

Land Reform in Scotland and the Multilateral Agreement on Investment

WWF Scotland Briefing Paper

September 1998

In this 1998 briefing paper, WWF Scotland outlines both the legal and other policy impacts that the now suspended *Multilateral Agreement on Investment* (MAI) treaty would have had on the Scottish Parliament and its emerging land reform agenda. The MAI was conceived by a group of leading members of the 30 democratic market economy states who operate together as the OECD (*Organisation for Economic Cooperation and Development*). Interested policy observers will find it rather ironic that Brain Wilson MP, a leading advocate of land reform in Scotland, was during part of the MAI negotiation period a junior Minister in the Department of Trade and Industry (DTI). The DTI was and remains an enthusiastic advocate and influential promoter of corporate globalisation, foreign direct investment and instruments such as the MAI.

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Background

Many of the core proposals for Scottish land reform identified by the Scottish Office's Land reform Group, and political parties in Scotland, will be open to legal challenge by international investors under the proposed Multilateral Agreement on Investment (MAI).

Though all political parties agree that land policy in Scotland needs reform and that current arrangements may not be serving the interests of local communities or the wider population, the MAI, if agreed in April 1999, would legitimise feudal and other current legal arrangements in international law before a Scottish Parliament had even had the opportunity to debate them.

Investors will be able to sue Governments in a closed international tribunal – similar to the one operated by the World Trade Organisation (WTO). This tribunal will be able to force laws passed by the Scottish Parliament to be repealed, and will award financial compensation for lost profits.

MAI rules are stronger, more wide ranging and easier for investors to use than existing European Union (EU) or EU Convention on Human Rights restrictions which also conflict with some reform proposals.

Many countries – especially in Scandinavia – have exempted laws on land ownership and natural resources from the MAI to protect the interests of local communities and the environment.

However, the UK government has not attempted to exempt any laws on land use. After the MAI is completed – likely to be in April 1999 – no more exemptions will be able to be filed. Therefore, the MAI will restrict the power of the Scottish Parliament both to enact land reform, and to ensure natural resources are used to benefit local communities and the country as a whole.

WWF calls on all parties in Scotland to preserve the freedom of the Scottish Parliament to promote equitable sustainable development by ensuring the Government does not sign an MAI which would limit their powers to enact democratically agreed land reform proposals.

What is the MAI?

The MAI is a free-standing international treaty on the protection and liberalisation of international investment including indirect, equity and portfolio investment. The MAI has been negotiated solely by the Organisation for Economic Co-operation and Development (OECD) countries, but will be open to non-members to join. Currently Brazil, Argentina, Chile, Slovakia and Hong Kong are scheduled to be the first invited to join.

Negotiations on the MAI started in 1995 and were scheduled to finish in May 1998. Due to opposition from non-governmental groups the European Parliament, cultural industries and sections of local government the negotiations were suspended until October 1998. However, most OECD countries would like to see it completed by April 1999.

What does the MAI do?

The MAI sets rules for global investment. Each party to the MAI commits:

- Not to treat foreign investors worse than domestic investors, or exclude them from any sector not covered by a specific exception (*national treatment*). Foreign investors may be treated better than local investors under MAI.

- Not to expropriate investments, either directly or through taxation or regulation (*including environmental laws*), without fair market value, convertible compensation.
- Not to restrict profit repatriation.
- Not to apply any restrictions (*performance requirements*) on incoming investors in respect of: technology transfer; joint ventures; local employment; local purchasing; export levels; production into local markets; and employment of key overseas personnel.

The MAI bans any new laws which conflict with the treaty. Any existing laws which conflict with the treaty have to be specifically exempted from the agreement. The extent of allowable exemptions is subject to negotiations with other parties. The aim is to progressively remove these exemptions (*termed exemptions in the MAI*) over time (*roll-back*). Even if an exemption is taken out to protect land reform, there will be pressure to remove it over time.

Nearly one thousand pages of exemptions have currently been registered. Countries have markedly different numbers of exemptions with the USA filing over five hundred and the UK only thirteen (see **Note 1**). In contrast to the UK, land ownership and natural resource use (forestry, mining, oil and gas), figure prominently among other countries exemptions.

The MAI is backed by a binding international dispute system to which investors can take complaints about governments which have breached MAI disciplines. This is similar to the dispute system under the North American Free Trade Agreement (NAFTA) which has recently been used to object to environmental laws in Canada and Mexico.

Indeed, on 20th July 1998 the Canadian government settled an expropriation case brought by the US Ethyl Corporation under NAFTA for \$13million, after they banned a potentially toxic petrol additive manufactured by US Ethyl.

How will the MAI affect Scottish Land Reform Proposals?

The MAI would stop any reform proposals which prevent or restrict foreign ownership of land. However, it would also conflict with many of the other suggestions contained in the Scottish Office Land Reform Policy Group document *Identifying the Solutions* (HMSO, September 1998).

This is because the MAI bans laws which are in practice discriminatory, even if they do not explicitly discriminate based on the nationality of ownership. Also the MAI articles on expropriation and performance requirements apply even when laws are not discriminatory.

Any foreign investor affected by non-conforming laws could take the UK government to the MAI tribunal directly, without passing through the UK courts. The tribunal can award financial compensation for lost profits. How, or whether, this cost would be passed through from central government to devolved authorities is still unclear. If

another country objected on behalf of its investor, not only would compensation be paid but the laws themselves could have to be repealed as breaching the *standstill* obligations entered into by the UK government.

Identifying the Solutions itself questions the legality of some reform proposals under European Union law and raises the question of challenges under the European Convention on Human Rights (ECHR) on matters relating to property rights. The MAI offers investors far wider protections than EU laws – as well as extending them to non-EU members – and far easier access to legal remedies than under the ECHR.

The nature of the MAI is that it prevents the more radical solutions proposed by the Land Reform Policy Group, especially on changes in ownership, the right to dispose of property or the right to use property in any way an investor would wish. The MAI reflects an absolutist view of property rights which does not recognise balancing public responsibilities of land owners, and is based around American not European legal principles.

The MAI is also likely to be used by UK investors as well as overseas ones. Because the MAI gives more favourable treatment than UK laws, it is likely that domestic investors will route their purchases through offshore companies in order to benefit from MAI's protections.

Listed below are the major clashes between the MAI and favoured legislative options on land reform. (References refer to the *Summary of Options table* on page 96 of ***Identifying the Solutions***).

Land Ownership

Introducing a community right to buy (*Land Ownership 9*) would be subject to disputes under the national treatment provisions of MAI, because it blatantly discriminates against foreign nationals in giving access to an investment opportunity. National treatment rules would also limit the provision of increased advice to local people and preferential funding of community purchases (*Land Ownership 8*). Introducing a delay period for land sales (*Land Ownership 2*) to allow for consideration of the public interest could result in expropriation claims for lost profits – especially if the price of the land fell as a result.

Less favoured options of compulsory leasing of land for community use (*Land Ownership 12*), regulation of land sales (*Land Ownership 4*) and mandatory involvement of communities in land use decisions (*Land Ownership 1*) would all be challengeable under the MAI as expropriation.

Land Use

Extending planning controls to cover forestry, sporting and other land uses (*Land Use 8*) would certainly amount to an expropriation under the MAI as it is likely to reduce the value of land. There is no public interest defence for expropriation under the MAI, and compensation levels are unlikely to be affected by considerations of environmental or other damage caused by existing management practices. The same

logic would apply to any legislation to restrict deer numbers on private land (*Land Use 10*).

Law Reform

The report suggests a Law Commission enquiry into new conditions on greater land use, but suggests no distinct options. However, all increased conditions on land use would amount to expropriation under the MAI and need to be compensated at market value.

Conditions which specified the use of local employment and preferential access for local business would be outlawed under the performance requirements provisions of MAI. Many proposed conditionalities would also require some definition of who constitutes the '*local community*'. Usually this is achieved by setting a residency requirement of a specific number of years before one can buy land or gain certain resource use privileges. Similar rules already exist on the Isle of Anglesey. There is currently disagreement among MAI negotiators over whether residency requirements are outlawed. The UK thinks they are allowed as long as they are not discriminatory – which is rather circular logic – while North American and Nordic countries think they need to be explicitly exempted.

Information Provision

The MAI allows governments to demand extra information from foreign investors *solely for information or statistical purposes*. However, it is likely that proposed laws to make the ultimate beneficiaries of land transparent (*Information 6*) would be viewed as discriminatory when extended to off-shore owners, especially as these may be used to level liability claims.

Landlord and Tenant

New rights for tenants to cut trees and use other resources on private land (*Landlord & Tenant 10*) would constitute expropriation under the MAI, and possibly breach its performance requirements. Other less favoured changes in the landlord-tenant relationship such as a compulsory right to buy farms (*Landlord & Tenant 4*), a pre-emptive right for tenants to acquire sporting leases (*Landlord & Tenant 12*) and provisions to allow tenants a share of royalties from mineral developments (*Landlord & Tenant 14*) would be restricted under expropriation and profit repatriation rules, especially where mineral rights are concerned.

Other Environmental and Resource Use Issues

Though the conflicts with land reform are clear and easy to analyse because an explicit list of legal options has been prepared, there are other conflicts between the MAI and regulations a Scottish Parliament may wish to pass.

The MAI puts significant restrictions on the ability of local authorities to pursue locally focused development by encouraging local hiring and use of local suppliers by investors. Such performance requirements may only be imposed if a subsidy is given

to the investor, and the investor has no obligation to accept these conditions even if a subsidy is offered.

The impact of these restrictions is unclear because very little research has been carried out, especially in the UK. *Note II* gives an excerpt from the most up-to-date work, an independent report commissioned by the Association of Finnish Regional and Local Authorities, which finds many conflicts between the MAI and the Finnish local government.

Given the success of Nordic countries in retaining vibrant rural economies and communities in similar geographical conditions to Scotland, these findings must cause concern for the ability of future Scottish legislation on rural development to be enacted.

Where newly defined or state owned resources are being opened up for private use (for example inland fishing rights or natural resource concessions), the MAI demands that overseas investors be given full notice of such sales and have equal access to them. The ability of governments to reserve portions of such '*privatisations*' for local groups is still under negotiation, with countries such as the US arguing heavily against such general restrictions.

The MAI bans joint ventures as a condition of investment, even in vital sectors like oil and gas, where government use such provisions to gain adequate profits from the resources. Canada, the USA, France, Finland, Greece, Italy, Japan, Korea and Norway – among others – have reserved the right to discriminate and control the use of mineral and hydrocarbon resources. The UK has not done this.

Other countries have placed restrictions on the control of hydroelectric resources, toxic waste facilities, nuclear power and reprocessing. Virtually all countries with active fishing industries have reserved the right to control these in favour of local communities, and even the UK has a wide set of measures exempted under the 1967 Marine Conservation Act.

However, the UK – along with Ireland and New Zealand – has registered the least number of exceptions to the MAI. The UK negotiators see this as an expression of their commitment to liberalised investment, and as an example to other countries to open up their resources to British companies. UK policy on the MAI is mostly being driven by the interests of our outward investors, not by the impact of inward investors on UK communities and the environment.

Conclusions

It is agreed by all political parties that land policy in Scotland needs reform and that current arrangements are neither fair, nor serving the interests of local communities or the wider population. However, if the MAI is agreed in April 1999 it would legitimise these feudal arrangements in international law before a Scottish Parliament had even had the opportunity to debate them.

The MAI will outlaw many of the most fundamental reform proposals outright, and will increase the level of compensation which must be paid to land owners. This

increase in costs may make these reforms economically infeasible in the face of spending priorities for education and health.

The MAI will also greatly restrict the ability of a Scottish Parliament to construct a system of local democratic control which will foster local employment and industry, while at the same time encouraging inward investment where appropriate. The MAI shifts the balance of bargaining power much further in the favour of inward investors, thus reducing the benefits to Scotland.

What does the World Wide Fund for Nature (WWF) Scotland want to see happen?

To preserve the freedom of the new Scottish Parliament to pursue sustainable development, WWF calls on all political parties in Scotland to:

- Object to the UK government signing the MAI until the Scottish Parliament has had the opportunity to consider the range and type of exceptions it would wish to include.
- Argue for a general ‘*carve-out*’ from the MAI for all and future measures which support local community development and environmental protection.
- Demand that the expropriation rules of the MAI do not prevent – legally or economically – the democratic reallocation of land and resource use rights in Scotland.

WWF’s position is that the current MAI is fundamentally flawed and should not be signed unless radically reformed. We have seen no evidence that the political will exists to do this, and the UK government in particular remains an enthusiastic supporter of early completion.

By pointing out conflicts between the MAI and Scottish land reform, WWF hopes the government will look again at the whole of the treaty which threatens to undermine progress towards equitable sustainable development not only in Scotland but around the world.

Further Information

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Note I: United Kingdom Exceptions to MAI as of October 1998

1. Industrial Act of 1975: a never used provision that lets government block takeovers against the national interest.
2. Broadcasting Act of 1990

3. Civil Aviation Act of 1982; Licensing of Air Carriers Regulations 1992 (particularly licenses for Isle of Man, Channel Islands)
4. EC Council Regulation 2407/92: public transport aircraft can only be owned by EEA and Commonwealth citizens
5. Cabotage (*reservation to a country of traffic within its territory – i.e. coastal trading*) the Chicago Convention
6. British Airways Articles of Association: 25 percent foreign equity limit
7. Shipments of military freight can be reserved to national flagged vessels
8. Flag requirements of Merchant Shipping Regulation, 1993
9. Regulation of shipping boats in Merchant Shipping Regulations, 1993
10. Defence: Special government shares in British Airways, Rolls Royce, British Telecom, and Cable and Wireless limit foreign share holdings and representation on boards of directors
11. Fair Trading Act of 1973
12. Financial Services Act of 1986 and WTO General Agreement on Trade in Services
13. Sea Fish Conservation Act of 1975

Note II: Extract from an Independent Review of the MAI commissioned by the Association of Finnish Regional and Local Authorities

The international arbitration tribunal is under no obligation to comply with Finnish law and practices in its interpretation of the MAI, but may concede the foreign investor rights and compensation well above the levels to which Finnish investors would be entitled to under domestic law.

Various policy measures, which from the investor point of view may distort the allocation of investment, are taken at the local level, for instance, in land-use planning and regulation, licence issues and the granting of concessions. There are several inconsistencies between the draft MAI and the Finnish Building Act and decrees, the expropriation rights of municipal governments, the Environmental Permit Procedures Act, the Pollution Control Act, the Waste Act, the Water Act, the Nuclear Power Act, the Mining Act, the Continental Shelf Act, the Nature Conservation Act, and the Soil Extraction Act. The MAI could consequently undermine current practices of local control and management, although the objectives of Finnish land use planning, regulation and environmental policy is not to impose restrictions on economic activity, but to ensure sound long-term development and the preservation of a good living environment for all. Furthermore, it should be stressed that various inconsistencies between the draft MAI and Finnish law which may seem minor on the national scale, may prove to be significant to individual municipalities.