COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON TREATIES

Reference: Multilateral Agreement on Investment

MONDAY, 21 DECEMBER 1998

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

JOINT COMMITTEE ON TREATIES

Monday, 21 December 1998

Members: Mr Andrew Thomson *(Chair)*, Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Laurie Ferguson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Andrew Thomson and Senators Bourne, Brownhill, Coonan, Cooney, O'Chee, Reynolds and Schacht

Senators and members in attendance: Senators Bourne, Cooney and Schacht and Mr Baird, Mrs Crosio, Mr Laurie Ferguson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Andrew Thomson

Terms of reference for the inquiry:

1. The potential consequences for Australia arising from the matter known as the draft MAI; and

2. the advantages and/or disadvantages for Australia which may have arisen from the draft MAI, with particular reference to:

(a) the ability of countries to impose conditions on foreign investment;

(b) the ability of countries to establish limits on foreign investment;

(c) the implications arising from the 'roll back' and 'standstill' provisions;

(d) the ability of countries to pursue social, environmental, labour, cultural, human rights and indigenous protections and the impacts for each of these sectors resulting from foreign investment regimes under the MAI;

(e) any implications for Australia's national debt and current account deficit of the growth in foreign investment the MAI is expected to bring;

(f) the MAI's dispute handling procedures;

(g) the issue of the constitutionality of the MAI for Australia;

(h) the impact on agricultural and manufacturing sectors;

(i) the impact on State, Territory and local governments; and

(j) the impact on Australian investors seeking to invest overseas.

WITNESSES

Committee met at 11.05 a.m.

CHAIR—I declare open this public meeting—the first for this committee in the 39th Parliament. Our first task is to take evidence for the sixth time on the matter known as the MAI. In the last parliament, the former committee took evidence twice here in Canberra and once each in Melbourne, Brisbane and Sydney. Considerable public interest has been excited by the draft MAI. The committee received over 900 submissions. That is probably close to a record for any such inquiry. Its primary recommendation was that Australia not sign the final text unless and until a thorough assessment has been made of the national interest. A decision was made that it was in Australia's interest to do so.

The committee's second recommendation was that the inquiry process should continue—and hence today's meeting has been convened. The cessation of negotiations on the matter in the meantime in October this year led the committee to decide that it should finalise this matter and table its report as soon as possible in 1999. That is likely to be in the parliamentary sittings in February or March.

Today we propose to take further evidence from the lead department, the Treasury, and the coordinating department for the overall treaty making process, the Department of Foreign Affairs and Trade. We will take evidence from them together and with a representative of the Attorney-General's Department. I welcome the representatives of those three departments.

MURPHY, Ms Janine Ruth, General Manager, Foreign Investment Policy Division, Department of the Treasury

POTTS, Mr Michael, Assistant Secretary, Trade Policy Issues and Industrials Branch, Department of Foreign Affairs and Trade

ZANKER, Mr Mark Andrew, Assistant Secretary, International Trade and Environment Law Branch, Attorney-General's Department

CHAIR—This morning we will not require you to swear an oath to give evidence. I am sure that you are familiar with these proceedings. They have the same status as proceedings of parliament and they warrant the same respect. Do you wish to make some introductory remarks before we proceed to questions? Ms Murphy, I understand that you are back from leave.

Ms Murphy—I did not go on leave. I have delayed my leave.

CHAIR—I would like to thank you formally for doing so, and also Mr Potts, who is in the same category, and Mr Zanker, who has returned from The Hague this very morning. Thank you very kindly, all of you. Ms Murphy, would you care to open.

Ms Murphy—Mr Chairman, members and senators, I wish to make clear at the outset that the negotiations within the OECD toward developing a Multilateral Agreement on Investment, the subject of the committee's inquiry, have ceased. There have been no negotiations since the OECD ministerial council meeting in April 1998. In October, the French government announced its decision to withdraw from the negotiating group. In withdrawing, the French Prime Minister raised concerns regarding the relationship between the MAI and the sovereignty of states and the benefit of the agreement to French business, given the long list of reservations of other countries.

Monsieur Jospin proposed that negotiations on investment should be taken up again on a totally new basis and in the WTO framework. Under OECD arrangements a consensus is required for negotiations to continue. Without the French participation no consensus could be reached on how to move toward meeting the April 1998 decision of the OECD ministerial council, inter alia, for the negotiators to continue their work with the aim of reaching a successful and timely conclusion of the MAI and seeking broad participation in it. You will recall that ministers also decided on a period of assessment and consultation between the negotiating parties and with interested parts of their societies at that time.

Consequently, the meeting of the MAI negotiating group that was scheduled for late October, following the period of assessment, never eventuated. Instead the OECD secretariat arranged a one-day informal consultation among OECD members, except France, and the eight non-OECD countries that had been participating in the MAI negotiations.

As the Assistant Treasurer noted in his press release of 2 November, which was sent to the committee:

. . . it is now clear that the Multilateral Agreement on Investment (MAI) would not go ahead in its current form . . .

Officials at the October consultation:

. . . supported the need for a transparent and certain global investment framework and accordingly agreed to continue work on developing an international framework of rules for investment.

It was decided that the April 1998 text of the MAI would only be a reference point for any future work. During the October consultations, all delegates yet again raised particular issues of concern with the April 1998 text. The tensions between the expectations of some OECD countries and the concerns expressed by representatives of non-OECD participants were obvious. A copy of my intervention as the Australian delegate, and a note on the outcome of the consultations, have been provided to the committee secretariat.

In his press release, Senator Kemp said:

. . . the Australian Government had indicated for some time that it had a number of serious concerns with the draft text of the treaty as it stood . . . other countries also had substantial concerns.

Senator Kemp also reiterated:

. . . the Government's commitment not to sign any treaty unless it is demonstrably in the national interest to do so.

In early December, the OECD secretariat held a further seminar with representatives of the OECD business and industry advisory committee, the trade union advisory committee and international NGOs to promote an exchange of views on practical approaches to the development of multilateral investment rules.

A similar seminar was held in October 1997. This was followed by further consultations among those countries who attended the October consultations on the development of international rules for investment. The report of that meeting noted that negotiations on the MAI were no longer taking place. However, the officials agreed on the importance of multilateral disciplinary work on investment at the OECD.

There are a number of important issues on which further analytical work and intergovernmental cooperation are needed. The officials agreed that this work should be carried out in a transparent manner and should involve all OECD members, as well as interested non-member countries, including those that participated as observers in the negotiations. The officials reaffirmed the desirability of international rules for investment. That meeting reached no consensus on the appropriate forum for pursuing the development of such rules. Some endorsed the WTO as the appropriate forum.

I am unable to advise as to the likely future of any work to develop international rules for investment. No decisions have been taken on preparations for providing advice to the next OECD ministerial council meeting, which is scheduled for April-May next year. The question of including the issue of foreign investment more broadly within the proposed new round of multilateral trade negotiations is most uncertain at this stage, despite some OECD members calling for it.

At the previous public hearing, a number of questions were taken on notice by the Treasury on issues raised. These questions were responded to in our letters of 29 May and 28 August to the previous chairman. The secretariat also queried the status of the draft exception lists of New Zealand, Norway, Portugal and the United Kingdom. I can now advise that the representatives of New Zealand and the United Kingdom have no concerns about the publication of their lists. The representative of Portugal has advised that Portugal's position is not to make its draft list public and we have been unable to obtain a response from Norway.

There is, I believe, only one matter left outstanding from the earlier questions taken on notice—that is to provide the committee with a marked up copy of the April 1998 version of the text, showing the changes from the February text. We were unable to obtain a marked up copy from the OECD and, therefore, undertook the task ourselves. For the record, I have brought the marked up copy with me today.

Treasury earlier provided the committee with a detailed list of our consultation processes and today I am able to provide supplementary information about our consultations. In view of the uncertain future of further work on multilateral investment rules, no further consultations are proposed, but we have kept our contacts up to date with developments. The MAI will no longer be listed on the SCOT schedule as a treaty under negotiation.

The Treasury web site now contains the Assistant Treasurer's press release of 2 November and a link to the OECD web site. That has the latest information on the statement on the outcome of the December informal consultations on international investments.

Mr LAURIE FERGUSON—Can someone give the committee a copy of that intervention by Australia?

Senator SCHACHT—I was not a member of this committee in the last parliament so I am still catching up on this, Ms Murphy. Would you have a chance of making available to us that statement you just read out? There are a number of points of information in that statement that I do not think were available in our previous documents and I would like to get hold of that as soon as possible, while you are still at the table, because I think it leads to a number of questions. I wonder if we could have it photocopied. I do not want to be pedantic but I think that statement should have been made available to us before we sat down and met here today. I appreciate that you have come back from leave, but I think that statement would have been useful to the committee for a couple of days before we actually heard it here. I think there are a number of issues in that statement that I want to follow up.

Mr BAIRD—Mr Chairman, there was also the statement by Ms Murphy that this is no longer a treaty that we are working on. Why are we then, as a committee, examining this if it has no status as a treaty on which we are working?

CHAIR—The reference from the minister has not been withdrawn and the previous committee decided to hold one more hearing and make one more report to parliament about the status of it. Hence, anything that comes out of today's evidence just goes into that for the edification of those who were interested in the demise of it, or who were sad at its demise, or whatever. The last committee just felt that it was not quite finished, hence—

Mr BAIRD—It is like a memorial address we are giving—is that right?

CHAIR—No, there is more to it than that. Mr Zanker and Mr Potts, you have the opportunity to likewise make an introductory statement, if you wish, or, if you have not prepared one, answer questions instead. Do you want to make an introductory statement like Ms Murphy has?

Mr Potts—Yes, Mr Chairman, a short one from the DFAT perspective.

CHAIR—By all means, please.

Mr Potts—Thank you. Given that, as the Minister for Trade said, the MAI is in deep frozen ice, the question that I guess we have to grapple with is: where does work on investor treatment go from here? From our department's perspective, we continue to support international efforts to discuss and to develop general guidelines and disciplines for investor treatment. There is valuable work that is being done, for instance, in APEC and in ASEAN. There was a recent announcement out of the ASEAN summit in Hanoi about the ASEAN investment area, for instance. The existing WTO agreements already have some coverage of investment matters—the General Agreement on Trade in Services, the agreement on intellectual property, the agreement on trade related investment measures, and the subsidies and countervailing agreements all have some focus on investment—and the WTO has a working group on trade and investment.

There have been calls from time to time for MAI work that is being done in the OECD to be transferred over in some way to the WTO. The principal argument is that the WTO's membership is much wider than the OECD's—much more representative, if you like—and that the interests of developing countries are better represented in the WTO. The fact is, of course, that while the negotiations on the MAI have ceased, no decision has been made in the OECD about the disposition of the MAI work program.

The department does not have a fixed view on future handling of MAI matters for the present. We would like to see how other players approach the issue. But as a choice between some continuing work on investor treatment in the OECD as opposed to the WTO, I think it is fair to say that either course of action has its problems.

If work on investor treatment remains in the OECD, there could be a public perception that, regardless of the difficulties with the MAI, it was a case of business as usual. Thus, if the OECD were to retain a role, we think it would need to send out the message that there is a new approach. But, in any case, we think two important problems would remain. The composition of the OECD—essentially confined to developing countries—would reinforce a possible perception that developing countries are being ignored, when arguably they should be key players in any multilateral approach. Also, a good half dozen OECD members oppose any further work being done in the OECD and want to focus the efforts on the WTO. The OECD approach, I think, has problems. But even the existing WTO work is complex enough. WTO approaches tend to be quite different from OECD type of approaches and, in any case, the much larger number of players in the WTO, while it has some advantages, also raises lots of problems.

Another complicating factor is that the WTO already has a work program on trade and investment but this is at a very preliminary stage. It is still talking about questions of definition, for example, and the inclusion of trade and investment in a future trade round is, at this stage, I think, still a very moot point. So, as a bottom line, the most one could say for the moment is that it is clear enough that work on the MAI has ceased in the OECD, but the future of any related work remains to be sorted out.

CHAIR—Mr Zanker, would you like to make an introductory statement?

Mr Zanker—I have not really prepared anything by way of a introductory statement but I think it is worth making a few points from a philosophical, international legal point of view and also just to go over a few points that were made in the submission by the department, because they are instructive, I think.

Today information of all kinds, scientific, cultural, educational, legal, commercial, parliamentary, whatever you can think of, is more widely available than it ever has been before in history. People have the opportunity to participate in international trade, commerce and political debate in a way that is unprecedented. In fact, we saw this to some degree with the Internet campaign in relation to the Multilateral Agreement on Investment. It was brilliantly successful for those who opposed it.

In some senses, none of these issues about international regulation are new. As long ago as 1936, the then Chief Justice of the High Court, in a case called King v. Burgess ex parte Henry—Burgess was somebody who delighted in looping the loop under the harbour bridge in a single-engine plane—said, 'Modern invention has almost abolished the effects of distance in time and space. This enabled most states to be indifferent to what happened elsewhere. Today all people are neighbours whether they like it or not and the endeavour to discover means of living together upon practicable terms, or at least to minimise quarrels, has greatly increased the number of subjects to be dealt with in some measure by international action.'

The immediacy of communication which is available today has probably finally abolished the distance, and the effects of it, that Sir John Latham referred to.

Senator SCHACHT—Did Burgess win the case?

Mr Zanker—My recollection is that he challenged the validity of air navigation regulations which prevented that from being done.

Senator SCHACHT—Did he win, though?

Mr Zanker—He lost. He did not go to the jug but he had to pay a fine.

Senator SCHACHT—Despite the Chief Justice's comment about new technologies, he actually still ruled against looping the loop.

Mr Zanker—That was not strictly the issue but that was the bottom line, I suppose. The point is that we have to harmonise public and private international law and refine

international dispute settlements and perhaps establish some new ones. Unless we do that, I think that process will be critical in making the great challenge of living together one of the next century's great achievements. But, if we look at what the state of play is with respect to investment, we can see that Australia is party to a number of bilateral investment agreements with other countries that make provisions for standards of treatment, protection of investments against expropriation and dispute resolution between foreign investors, host governments and domestic investors.

Since 1991, we have been a party to a multilateral investor government dispute resolution treaty called the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. That convention is implemented in the International Arbitration Act.

There are many examples of state legislation which approve large-scale investment and development projects and provide for dispute resolution by arbitration between the host government and the investment consortium. None of the existing investment treaties or arrangements involve nations which are novel in domestic or international law. Many of the provisions of the MAI drew upon established precedents in bilateral investment treaties, the ICSID convention and, so far as dispute resolution was concerned, the dispute settlement understanding under the World Trade Organisation agreement. It did differ, of course, in terms of what was required in national treatment and most favoured nation and what was called a 'top down' agreement.

Nevertheless, there probably is some justification for work to take place in some forum and I would expect to see it for new rules relating to multilateral investment. There is an enormous number of bilateral investment promotion and protection agreements around the world, many of which have similar sorts of provisions. Many of the core provisions are basically similar. Naturally, it is a whole lot easier for people to know what the rules are if there is one set of rules across the board rather than a multiplicity of bilateral ones with different exceptions and permutations and so on.

The MAI, as Janine Murphy has pointed out, is probably dead in the present context, but the issues that justify having bilateral agreements will, no doubt, lead in some forum or another, and not in the distant future, to work to be done on some other sort of way of getting a multilateral investment agreement up and running.

CHAIR—Thank you. There are three opening statements, on the basis of which we can begin a session of questions and answers.

Senator SCHACHT—I have a question to Treasury on attachment A of the letter in which you list the departments for consultation which Treasury consulted. There is a whole list of them there, probably over a dozen. Can you take on notice to provide the committee with the information on when those consultations took place and exactly what sort of consultations they were? It is very easy to say that you consulted Social Security. Was that a phone call? Was that a paper? Did they respond?

Mr BAIRD—Did you send them a letter?

Senator SCHACHT—Yes; did you send them a letter, a fax or use the Internet, and so on? In view of the fact that a Treasury official represents us at the OECD—it is a Treasury person that represents us at OECD, is it not?

Ms Murphy—Yes.

Senator SCHACHT—When did they start sending back notices and information via Treasury in Canberra to all of these government departments and when did the OECD official first start discussing, in the OECD, the MAI? I want to find the gap between when it started and when other government departments started being consulted.

Ms Murphy—I can give you a short response. I cannot give you all the detail here. The short response is that Australia participated right from the beginning in 1995 and the cables would have come back from then and they are available to all departments.

Senator SCHACHT—So the cables were circulated. When they were circulated, were they circulated as information, were they circulated seeking the views of all these departments or is this departmental list just the circulation list of where the cables went to?

Ms Murphy—The cables were more generally available. They are the list of departments that we have actually contacted and consulted with for various reasons.

Senator SCHACHT—Could you take it on notice and provide the committee with the information about the form of the consultation and what advice you were seeking. I was not on the committee before the election. Has what those various government departments said about the MAI negotiation been made available to the committee?

Ms Murphy—Most of the departments have made submissions to the committee if they had any particular issues. A number of departments that we have consulted with did not have particular issues at all. The consultations have been on the issue of both the text and what was in the Australian reservations. The consultations have involved all those things—meetings, telephone calls, written requests, et cetera. It is a great array of things going back to 1995.

Senator SCHACHT—When the departments responded to Treasury's invitation for views, were those submissions the same submissions that were provided to the committee?

Ms Murphy—The departments did formal submissions to the committee—

Senator SCHACHT—Yes, but what did they provide you with? In view of the fact that at one stage the government had a policy of negotiating this MAI, when you sent out the information seeking consultation, did you do so on the basis that this would proceed under government policy and therefore a particular response was required? Or did you give the departments the right to say, 'This is a crazy idea. We do not want to be involved in the MAI because in our area it would have the following consequences.'

Ms Murphy—The government has always been participating in the MAI on the basis of ensuring that existing government policy would be maintained.

Senator SCHACHT—That is not what I asked. What I asked was concerning the government and Treasury setting a view initially that the MAI was subject to satisfactory negotiation. It was to be a positive move for investment in Australia and, therefore, it had a positive tick next to it. It was not like trying to spread anthrax around the world or nuclear bombs going off which would be considered nasty. It had a positive spin about it. Therefore, when the consultations took place with the other departments, did you indicate to them that this was proceeding and you wanted them to be cooperative on how it would work or did you seek the department's view, giving them the open choice to say, 'In our area this will not be successful; it will not be positive in the national interest in our area'?

Ms Murphy—The government, as we have all said here, has always favoured negotiations on developing a multilateral agreement on investment but the government has never said what it saw as the nature of that. Therefore, when we have consulted with departments, it has been on the basis that the government agreed with the philosophy behind what we were doing but that the nature of the text and the way it was being done was not anything the government had signed up to in any hard and fast way.

Senator SCHACHT—There was no cabinet decision made by the time you started consulting government departments to say that this was positive and that this was a Treasury view?

Ms Murphy—I was not involved early on, but as far as I understand there was a cabinet decision that said we should participate in the negotiations.

Senator SCHACHT—'Should participate.' I know we could get into the dreaded area of cabinet confidentiality and it may affect my government as much as yours—maybe even more, I suspect. Can you tell us—I do not think that it should be a cabinet secret—when the decision was made by cabinet to be positive about the negotiations over the MAI?

Ms Murphy—I think you are taking more than I said. I just said that a decision was made for Australia to participate in the negotiations.

Senator SCHACHT—Who made the decision?

Ms Murphy—The government.

Senator SCHACHT—Did cabinet make the decision?

Ms Murphy—I think so. I was not there at the time.

Senator SCHACHT—But you will take that on notice?

Ms Murphy—Yes.

Senator SCHACHT—There is a difference between cabinet making a decision and a government department making a decision.

Ms Murphy—The government department did not make the decision.

Senator SCHACHT—You are now telling me that there was a cabinet discussion early on that approved that it was a positive thing to be involved in the negotiations?

Mr BAIRD—If you say that the government decided to participate in the observations on these discussions then by definition it must have been a cabinet decision. Or are you saying it was a minister's decision?

Senator SCHACHT—Or it was a departmental secretary's decision?

Ms Murphy—It was definitely a government decision but exactly what that was I will have to confirm.

Senator SCHACHT—That is the definition I want. The word 'government' is thrown around as though this has got a tick from cabinet. Some of us who have been around—and I have only been here 10 years—know that that does not necessarily mean anything.

Senator COONEY—You had better clarify it in your own mind. Was it back in 1993 or 1995? It was 1995.

Mr HARDGRAVE—The other thing, Ms Murphy, is that you have actually, if you go and check the *Hansard*, scaled from being definite on it being a cabinet decision. Under questioning from Senator Schacht, you have now backtracked—

Ms Murphy—I am pretty sure it was a cabinet decision. As I was not here I need to go back and check that; that is all. All I am saying is I do not want to be held—

Senator SCHACHT—I want you to check because I want to compare when you started sending out consultation notes or memos—not just cables—seeking views. Was that before the cabinet decision or after the cabinet decision?

Also, in the statement you have just tabled, or read from, Ms Murphy, it says on page 3 at the bottom 'The report of the meeting noted that' and then there is a paragraph. At the top it says, 'Negotiations on the MAI are no longer taking place. However, the officials agreed on the importance of the multidisciplinary work on investment at the OECD.' When the officials agreed on that, has that been subsequently approved by cabinet?

Ms Murphy—No. The issue is that, the way the OECD operates, officials can make agreements, if you like, but at the end of the day it has to go to the ministerial council meeting and that is when—

Senator SCHACHT—It has not been to the ministerial council meeting yet?

Ms Murphy—If something was put to the ministerial council meeting, it would go to the government for agreement.

Senator SCHACHT—So when does that go to the next council meeting?

Ms Murphy—Probably in April-May next year.

Senator SCHACHT—Down the bottom of that same page, the last part of it says, 'The officials reaffirmed the desirability of international rules for investment.' Does that mean that, at some level in the OECD, officials can continue to have discussions under another subheading other than MAI about preparatory work on multilateral rules for investment?

Ms Murphy—Until they are told otherwise by the ministerial council meeting, yes, because they have a remit from the April 1998 ministerial council meeting to do that.

Senator SCHACHT—Even though the French pulled the plug, that does not stop the remaining officials having some level of discussion?

Ms Murphy—That is right, and, unless their ministers pulled out—

Senator SCHACHT—Yes, I know. Until the April council meeting, until either the—

Ms Murphy—Unless an individual country's minister has pulled them out too.

Senator SCHACHT—The French have pulled out. Has Australia considered doing what the French have done—pulling out?

Ms Murphy—The Australians have not made a decision to do so.

Senator SCHACHT—Has any advice gone to the government that we should consider that in view of the French decision?

Ms Murphy—The advice was that we should stay participating with the other countries. The French are the only ones who wanted to pull out.

Senator SCHACHT—But the advice from Treasury was that we should stay in. That has gone to the minister?

Ms Murphy—Yes.

Senator SCHACHT—And the minister has not changed that advice?

Ms Murphy—The government's view is that, as the Assistant Treasurer's press release says, it continues to support such things.

Senator SCHACHT—Since the October meeting, have there been any meetings of the OECD officials, including ours, that have continued on to discuss the desirability of the international rules for investment?

Ms Murphy—I think you are actually referring to the December meeting.

Senator SCHACHT—I see.

Ms Murphy—There were October and December meetings.

Senator SCHACHT—But have there been, since the French pulled out—which was what—

Ms Murphy—October. The French pulled out before the October meeting. That changed its constitution from a meeting of the negotiating group to an informal consultation. That was followed up by another set of informal consultations in December, but the French did not attend.

Senator SCHACHT—But that meeting has already taken place?

Ms Murphy—Yes. The results of that are what is in quotes there.

Senator SCHACHT—This is the quote from the December meeting.

Ms Murphy—That is right.

Senator SCHACHT—It says, 'A similar seminar was held in October 1997'; then it jumps to the quote.

Ms Murphy—Yes.

Senator SCHACHT—This could get another head of steam, having the officials working away for several weeks, months, years, at this work in the OECD with no transparency about the work. Is that correct?

Ms Murphy—There really is not any work going on because nobody could agree as to what forum that should be taken into. The only work that will be done is some work on what is told to the ministers in April-May, and that will probably be done within the—

Mr BAIRD—What about from the historical viewpoint, though, as to what happened?

Senator SCHACHT—Yes, what happened; but now I want to look at where that leads to in the future if these officials, which the French are not part of, can continue to do this work at an officials level in Paris which our representative will attend?

Senator COONEY—Mr Chairman, I notice we have somebody else at 12. Are you going to—

CHAIR—Chris, can we pause for a while and go around the table and then come back to you?

Senator SCHACHT—Well, I have asked that on notice. I would like to get more information, if you could take that on notice?

Ms Murphy—As I said, we do not know what the future will be. Because there is no consensus, it will not be until the ministerial council meeting that any agreement can be made on exactly what will happen.

Senator SCHACHT—Okay. One last question on this statement, to Ms Murphy and Mr Potts. It says at the top of page 4 that some endorsed the WTO as the appropriate forum for future discussion. Has that view yet been agreed to by the government here and does Treasury have a view about the WTO being the relevant organisation and does Foreign Affairs have a view about the WTO being the appropriate forum? I have to say, in view of the WTO's broader writ, that I would have thought it would be a more appropriate organisation.

Mr Potts—I am happy to make a couple of comments on that. I think it is fair to say that the government has not looked in any formal sense at whether it should go down the WTO track, simply because there is no indication that there is a sufficient head of steam behind that. As we understand it, within the informal group of roughly 29 countries—

Mrs CROSIO—Can I just say, please, Mr Potts—and I will say it to the chairman again later—the acoustics in this room are appalling. The microphones are strictly for *Hansard*. We do not hear it very well. So could you just speak up a little bit louder?

Mr Potts—I am sorry.

Mrs CROSIO—Lean forward, by all means. We cannot hear—every second word just drifts off somewhere.

Mr Potts—There are about 29 or 30 countries involved in this informal group. There are a number of different viewpoints. There has not been a sufficient head of steam behind moves to transfer the MAI work—whatever you understand by that—to the WTO to actually form a sensible basis for consideration by government. Things are just too confused at this stage for proper advice being put to government. Janine Murphy might have some views on this, but I do not think it will be until pretty close to the April-May ministerial council meeting at the OECD that maybe opinions will start to coalesce and we can then look at it in a more structured manner.

Ms Murphy—I would just refer you to Senator Kemp's press release of 2 November where he said that the Australian government was carefully considering its approach to future consultations on the issue. That is where it stands. The Australian government has never taken a lead role in these negotiations. The negotiations were started by the US and the EU, and they are the major players, so unless they come up with a view—

Senator SCHACHT—So even if we supported it going to the WTO as the most appropriate body—

CHAIR—Senator, we must pause on that. We have a great queue.

Mr HARDGRAVE—I have a couple of questions based on a philosophical, domestic political, 'what's in it for Australia?' consideration, to paraphrase Mr Zanker's one-liner before. This, Ms Murphy, is really a dud. It has cost us a whole pile of money and a whole pile of time. It was based on so many false premises that even one of the key countries, France, has pulled out of it. You said in your submission to us this morning that officials from various other countries all raised concerns, concerns that this committee has raised in

hearings, concerns that at previous hearings you have attempted to defend. So this whole thing was an absolute failure. How do you defend this sort of failure?

Ms Murphy—These negotiations have been going on since 1995. The only comparison I can make is development of the GATT rules, which took an awful lot longer. I think the issue was that the EU and the US, when they set this thing up, thought it would be a lot easier than it has proven to be. These things are negotiated and, if things get too difficult, it has always been the situation that you stop and take stock, which is what they did. Because of the French decision we cannot necessarily move on. It will take the French to decide on a way in which they can re-participate in any future negotiations—

Mr HARDGRAVE—When you stop to take stock, Treasury would have to have a few accountants in it. What do you do—a cost-benefit analysis: cost as in what is it going to cost Australia versus what is the benefit for Australia? Is that part of your 'stop and take stock' process now?

Ms Murphy—As we said to you in the first hearing, we have never done a cost-benefit analysis of this because the treaty itself is in far too draft a state, but also because Australia has been negotiating on the basis that all current policies would be maintained. We did not see that there would be any particular cost to Australia from participating in this text.

Mr HARDGRAVE—We still come back to the situation where Treasury had this convenient wall built around it while it was hopping offshore and discussing this—I guess that is within the domain of your brief as a department—while at the same time Mr Potts and his colleagues over in Foreign Affairs and Trade were negotiating things like the General Agreement on Trade in Services and all these other things which have complementary and perhaps, I guess, contradictory elements to this. We had a couple of dozen countries potentially signing up to this, if it ever came to see the light of day, whilst there were 100 or more nations that might have signed up to something negotiated in the WTO area. Surely the whole thing was on the wrong premise from the beginning; the gaze was too narrow.

Ms Murphy—I guess you have just got to say that the gaze of it was determined early on and the main players were the US and the EU, and Australia was there to listen and protect its interests. Australia does not have a lead role in these negotiations so in a sense the direction they took was somewhat beyond Australia's control.

Mr HARDGRAVE—But can you concede that there could be damage and that there is damage to Australia's rightful quest to regulate or determine for itself because of its sovereign status its foreign direct investment rules; that we have in fact damaged our own standing as a nation in the foreign world by going on this particular course and that the whole thing has fallen down a great big hole? What sort of damage is being done?

Ms Murphy—I would not have thought there is any damage. All the time we were negotiating on the basis of protecting our foreign investment policy. That has still been maintained. The fact that the negotiations have ceased at this stage reflects the nature of those negotiations and the difficulties with the particular text. I think it is quite obvious that

most countries, and even France when it pulled out, still said that they were very keen to negotiate a multilateral set of rules on investment.

Mr HARDGRAVE—But at what level—at the OECD level or at the World Trade Organisation level?

Ms Murphy—That is something that is yet to be decided.

Mr HARDGRAVE—I think that is probably the key argument. Just one last group of questions: what did this whole thing cost?

Ms Murphy—To Australia or to—

Mr HARDGRAVE—Treasury. What did your department spend over the course of time since whenever the cabinet decision or minute was noted or whatever at whatever level, which Senator Schacht has asked you to qualify? What did this cost? You have an idea of what sort of money was expended by Treasury since 1995 on the MAI?

Ms Murphy—I would have to go back and work that out.

Mr HARDGRAVE—The reason I want to know is that your former boss, Tony Hinton, who is now the commissioner at the OECD, told us in a briefing earlier this year that every five or six weeks Treasury officials were flying to Paris to discuss the MAI.

Ms Murphy—There was a period of about three months between February and December 1997 where that happened, but that was a short period.

Mr HARDGRAVE—You are taking this on notice. I will just say that, from his perspective earlier this year, it stuck in the minds of a number of us that every five or six weeks Treasury officials were going to Paris. You can shake your head all you like but he said it to us and I would like a quantification of how many times people flew to Paris and discussed the MAI, how much staff time was taken in the consultation with various departments and what the costs of it were. I am sure you will be able to qualify it and I look forward to getting that on notice.

One very last question to Mr Potts: are we better off now looking at, as you said, or perhaps Mr Zanker said, the concept of a series of bilateral treaties on investment than pursuing that?

Mr Potts—We already have a series of bilateral instruments. I guess the decision that has to be taken at some stage is whether the web that those bilateral treaties create is sufficient to protect your interests or whether, in fact, there is value in renewed multilateral efforts for a wider instrument. That is the debate, in a sense, that is really behind the MAI. That is an ongoing question.

Mr LAURIE FERGUSON—In October you expressed the noble sentiment that people should ‘take into account the views of the broader community’. Further, at point 17, you cite debate about a previous seminar and you say, ‘Others expressed concern that the last OECD

seminar for NGOs had the effect of unifying opposition to the MAI.' Within your own document you are saying that we would like to in future have some consideration of people's views—

Ms Murphy—That was the note on the meetings, not my intervention. I think there is a difference there. I am reporting what was said rather than my own views.

Mr LAURIE FERGUSON—I would be interested in you bringing together the two lines of thought that we should take consideration of people's views and then, on the other hand, people expressing concern that a previous seminar had the lamentable outcome of 'unifying opposition to the MAI'. How did those parties there think that they would be able to 'manage such a future forum'?

Ms Murphy—The fact is that the text is in such a draft state that a number of people read into the text things that I do not think those who were negotiating it ever intended. That had something to do with the opposition to the text, I believe.

Mr LAURIE FERGUSON—So all opposition can be taken as misinformed?

Ms Murphy—I am not saying that. I am just saying that that was part of the problem. Because the text had so many square brackets and you could read it in different ways, people who had a predilection to be against it could read it as more of something that they would not like than might have been the situation if they had spoken to other people who were involved in the negotiations. But I think I am just referring to what Mark was saying before. It came from that October meeting that a lot of information—and some of it was misinformation—was put on the Internet. That did galvanise a lot of opposition to the MAI. I do not think I am really saying much more than what the officials at the meeting were saying: that we have to be more aware of the Internet and, in a sense, make sure we are using it as much as those who oppose. The MAI is dead but in any future negotiations on anything we will probably find the same issues arise. You will have pockets of people who oppose it and they will use the Internet for their purposes.

Mr LAURIE FERGUSON—So your perspective on people around the world and their attitudes towards it is just 'pockets' of resistance.

Ms Murphy—There were probably more than pockets of resistance but those pockets were very wide and varied, covering all sorts of different aspects of the negotiations.

Mr LAURIE FERGUSON—In point 5 of this document you say what the United States did and then you say that others took a harder line, with Austria, for example, supporting the concept of NGOs having the right to bring issues of concern to dispute settlement. Then we move to point 17(b) that says there was a need to address the ministerial requirement to protect the sovereign right to regulate and ensure citizens are not harmed by efforts to liberalise foreign investment. Could you give us a bit more of a feeling for how that was going to be accomplished? How does Australia think it will be accomplished? We have got the US and the Austrian positions earlier in the document. Does Australia have any contribution in regards to how we could 'ensure citizens are not harmed by the efforts to liberalise foreign investment'? Do we have any role there or any kind of position?

Ms Murphy—We were looking at some textual work on that. By the April text there was already some draft wording that would have improved the exercise of sovereign right. In our consultations with a number of people, we discussed what might be required but, unfortunately, never got back to really discussing that again in any OECD context.

Mr LAURIE FERGUSON—I have two quick points, Mr Potts. You said that 'five to six nations in the OECD preferred it to be WTO sponsored'. Who were the five to six countries that were taking that attitude?

Mr Potts—I cannot recall them all but I think from recollection France certainly—they have done it publicly—New Zealand, Canada, I think Belgium and maybe one or two others.

Mr LAURIE FERGUSON—And the other final point: you said that there were 'lots of problems in going down the WTO line'. Could you just give us a feel for what you understand most of those problems would be?

Mr Potts—I think the basic problem is that the existing WTO work—and the WTO has 130 members at the moment—is at a very preliminary stage. Trade and investment only came onto the WTO agenda at the Singapore ministerial conference and that was in December 1996. The agreement was for it to come into a working group, which is, if you like, the lowest form of WTO group, for two years on an exploratory basis. The mandate of the working group has now been renewed into next year but it is essentially at a very early stage. They are looking at definitional questions like 'What is foreign investment?' and linkages with trade, questions of incentives and the philosophical problems, the so-called 'race to the bottom' issue and things like that. They are not looking at any text or anything like that. It is really at this stage a philosophical discussion to try to raise the level of understanding within the WTO rather than to look at any instrument. If you were to go down the negotiating track you would need a political decision being taken by the WTO. The next ministerial meeting of the WTO will be at the end of November of next year somewhere in the United States. If there were a head of steam—and I am not sure that there is; you do not get that sense necessarily at the moment—it would only be that meeting that would then take a decision.

Mr LAURIE FERGUSON—What do you say to those detractors who would say that the real reason you are concerned about this is that essentially the OECD wants to have a gun at the head of the developing world—Malaysia, Indonesia, I guess to some extent India, Pakistan, et cetera—that is seen as more resistant? What do you say to those people that would say that the real motive behind keeping it in the OECD is to essentially lock it up and have a decision which can then basically be enforced on recalcitrants?

Mr Potts—I think that is probably reading too much into it. I think the reason why it started in the OECD was historical to an extent. Also I think from a philosophical point of view there is always—

Senator SCHACHT—The OECD is the First World development club whereas the World Trade Organisation with 130 has got all those recalcitrants from the Third World.

Mr Potts—I think it is important to say that even within the OECD there were a series of developing countries who followed the negotiations as observer countries.

Senator SCHACHT—Observer?

Mr LAURIE FERGUSON—We are aware of that but that does not really answer the point, I do not think.

Mr Potts—But I think also, philosophically, it is perfectly reasonable to say a certain body may offer a better possibility of getting a text than another body. Certainly the reason may be as Mr Ferguson suggests but I do not think there was any sort of mala fides going down the OECD track as such.

CHAIR—Thank you.

Senator BOURNE—Much of the previous evidence—and I am sure you know better than most—said that it was more likely to go to WTO if this fell down, which it has. Can somebody tell me if any of the WTO agreements, or any other agreement that we are party to, have that part to them which says that you can never be more restrictive in your legislation in relation to whatever you are doing, as was in the MAI? Would that be something that has already appeared anywhere in WTO, do you know?

Mr Potts—If I understand your question correctly, Senator Bourne, it was, 'Do WTO texts say you cannot resile from commitments?' Yes, that answer is clear.

Senator BOURNE—I understand that. A commitment is a commitment, yes. But, in the MAI, if you recall, there was a piece, the effect of which would be that, if you have legislation which says foreign ownership of newspapers is a maximum of 30 per cent, and you went to foreign ownership of newspapers being a maximum of 50 per cent, you could never go back to 30. You could not go past 50. Even though your agreement was at 30 and you then changed your law to put it to 50, which was more liberal, under the MAI you could not go back again. You had to stay at 50 as a minimum, except if you wanted to get out or renegotiate or any of those things. Is something to that effect anywhere—not that you cannot go back on your agreements but that you cannot go back on what you might do in the future—that you restrict yourself in that way?

Ms Murphy—For a start, that particular arrangement was something that was still very much open for negotiation in the MAI. I think it came into the text as something that is in the NAFTA agreement, but I am not certain that there is any other agreement that has similar—

Mr Zanker—The point was the difference between the MAI and the way it was being drafted and something like the WTO negotiations. As I said, it was top down rather than bottom up. With the WTO things, there is gradual sectoral liberalisation, whereas the MAI said that it is all open, right from the word go, unless you put in these country specific reservations, which is what had been the case here. That is the fundamental difference.

Senator BOURNE—If it does go to WTO, that is the precedent.

Mr Zanker—Yes.

Mr BAIRD—I want to come from a different viewpoint. I, for one, think it is probably appropriate that you are involved in these discussions and that you keep monitoring what is happening. Seeing this is a eulogy, I really want to ask, when people pick up the pieces in some years to come, do you believe that it is appropriate that, in today's multinational global economy, we should be negotiating this type of agreement? It is the first part which I would like to open to the three of you, and particularly Mr Zanker and Ms Murphy, in terms of your philosophical views, Mr Zanker.

Secondly, what then is, in your view, the philosophical flaw in terms of why we have reached this position where France has pulled out and why we have this degree of opposition within Australia? I want to throw it back to you and ask you for your opinion on an honest basis. We are now at a position where the thing is dead. Do you believe it is worth while continuing the process? What are the real benefits? Where have we failed in this process?

Mr Zanker—I think the thing is that, so far as the Multilateral Agreement on Investment is concerned, we are a party to the OECD for a start, which is established by a treaty. As a member country that participates in that organisation, I think we have accepted an obligation to participate in its deliberations and negotiations and so on.

So far as rules relating to investment, or indeed anything else I guess that one would care to think of—human rights, transfer of money, transfer of prisoners, all of that sort of thing—there are numerous examples of bilateral relationships in all of those areas, but they are increasing. And, yes, I agree with you, in circumstances such as we are in today where just about every issue that you can conceive of is something that attracts international concern, countries face the stark reality of participating at the table in negotiations on whatever the subject matter might happen to be, trying to protect and promote their interests and influence debate, or they can withdraw and not participate. But I really do not think that is a realistic option and I do not think it is in any of the possible subject matters that could conceivably be the subject of an international treaty.

So far as the failure of the MAI negotiations is concerned, I just think that is a very interesting object lesson in how public opinion can be mobilised on issues of quite legitimate concern to people. What is needed, I guess, is an ability to explain some of the realities of these things and also to understand that multilateral negotiations are very complex, involving, as they do, many players with many different positions, and that trying to come to a comprehensive agreement on a particular subject is a very difficult exercise which can be made more difficult when people are putting forward particular points of view very vocally without trying to move towards some sort of compromise.

I did hear somebody earlier in the year from the OECD secretariat who said that when the negotiations started in 1995 the OECD had no end of difficulty in trying to interest the media and other people in what they were doing, and that they put out numerous press releases. Of course, it was a pretty dull subject. I must say that I yawned my head off many times when I received drafts of the agreement from Treasury. It was just soul destroying stuff.

Senator SCHACHT—It always is from Treasury.

Mr Zanker—No fault of theirs, of course. Then everybody decided that, oh, yes, this is pretty important because it potentially does have impacts in areas that we possibly have not thought about, like television broadcasting and support for cultural activities and what have you, so there was a need to talk about those things. But I do not think there is any difficulty whatsoever in talking about them and I think we would be foolish as a nation not to engage.

Mr BAIRD—Is there anything to add, Ms Murphy?

Ms Murphy—I would certainly support everything that Mark said. I have said in a number of consultations, and it was reflected in the intervention that I gave in October, that there was a real tension in the negotiations, as I perceived it—I have only been involved since February this year. You had the OECD developed countries, who already have fairly liberal systems, who were wanting, as the text developed, to add all sorts of hooks onto a text that should have focused on the particular issue at point, which I believe is investment rules. And, while the OECD developed countries were trying to add all sorts of things onto it, they were not taking into consideration the concerns of developing countries who already had difficulties with even just an agreement on investments, never mind all the other issues that others were trying to add on.

I think that if any future negotiations, wherever they might be, are to take place, both sides need to take more heed of what the other side is saying. That did come out somewhat in the October round table discussions—you could clearly see the tensions there. Partly they were from the OECD point of view: their governments were clearly being, in a sense, pushed or dragged by particular parts of their societies to add these things on, so they had a tension domestically as well. Those things will be very important to address. I think the fact that that has happened is part of the reason why the thing has failed.

CHAIR—Thank you. Gary, one more question?

Mr HARDGRAVE—A quick last one to Mr Zanker: it would be a fair observation to make though, wouldn't it, that mobilised public opinion seemed to have a better understanding of Australia's constitution and the particular use of foreign treaties and so forth that could be made against our domestic law than the officials who were negotiating this treaty?

Mr Zanker—There are differing views on either side. I think—

Mr HARDGRAVE—No, I said the mobilised public opinion seemed to understand our constitution better than the Treasury officials who were negotiating this text—you called it earlier 'harmonising' and I think we agreed in an earlier hearing that the multilateral treaties were the art of the compromise. Those officials from Treasury, Australia, who were dealing with all these other countries in negotiating this text, forgot about one of the salient things, that is, our own constitution, the basis of laws and legislation in this country, and yet mobilised public opinion understood that very well.

Mr Zanker—No, I do not think so. I think the Treasury approached the negotiations with a very clear objective in mind and that was shown throughout—

Mr HARDGRAVE—Mr Zanker, I want to cut you off there because—

CHAIR—Hang on a second, Gary. Let him finish and then comment on it.

Mr HARDGRAVE—Mr Chairman, I have heard the word 'snow' spelt many different ways this morning, with the greatest of respect. But I suspect, Mr Zanker, you have again missed the point of my question. The fact that Treasury had to write to you, and that you wrote back to them on 7 August to give them an understanding of how our constitution works, to my mind clearly shows that, systemically, Treasury had very little understanding about our constitution. While I appreciate that you are offering the defence, as their barrister, it seems, this morning, Treasury have still not got the gist of what it is to be Australia negotiating a treaty or convention on the basis of what is in it for Australia first, rather than simply trying to be members of this nice OECD old world club.

Mr Zanker—They were simply participating in negotiations under the auspices of government. The treaty making power is, under section 61 of the constitution, something that resides in the executive in right of the Commonwealth. Whether a treaty can ultimately be implemented depends, certainly in the case of treaties requiring legislation, on the government being able to get the necessary implementing legislation through the parliament.

To the extent that the government was unable to do so, then the government would be unable to fulfil its treaty obligations. Certainly with something like foreign investment policy, which was what was being dealt with in the MAI, had it gone ahead, whatever changes were mandated to foreign investment policy by what had been agreed in the context would have required legislation to, for example, change the Foreign Acquisitions and Takeovers Act. So I do not think that really it is a question of understanding the constitution or anything else. It is simply a matter of: the executive government negotiates treaties and, to the extent that it is necessary to give effect to what has been negotiated, legislation is required.

Mr HARDGRAVE—So our constitution is not important in this process?

CHAIR—This is not going to take us far, Gary. This is a question for another hearing into the whole notion of: does the executive government have any authority to undertake any negotiation at all and where does the parliamentary process come into it?

Senator SCHACHT—I have just come into this committee but from what I have heard so far it seems to me that, if Mr Zanker's view is continued, we are going to have great trouble getting any agreement from the Australian community on any reasonable international agreement. If the attitude is taken that the various departments, and particularly Treasury, go off to a whole range of negotiations and say, 'Well, this is a wonderful idea and all you people who do not agree with it are mugs—'

Mrs CROSIO—'And you are pedalling false information.'

Senator SCHACHT—then what is going to happen politically is that it will fail every time, because you are out of the political loop of convincing the community. I just think Mr Hardgrave has a reasonable point and it ought to be reflected in our final report. Mr Chairman, I have two questions I want to put on notice.

Senator COONEY—I notice that, in the letter to Mr Taylor dated 28 August, Mr Murray had some concerns on page 2 about what the committee had said in its interim report. There might be a perception in the committee that the Treasury is becoming an advocate for the committee rather than a witness just putting forward issues. Has the Treasury got any difficulties—and it may have; I am not saying this in any derogatory sense at all—before a committee like this where it has to go in on behalf of the executive and put positions? Is Mr Murray saying it is all a bit difficult and, if you look closely, all would be well, but really we cannot do any better?

I think what has been raised by others on the committee is this issue of the relationship between Treasury and the committee. There may be difficulties in that. It would seem from the letter of Mr Murray that there is. Would you like to think about that? What has been put to you?

The committee, for whatever reason, has the impression that somehow Treasury has not been a witness before it but has been an advocate and that the Treasury comes down here and puts a view rather than tells the committee what has gone on, including what the progress of the negotiations is, what has been said and what has not been said. What you get instead is a litany of the good things there might be about the MAI. The disadvantages have not been looked at nor is the MAI described to the committee, so that the committee is left, rightly or wrongly, with the impression that Treasury is irritated that we have a body such as this which is going to come down here and certainly go around it properly and comprehensively, but not in a way that would be as helpful as it might be to the committee. I think that is what has been put to you. That is what has been put to Treasury before and that is why you get the reaction you do in this letter.

Ms Murphy—I apologise if you have taken that sense from our letters or our approach.

Senator COONEY—No, from the whole of your approach. I have spoken to people on the committee and thought they were very reasonable people. I think the people on the committee now are very reasonable. But that is certainly the impression that has been left.

Ms Murphy—It is certainly not the impression we mean to give you, Senator Cooney. I would just say that I think there has been a misapprehension perhaps on the committee's part about the Treasury role. Treasury was given the remit to participate in the negotiations on the basis of protecting Australia's interests. That is what we have done. That does not mean that we agreed with the text at all. There are clear parts of the text where Australia has indicated that it could not agree to a text with those words in it. We also developed our reservations on the basis of those parts of the text whose words we could live with, but we could not actually agree to them from Australia's point of view. The exceptions dealt with that.

Equally, Australia was a very small player in these negotiations. What comes out of the text does not necessarily reflect Australia's position. But I think we are being tarred with a brush to the effect that somehow the Treasury drafted this thing and agrees with every word in it. That is quite the contrary.

Senator COONEY—I think you have said to me now, 'We had a brief and that is what we have done; we have done all that.' What the committee would like to be in a position to do at times is to decide itself whether you have done that. Can you follow? What you are giving is what might be called opinion evidence. You are saying, 'We have done everything that is right.' I think that somehow does not always go down well with the committee. You could say, 'Look, this is what we have done,' and then answer the questions and we could draw the conclusion, because that is what we are supposed to do.

CHAIR—We have reached a point where I do not think you can reconcile those views, but they are on the record, and they will have to be reflected. Thank you for your evidence.

Senator SCHACHT—I want to put two questions on notice to the witnesses so that they can take them away with them. It is the same question to the Attorney-General's Department as Mr Hardgrave put on notice to Ms Murphy and Foreign Affairs about the cost, air fares, et cetera. Could both the Attorney-General's Department and Foreign Affairs take the same question and respond accordingly?

Mr Zanker—There was no cost to Attorney-General's.

Senator SCHACHT—There must have been some cost.

Mr Zanker—There was no cost. We just responded to requests for advice from Treasury within—

Senator SCHACHT—Did any representative of A-G's go overseas?

CHAIR—Those questions are on notice.

Senator SCHACHT—My second question on notice to all three is: what other treaty has the OECD ever put forward that is of the same magnitude as the MAI? Secondly, wasn't the OECD initially started in the developed world as a basis for exchanging information, technical information, et cetera, rather than as an international treaty making body? I was never under the impression that the OECD was a United Nations or a World Trade Organisation. I wanted to get some more information. You may have already put that forward, but could you give me examples of the treaties we have signed up to under the OECD that have the same magnitude as the MAI?

CHAIR—I would like to give you the opportunity to make a very brief final comment, in the sense that we have had some exchange.

Ms Murphy—There are some other treaties under the OECD. They are not of the same magnitude as what would have been proposed by the MAI. Some of them have investment focus on them. I can give you a more detailed response.

Senator SCHACHT—Have they already been provided in evidence, because I was not here before?

Ms Murphy—Possibly.

Mr Potts—The DFAT submission certainly covered some of the early investment treatment work that the OECD has done. That has been particularly the OECD guidelines for multinational enterprises and so on. They go back a long way—well over 20 years. It is certainly fair to say, as Janine Murphy has just said, that the MAI takes it a quantum leap forward—there is no doubt about that.

Senator SCHACHT—Yes, that is what I thought.

Mr Potts—But at the same time the OECD work has had a fair amount of focus on guidelines on investor treatment over—

Senator SCHACHT—Which other bodies have taken up or, bilaterally, countries have taken up?

Mr Potts—Both bilaterally and multilaterally—ASEAN, NAFTA and lots of other bodies.

CHAIR—Thank you very kindly for giving evidence this morning.

Resolved (on motion by **Mr Hardgrave**):

That supplementary submission No. 728A from Dr Goodman be received, accepted as evidence and authorised for publication.

[12.23 p.m.]

GOODMAN, Dr James, Coordinator, Stop MAI Coalition

CHAIR—Welcome, Dr Goodman. Although this committee does not require you to give evidence today under oath, I must advise you that the hearings are legal proceedings of the parliament and they warrant the same respect as the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you want to make some introductory remarks before we proceed to questions?

Dr Goodman—Thank you. I have tabled a five-page outline of what I wanted to say. I will not read through it, but I would like to highlight some of the issues, particularly the ones that are relevant to the earlier discussion. I would like to start by outlining our position on the MAI, just to remind members. We are not against a treaty on international investment. Our position is that we want a treaty on international investment, but we want one that imposes obligations on investors as well as gives them rights. The existing draft of the MAI elevates property rights above all other rights, including democratic rights. It provides investors with an enforcement mechanism that is not available to any other treaty including, for instance, to enforce human rights. That is our general position.

My submission falls into three sections. The first is basically an update on the situation with the MAI. I must emphasise very strongly that the MAI is not dead. The OECD MAI may be dead, but the MAI is not dead. I outlined in my submission what has been happening in the OECD.

Senator SCHACHT—It is like Dracula, is it? You have to put a stake through its heart in its coffin.

Dr Goodman—I say that because it has been announced in the OECD that the MAI is going to provide a reference point for further discussions on investment liberalisation, in particular within the World Trade Organisation.

I want to backtrack a bit on the OECD. It is very important to make the point that the OECD negotiations were initiated in 1995 because OECD states failed to get the WTO to agree to put investment on the agenda. That was tried in the Uruguay Round and again in 1996. Non-OECD states blocked that proposal. That is why negotiations began in the OECD as opposed to the World Trade Organisation.

I mentioned a few intergovernmental organisations from which MAI-like proposals are emerging, in particular the WTO, of course, but also the IMF, regional trading blocs and the

debate that has been initiated in the United Nations Conference on Trade and Development. My point there is that the MAI is not dead.

The debate about the rules that should be applied to international investment, as has been mentioned, has opened up beyond intergovernmental organisations into the wider NGO—non-government organisations—networks. I outlined some of the proposals that have been put forward by non-government organisations as an alternative to the MAI, and these are based upon notions that rights other than property rights—or rights as well as property rights—should be enforced through such an international treaty.

The point I want to focus on, though, is the role of the Joint Standing Committee on Treaties within this MAI process. I want to talk about this in some detail. The committee has been a key focus for public concern about the draft agreement—900 submissions and so on. The committee hearings have exposed a surprising absence of consultation, as we have heard. In effect, the committee has been required to take on the very difficult role of compensating for the absence of consultation through Treasury. There ought to have been public consultation and participation in debates about the MAI well before March 1998. The agreement was due to be signed in April 1998. Observers would be forgiven for suggesting that the committee inquiry—this inquiry—was a face-saving device for the government rather than a genuine effort of public consultation. It is a bit late to initiate an inquiry into the treaty one month before it is about to be signed. That is my first point.

Despite this, the committee has performed a very important role in providing a channel for public concerns about the treaty. In November 1998 Senator Kemp announced that the MAI was 'deep frozen' and that this committee had allowed a 'proper input' from the parliament and community before Australia signed up to the MAI. I would argue that this is just good luck. It is simply good luck that the treaty was not signed in April; it is more broadly due to the campaign against the MAI that it was not signed. So the proper role of this committee has been fortunate. It has realised its role through good fortune.

In view of that, I would suggest that there be some reflection about the possible future role of this committee in overseeing MAI-like negotiations in other intergovernmental institutions that are ongoing at the moment and are likely to intensify over the coming year. I outline some suggestions on how that could be achieved in the three recommendations. Sorry, I probably went on too long.

CHAIR—Thank you. I am interested in your great fear of the notion of property rights. This seems to be the basis of your opposition to it. Could you give us an example of a jurisdiction or an industry where property rights have been diminished and the return to people in that jurisdiction has increased? What is the economic benefit in diminishing the protection of property rights?

Dr Goodman—Over the last 25 years, there has been an enormous increase in international investment flows: 25-fold in the OECD estimates. The problem with that increase in investment flows is not how to increase it further as was the main objective of the MAI but how to ensure that investment delivers on wider public objectives as well as the immediate objective of securing income from investment. Our argument all along is that what is urgently needed is some form of regulation for a set of obligations for international

investors as a condition of receiving these hugely enhanced rights which were proposed for international investors under the MAI.

CHAIR—For example, if a foreign investor committed capital to the production of an Australian film, that investor should bear obligations. You describe them as wider obligations to the Australian community. What effect do you think that would have on the decision making process of investing in that film?

Dr Goodman—There are a whole range of obligations which countries impose upon international investors in order to secure wider benefits from their investments. The effect that it would have at the moment of one state imposing such obligations—and this is perhaps what happens—is that the investor goes elsewhere of course. This is one of the big problems. Given the enormous rise in international investment, states are competing with each other in what has been earlier called the race to the bottom in terms of social and environmental standards and a whole range of other areas. That is what we within the Stop MAI campaign internationally have been arguing. We need an international treaty to prevent democratically elected governments from being played off against each other in this way.

CHAIR—So you would prefer unemployment to these kinds of obligations being, as you would put it, not duly shouldered or fulfilled?

Dr Goodman—That is the choice which governments are faced with at the moment. That is the problem that we are concerned with. Governments are faced with the terrible dilemma of being unable to improve the environmental spin-offs and social benefits from investment for fear of causing unemployment by that investment going elsewhere. They are competing with other states. That only underlines our position. Yes, it is an idealistic position but it is one that should be the beginning point, the opening gambit as it were, for any discussion about laws on international investment.

CHAIR—So you visit the consequences of success—that is, stopping or diminishing these property rights—on the very poorest people in our country. Is that the outcome of your campaign?

Dr Goodman—That is one of the criticisms of, for instance, introducing a social clause into the World Trade Organisation, that it would effectively end up being a protectionist measure. If an international treaty was agreed through the United Nations, a comprehensive agreement which included all states, then I think those sorts of concerns about protectionism would be dealt with.

I think it is a question of the opening gambit, as I was saying earlier on. It is a question of where you start in terms of the main concern that you might have for negotiating an international treaty on investment. If from the outset your main concern is to protect property rights, to protect the income of investors, then you will end up with a treaty, as has happened with the MAI, that is set against the wider concerns in terms of the environment and in terms of social issues as well, and you will get states drawing up lists of reservations, which is actually what has happened, trying to protect those areas of legislation from the effects of this 'top down' investment treaty that protects property rights. So I think the premise is incorrect.

CHAIR—Thank you.

Mr HARDGRAVE—For the sake of perhaps correcting Dr Goodman's view on the way things happened with regard to this committee's involvement in this public inquiry, we had this matter referred to us on 5 March by the Minister for Foreign Affairs, who is not the minister in charge of the lead department negotiating this. Minister Downer referred this to the committee as a result of public concern that was expressed. As we said in our interim report tabled on 1 June, there was a view that this whole matter was negotiated in secret. I think I can accurately reflect that committee members felt they knew nothing about it until we actually started inquiring into it, so essentially it was being negotiated in secret. I think we played a good role.

Our interim report was cognisant of two things. One was that there was a halt in negotiations until October 1998, announced in April, and the second was the prospect of a general election in Australia. The committee did not want to leave the matter unanswered, so we tabled an interim report to put a statement on the public record that this thing should not proceed until matters were proven. I just want to reinforce with you that we have taken this process very seriously, as a committee.

The question I wanted to ask related to the fact that the question of human rights and so forth with regards to this MAI is really not as relevant as it would be with the broader context of the world, one would imagine, because the OECD countries are generally mature democracies with a pretty good understanding of human rights. Is that a fair observation?

Dr Goodman—Yes, I would say so in general terms, but the main objective of negotiating the MAI was not necessarily to achieve investment liberalisation amongst OECD states. It was actually that this treaty would be adopted by the World Trade Organisation and would be employed elsewhere, beyond the OECD.

Mr HARDGRAVE—So what now? We have what I guess I can concede is a useful tool, a useful benchmark from which to develop some sort of international arrangement; maybe a series of bilateral arrangements between this country and other countries. What do you suggest that the MAI, in its smoking ruins, if given full life support, should be used for?

Dr Goodman—I think it should be used as it is being used now—to open up a debate about what rules for international investment should look like, and as a means of drawing lessons on what sort of framework would be desirable.

Mr HARDGRAVE—You have big problems if you try to negotiate with a country that does not have democratic tradition, let alone democracy in a contemporary sense, compared with negotiating, say, with England or the United States. So the MAI in one sense is sort of wishful thinking, isn't it?

Dr Goodman—It was always, I think, wishful thinking. You have probably heard that the World Trade Organisation called it a constitution for the world economy, for the global economy, when negotiations were initiated in 1996. That is a hugely ambitious treaty. As has been said, it is a 'top down' treaty that affects all legislation at the state level, except for reserved areas of legislation and the general exemptions which are to do with defence and so

on. But it is a hugely ambitious treaty. That is why I raised these questions of human rights. What the MAI was attempting to do was to establish a new international norm around property rights. When you compare the strength of the treaty in terms of its enforcement mechanisms and so on with the conventions on international human rights and with the conventions on environmental concerns, like the Rio Declaration and so on, you cannot help noticing that the MAI provides a very strong enforcement mechanism at the expense, potentially, of these other areas of rights.

Mr HARDGRAVE—Finally, is it far more sensible to proceed now in small bites, bilateral arrangements, than try to do the massive swallow?

Dr Goodman—In view of my comments earlier in answer to questions from the chair, the Stop MAI coalition has been arguing for a broad international treaty, a multilateral treaty, not simply bilateral, and universal, not simply OECD. From the perspective of the coalition, it is very important this debate continue and proposals be developed out of this debate, that it is not simply slipped down to the bilateral level where, as I have said, the major problem of the enormous power wielded by corporate investors is not addressed.

Senator SCHACHT—You have said here that you are not opposed to international treaties and you want a broader one. I think you would rather go to the WTO, which has got a broader range of countries represented than the OECD, and I understand that point. What I am interested in is your concern that this treaty may affect sovereignty in Australia or impose what you call lower standards. I presume you have never been opposed to previous Australian governments signing up to the ILO conventions that established higher standards for industrial relations—working conditions, living conditions, equal pay, equal rights for women, et cetera. Many of these were achieved in Australia under previous governments by the government ratifying the ILO convention in those areas. They would have been a good outcome, wouldn't they?

Dr Goodman—Yes, certainly.

Senator SCHACHT—So your main concern here is not the treaty per se; it is the content of the MAI?

Dr Goodman—Yes.

Senator SCHACHT—If the MAI had made sure that it had reservations such as that working conditions or environmental conditions of other treaties we had signed could not be overridden, would that assuage some of your fear?

Dr Goodman—It would not, given the norms that are laid out within the treaty and enforced through its dispute mechanism. The OECD and some states in the OECD have argued that there perhaps needs to be some reference to these other treaties. But this has always been voluntary. It has never been enforceable within the draft MAI. There has been talk about references to sustainability, for instance, under the Rio Declaration but this would not be included under the—

Senator SCHACHT—But presuming we accept the evidence that the MAI under the OECD negotiations is now basically dead for political reasons for a fair time, and the debate will be whether it should go off to the WTO, are you concerned that some of the countries in the WTO are not exactly noted for having an excellent record on human rights?

Dr Goodman—Yes, certainly.

Senator SCHACHT—We then run into the problem of the WTO negotiating with countries which have very bad records on human rights, whereas the full membership of the OECD basically gets a reasonably clean tick as being democratic and having rule of law processes protecting human rights. Therefore, is there an argument to say on that basis that the OECD might be a better body to deal with that than the WTO, if China joins, for example? They want to join and they do not exactly have a great record on human rights.

Dr Goodman—If the MAI had been signed by the OECD states, the argument put would have been that it undermined a whole range of rights and existing legislation within those OECD states because it created a dispute mechanism that allowed corporations to sue governments and allowed them to influence legislation at the national level in a way not possible under other international regimes. That is the concern. It is a concern as much for the consequences of the MAI within the OECD states as for its consequences beyond the OECD.

Senator SCHACHT—Do you think it is a bad idea that an individual has the right to sue and take legal action against a dictatorship which has appropriated property—assets of ordinary people? You say corporations would be able to sue under the dispute arrangements. But it might not necessarily be Coca-Cola, which may be the image we all have of some antisocial features of multinationals. It might be quite a small business that has invested in China or Malaysia and has suddenly found it has had its intellectual property expropriated or pinched. It finds, when it goes to sue to get back, that the government says, 'Bad luck. We will take the visas off you and throw you out of the country.' I think that is an infringement of human rights. Would you think that an infringement?

Dr Goodman—Certainly of property rights.

Senator SCHACHT—I am just trying devil's advocate questions to say there is a lot more grey than there is black and white, whichever way we go with it. I accept that the OECD may not be the best body in some ways, but in other ways it may be a better body because, first of all, under your definition most of the full member countries—if not all of them—are actually democratic.

Dr Goodman—Which from our perspective should then suggest that the treaty that they negotiate should not be one that simply elevates property rights. It should be one that balances property rights with other rights which, as you have stated, are in force in those countries.

Senator SCHACHT—It then means that because they are democratic countries in the OECD, and the process is available through elected parliaments and democratic discussions, you may get a better outcome. Some of the Third World countries that are dictatorships have

no interest at all in writing themselves into treaties that guarantee that they could be sued or have action taken against them. That would be the last thing they would want. Therefore, the difficulty of getting an improvement in human rights through the WTO is going to be harder than through the OECD.

Dr Goodman—I think the principle objection of non-OECD states within the WTO to including investment issues under the ambit under the WTO was not so much questions of human rights and so on, but actually questions of democratic rights or state rights.

Senator SCHACHT—What is the difference between a state right and a democratic right?

Dr Goodman—What you are highlighting here is a conflicting logic in international politics of international property rights on the one hand and states rights on the other. I think there is constant tension between those, and what the MAI would have done is to elevate property rights above states rights and other rights. I am saying that that is the wrong premise; it is the wrong starting point. I cannot elaborate the details of how to resolve that. I think it is fair to say that amongst the NGOs that are discussing this issue they themselves cannot resolve this conundrum.

Mr HARDGRAVE—Dr Goodman, isn't that a fair enough situation, given that the lead agency involved in this was Treasury, which is not known for involvement in human rights issues?

Dr Goodman—Yes.

Senator SCHACHT—I would agree with that, Mr Hardgrave, but not exactly that far.

Mr BAIRD—May I ask you the same question as I asked the Treasury representatives and Attorney-General's. Do you regard it as appropriate that Australia was participating in these discussions, or perhaps being involved as an observer? Do you think that in the globalisation of the world economy we should be looking for these types of guidelines in relation to investment? I suppose a third part is, given that you are involved in the humanities and social sciences area—which is a very fine area to come from, as I did myself—do you have any involvement yourself in investment programs and understand the difficulties of uncertainties in relation to investment?

Dr Goodman—In response to the last point, my own involvement in terms of my academic involvement has been in what has been mentioned already about the growing attempts to democratise the process of drawing up international economic agreements. I am very interested in the debate that has emerged out of the MAI initiative in terms of its forcing a wider participation in these issues. The *Financial Times*, after the treaty was delayed in April this year, pointed out that such agreements would no longer be able to be negotiated behind closed doors because people are demanding some involvement in this, and that is what has been referred to already. That is my general interest.

In terms of looking for guidelines, as I have said, I think guidelines and an international treaty on investment are very urgent, but the question is what sort of treaty, and what sort of norms will be expressed in that treaty?

Mr BAIRD—You regard it as being appropriate that Australia was there participating in the whole discussions?

Dr Goodman—In the case of the MAI I do not, because, as I have outlined, that treaty was based on the wrong premise.

Mr BAIRD—I understand, but if, as the Treasury officials say, they were there and putting forward Australia's viewpoint to protect our interests, isn't that an appropriate role for our Treasury people?

Dr Goodman—In terms of the Treasury role, what has not been discussed is what positions the Treasury argued for in those negotiations. We do not know that. There has been a freedom of information request to obtain documents to do with the negotiations from Treasury. They have revealed that Australia was arguing for a treaty that would, purely and simply, be to do with property rights—that any reference to environmental regulation or labour rights be simply in the form of a recognition that they were issues, but that they not be enforceable or come under the wider mechanisms of the treaty or be connected with investment issues.

Mr BAIRD—Wouldn't labour rights come under the ILO provisions?

Dr Goodman—That is exactly my point. The position adopted by Treasury, as far as I can see, is that it should be simply a treaty to do with investment.

Senator SCHACHT—Wouldn't that override the already ratified ILO conventions?

Dr Goodman—Exactly. That is the crux of the matter. If the MAI had been agreed, states would have responded and delivered on their MAI norms because they are enforceable. Even ILO conventions are not enforceable, of course.

I will return to the point you were making earlier about guidelines and the Treasury's involvement. Australia was not simply participating as an observer in this process. It was an active participant and argued very actively for a very particular position—for a very particular sort of treaty.

Mr BAIRD—I understand that, but you are wanting a multifaceted agreement which deals with the environment and all the labour laws. It seems difficult enough to have an agreement strictly related to investment and the ownership question. If you then bring in all of the other aspects you are really getting the most humungous agreement. The agreements in Rio are going to go out the window as you renegotiate them all there, or in Geneva in terms of the ILO. Wouldn't that be in the too hard basket? If you really believe that there should be guidelines for all these other aspects, you will never get there. The companies who want to make investments would continue to be frustrated. The more we go on, the more global our economies become and the more I would see that we would need the guidelines.

We are not arguing that there should not be appropriate guidelines, but it seems that the guidelines you are proposing are extremely optimistic and so wide ranging that they are very difficult to reach.

Dr Goodman—I agree that the proposals coming out of the Stop MAI coalition have been wide ranging, very broad and idealistic. But I would also suggest that the MAI proposal, which, as you mentioned, was designed to increase certainty for international investors, was itself hugely ambitious and would not have delivered on that certainty because it would have created huge political problems—as are actually already emerging around NAFTA where similar powers are being granted to corporations to sue governments within NAFTA. It would not have resolved the issue of certainty at all. In fact, I think it would have exacerbated some of the problems we have already experienced in terms of the uncertainty of speculative flows and so on.

Senator COONEY—During the course of our going around the country last year on the MAI and the Convention on the Rights of the Child, we found that what people are worried about—whether they are justified in worrying about it or not is another matter—is the use of arbitrary powers. I do not think people are against big international companies; they are against the ability of big international companies to use arbitrary powers to come and go, as they probably already do. Do you think that the United Nations is a body that is capable of restraining arbitrary powers to any extent—or to a sufficient extent and then to a greater extent?

Dr Goodman—The issue you pose concerns the institution and the mechanism.

Senator COONEY—I understand what you say: that finances and investment should be in some way controlled so as to dampen that arbitrary power so money does not just go here, there and everywhere. It is a dictatorship of arbitrary power.

Dr Goodman—It is fair to say, as you have pointed out, that there is widespread and justified concern about the arbitrary power that is wielded by corporations or speculators over the fate of economies. In regard to ways of dealing with that, I have referred to an international treaty really in response to some of the points that have been raised. But picking up on the point that was raised about states' rights and the role of states, a lot of the groups within the Stop MAI coalition have been arguing that states should have the right to manage, and be charged with the responsibility for managing, capital and investment flows, and that those rights and responsibilities should be enshrined in an international treaty.

People often refer to the 1974 United Nations draft treaty on the rights and duties of states, arguing that the regulating mechanism—this needs to be agreed internationally—at the end of the day, given the nature of the international system, will be the states. It will be the states that are doing the job of regulating. That is then set in the framework of an international treaty and it is very important that individual state initiatives are not isolated from others; that there is a wider coordinated response to this problem of what is sometimes called the architecture of the global economy—or the absence of that architecture.

Senator COONEY—You are saying that a state, no matter how the arbitrary powers are used, has an obligation to protect its citizens, even though that might come from an agreement or from an attack from outside.

Dr Goodman—Yes, that is exactly what the 1974 treaty does. It bases the rights and obligations of states on citizen rights, on the immediate rights that are carried by individuals.

Mrs DE-ANNE KELLY—You mention on page 140 that there is a hollowing out of the national economy. Would you mind elaborating on that?

Dr Goodman—A hollowing out of the national economy results from national companies that essentially used to operate within the one national unit going international. In order to take advantage of different social rights and regimes in other countries or so as to gain access to markets, companies start to go multinational. That results in those companies ceasing to be primarily national companies that can be seen to be part of the national economy. They increasingly become part of a multinational or even a transnational economy, with no immediate allegiance to any one national state. Hollowing out occurs when the whole concept of the national economy ceases to have any meaning because the companies operate beyond that framework. An example might be BHP, the 'big Australian', going international and becoming a multinational corporation, or even transnational. Instead of being seen as an expression of the national economic interest, it may be seen by some people—in Newcastle, for instance—as a threat. So, in a sense, you can see that that has hollowed out the whole concept of a national company being part of the national economic interest.

Mrs DE-ANNE KELLY—Thank you. You say on page 143 that the MAI permits free access for international investors to agricultural industry support schemes. Could you nominate some schemes that would be potentially accessed by investors?

Dr Goodman—An example that is used is the CAP, the common agricultural policy, within western Europe where, in effect, investors would be able to argue that the CAP discriminates. The price support regime within the European Union provides advantages to agricultural producers within the European Union that are not available to international investors. Therefore, that has to be wound back, or extended to those international investors—in which case the CAP would become meaningless. So there is an in-built logic there. Therefore, the common agricultural policy, and agricultural support schemes generally, are listed under country reservations in an attempt to escape that problem of them being discriminatory.

Mrs DE-ANNE KELLY—We obviously have some marketing arrangements in Australia—single-desk selling for the wheat and the sugar industry. In your opinion, would they be subject to challenge under an MAI regime by a foreign investor?

Dr Goodman—In so far as they provide subsidies to national producers; in so far as they provide an advantage to national producers not available to an international investor—

CHAIR—Where would the investment take place if you were talking about a producer of sugar or wheat in another country? That is not investment; that is production. Why would

they challenge something that was going on in Australia when they had not made an investment?

Dr Goodman—If those support regimes discriminated against an international investor in, say, the sugar industry in Australia, if they could not gain access to these support schemes, then, yes, that would be deemed to be discrimination.

Mr BAIRD—But if they had invested in Australia then they would.

CHAIR—If someone comes in and invests in a sugar plantation or a wheat farm in Australia, our arrangements force them into the single desk, don't they?

Senator SCHACHT—That is right.

CHAIR—They cannot bypass it. So you are trying to tell us that people offshore could sue the Australian government to try and destroy these things, not only when they have not made an investment but even when they have made an investment here, ignoring the fact that they are forced to participate in it. What is the reverse of discrimination? I think, frankly, what you are saying is nonsense.

Mrs DE-ANNE KELLY—What I was actually asking Dr Goodman was not so much to do with sugar producers but with sugar traders. There are a number world wide and, of course, Australia has only one sugar trader, which is CSR, which presently has the marketing rights for the single desk, as there is similarly in wheat. Is it possible that other sugar traders would challenge, saying that they are discriminated against selling raw sugar from Australia? I am asking for your opinion, because obviously it is open to—

Dr Goodman—This is difficult ground for me because I do not know much about the sugar industry in the first place.

Mrs DE-ANNE KELLY—You will have to come up to North Queensland then.

Dr Goodman—Yes. More generally, the comment that what I am saying is nonsense is important because the whole concept of what is discrimination in international law, what would be actionable within the international tribunal set up under the MAI, is very unclear. Several international lawyers have provided opinions on what would be the impact of across-the-board non-discrimination against international investors within the MAI.

There are very differing answers to that, largely because the whole concept of discrimination under the MAI is so widely drawn under the international law there is on this, so that advantages to national producers can be interpreted to be discriminatory against non-national producers, against non-national entities. As to how that issue is fought out—

Senator SCHACHT—Dr Goodman, can I give you an example the other way. Our beef producers can claim that the common agricultural policy in Europe, because we are a member of the European Community, discriminates against our producers in Australia. Even if we do not choose to invest in Europe but want to sell into their market, we cannot do so because they have protections under the CAP in one form or another that stop us being able

to do that—quotas, whatever. Are you saying that under this MAI it is open to interpretation that even if an Australian beef company does not invest in Europe but wants to sell into Europe we can take legal action under the dispute tribunal as it was proposed to get the CAP knocked over?

Dr Goodman—I have admitted that I do not know what the full implications are.

Senator SCHACHT—But that is a discrimination against us in world trade. We are an OECD country; they are OECD countries; they have a CAP amongst a group of them; we cannot sell our beef into Europe because there are quotas, there are tariff protections, et cetera. We are discriminated against. Even without an investment or even wanting to invest in Europe, all we want to do is say, 'We produce better beef in North Queensland. We want to sell it to Europe at a better price and of better quality. Let the consumer choose.' As you understand it, before the MAI fell over in the OECD, is that an area in which we could take action under the tribunal that this discriminates against us as a signatory to the MAI?

Dr Goodman—A point I should have made earlier on—and made very clear when I was responding to the point on agricultural subsidies—is that the MAI is about investment; it is not about trade.

Senator SCHACHT—Okay, but you have given evidence that it is a very wide definition of investment, of discrimination. We could say, 'We want to invest in a distribution system of selling meat in Europe. We want to go and set up butchers shops to sell our high quality cheaper beef.'

Mrs DE-ANNE KELLY—You cannot do that if you have growth hormone promotants in them. You do not know enough about this, with respect.

Senator SCHACHT—I do not want to actually produce the beef in Europe; I just want to invest the money in a distribution system. It is going to cost us millions more dollars to put up a marketing system.

Dr Goodman—That would apply there.

Senator SCHACHT—Okay. There is the discrimination: we are stopped from doing that, because they will not let our beef in because of quotas. I am asking you whether you understand that therefore we could have accordingly taken an action against the OECD signatories from the European Community.

Dr Goodman—In so far as it relates to discrimination against an Australian investor within the European Union, yes, but only if this area of legislation is not under a country reservation—

Senator SCHACHT—But that would be a positive outcome for a national interest in Australia—our beef industry would get higher prices, more production, more jobs in Australia. That could be seen as a positive outcome.

Senator COONEY—He is saying that the investment has to be in Europe, though.

Senator SCHACHT—No, but what you are misunderstanding is that, if the investment is in the distribution system that creates more demand for beef in Australia, more people will be employed producing the beef and processing the beef at our meatworks and sending it over as chilled beef in planes et cetera; therefore we end up with more jobs.

Dr Goodman—What you are raising there also—

Senator SCHACHT—No, more jobs in Australia to sell the prime quality beef to Europe.

Mr BAIRD—You could do that through a distribution system as well. If you set up a distribution—not necessarily retail—

Senator SCHACHT—But I am trying to get at the point of Dr Goodman saying that this is very broad discrimination that may be used in an anti-Australian way.

Mr BAIRD—The point is valid. It can work in reverse.

Senator SCHACHT—I am just trying to find examples, as a devil's advocate, that nothing in this area is black and white.

Dr Goodman—I think the important point there is a definition of what an investment is. It is fair to say that the treaty casts that definition as wide as is possible. It is tangible and intangible investment.

Senator SCHACHT—That means an action could be taken?

Dr Goodman—But the point I was trying to make about the state of international law on this question of discrimination is that it is untried and untested, which is why in the Canadian case NAFTA is starting to get judgments which people did not anticipate would be the result of giving corporations the right to sue against Canada, the US or Mexico if the corporation felt it had been discriminated against by those governments.

CHAIR—Thank you for your evidence.

Dr Goodman—Can I make one brief closing statement. It does not relate to the discussion we have been having; it relates to the suggestions that I put up in my paper that I distributed.

CHAIR—That ought to be the subject of another submission, frankly. The purpose of a closing statement is to tie up any loose ends you think appropriate from the discussion we have had. If you want to make another submission on other points, you are most welcome, but you must confine your closing statement to issues we have raised here.

Dr Goodman—Okay. Given that the MAI is resurfacing in many intergovernmental organisations, given the evident failings of the OECD MAI process, and given the ongoing debate about investment liberalisation—I did talk about that—I would suggest that this joint committee establish a regular watching brief on the issue, that it request departments to

produce a set of guidelines on how they propose to widen public participation on these issues, and also embark on its own investigation into the principles that should guide Australian government negotiations on investment liberalisation.

CHAIR—Thank you kindly.

Resolved (on motion by **Mr Hardgrave**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 1.16 p.m.