fails to introduce measures to curb anti-competitive behaviour by firms so is unlikely to promote economic efficiency.

Yet despite its far-reaching implications, negotiations over the MAI have so far been conducted with minimal public debate or consultation. Many Parliaments, including that of the UK, will apparently not get to see the agreement until it is ready for ratification. While the MAI will eventually be open to accession by developing countries there has been no formal consultation with them.

[...]

In Oxfam's view the MAI needs to be amended so that it promotes forms of international investment which truly benefit communities and the environment including:

- greater transparency and consultation in the negotiation process including meaningful consultation with developing countries and non-governmental actors at an early stage, and timely availability of draft texts.

- a comprehensive and independent review of the social and environmental implications of the MAI for developing countries and the UK.

- accountability in investment decisions by allowing citizens, workers and communities the right to bring claims directly against investors and to present their views to any tribunal considering a state-state or investor-state dispute, either as affected persons or through representative organisations.

- balancing investor rights with their obligations to comply with international standards relating to the rights of workers, affected communities and consumer and environmental protection by the addition of a binding code of conduct for TNCs (transnational corporations).

- safeguarding the ability of governments to regulate foreign investment in the public good by including a broader list of general exemptions based on discussions with developing as well as OECD countries.

- common rules aimed to prevent unfair competition for foreign investment through financial subsidies and tax competition, as well as measures to curb anti-competitive practices.45

45 Source: Oxfam
C. CAFOD\textsuperscript{46}

The view of CAFOD, another NGO with strong ties with developing countries, is summarised below:

Inequalities between countries and regions continue to grow, and in a context of declining aid and overseas development assistance (ODA), the world's poorest countries are set to become more and more marginalised. However, increased FDI in itself is not the answer. The effect of uncontrolled investment can be just as negative as too little. Most FDI is via multinational companies, which are becoming increasingly powerful, and whose prime motive is profit for shareholders, often at any price. The Multilateral Agreement on Investment (MAI) is one way of addressing control of FDI. The core provision of the MAI is that foreign investors should receive the same treatment as national investment. In theory this sounds fair, but in practice it means that small or fledgling local companies are competing with huge, well-established foreign transnational companies. Such an agreement would prohibit the protection of key industries which was crucial to the development of East Asian "Tiger" economies of Taiwan and South Korea, often used as examples of free trade success stories.

A Multilateral Agreement in Investment is due to be agreed by the developed countries belonging to the OECD (Organisation for Economic Co-operation and Development), which collectively provide 80\% of global outward investment and absorb 66\% of inward investment. A global MAI was proposed at the WTO Meeting in 1996 but was opposed by many Southern states, and is now being taken forward by UNCTAD (UN Conference on Trade and Development). The concept of investment includes capital, intellectual property rights, and concessions over natural resources.\textsuperscript{47}

D. International Business Organisation

A delegation brought together by the Business and Industry Advisory Committee (BIAC) to the OECD presented a business case on the MAI at a consultation with governments in Paris on 15 January 1998. An outline of its views was set out in a press release produced by the International Chamber of Commerce.\textsuperscript{48}

Some concerns from international businesses were repeated in an article in the \textit{Financial Times}:

'We now hear of disturbing signs that many of the elements we were hoping for may not be possible,' said Herman van Karnebeek, deputy chairman of Akzo Nobel, the Dutch chemicals group, who heads the OECD business and industry advisory committee. 'What then, we are beginning to ask ourselves, is in the MAI for us?'

Frans Engering, chairman of the OECD talks, conceded the draft agreement contained flaws, which required further negotiation. But he dismissed some criticisms by business organisations as misplaced, and said they had adopted a more positive attitude after meeting OECD negotiators late last week. Nonetheless, some business representatives say unless they

\textsuperscript{46} CAFOD is the official relief and development agency of the Catholic Church in England and Wales.

\textsuperscript{47} CAFOD, \textit{Globalisation of Trade Free vs Fair}, http://www.cafod.org.uk/cafod/trade.htm

\textsuperscript{48} Business states its views on OECD investment agreement, Document 664/943e, Dated 16 January 1998.
are satisfied with the final agreement, due to be completed by April, they will not support its approval by OECD member parliaments. Business organisations have stepped up their lobbying partly to counter demands by trade unions and other non-government bodies for tough provisions in the MAI to enforce core labour standards and strengthen environmental safeguards.

Many of the demands are supported by the US, which is pressing hard for tighter environmental provisions in the MAI. Although business groups say they can accept some US goals, they oppose a proposal to require environmental impact assessments of certain planned investments. Some business lobbyists are worried that strengthening labour standards provisions in the MAI could make it harder for governments to adopt policies designed to create more flexible labour markets. They also complain that OECD governments are still attaching reservations and exceptions to commitments to protect foreign investors and are balking at a binding undertaking to renounce abusive tax treatment of foreign-owned subsidiaries.

Mr Engering said the MAI talks now needed to move beyond technical issues to political discussions.

E. Trade Union Advisory Committee

The Trade Union Advisory Committee (TUAC) to the OECD produced a so-called non-paper in January 1998 on matters relating to workers’ rights, especially the clause on not lowering standards. According to the TUAC, the inclusion of binding labour and environment clauses in the MAI is essentially a political matter. TUAC stated:

That enshrining legally binding investors’ rights in the Agreement should be balanced *inter alia* by binding commitments by signatories to observe internationally recognised core labour rights and not reduce or offer to reduce domestic labour standards to attract foreign direct investment. Without this, the Agreement will be perceived as unbalanced and unfair and many TUAC affiliates will be campaigning against ratification of any agreement in national legislatures.

According to the TUAC there is little dispute about the definition of domestic labour standards as being preferred to the word measures. In the TUAC’s view, a clause on not lowering domestic labour standards is intended to guarantee the implementation and enforcement of labour standards on a non-discriminatory basis for both domestic and foreign investors, reflecting in the labour field the principle of National Treatment which is fundamental to the MAI.

It would not, as some have argued, create disputes under the MAI over changes to, for example national minimum wage systems (footnote 99, page 49 of May 1997 MAI text).

The TUAC stated that any disputes concerning labour standards should, as a rule, be resolved ahead of the implementation of any announced changes.

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50 Non-Paper on Binding Labour Clauses in the MAI: definition and implementation mechanisms, TUAC, January 1998
51 *ibid.*
This would be analogous to investment protection in the pre-investment phase, and in general render as unnecessary recourse to an arbitral tribunal. A disputes settlement panel would be envisaged only as a last resort. In this sense, binding obligation of parties to the Agreement to set up National Contact Points would play a vital role.\textsuperscript{52}

These National Contact Points would come into play as a focal point for resolving disputes involving allegations of breaches of the principle of non-discrimination as it relates to not lowering labour standards. Should the dispute be unresolved by consultation, conciliation and mediation then arbitration would be envisaged. The TUAC comments that if the ILO does not provide the tribunal members, then “labour experts” should be included within the roster of those nominated to serve on the tribunals. The TUAC also comments that an offending country be given a period in which to bring its non-conforming actions into conformity with the MAI while being monitored by the nominated experts under the guidance of the ILO.

\textsuperscript{52} ibid.
VII Comment

The NGOs have clearly expressed a variety of concerns. In his opening address at an Informal Consultation with NGOs, Donald J. Johnston, secretary-general of the OECD, summarised the concerns that he had heard from NGOs in the following way:

Your concerns range from the general impact of the MAI on the national sovereignty of Parties to the agreement, to very specific portions of the proposed agreement having to do, for example, with the treatment of foreign personnel and their families. You are interested in ensuring that the MAI does not impair the ability of governments to exercise their powers over the environment, labour practices, consumer standards, anti-competitive activities, and other important matters of public policy.

You are also concerned about the position of countries who are not directly engaged in the MAI negotiations, especially developing countries.

Today’s session will permit a dialogue on these questions and any other concerns you may have.

A. Sweeping New Powers?

NGOs allege that the MAI will give multinational companies sweeping new powers, including the ability to sue governments and local authorities. Business already can, and do, sue governments and local authorities, since they operate within the law. The fact that, under the MAI, disputes could be settled in an international tribunal is hardly new. For example, the European Court of Justice receives petitions from businesses in disputes with member governments of the EC over the interpretation of EC legislation. What is new in the MAI is binding international arbitration for investor-to-state disputes, over a wider range of issues than in existing bilateral treaties.

B. Undermining Local Initiatives and Local Authorities?

As noted above, some NGOs complain that local authorities and regional development agencies, including those in the UK, will lose important powers to control and influence local economic development. However, to the UK Government this is misplaced. The provisions of the MAI will apply to all levels of government, including local authorities, but the Minister argued:

The MAI will not obstruct local government or interfere with programmes that are aimed at increasing employment opportunities for local people. We would not expect nationality of

53 Informal Consultation with NGOs on the MAI 27 October 1997
54 HC Deb 23 F February 1998 c152
55 See material from World Development Movement.
ownership to be a factor in local government decisions, but we have consulted local authorities. They have not identified any problems or any need for exceptions. If any do come to light, we shall of course consider them.  

Even if for some reason a local authority found itself in breach of the provisions of the MAI, the legal remedy would be taken against central government and not the local authority itself.

C. Undermining Government?

The MAI has also been criticised as promoting the interests of international business and undermining the rights of governments. Generally, multinationals, like domestic enterprises, will have to respect the laws of the countries where they operate. At its basic level the MAI will constrain governments and restrict their (notional?) freedom to impose arbitrary and discriminatory measures on foreign businesses. In countries such as the UK where there is a liberal approach to inward investment, the policy of non-discrimination is not unusual. For example, foreign owned businesses in the same position as domestically owned businesses are treated in the same or similar manner in matters of taxation, industrial and commercial law. There are some sectors where this rule does not prevail but these are exceptions rather than the rule.

Some have claimed that the MAI will prohibit governments from dealing with economic and monetary difficulties, but the draft agreement contains provisions that allow governments to impose temporary safeguards that, although inconsistent with parts of the MAI, are allowed in exceptional circumstances. These measures could be adopted if capital movements cause, or threaten to cause, serious difficulties.

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56 HC Deb 23 February 1998 c152
57 The UK competition legislation on mergers is widely drafted to allow UK interests to be taken into account, both on the distribution of assets and employment, and to promote export activity. However, despite a few cases in the 1980s (including Kuwaiti interest in BP), according to one study 'generally speaking...the British authorities have taken the view that the nationality of the bidder in a merger case is irrelevant' (Nick Gardner, *A Guide to United Kingdom and European Union Competition Policy*, 2nd ed. 1996, p. 89). In July 1990 the secretary of state for trade and industry announced a policy of looking closely at the degree of state control in an acquiring company when making a merger referral decision. The policy was dropped in June 1991 after the MMC had shown that it regarded state control as just another circumstance to be investigated. (Source: C. Blair, BTS)
58 VI Exceptions and Safeguards 1 October 1997. The measures must be temporary, not excessive and approved by the IMF.
D. Impoverishing Developing Countries?

Given that developing countries are trying (for obvious reasons) to attract foreign direct investment, they will be obliged, as host countries, to provide a secure economic and policy environment to potential investors, regardless of whether or not the MAI exists. For example, foreign investors will need to be reasonably sure that their foreign investments are safe from unfair expropriation. Arguably the most efficient way - in terms of predictability and transparency - of providing this level of confidence may be via a common, well-understood and internationally accepted framework of rights and obligations. Developing countries and advanced industrial countries may find that investor protection and non-discrimination become required standards by international investors. But this does not mean that the developing countries will also not wish to identify their own exceptions to the main provisions of the agreement.

As noted above, the DfID commissioned study into the likely effect of the MAI on poorer developing countries will provide further evidence. However, the DfID review is not expected to throw up anything surprising or significant that has not already been considered. Publication of this study is expected in late March some time before the negotiations are concluded.

E. Undermining Labour and Environmental Standards?

1. Overview

Whereas some NGOs claim that social and environmental laws in all countries could be progressively dismantled as the result of the MAI, some developing countries are concerned that uneconomically high labour and environmental standards may be imposed by industrialised countries as a way of inhibiting capital flows into developing countries. To some developing countries there is a clear risk that the process of development could be slowed if artificially high environmental and labour standards are imposed on poorer countries.

The OECD has, for some time, been involved in setting standards for corporate behaviour. For example, the “1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises” contains several distinct elements, including a political commitment by governments to provide national treatment for foreign-controlled enterprises. The OECD has also produced “Guidelines for Multinational Enterprises”, which are addressed to enterprises themselves. Although business and labour organisations have endorsed the OECD Guidelines, they represent a voluntary code and are not legally binding. The OECD claims that the Guidelines provide a clear statement of good conduct by multinational enterprises and have follow-up procedures.
The Guidelines have been strengthened over time, and a special chapter on environmental practices was added in 1991. The Guidelines are likely to be closely associated with the MAI, as the UK has been pressing. An advantage of this is that it will extend the influence beyond OECD members as non-members accede to the agreement. However, this may be considered insufficient since the Guidelines are voluntary and would not be subject to the MAI disputes settlement. There are likely to be increased calls for the Guidelines to be strengthened further and to be more firmly linked to the MAI.

A balance clearly needs to be struck between not undermining environmental and labour standards and not burdening the MAI with “inappropriate” measures. For example, the UK government considers using the MAI to prescribe the inclusion of environmental and social audits in company reports as inappropriate. Clearly a major concern throughout is that discrimination should not be allowed to be disguised as environmentalism in order to evade the provisions of the MAI. Annex 2 to this Paper outlines three recent disputes concerning discrimination and labour and environmental standards. The issues are fairly complex but it is important to differentiate between discrimination for protective purposes and measures with a genuine environmental purpose.

It is likely that environmental protection will be allowed under the MAI on condition that it is not discriminatory. Having said that, the agreement may even allow some additional controls on foreign investors provided such controls are consistent with the principle of national or similar treatment. This area is still under negotiation.

In a letter to the Financial Times, the secretary-general of the International Chamber of Commerce and the executive director of Business and Industry Advisory Committee to the OECD outlined the case against introducing high environmental and labour standards on international investment.

As the April deadline for agreement by OECD ministers approaches, the agreement risks being encumbered by excess baggage that would dilute business enthusiasm and discourage non-OECD countries from acceding. The International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and other business groups will argue at a meeting in Paris today that OECD governments should be careful not to discourage developing countries and emerging economies from joining the agreement. This could happen if they imposed binding requirements governing the environment and labour standards that countries cannot realistically meet. The risk is real. Some proposals imply that even OECD countries’ laws do not provide sufficiently high levels of environmental protection and are not effectively enforced. If these are to be believed, how can a developing country that is building an environmental regulatory capacity be expected to commit itself to standards.

This is not to say signatories should be barred from adopting domestic measures they consider necessary to promote national objectives on environmental protection. However, such

59 HL Deb 27 Jan 1998 col 17WA and based on remarks by the secretary general of OECD, Informal Consultations with NGOs, October 1997, OECD
60 HC Deb 22 January 1998, c657W
measures must not discriminate against foreign investors. There are similar concerns about labour standards. Any governments that attempt to use the agreement as a basis for setting core labour standards would pre-empt discussions in the International Labour Organisation, the appropriate forum. They would introduce uncertainty for investors by raising the spectre of disputes in which signatories could use the new language as an excuse for administrative delays or outright discrimination against foreign investors.

Business wants an agreement that truly builds investor confidence by ensuring greater predictability and transparency.  

2. **OECD’s Review into MAI and Environment Policy**

The OECD Secretariat has undertaken a two-part review into the relationship between the MAI and existing and proposed multilateral agreements on the environment. The first part of the review was published on 28 November 1997. Although the second part has not yet been made public, it was apparently available for consideration by the Negotiating Group in early 1998.

The first part of the review was an overview of the literature into FDI and environmental relationships. That review commented that:

Four key aspects of the FDI-environment relationship have dominated much of the research effort to date:

**Environmental effects of private international finance.** FDI may generate both risks and opportunities for the environment, depending on the circumstances. On the one hand, FDI can generate new growth and new structural efficiencies, making larger investments in environmental protection possible. But it may also lead to increased production and consumption of polluting goods, or to expanded industrial activity (and thus, to increased emissions).

**Environmental effects of FDI-based technology development and diffusion.** Foreign investors may bring modern technologies that represent environmental improvements over what is currently available in the country in which they are investing. Thus, FDI-based economic expansion may offer the prospect of significant technology-based environmental improvements.

**Impact of environmental standards on investment decisions by the firm.** A key question is whether or not higher environmental standards lead firms located in “high-standard” countries to move to jurisdictions with “lower” environmental standards (i.e. to “pollution havens”). Plant relocations may be the result of the higher costs associated with more stringent environmental standards, or they may simply be the result of other cost/quality advantages offered by the host location.

**Environmental effects of international competition for FDI.** A related fear is that some jurisdictions will use lower environmental standards as a way of attracting new FDI. Countries could either lower their standards intentionally, or they could resist increasing their standards, in order to gain a competitive advantage.

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61 Letters to the Editor: Transparency key to investment accord: *Financial Times* 15 January 1998 Maria Livanos Cattaui, secretary-general, International Chamber of Commerce, Steven Bate, executive director, Business and Industry Advisory Committee to the OECD, 7016 Paris

62 Meetings between 12 to 16 January and 19 to 23 January 1998
And later:

For all of the above reasons, the fear of a general "race to the bottom" in environmental standards, based on competitiveness concerns, may be somewhat exaggerated. There are some sectors of the economy in some countries where a "race to the bottom" may be occurring, but this does not seem to be the general case.

A more important question may be how international economic competition might be inhibiting a "race-to-the-top" (i.e. preventing countries from raising environmental standards). For example, there is some evidence that countries sometimes do not implement new environmental policies out of a fear that their domestic enterprises will lose competitiveness (e.g. European carbon tax; US BTU tax). Enhanced international co-operation is likely to be part of the optimum policy response to this problem (See Zarsky, 1997).  

The second part of the review has investigated allegations made by NGOs and others that the MAI could have the unintended effect of undermining environmental standards such as the Montreal Protocol. This part of the review is under discussion by MAI negotiators. When published it is likely to indicate that in general the MAI will not undermine Multilateral Environmental Agreements (MEAs), largely because MEAs do not have explicit references to investment related sanctions. However, the review may identify some potential conflicts between the MAI and MEAs, which may need further clarification. For example, quotas or permits could easily be classified as assets and therefore fall within a wide definition of investment used by the MAI. Having said that, provided the issuing of permits and quotas is not discriminatory, there should no incompatibility.

F. Negotiating with Excessive Secrecy?

It has been alleged that the MAI is being negotiated under strict secrecy. These criticisms seem to relate more to the lack of publicity in the media, at least until very recently, than with secrecy on the part of the negotiators. In many ways, the negotiations have been conducted in a fairly open manner. First, there is very little prospect of excessive secrecy being maintained, even if desired, when negotiations are being conducted between a group of 29 industrialised governments and a number of developing countries are involved as observers. Second, some degree of secrecy is not unusual when international treaties are being negotiated. And in that context the MAI negotiations do not seem excessively secret. Third, the OECD has published a large amount of material and even has an internet web-site dedicated to the subject. Last year some governments wanted to make the draft agreement widely available on the Internet but at least one government, possibly the US, objected. In the event a copy of the draft agreement was leaked and posted onto the internet. Copies of the draft MAI consolidated text have also been available from the DTI to interested parties.

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64 The Montreal Protocol in 1987 commits over 100 nations to an agreement on the reduction and phase out of substances that deplete the ozone layer.
65 HL Deb 28 January 1998 c45WA
including businesses and NGOs and have also been placed in the Libraries of both Houses. In early February the OECD secretariat put the revised consolidated text of the agreement on its web site.

Fourth, officials of the OECD secretariat have held consultations with representatives from business, trade unions and NGOs associated with environmental and development issues. Indeed the OECD posted a critical joint statement by NGOs on its own website. Background documents are posted on the OECD’s on-line information service, which serves member governments. In the UK representatives have also had discussions with officials and Ministers including, Clare Short, Secretary of State for International Development and Lord Clinton-Davies, Minister for Trade.

66  HL Deb 12 Jan 1998 : c156WA
Developing Countries and Investor Protection

Investor protection is not restricted to the MAI but is being promoted by other bodies such as the EU and the WTO. The MAI, if agreed, would replace a tangle of bilateral treaties and other arrangements that currently exist between countries. In a sense the question for developing countries is not whether to provide greater investor protection but what form the investor protection should take.

A. Various Options

The EU’s Green Paper on relations with African, Caribbean and Pacific (ACP) countries sets out some options for ACP countries wishing to revive investor confidence through more credible investment protection. These are:

a. Pursue current policies of concluding bilateral investment protection agreements with countries of the EU and the home countries of other foreign investors. These agreements cover the basics of compensation for expropriation, but are otherwise limited in scope, offering little redress against discriminatory or discretionary decisions by host country governments. They have not been conspicuously successful in attracting new investment, particularly in Africa.

b. Enter into regional investment protection arrangements. One example to follow might be the UEMOA, whose members are introducing a common investment code, common trade law and common investment protection standards. With regional arrangements it should be relatively easy to police compatibility with rules and undertakings, and judicial redress should be relatively accessible for aggrieved investors. Successful regional arrangements might be extendable to other interested ACP states, thus creating an acknowledged ACP standard of practice.

c. Subscribe to an internationally recognised standard of investor protection - based perhaps on principles agreed in the WTO. The advantage for ACPs of adopting international norms of investment protection lies in their greater visibility and familiarity to investors, and thus in their greater confidence-building effect.

However, as there is at present no internationally agreed model, the most advantageous option for ACP countries, in the interim, is likely to be to collaborate - with EU support - in regional arrangements which satisfy the basic principles outlined above. In their longer-term interest the EU and ACP countries should simultaneously work together towards agreement on a wider international standard.

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69 UEMOA, a recently created regional organisation, West Africa
IX Concluding Comments

A number of the arguments against the MAI seem to be more concerned with criticising globalisation of the world economy and further moves towards a more open world economy generally rather than with the MAI specifically. Much of the general case against the MAI is similar to that raised by the same groups during the Uruguay Trade negotiations.

Much of the criticism of the MAI concerns issues other than the principal purpose of the MAI: namely; non-discrimination. One benefit of the agreement would be that it would prohibit a government from treating national and foreign firms unequally. For example, governments would be prohibited from confiscating foreign owned assets to the extent that the policy discriminated between domestic and foreign owned assets and involved unfair compensation. This would not apply, of course, if the sector had been notified as a country specific exception. The MAI would also seem to pose some difficulties for the US Helms-Burton (anti-Cuba) law, perhaps a factor that may make the US reluctant to conclude the negotiations.

Barbara Roche addressed many of the concerns raised by the NGOs in her winding up speech in the two adjournment debates\(^{70}\) and in a series of written answers. During her speech, Ms Roche said:

I am well aware that a number of organisations and individuals, some of whom carry considerable weight and are well known to hon. Members, are concerned about the possible impact of the MAI on environmental and labour standards world-wide. I am also aware that some are concerned about the possibility of the MAI overriding obligations agreed in previously signed multilateral agreements. The new Government have made a clear commitment to safeguarding the international environment and to promoting sustainable development in both developing and industrialised countries. We would not sign an agreement that might damage those commitments. My hon. Friend the Member for Bury, North made an important point about possible legislation on environmental regulation. I reassure him that so long as environmental legislation is non-discriminatory it should be safe from the legal challenge that he described.\(^{71}\)

The Secretary General of the OECD made similar points at the informal Consultation with NGOs. He said:

**OECD governments recognise that investment restrictions and discriminatory treatment of foreign firms are a potential source of international friction. The greater the role of investment in the global economy, the more important it becomes to have an agreed international framework to address such frictions and to avoid them wherever possible.**

While market factors are, of course, the primary determinants of investment decisions, the investment climate is also a major factor. Investors need long-term stability of rules and procedures, guarantees for entry and establishment, equal competitive opportunities and
protection of existing investment. By adhering to common international rules of the game, countries become more attractive for investment and economic activity, and avoid distortions bound to have a detrimental effect on economic growth and development.

Those rules must, of course, account for other vital public policy goals: governments must be able to protect their national security, protect the environment, maintain high labour standards, and offer solid consumer protection. The task of the negotiators is to find the right approach to achieve that objective. We are, therefore, glad to have this opportunity to hear your views.  

72 op.cit.
## Annexes

### A. Annex 1: UK Preliminary List of Exceptions

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B. Annex 2: Discriminatory Measures or High Environment and Labour Standards?

This annex contains some material on three cases that have been linked with aspects of the MAI.

Case one

1. Ethyl Corporation: NAFTA

In 1997 the Ethyl Corporation, the manufacturer of a gasoline additive MMT, started legal proceedings against the Canadian government. Ethyl Corporation was suing the Federal Government for $250 million in damages, claiming that the legislation introduced in 1996 that banned the importation and trade in MMT in Canada, was expropriation of its product under the investment provisions of NAFTA. The action has been identified by NGOs as demonstrating that environmental standards will be undermined and governments frustrated in their endeavours to introduce higher environmental standards. David Wilson, President, Ethyl Canada, pointed out in a letter to the Toronto Star that the legislation (Bill C-29) discriminated against the importation of imports of MMT and not MMT itself. The relevant extract is reproduced below:

Bill C-29 is a piece of bad legislation designed to ban the importation and inter-provincial trade of MMT. The bill is not to ban MMT. There is a major difference. If this additive was either a public health hazard or a danger to the environment, then why didn't the federal government ban its use outright? In fact, C-29 was passed because the debate surrounding the issue was based on a series of innuendoes and myths propagated by the automobile companies.73

Case Two

2. US Clean Air Act: WTO Dispute Settlement Body

In 1996 the WTO Dispute Settlement Body found in favour of Venezuela and Brazil and against the US Clean Air regulations covering gasoline cleanliness. However, contrary to the views of some critics of international agreements, the findings were not directed at undermining a government’s environmental standards. The position is set out in the concluding remarks of the Dispute Settlement Body:

In concluding, the Panel wished to underline that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement. Under the General Agreement, WTO Members were free to set their own environmental objectives, but they

73 Debate on gas additive was based on myths, innuendoes, Letter to Toronto Star, 14 Jan 1998:
were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.

8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

8.2 The Panel recommends that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.74

Case Three

3. EC Measures Concerning Meat and Meat Products (Hormones)

In 1997 the WTO Disputes Body heard a complaint from Canada against EC measures relating to meat and meat products. In short the WTO decided that the EC was not entitled under the GATT to maintain its ban on six hormone residues in beef. The concluding remarks of the WTO panel are reproduced below because this case is also likely to be cited as evidence of the power of the new GATT agreement to undermine standards.

CONCLUDING REMARKS75

0.1 In order to avoid any misunderstanding as to the scope and implications of the findings above, we would like to stress that it was not our task to examine generally the desirability or necessity of the EC Council Directives in dispute. The ability of any Member to take sanitary measures which do not affect international trade was not at issue in the present case. Our examination was confined to those aspects of the EC measures that have been raised by Canada, namely the EC import ban on meat and meat products of bovine origin treated with any of six specific hormones for growth promotion purposes. It was further limited to the specific provisions of GATT and the SPS Agreement, which have been invoked by the European Communities in support of this import ban. That is the necessity of the import ban, which the European Communities strictly construed as a sanitary measure, for the protection of human life or health. Likewise, the ability of any Member to enact measures which are intended to protect not consumer health but other consumer concerns was not addressed. In this regard, we are aware that in some countries where the use of growth promoting hormones is permitted in beef production, voluntary labelling schemes operate whereby beef from animals which have not received such treatment may be so labelled.

74 "United States - Standards for Reformulated and Conventional Gasoline" (WT/DS2/AB/R) and the attached panel report on "United States - Standards for Reformulated and Conventional Gasoline" (WT/DS2/R) as modified by the Appellate Body report.

75 EC Measures Concerning Meat and Meat Products (Hormones)
CONCLUSIONS

In light of the findings above, we reach the following conclusions:

(i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

(ii) The European Communities, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

(iii) The European Communities, by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements contained in Article 3.1 of that Agreement.

We recommend that the Dispute Settlement Body requests the European Communities to bring its measures in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures.