

OXFAM GB - UPDATE ON THE MAI

December 1998

This update provides information on recent developments on the draft Multilateral Agreement on Investment (MAI) and Oxfam GB's position on it. A more detailed Oxfam policy briefing on the post-MAI investment agenda will be available in January 1999.

1. WHAT WAS THE MAI

The MAI was a free-standing investment treaty being negotiated at the Organisation for Economic Co-operation and Development (OECD). The MAI was to be a comprehensive, high-standards agreement establishing a legally-binding multilateral framework for investment liberalisation and investor protection, and providing "...a benchmark against which potential investors would assess the openness and legal security offered by countries as investment locations."¹ Negotiations on the treaty had begun in 1995 among the 29 OECD member states and the European Communities, pursuant to a mandate granted by the OECD Ministerial in June 1994. The treaty was to be open to accession by non-OECD Member countries and eight non-OECD states² were invited as observers at varying stages of the negotiations. The intended completion date was the 1997 OECD Ministerial. This target date was never met due to growing internal dissent and widespread civil society opposition to the draft MAI. In April 1997, OECD Ministers called for a six-month halt in negotiations to allow for a "period of assessment" and national consultation with civil society. When OECD governments returned to Paris to resume negotiations in October 1997, the new French government announced its withdrawal from the MAI talks citing conflicts with national sovereignty and protection of France's culture industries. Negotiations never recovered, and on December 3, 1998, the OECD announced that "Negotiations on the MAI are no longer taking place." An official pronouncement on the MAI, and the role of the OECD in any future investment negotiations, is expected at the next OECD Ministerial in May 1999.

2. WHAT WAS WRONG WITH THE MAI

The draft MAI, referred to by many critics as the 'Corporate Charter,' attracted widespread public opposition due to concerns about its implications for sustainable development (particularly poverty eradication and environmental sustainability goals) and national sovereignty. At the time of its defeat, internationally co-ordinated anti-MAI campaigns were known to be active in more than half of all OECD countries and numerous developing countries. Opponents ranged from environment and development NGOs, to consumer organisations, human rights bodies, trades unions, local governments, parliamentarians and church groups.

¹ OECD report on the MAI. OECD/GD(95)65, 1995

² Argentina, Brazil, Chile, Hong Kong (China), and the Slovak Republic; later Latvia, Lithuania and Singapore.

Oxfam had fundamental concerns with the draft MAI relating to its scope, process, principles and provisions. Our analysis led us to conclude that the draft MAI was a seriously unbalanced agreement that would be likely to exacerbate inequality and social tensions, thereby reducing business confidence and the prospect of environmentally-sound, pro-poor development in the long run.

Oxfam's objections to the draft MAI can be summarised as follows:

Scope

- Coverage of every economic sector and an expansive interpretation of investment.
- Coverage of every tier of government (local, provincial and national) without due consideration to subsidiarity or informed consent of local and provincial governments.

Process

- Lack of transparency and involvement of all relevant actors (including NGOs) and agencies at intergovernmental and governmental levels.
- Exclusion of developing countries from the negotiations even though they were key targets of the eventual treaty.
- Top-down negotiating model, instead of a bottom-up sector-by-sector ('positive list') approach.
- Lack of adequate, timely and transparent independent reviews of the social and environmental implications of the draft MAI for OECD and developing countries.
- Absence of policy co-ordination at OECD and governmental level to ensure that the draft MAI promoted, and in no way impeded, national obligations under international social, environmental and human rights treaties.

Principles

- Exclusive emphasis on **investor protection** and private property rights, without comparable attention to establishing legally-binding investor obligations and accountability.
- Rigid interpretation of the **non-discrimination** (national treatment) principle that could lead to foreign investors being treated not only as favourable as, but better than, domestic investors.
- Blanket prohibition of **foreign investment controls and screening** by governments – unless exceptions were specifically negotiated.

Provisions

- The unprecedented inclusion of national treatment and market access provisions in the **pre-establishment phase**, not just in the post-establishment stage common to bilateral investment treaties.
- Prohibition of compulsory **performance requirements** (e.g. local content and employment stipulations).

- Inadequacy of proposed **Non Lowering of Standards** clause to prevent downward pressure on environmental and labour provisions in order to attract foreign investment.
- Wide definition of **expropriation** which could be abused by foreign investors (precedents under the North American Free Trade Agreement) and threaten legitimate national legislation on the environment, taxation, health and safety, consumer and labour rights.
- Foreign investor bias of the **investor-state dispute settlement mechanism**. This would enable foreign investors to sue governments for alleged breach of MAI rules in secret tribunals, but provide no corresponding legal standing for citizens to bring evidence before such courts.
- Undemocratic nature of the **standstill** and **roll-back** clauses. These would force progressive conformity of national laws to MAI disciplines and be irreversible, even if national governments and priorities change, unless countries withdraw from the MAI.
- Absence of any provisions to regulate **investment incentives** (fiscal and regulatory), or strengthen laws on **competition policy** and combat **restrictive business practices**.

3. SOME LESSONS FROM THE MAI

The defeat of the MAI has been a shock to the system for the OECD and the treaty's governmental and business proponents. After its exposure by NGOs in 1996, the draft treaty failed to stand up to the light of public scrutiny and became an impossible political sell for governments. Internal complications and divisions, inherent to negotiations of such a wide-ranging nature among parties with often competing economic interests, became politicised and bogged the talks down further. Two additional factors were crucial to the final unravelling of the MAI: political changes in several OECD governments during the negotiations, which saw a reversal (e.g. France) or re-thinking (e.g. UK) of governmental positions; and the international financial turmoil which heightened sensitivities in OECD treasuries of the need for regulation of international capital flows instead of further ill-considered liberalisation. With governmental confidence (many though not all) in the MAI shaken, the negotiations stood little chance of success. Their eventual failure has important wider implications for how international economic agreements will be negotiated in the future. The lessons to be learnt are manifold and need to be institutionalised at the governmental and intergovernmental level.

Oxfam's initial analysis suggests that some key lessons are:

- The rationale for multilateral investment rules, including attention to the beneficiaries of such rules, must be more clearly conveyed to build popular consensus on the need for an international investment regime.
- Foreign investment liberalisation must not be pursued as a goal in itself but as a means of promoting sustainable development and poverty eradication goals. This calls for greater attention to the quality and distribution of

foreign investment, as well as national re-distribution policies to ensure that the poor gain as a result of liberalised foreign investment.

- As transnational corporations (TNCs) dominate foreign investment, corporate market access rights (and other privileges), must be balanced by clear and enforceable rules on corporate responsibility.
- International investment rules cannot be 'standalone' rules, divorced from social and environmental policies (and related rules on competition and taxation), but integrated as part of a coherent macro-economic policy package.
- Timely and independent social and environmental assessments of investment rules must be conducted, a priori, to identify areas of potential conflict with government policies and international treaty obligations.
- International investment rules must not act as a barrier to the progressive upgrading of social or environmental policies.
- Any future negotiating forum for a multilateral framework on investment must be truly multilateral, democratic, transparent and have the full confidence of all negotiating parties (e.g. not the OECD or WTO).
- The negotiating process must be transparent, multidisciplinary and inclusive at both the intergovernmental and national level.
- Areas which are beyond the competence of investment negotiators (e.g. social and environmental dimensions) should be entrusted to the relevant expert bodies (governmental and inter-governmental levels).
- Mechanisms to ensure public participation must be developed and widely communicated to interested constituencies.

4. LATEST DEVELOPMENTS

There have been a number of recent developments at the national and inter-governmental level that could hold new opportunities for broadening and democratising the policy debate on international investment. These developments will have to be carefully assessed to see whether they reflect a truly changed landscape and offer new openings, or are mere mirages born of wishful thinking.

United Kingdom (UK)

The new UK Minister of Trade responsible for international investment, Brian Wilson (who replaced Lord Stanley Clinton-Davis in mid-1998), has announced a fresh approach to negotiating any future international investment treaty. This new approach is to begin with a 'blank sheet of paper' and the inclusive drawing up of 'new objectives.' On 26

November, Minister Wilson, hosted a joint meeting³ with Ministers from the Department for International Development (DFID) and the Environment Agency for a small group of NGOs (including Oxfam), business and trades union representatives. The exchange was frank and fruitful with a follow-up meeting in three months promised by Minister Wilson, as well as a commitment to broader and deeper dialogue with civil society on the Government's international investment policy.

The Parliamentary Environment Audit Committee (EAC) has conducted an inquiry into the environmental aspects of the MAI, with evidence provided by DTI, DFID and the Environment Agency, as well as business, NGOs and others. The committee is expected to release its Report on December 15, 1998.

The Parliamentary Trade and Industry Committee has conducted a brief inquiry into the draft MAI covering all aspects of the Agreement except environmental ones (considered simultaneously by the EAC). (Oxfam submitted written evidence to the Committee.⁴) The Report will be published before Christmas.

OECD

On December 2, 1998, the OECD held an Informal Seminar on a Possible Multilateral Framework on Investment with OECD and non-OECD MAI observer governments, business, trade unions, NGOs (WWF-International and Oxfam GB⁵) and others. The meeting proved to be a challenging encounter for those on both sides of the MAI argument, and suggested a new willingness by governments for deeper debate with civil society groups. It was an implicit acknowledgement by the OECD that the MAI was history (the explicit acknowledgement followed a day later), that lessons were being learnt and a new attempt to craft rules for international investment in a different manner was being considered. The OECD emphasised it was considering institutional changes to make the organisation more receptive to civil society concerns and welcomed external input to this process.

In June 1998, the OECD began its periodic review of the OECD Guidelines for Multinational Enterprises. (OECD governments had offered these as a non-binding annex to the MAI.) The review is expected to last from one to two years and provides a useful opportunity to assess the effectiveness of non-binding multilateral frameworks for corporate behaviour. The process is open to NGO input for the first time (first NGO consultation was held in November 1998, the next meeting is scheduled for February 1999). Oxfam will be

³ Meeting report available from Oxfam.

⁴ Copy available from Oxfam.

⁵ Meeting report available from Oxfam.

involved in this process and intends to test the effectiveness of the Guidelines by bringing cases at the national level.

UN Conference on Trade and Development (UNCTAD)

UNCTAD, commonly perceived by NGOs to be more sympathetic to development concerns given its explicit mandate to assist developing countries, has undertaken a two-year work programme on the development implications of a possible multilateral framework on investment. This will involve research and analysis, including consultations with other relevant agencies and civil society groups (one such was held in June 1998). The eventual output will be a Report to be released at the organisation's tenth quadrennial conference (UNCTAD X) in February 2000 in Bangkok. (Oxfam will remain involved in this effort, as well as UNCTAD's parallel "Rethinking Development" process, and encourage it to become a more independent educational process on trade, investment and sustainable development, including gender and human rights dimensions.)

World Trade Organisation (WTO)

The WTO has now become the focus of many following the collapse of the MAI at the OECD. Several OECD governments, and powerful others such as the European Commission and the International Chamber of Commerce, are known to support investment being added to the WTO's negotiating mandate⁶ as part of their efforts to push for a new round of trade negotiations in 1999 (the so-called 'Millennium Round'). Many developing countries, and a sizeable number of NGOs active on the MAI campaign, are vigorously opposed to such a move.

The recently released report of the WTO Working Group on the Relationship between Trade and Investment (following a two-year study period instigated by proponents of a multilateral investment agreement at the WTO) is deliberately modest on this subject. It recommends that the WTO General Council allow the Working Group to continue its educational work on issues specified by WTO members. On December 9, 1998 the General Council authorised this but, in view of the highly politicised context of this discussion and inferences that could be drawn from any set dates, decided not to specify the length of time.

5. NEXT STEPS

Oxfam commends the abandonment of the MAI negotiations at the OECD. We are encouraged by the new, more reflective attitude adopted by the OECD, and welcome the openness and willingness for dialogue demonstrated by the UK government. However we recognise that the defeat of the MAI at the OECD has not meant an end to the investment liberalisation agenda

⁶ In addition to its existing responsibilities covering international trade in goods, services and intellectual property. Investment issues are currently already on the WTO's built-in agenda in a limited way as part of the TRIMS (Trade-Related Investment Measures) and GATS (General Agreement on Trade in Services) reviews.

symbolised by the MAI, either at the regional (e.g. investment chapters in the EU/ACP Lomé agreement, the proposed Free Trade Area of the Americas, and the Asian Free Trade Area) or even the national and bilateral level. In this context, we are concerned at apparent moves to transfer investment discussions to a multilateral negotiation forum such as the WTO, such that the WTO will “complete what the OECD started.” We believe this to be a precipitate and politically unwise move that could repeat the failings of the MAI, and distract attention from more pressing trade problems (especially the implementation of existing WTO obligations) faced by the poorest countries and communities.

In the coming months, Oxfam will engage with the UK government, relevant national and international agencies to press for a more cautious, integrated and balanced approach to trade and investment. This must, above all, be pro-poor and focussed on meeting the challenges of social and environmental goals in the coming decades, in particular the OECD’s own target of a 50% reduction in poverty by 2015. We will draw on our own field experience and research, and that of national and regional partners, to bring the realities of the poor and the marginalised to the debate and foster new thinking on globalisation and liberalisation. In the immediate term, our advocacy work will include calls for:

- institutionalising the lessons learnt from the MAI (especially open process, policy co-ordination and multidisciplinary approach) through formal national evaluations;
- closer collaboration between the OECD and UNCTAD, with inter-agency and NGO involvement, on trade, investment and sustainable development;
- systematic attention to resource and capital flows (not just FDI but also short-term capital flows) with a focus on regulation, quality and distribution issues rather than merely volume;
- far greater efforts on capacity-building to enable developing countries (including their civil society groups) to participate fully, and in an unprejudiced environment, in trade and investment discussions, and;
- a more coherent, democratically determined international regulatory framework for the global economy, joining up issues such as investment with competition policy and corporate accountability.

Malini Mehra
Policy Adviser, Oxfam GB

First published by Oxfam GB in December 1998.
Published by Oxfam GB under ISBN 978-1-84814-161-2 in October 2010.