THE UNIVERSITY OF CALGARY

# International Investment and the Environment:

# An Analysis of the Multilateral Agreement on Investment

by

Lee Michelle McIntosh

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF LAWS

FACULTY OF LAW

CALGARY, ALBERTA

May, 1999

0-612-47927-7

## ABSTRACT

This thesis is concerned with the potential effect of the Multilateral Agreement on Investment (MAI) upon the environment. It is specifically concerned with whether investment activity under the MAI will lead to sustainable development. It explores the relationship between international investment and the environment and determines three criteria by which to judge whether the MAI will lead to sustainable development. These criteria are: 1) the MAI should provide a certain, liberalised and non discriminatory legal regime for international investment; 2) it should govern international investor behaviour; and 3) it should allow countries latitude to regulate international investment when it becomes clear that such investment is having a deleterious effect upon the environment. This thesis analyses the draft provisions of the MAI to determine whether it meets these criteria. It concludes that the agreement will meet the first criterion but not the final two and therefore that it will not promote sustainable development.

## ACKNOWLEDGMENTS

I gratefully acknowledge the invaluable direction and advice that my supervisor, Professor Irene McConnell, Faculty of Law, University of Calgary provided me while I was preparing this thesis.

I also thank Professor Nigel Bankes, Faculty of Law, University of Calgary, for his support and encouragement.

## TABLE OF CONTENTS

## INTRODUCTION

In 1995 the countries who are part of the Organisation for Economic Co-operation and Development (OECD)[1] began to negotiate an international agreement on investment known as the Multilateral Agreement on Investment (MAI). OECD nations intended to conclude and sign the MAI during 1997. However, in that year a coalition of non governmental organisations (NGOs) protested against the MAI stating that it would lead to both a breach of international labour standards and to environmental degradation. The protest was so powerful that it stalled the OECD negotiations and countries commenced extensive inquiries which continue today into the potential impact of the MAI. This paper is intended to add to the growing body of research on the potential effect of the MAI upon the environment.

Commentators who have examined the potential impact of the MAI upon the environment express widely varying opinions. For example, critics of the MAI such as Clarke and Barlow state that "all countries seem to be willing to sacrifice their responsibility to the environment to be players in a competitive world. The loss in the earth's."[2] And Swenarchuk states that "the MAI suffers from a lack of balance between commercial interests and the interests of citizens and the environment.... if signed, it will provide corporations with powerful new tools to prevent regulation of their activities for social and environmental purposes."[3] However, supporters of the MAI believe that "a high standard (investment) agreement and increased liberalisation can be consistent with a

---

[1]Australia, Austria, Belgium, Canada, Czech Republic, Denmark, France, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States and the European Community.

[2]T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 101.

[3]M. Swenarchuk, "The MAI and the Environment" in in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 120 at 134.

commitment to environmental protection and sustainable development"[4] as long as "sound environmental policies are properly integrated with trade and investment policies."[5] This paper will consider the draft provisions of the MAI to determine whether it does in fact incorporate sound environmental principles which make it compatible with the goal of sustainable development, whether it will lead to the environmental degradation that the critics predict, or whether the answer lies somewhere in between.

All human actions lead to some change and arguably some degradation of the environment. The question then for those who must decide whether to sign the MAI or not is whether it will lead to environmental degradation that is acceptable. This paper utilises the concept of sustainable development to determine whether the MAI will lead to acceptable environmental degradation. Sustainable development is development which allows the current generation to develop but leaves a sufficient quantity and quality of environmental resources to allow future generations to develop. It incorporates the idea that to be sustainable, development activities must not use more resources or energy than the earth can renew or produce more pollution than the earth can assimilate. Another way of expressing this is that development activities must not take up an 'ecological space' or 'footprint' that exceeds the carrying capacity of the earth[6]. The concept of sustainable development was chosen because it is the policy ideal of most countries involved in negotiating the MAI[7] and therefore an analysis based on sustainable development will be of the most use to those charged with determining whether to sign the agreement or not.

---

[4]B. Griffiths, "The OECD Guidelines for Multinational Enterprises, and Environment and Labour Issues" in OECD, *Working Papers No 51* (Paris: OECD, 1997) 42 at 43.

[5]OECD, *Open Markets Matter* (1998) available at http://www.oecd.org/cch/events/sover.htm.

[6]W. Sachs *et al*, *Greening the North* (London: Zed Books, 1998) at 12.

[7]S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty, *Thinking Ecologically* (New Haven: Yale University Press, 1997) 118 at 118.

The chapters of this paper are organised as follows. Chapter 1 examines the nature of international investment and the impact that globalisation has had upon it. It notes that most countries have traditionally regulated international investment to maximise the economic advantages they receive from it and to minimise its unwanted, including environmentally degrading, side effects. The result of this is that investors today are faced with a myriad of different national investment laws and regulations. They are also governed by international agreements such as the *General Agreement on Trade in Services* (GATS) and the *Agreement on Trade Related Investment Measures* (TRIMs). The chapter then explains that globalisation has led many countries to partially relax their investment laws and to a dramatic increase in the level of investment. This chapter concludes that an international agreement on investment is necessary to provide non discriminatory treatment, stability and certainty to the growing number of international investors. An international investment agreement is also necessary to regulate the behaviour of multinational investors (who can escape the ambit of many national laws) by setting standards for the conduct of international investors.

Chapter 2 deals with the question of whether international investment facilitated by an international investment agreement such as the MAI will have a negative impact upon the environment or not. To determine whether international investment will have positive or negative effects on the environment, the chapter uses the concept of sustainable development. This chapter analyses the literature in several areas to determine whether investment will result in development which has a reduced or enlarged ecological footprint. It determines that in some areas, investment may lead to development which has a reduced environmental intensity, but that this is far from certain. It determines that in other areas investment is likely to lead to development with a greater ecological footprint. This chapter also determines that some governments may reduce their environmental standards in order to attract investment and therefore that pollution havens may form in some countries in specific highly polluting industries. This chapter concludes that if any international investment agreement is to lead to sustainable development, it must include provisions which permit countries latitude to regulate investment to protect the environment and some provision to disuade countries from lowering their environmental standards and facilitating the creation of pollution havens.

Chapters 1 and 2 outline three criteria that commentators believe an international agreement on investment which results in sustainable development should meet. First, it should provide a certain, liberalised and non discriminatory legal regime for international investment. Second, it should govern multinational investor behaviour. Third, it should allow countries to regulate international investment when it becomes clear that investment is having a deleterious effect upon the environment.

Chapter 3 examines the MAI to determine whether it meets the criteria of an international investment agreement established in chapters 1 and 2. It concludes that the MAI mandates extensive liberalisation of national investment regulations and will go a long way to providing stability and certainty to international investors. However, the MAI does not regulate the behaviour of multinational investors. It incorporates an OECD code on multinational behaviour which does not bind investors and reinforces the non binding status of that code.

Chapter 4 examines in detail the provisions of the MAI which relate to the environment. It deals first with the not lowering standards provision and determines that this provision is unlikely to influence investors' behaviour. It then looks at the preamble to the MAI. By analysing a recent case decided by the dispute Panel and Appellate Body of the World Trade Organisation (WTO) this chapter determines that the preamble will probably have a limited effect upon promoting sustainability. It then analyses the environmental exceptions to the performance obligations provision by considering the *General Agreement on Tariffs and Trade* (GATT) jurisprudence which deals with a similar provision. This part of the chapter concludes that the MAI environmental exception will not give countries the latitude they need to regulate investment when it has a negative impact upon the environment. Finally, this chapter considers some recent cases filed under the *North American Free Trade Agreement* (NAFTA) which indicate that the investor-state dispute resolution regime of the MAI may be used by investors to resist environmental laws or to claim massive damages because they are affected by an environmental law. The chapter concludes that the MAI will not lead to sustainable development.

Chapter 5 concludes this paper and recommends some ways in which the MAI as currently drafted could be amended so that it has a greater capacity to lead to sustainable development.

# CHAPTER 1: INTERNATIONAL INVESTMENT

## I. Introduction

This chapter sets the scene for a discussion of the Multilateral Agreement on Investment which is currently being negotiated in the OECD and its potential impact upon the environment. It describes the traditional nature and scope of international investment and explains that despite the benefits of international investment, most countries have traditionally sought to regulate and restrict it in some way. This has led to a myriad of different national investment laws and international initiatives to liberalise and codify the national laws. Since the 1980s, globalisation has had a dramatic impact upon the field of international investment, leading to pressure on countries to reduce their investment restrictions and regulations and to a rapid increase in the amount of international investment. Most commentators today believe that an international agreement on investment is essential for two main reasons: first, to further liberalise national investment rules so that foreign investors are not discriminated against and to provide them with certainty in the face of the myriad of national investment rules, and second; to provide international standards for investor behaviour to mitigate the effect of nations' global race to de-regulate their investment laws.

Part II of this chapter will define 'international investment'. International investment has traditionally been in the form of foreign direct investment ('FDI'). FDI is investment which enables an investor to have control or significant influence over an enterprise in another country. However, since the 1980s the nature of international investment has been changing and FDI is no longer the primary form of international investment. Short term portfolio investment and debt financing now contribute substantially to the flows of international investment. Investors no longer invest solely in enterprises, they also invest in new forms of property such as intellectual property. The definition of investment in the MAI has been drafted in response to the changing nature of investment. It is a broad based definition with the scope to incorporate new and evolving forms of investment.

Part III of this chapter outlines the patterns of international investment. It details that most international investment flows from developed OECD nations to other developed OECD nations, though an increasing share is going to non-OECD developing nations. Of the share that goes to developing countries, most is to Asian nations, and little is to the least developed nations in Africa. International investment was originally directed to the agricultural sector, then to the manufacturing sector, and is now beginning to become concentrated in the services sector. Most investment is carried out by multinational corporations.

Part IV explains that countries primarily seek international investment because it stimulates their economic growth, and for this reason it is especially important to developing countries. However, international investment can have negative consequences in countries if it discourages local investors or involves unduly influential multinationals. Most countries have therefore traditionally regulated foreign investment in an attempt to maximise its benefits and minimise its disadvantages. Part V describes these regulations. There are two main types of regulations - those relating to the establishment of investments, and those which govern the performance of an investment. Some countries also regulate investment by offering incentives to attract foreign investors.

Part VI explains that there have been many international attempts to liberalise and codify national investment laws in an international investment agreement so as to provide greater freedom, certainty and predictability to investors. Most attempts have failed. This part describes the main attempts. Of those which have been successful, none are comprehensive. The *Agreement on Trade Related Investment Measures* (TRIMs) and the *General Agreement on Trade in Services* (GATS) negotiated at the WTO Uruguay Round do not comprehensively deal with investment. The OECD codes are not binding on non OECD nations. While most countries use bilateral investment treaties (BITs), these are too variable and weak to constitute a consensus on investment principles.

Part VII describes the impact that globalisation has had upon international investment. Globalisation has been responsible for dramatic growth in international investment, growth which is expected to continue well into the 21st century. It is also a major force behind most countries' moves to liberalise their investment regimes - and in any case, globalisation reduces the impact of government regulation in the investment field. Therefore if growing international investment is to be regulated at all, countries need to negotiate an international agreement to set standards for investor behaviour in this field. The MAI represents the most successful attempt made so far to create a comprehensive international investment agreement.

## II. Definition of International Investment

### A. Traditional Meaning of International Investment

The 'international investment' that is the subject of this paper is investment which enables a foreign investor to establish a presence in a domestic economy. Such international investment has traditionally been synonymous with foreign direct investment ("FDI"). FDI is investment which enables an investor to have significant influence over or control of a *business* or part of a business in a foreign country[8]. The OECD has developed a benchmark definition of foreign direct investment, which states that "foreign direct investment reflects the objective of a resident entity in one economy of obtaining a lasting interest in an entity resident in an economy other than that of the investor. The lasting interest implies the existence of a long-term relationship between the direct investor and

[8]M.J. Trebilcock and R. Howse. *The Regulation of International Trade* (London: Routledge, 1995) at 274.

the enterprise and a significant degree of influence on the management of the enterprise."[9]

A foreign investor is commonly thought to have long term influence or control over an enterprise when it owns more than half of the voting equity in a firm. However, a foreign investor may have control with a smaller shareholding[10]. In fact, the OECD suggests that a foreign investor has significant influence and control when it owns as little as ten percent of the ordinary shares or voting power of an enterprise. It states that:

> "The numerical guideline of ownership of ten percent of ordinary shares or voting stock determines the existence of a direct investment relationship. An effective voice in the management, as evidenced by an ownership of at least ten percent, implies that the direct investor is able to influence or participate in the management of an enterprise; it does not require absolute control by the foreign investor."[11]

Most OECD countries apply the ten percent threshold without exception to determine whether an investor has significant influence or control of an enterprise[12]. However, some countries treat the rule flexibly and look to the specific characteristics of an enterprise to determine whether an investor has significant control or influence, regardless of that investor's numerical share of stock[13].

The traditional method of determining whether an investor has established a presence in a foreign economy by looking at its share in an enterprise is no longer appropriate because the nature of investment is changing. The traditional method was appropriate when

---

[9]OECD, *OECD Benchmark Definition of Foreign Direct Investment*, 3rd ed. (Paris: OECD, 1996) at 5.

[10]P.J. Buckley, "Introduction" in P.J. Buckley, ed. *International Investment* (London: Edward Elgar Publishing Company, 1990) at xi.

[11]OECD, *OECD Benchmark Definition of Foreign Direct Investment*, 3rd ed. (Paris: OECD, 1996) at 8.

[12]Including Australia, France, Canada, and the United States.

[13]For example Belgium and Luxembourg consider several characteristics of an enterprise and don't exclusively use the 10 percent rule. Germany and the United Kingdom use a 20 percent rule. OECD, *International Direct Investment Statistics Yearbook 1998* (Paris: OECD, 1998) at 393 and 427.

foreign investors owned or controlled all the capital, technology, management and marketing involved in an enterprise[14]. However, this is no longer common. Host countries have become wary of foreign investors who are large enough to control or significantly influence all aspects of an enterprise and have instigated regulations to counter this. Investors now invest in a variety of different ways and place less emphasis on outright ownership in an enterprise. Co-operative arrangements, joint ventures and limited partnerships have all become common vehicles for foreign investors[15]. Foreign investors have begun to invest in things other than enterprises, such as real estate and intellectual property[16]. If a country wants to determine whether a foreign investor has a long term interest in its economy, that country must now consider more than that investor's share in an enterprise.

Foreign direct investment is no longer the primary form of international investment. Two other major forms of international private capital are portfolio investment[17] and debt finance. These are both increasing in importance, especially in emerging markets. Portfolio investment, which was virtually unheard of 10 years ago, now accounts for 13 percent of private capital flows[18]. Debt finance accounts for 33 percent. In 1995, traditionally understood foreign direct investment accounted for only 54 percent of private

---

[14]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 271.

[15]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 149 at 271.

[16]F. Engering, "Keynote Address" in OECD, *Working Papers No 51* (Paris: OECD, 1997) 6 at 8.

[17] Portfolio investment is indirect investment, such as the purchase of bonds or stocks, or equity participation. X. Musca, "Scope of the MAI" in OECD, *Working Papers No 96* (Paris: OECD, 1997) 9 at 9.

[18]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 153.

capital flows[19].

## B. 'Investment' under the MAI

The traditional conception of international investment which focuses on FDI and enterprises is no longer suitable for determining the presence of foreign investors in an economy[20]. The definition of international investment in the MAI has been articulated in response to this. The basis of the MAI definition is an investor's assets, rather than its share of an enterprise. This means that the definition includes new forms of investment and that the MAI can cover all stages of investment from establishment to acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition[21].

The definition of investment in the MAI[22] is found in Part II, *Scope and Application*, section 2. It states that investment means:

> "Every kind of asset owned or controlled, directly or indirectly, by an investor, including:
>
> > i) an enterprise (...including corporation, trust, partnership, branch, joint venture, association or organisation);
> > ii) shares, stocks..;
> > iii) bonds, debentures, loans...;
> > iv) rights under contracts...;
> > v) claims to money and claims to performance;
> > vi) intellectual property rights;
> > vii) rights conferred pursuant to law or contract such as concessions, licences, authorisations and permits; and
> > viii) any other tangible or intangible, movable or immovable property, and any related property rights, such as leases, mortgages, liens and pledges."

---

[19]OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 39.

[20]Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 838.

[21]X. Musca, "Scope of the MAI" in OECD, *Working Papers No 96* (Paris: OECD, 1997) at 10.

[22]Draft text, April 1998. Available at http://www.oecd.org/daf/cmis/mai/.

This is much wider than the traditional conception of international investment. The negotiating group intentionally drafted a broad definition so that the agreement would have a comprehensive application[23]. The group forsook the certainty of an inclusive list and used an open ended definition so that evolving forms of property could be included in the future. Their intention was to include all forms of tangible and intangible investment that created a significant stake in the host economy[24]. However, by incorporating such a broad definition, the MAI covers many situations where an investor does not have a significant stake in a host economy. For example, part (ii) includes any amount of shares or stocks which are owned indirectly by a foreign investor, regardless of whether the amount is significant or negligible. Part (v) covers all claims to money, including any short term claims to money arising out of purely financial transactions (such as an obligation to pay damages) which are independent of the operations of a firm and do not represent a significant stake in the host's economy[25].

In light of this, the negotiating group have discussed modifying the definition in the final agreement so that it only includes investments which are associated with a significant economic presence in an economy[26]. A significant economic presence will be evidenced by either an associated commitment of capital or other resources, an expectation of gain or profit, or an assumption of risk. This will ensure that negligible investments that do not create a significant stake in a host's economy will not come within the ambit of the MAI.

---

[23]E.M. Burt. "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1017.

[24]*Ibid* at 1041.

[25]Biswajit *et al*., "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 838 note that other agreements which have a similarly wide definition of investment, such as the NAFTA and the *Energy Charter Treaty*, specifically exclude claims to money unless they are associated with long term investment interests.

[26]MAI draft text at 11.

## III. Patterns of International Investment

As international investment has traditionally been comprised of foreign direct investment, most of the data on international investment is solely concerned with FDI. Most of the data has been collected by the OECD or the World Bank, both of which use traditional definitions of investment. Although this thesis is concerned with all the forms of investment covered by the MAI, the data on FDI is still useful. The trends exhibited by FDI noted here are representative of trends in international investment generally.

### A. Geographical Distribution of International Investment

Foreign direct investment is not evenly distributed around the world. The majority of foreign direct investment moves from developed countries to other developed countries. The countries who are responsible for the greatest outflows of international investment are the United States, the United Kingdom, Japan, France and Germany. Companies based in these countries provide 85 percent of FDI outflows[27]. These countries also receive the most investment. The 'triad' which consists of the European Community (EC), Japan and the United States has received approximately 70 percent of investment inflows throughout the 1990s[28]. Foreign investment began as an overwhelmingly United States phenomenon[29]; for example, in the 1970s, the United States was the origin of 52 percent of total foreign investment outflows. Today, while the United States still has a large share

---

[27] H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 152. Most of the remainder of foreign capital is provided by Hong Kong, Brazil, South Korea, Singapore and Taiwan - R. Deigan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Canada: Thomson Professional Publishing Canada, 1991) at 23.

[28] D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997) at 145.

[29] T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 82.

of the investment market, its share has decreased[30].

In the 1980s, only 20 percent of FDI went to developing nations[31]. This figure has been steadily rising - in 1992 30 percent went to developing nations[32], while in 1995 they received 38 percent[33]. This figure is expected to increase further in the future as the improved growth prospects of many developing countries combined with an improving macro-economic environment, liberalisation policies and privatisation programs make them increasingly attractive to foreign investors in the future[34]. Of the money that does reach developing nations, most of it goes to a relatively small group of countries - generally the middle income countries, rather than the poorest countries. Seventy five percent of the flows go to just ten countries[35], none of which are African[36]. The Asian region attracts the majority of foreign investment which flows to developing countries - it received 61 percent in 1992. Most of the Asian investment inflow goes to China[37], and

---

[30]R. Deigan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Canada: Thomson Professional Publishing Canada, 1991) at 28. In fact, Japan eclipsed the United States as the greatest provider of global FDI in 1988-1991. Chia Siow Yue, "Trade and Foreign Direct Investment in East Asia" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 49 at 63.

[31]J. Startup, "An Agenda for International Investment" in OECD, *The New World Trading System* (Paris: OECD, 1994) 189 at 190.

[32]*Id.*

[33]D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997) at 145.

[34]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 2.

[35]Argentina, Brazil, China, India, Indonesia, South Korea, Malaysia, Mexico, Thailand and Turkey.

[36]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 150.

[37]W. Dobson, "Canada and Pacific Dynamism: An Introduction to the Issues" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 1 at 2.

investment to India is expected to increase in light of its recently liberalised investment policy[38]. Latin America and the Carribean receive 32 percent, Africa 7 percent and the least developed countries 0.7 percent[39].

## B. Sectoral Distribution of International Investment

Large scale sectoral movement of foreign direct investment dates from the beginning of the twentieth century. It was initially focused in the agricultural and raw materials sectors, and rarely in manufacturing or industrial sectors[40]. After World War II, however, multinational corporations began to invest in the manufacturing sectors in some African, South American and Asian countries[41]. Today the services sector which includes the construction, electricity distribution, finance and telecommunications industries is becoming the dominant recipient of foreign investment[42].

The vast majority of foreign direct investment is carried out by companies[43], primarily multinational enterprises[44]. The relationship between FDI and multinationals is so close that foreign direct investment is the most commonly used measure of the activities of

---

[38]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 82.

[39]*Ibid* at 22.

[40]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 252

[41]*Ibid* at 254.

[42]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 153. The services sector receives more than one third of the foreign direct investment directed to the developing world, and up to 50% of that which goes to the developed world.

[43]P.J. Buckley, "Introduction" in P.J. Buckley, ed. *International Investment* (London: Edward Elgar Publishing Company, 1990) at xii.

[44]*Id.*

multinational corporations[45]. A small number of multinationals conduct the bulk of investment. The largest 100 multinational companies own 20 percent of global foreign assets and employ over 6 million people[46].

In summary, international investment primarily flows between developed nations, with developing nations receiving a small but increasing share. Much investment flows to the manufacturing sector and in increasing amounts to the services sector. It is largely carried out by multinational firms. This chapter will now examine why countries seek foreign investment, why investors wish to operate outside of their home country, and some of the reasons countries may wish to regulate international investment.

## IV. Advantages and Disadvantages of International Investment

### A. Advantages of International Investment

#### 1. Advantages to Host Countries

The main reason countries seek foreign investment is to stimulate their economic growth - in fact, the WTO states that countries cannot expect any sustained economic growth unless they receive foreign investment[47]. The technology and information that flow as a result of foreign investment are thought to provide an important spur to productivity increases. In addition, foreign direct investment often combines capital, technology, training and trade in an integrated package of tangible and intangible assets to host

---

[45]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 54.

[46]J. Burns and E. Chrysler, "Multinational Corporate Growth: The Need for Multinational Control" (1997) 141 Foreign Investment in Canada Report Bulletin 1 at 2.

[47]World Trade Organisation, *Trade and Foreign Direct Investment* (Geneva: WTO, 1996) at 56.

countries[48]. Nations which have low rates of domestic savings[49] depend on outside flows of capital to augment their own scarce capital resources.

The Canadian experience is a good example of the value of international investment to a country. The Canadian Department of Foreign Affairs and International Trade estimates that Canada attracts an average of $10 billion new foreign investment dollars each year. For every $1 billion increase in foreign investment, 45,000 jobs are created for 5 years. Overall, one job in 10 is derived from foreign investment. The Department states that "over the past decade foreign direct investment in Canada has become one of the principal sources of growth and job creation."[50]

Developing nations have additional reasons to seek FDI. While developing nations receive a relatively small proportion of total direct foreign investment, what they do receive is very important to them[51]. The WTO states that "without an increased flow of foreign direct investment in (developing) countries, it is difficult to imagine how a major improvement in their economic prospects can be achieved. Foreign direct investment brings resources that are in critically short supply in poor countries, including capital and other such intangible resources as organisational, managerial and marketing skills."[52] Receiving foreign investment facilitates the transfer of western technology to developing

---

[48]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 5.

[49]Such as the United States, and many developing nations. T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 258.

[50]Department of Foreign Affairs and International Affairs, *Foreign investment: an engine for jobs and growth* available at http://www.dfait-maeci.gc.ca/english/trade/rationa2-e.htm at 1.

[51]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 2.

[52]World Trade Organisation, *Trade and Foreign Direct Investment* (Geneva: WTO, 1996) at 56.

nations as foreign firms transfer their technology to foreign affiliates in host countries[53]. Technology is transferred to a developing nation both when it is licenced there and when local workers learn the skills, knowledge and techniques associated with it[54].

The foreign investment that developing nations receive is becoming steadily more important to them in light of falling foreign aid levels, which have fallen in real terms since 1992 and fell nearly a quarter between 1995 and 1996 alone[55]. The United Nations passed a resolution "noting the need for the expansion of private capital flows and for broader access by developing countries to these flows"[56] after it "noted with concern the continuous decline of the official development assistance to developing countries"[57]. FDI is so important to developing nations that the United Nations states " foreign direct investment.... has become the primary means by which a growing number of countries are integrated in the international economy."[58]

## 2. Advantages to Investors

Lairson and Skidmore suggest a variety of factors which motivate firms in developed

[53]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 1.

[54]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 258-9.

[55]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 149.

[56]"Global financial flows and their impact on the developing countries" GA. Res 52/180, UN GAOR (18 December 1997) A/52/626/Add.1

[57]"Global partnership for development high level international intergovernmental consideration of financing for development" GA Res 52/179, UN GAOR, (18 December 1997) A/52/626/Add.1

[58]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 2.

nations to invest in developing nations[59]. With sustained economic growth at home, investors face labour and land shortages, rising wage and labour costs, erosion of competitiveness and profits - pressures they can alleviate by investing overseas. Investors in countries with strong balance of payments can take advantage of currency appreciation if they invest overseas[60]. Investors may directly invest in a country so they can produce goods locally and take advantage of the lowered barriers in free trade areas[61] rather than face barriers by importing goods. Investors may hope to create new markets for their products or services by operating in another country. Investors in developed countries can spread their risks by diversifying their capital. Foreign investors are attracted to and have sufficient capital to take part in overseas privatisation schemes where governments sell utilities such as telecommunications and transport systems. Technological advances have made it much easier for investors to shift vast sums of money and invest in previously remote locations[62].

While these are some general reasons explaining why investors are attracted to invest overseas, the primary reason a particular firm invests overseas depends upon the particular activity it is engaged in[63]. For example, extractive industries are attracted to the presence of raw materials and mineral deposits. Food producers are attracted to the climate in developing nations which supports cash crops. Manufacturing firms are attracted by new

---

[59]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 257.

[60]Chia Siow Yue, "Trade and Foreign Direct Investment in East Asia" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 49 at 70. For example, the sharp yen appreciation against the US dollar between 1985 and 1988 led to increased levels of Japanese foreign investment.

[61]For example, those in Europe and in North America.

[62]R. Barnet and J. Cavanagh "Electronic money and the casino economy" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 360 at 361.

[63]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 257-8.

markets in developing nations and invest there to take advantage of local tastes and lower wages.

## B. Disadvantages of International Investment and the Reason for Regulation

Despite the advantages of international investment, many countries traditionally limited international investment or at least sought to regulate it. Some of their reasons for doing so are explained below.

Critics of foreign investment argue that foreign investors earn excessive profits in developing nations because of their oligopolistic position. They return the majority of these profits to their shareholders at home, rather than re-investing them locally[64]. This negates one of the benefits commonly associated with FDI - a greater pool of sustained capital. In addition, foreign investors may borrow from the already scarce supply of capital, rather than actually bring any in. This will occur when foreign investors are given preferential treatment from local banks because of their size and resources[65]. Foreign investors may discourage entreupenerialship in developing countries because they use superior resources and drive local competitors out of business. Sometimes foreign investors do not transfer technology, or if they do it is at a greater price than expected - some studies have shown that multinational companies overcharge for technology transfer to their own subsidiaries in foreign countries[66].

Some countries are simply not ready to receive large influxes of foreign investment, and doing so would seriously destabilise their economies. A recent study by the International Monetary Fund ('IMF') found that many developing countries should conduct macro-

---

[64] *Ibid* at 259.

[65] *Ibid* at 260.

[66] *Id.*

economic stabilisation and financial sector reform before they begin to receive large inflows of foreign investment[67]. Even those developed countries which have adapted to large amounts of international investment may want to regulate some international investment so that they can control the impact of large movements of primarily short term capital upon their foreign exchange[68]. Barnet and Cavanagh[69] state that it is important that countries retain the ability to regulate investors as the globalised economic system in which money moves rapidly and freely puts many countries at risk of financial meltdown if investors pull out without warning.

Countries also have non economic reasons to regulate foreign investment. These include the simple fact of nationalistic concern or a desire to preserve a local culture from outside influences[70]. For example, in 1949 the Indian government policy on foreign investment stated that the major interest in ownership and effective control of any undertaking should be in Indian hands[71]. The Canadian *Foreign Investment Review Act*[72] was enacted "in recognition that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern"[73]. Further, most nations believe that some activities such as nuclear

---

[67]Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 846 citing IMF, *International Capital Markets*, 1995.

[68]See W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 455.

[69]R. Barnet and J. Cavanagh, "Electronic money and the casino economy" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 360 at 373.

[70]R. Deigan, *Investing in Canada* (Canada: Thomson Professional Publishing, 1991) at 406.

[71]M.J. Kust, *Foreign Enterprise in India* (USA: University of North Carolina Press, 1964) at 63.

[72]SC, 1973-74, c.46, no longer in force.

[73]Section 2.

power, telecommunications and airlines should be domestically run because of their strategic nature and importance to national security.

Some countries decide to regulate investment so that they can control the influence of the multinationals who carry out most international investment. Lairson and Skidmore state "the sheer size of many multinational corporations[74], combined with their economic efficiency and international mobility, not only provides such firms with a key place in the world economy but also endows them with considerable political power and influence."[75] Clarke goes so far as to say that "multinational corporations have consolidated their power and control over the world.... it is now the multinationals that effectively govern the lives of the vast majority of the people on the Earth." [76] This issue is of particular concern to some developing nations[77], who believe that if they do not regulate investment they may lose control over their economic, social and ecological future[78].

No country, even the most economically powerful, completely allows foreign investors to enter their economic system and maintain a presence there without at least monitoring them. Few countries, developed or developing, pursue a policy of complete non-

---

[74]Of the 100 biggest economies in the world, 51 are corporations. In 1994, Mitsubishi sold US$175.8 billion worth of produce, while the GDP in Indonesia was $174.6 billion, in Iran was $63.7 billion, and in Bangladesh was $26.8 billion. United Nations. *World Investment Report 1996* (New York: United Nations, 1996).

[75]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 251.

[76]T. Clarke, "Mechanisms of Corporate Rule" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 297 at 298.

[77]Developing nations have continually called for the development of an international code to regulate the behaviour of multinationals.

[78]T. Clarke, "Mechanisms of Corporate Rule" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 297 at 307.

intervention in the area of international investment[79]. Whatever the specific advantages or disadvantages of foreign investment to a country, most regulate it to ensure that they get the most benefit from it. The United Nations Transnational Corporations and Management Division states that "measures adopted by governments with varying degrees and coverage have as their objective to increase the benefits of FDI to host economies or to minimise negative economic or non-economic impacts."[80]

## V. National Investment Regulations

States have traditionally regulated foreign investment in two ways. One is to regulate incoming foreign investments by reviewing and screening applications and placing restrictions on the areas foreign investors can invest in. The second is to regulate existing investments by placing performance requirements upon them. Although many of the laws described below have now been repealed and states have adopted more liberal laws regarding international investment, the following discussion provides examples of the types of regulations which led to the MAI negotiations.

### A. Establishment Regulations

Establishment regulations included regulations which excluded foreign investment altogether in crucial sectors such as mining, insurance and banking. For example, in Uganda the *Foreign Investments Protection Act* 1964 and *Foreign Investments Decree* 1977 excluded foreign investors from investing in the coffee, cotton, tea and tobacco industries and from participating in the banking sector[81]. The United States continues to

---

[79]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 272.

[80]*Ibid* at 272.

[81]The Law Reform Commission and Ministry of Justice of Uganda, *Foreign Investment in Uganda* (Uganda: Government Publisher, 1977).

restrict foreign investors in areas of key national concern such as nuclear power generation[82].

Establishment regulations also set up bodies to review all foreign investment applications. An example is the Foreign Investment Review Agency[83], which was established in Canada to monitor and restrict foreign investment during a period of great public concern over the extent to which control of Canadian industry and natural resources had been acquired by non Canadians[84].

Foreign investors have been required to form joint ventures with local partners who maintain a majority control. For example in Brazil no company could exploit natural resources unless 51 percent of its capital was locally owned and controlled[85]. Investors were sometimes required to indicate what benefit the host country would gain from permitting a particular foreign investor to establish an operation. In Uganda until 1977 the Minister would not permit foreign investment unless the investor showed that the chosen enterprise would further the economic development of Uganda [86].

## B. Performance Requirements

Performance regulations cover a wide range of areas. Foreign investors have been required to export a stated percentage of production (to increase the country's balance of

---

[82] 15 CFR pt 806 (19930 and 31 CFR pt 129 (1993).

[83] Created by the Foreign Investment Review Act SC. 1973-74, c.46 (which has since been repealed).

[84] R. Deigan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Canada: Thomson Professional Publishing Canada, 1991) at 1.

[85] E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (UK: Manchester University Press, 1965) at 11.

[86] The Law Reform Commission and Ministry of Justice of Uganda, *Foreign Investment in Uganda* (Uganda: Government Publisher, 1977).

payments), to hire a certain percentage of local labour, and to place a level of this labour in management positions. For example, the *Egyptian Company Law Act* 1954 stipulated that a minimum of 75 percent of administrative, technical, clerical and accounting personnel in the offices of foreign investors must be employed by foreign investors, and that these people must receive more than 65 percent of the total wages paid by the office. The *Haitian Labor Code* 1952 stated that 95 percent of the total staff in all foreign enterprises must be Haitian[87].

In Eastern Europe there were often severe restrictions placed upon companies who wished to set up a local office, and foreign investors were totally prohibited from setting up local offices in Albania[88]. Some countries imposed higher taxes on foreign investors than on local businesses. In Argentina, a 24 percent tax on local companies was raised to 30 percent for foreign investors[89]. Foreign investors have been required to transfer technology, to maintain a certain level of domestic content in their products, to purchase a certain level of domestic goods and services, and to conduct a certain level of research in their host country.

International investment is characterised by a mass of different national laws and regulations. Foreign investors have continually complained that most investment laws discriminate against them and have called for liberalisation, certainty, predictability and uniformity in the area. In response, the developed countries which most foreign investors call home have made several efforts at an international level to liberalise and codify the myriad of national regulations. Developing nations have also favoured a codification of

---

[87] E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (UK: Manchester University press, 1965) at 13.

[88] J.T. Connor, *Legal Aspects of Doing Business with the USSR and Eastern Europe* (New York: Practising Law Institute, 1977) at 45.

[89] E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (UK: Manchester University Press, 1965) at 10.

international investment practices to provide them with international protection from powerful foreign multinationals. A summary of these international efforts follows.

## VI. The History of Investment Agreements

### A. Failed Agreements

In Havana in 1948 several countries signed the *Charter of International Trade Organisation* ('the Charter'). This laid down general rules regarding the treatment and protection of foreign investment[90]. It stated that countries receiving foreign investment should "avoid unreasonable or unjustifiable action injurious to the rights of foreign investors" and "give due regard to the desirability of avoiding discrimination as between investments"[91]. It never became a legally binding instrument, due in part to the fact that the agreement did not receive the endorsement of the US senate. Kronfol states that this was partly because the obligations in the Charter were too uncertain as they were based on vague terms such as "due regard" and "reasonable"[92].

The International Chamber of Commerce issued the *International Code of Fair Treatment for Foreign Investments* in 1949[93]. This prohibited "discriminatory, political, legal or administrative measures designed to hamper investments" based on the nationality of investors[94]. Subject to obligations imposed on them by the International Monetary Fund, states were to allow foreign investors to freely transfer capital, interest, dividends and

---

[90] Articles 8 - 15.

[91] Article 12.

[92] Z.A. Kronfol, *Protection of Foreign Investment* (Netherlands: A.W. Sijthoff International Publishing Company, 1972) at 31.

[93] *Ibid* at 32.

[94] Article 3.

other funds related to their business enterprise[95]. This too never received official recognition from governments.

In 1959, the *Abs Shawcross Draft Convention on Investments Abroad* was prepared by Lord Shawcross. It was an effort by Western European countries to negotiate a multilateral treaty to protect their investors' foreign investments[96]. It obliged parties to observe any undertakings they had given any foreign firm in relation to that firm's investments[97], set limits on lawful expropriation, required fair and equitable treatment of the property of foreign investors, and provided a scheme for the settlement of disputes. It did not become adopted because, according to Schwarzenberger, the political price of forsaking nationalist policies was too high for most countries[98].

## B. The General Agreement on Tariffs and Trade

The *General Agreement on Tariffs and Trade* (GATT)[99], which deals comprehensively with international trade and the national regulations which may affect international trade, makes no reference to international investment. Investment issues are excluded from the GATT because this agreement deals only with trade in goods, not with international capital flows or with trade in services[100].

Some GATT countries argued that investment regulations which affected trade ('TRIMs')

---

[95]Articles 9 - 10.

[96]Z.A. Kronfol, *Protection of Foreign Investment* (Netherlands: A.W. Sijthoff International Publishing Company, 1972) at 33.

[97]Article 2.

[98]G. Schwarzenberger, *Foreign Investments and International Law* (New York: Frederick A. Praeger, 1969) at 134.

[99](1947) as amended. (Marrakesh, April 15 1994)

[100]N. Grimwade, *International Trade Policy* (London: Routledge, 1996) at 323.

were GATT illegal, while others (usually those who imposed such regulations) did not accept they were[101]. The only case which has dealt with this issue is the GATT Panel report *Canada - Administration of the Foreign Investment Review Act*[102].

Under the administration of the *Canadian Foreign Investment Review Act*, US investors were required to sign written undertakings that they would give preference to purchasing Canadian goods and that they would export a certain level of the goods they produced in Canada before they were permitted to invest in Canada. The US asserted that these performance requirements were GATT illegal. The GATT panel began its findings by stating that "nothing in the GATT prevented Canada from exercising its sovereign right to regulate foreign direct investment."[103] It held that the GATT did not prohibit a country from requiring a foreign firm to export a certain level of the goods that it produced locally[104]. However, the panel did find that an undertaking without qualification to purchase Canadian goods excluded the possibility of buying other imported goods, and therefore provided less favourable treatment to imported goods contrary to Article III (4)[105]. This decision indicates that generally the GATT will not apply to a state's foreign investment regulations, but that if a specific investment measure is found to affect trade in goods in a discriminatory way it will be GATT illegal[106].

---

[101]Developing nations argued that they had to implement the measures to protect themselves from abuse by foreign multinational investors. E.M. Burt. "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1034.

[102]*Canada - Administration of the Foreign Investment Review Act*. GATT panel decision (GATT 30th Supplement BISD 140. panel report adopted February 7 1984).

[103]At 5.1.

[104]"There is nothing in the GATT which forbids requirements to sell goods in foreign markets in preference to the domestic market." - at 5.18.

[105]At 5.8

[106]E.M. Burt. "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1030.

## C. Agreement on Trade Related Investment Measures

GATT parties established the *Agreement on Trade Related Investment Measures* ('TRIMs')[107] in the Uruguay Round of multilateral trade negotiations. This was the first time that GATT rules were applied explicitly in the investment field[108], albeit only in relation to investment measures which affect trade in goods. A TRIM is any investment restriction that directly affects trade in goods[109]. The TRIMs is primarily aimed at removing trade related investment measures so as to promote and expand the liberalisation of world trade[110]. It confirms that GATT Articles III and XI apply to certain trade related measures, which means that no GATT member may impose a trade related investment measure so as to afford protection to domestic production of goods or to restrict imports. Members are required by TRIMs Article 6 to be transparent in their application of trade related investment measures. Article 9 states that by 2000 the parties shall consider whether to amend the agreement to incorporate provisions on investment policy and competition policy.

TRIMs are not defined, rather an illustrative list is provided in the appendix to assist members in determining what constitutes a TRIM. This list includes laws which require an investor to purchase domestic goods, laws which limit an investor's use of imported products, and laws which restrict the level of goods an investor can export. It therefore only includes the preferential purchasing requirement that the US complained of in *Canada - Administration of the Foreign Investments Review Act*. It does not include the requirement that Canada imposed upon investors to export a certain level of goods.

---

[107](Marrakesh, April 15 1994)

[108]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 70.

[109]E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1033.

[110]Preamble.

The TRIMs Agreement is limited to dealing with investment measures which affect trade in goods[111], and therefore does not deal comprehensively with investment. This was a disappointing outcome for many of the OECD countries who had hoped to negotiate a complete investment agreement[112]. They were particularly disappointed by the limited list of WTO illegal TRIMs[113]. Developed countries argued that a more expansive list should be adopted, but the developing nations led by India successfully rejected this. The list does not include requirements to export a specific level of goods, technology transfer requirements, screening and establishment regulations, expropriation and compensation, restrictions on movement of personnel or repatriation of capital. In addition, the WTO lacks the regulatory framework as well as the substantive rules to govern state policies regarding foreign direct investment[114]. In summary, Wong describes the TRIMs agreement as "important in recognising the trade restrictive and distortive effects of certain investment measures. But it falls short of providing a full set of rules and disciplines."[115]

## D. General Agreement on Trade in Services

Some commentators consider a second agreement negotiated in the Uruguay Round, the *General Agreement on Trade in Services* ("GATS")[116] to be the true investment

---

[111]N. Grimwade. *International Trade Policy* (London: Routledge, 1996) at 327.

[112]G. Raby. "Introduction" in OECD. *The New World Trading System* (Paris: OECD, 1994) 13 at 21.

[113]E.M. Burt. "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1016.

[114]R.K. Paterson and M.N. Band. *International Trade and Investment Law* 2nd edition (Canada: Carswell, 1994) at 1-8.

[115]J.W. Wong. "Overview of TRIPs. Services and TRIMs" in OECD. *The New World Trading System* (Paris: OECD. 1994) 173 at 175.

[116](Marrakesh. April 15 1994)

agreement of the WTO[117]. The GATS deals with national regulations made concerning trade in services. It defines section a trade in a service as occurring when a body supplies a service in a country after it has established a commercial presence there[118]. The GATS therefore applies to the increasing number of investors who provide services in a foreign country. GATS members must accord all foreign service providers with most favoured nation treatment, that is, treatment that is no less favourable than that they accord other foreign investors who provide services in that member's country[119]. However, countries only need provide national treatment[120] to domestic and foreign investors in the specific service sectors they list in national schedules[121]. Therefore the GATS' effect on liberalisation of investment may vary from negligible to substantial[122] depending upon whether a country includes any of the specific service sectors which foreign investors are involved in its national schedules. In summary, Burt states that "with the national schedules of commitments qualifying most of the obligations of the agreement, FDI liberalisation through the GATS agreement, in effect, is limited to the extent that members choose to enter into specific liberalisation commitments."[123]

## E. The Development of Investment Codes

In the absence of a global treaty on investment countries have sought to develop standards

---

[117]E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1031.

[118]Article I (2) (c).

[119]Article II.

[120]Treatment that is no less favourable to foreign investors than it is to domestic investors.

[121]Article XVII.

[122]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 69.

[123]E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1033.

for foreign investments by developing international codes. Negotiations on an investment code began in the United Nations Center on Transnational Corporations in the late 1980s. They were unsuccessful[124]. Negotiations in the OECD have been more successful.

The OECD's goal is to promote economic growth by reducing and abolishing obstacles to the exchange of goods and services and to maintain and extend the liberalisation of capital movements[125]. In pursuit of this goal, OECD members have become parties to several codes dealing with liberalisation of investment. These codes have the status of an OECD Decision which is binding on all members[126].

The OECD *Code on Liberalisation of Capital Movements and Current Invisible*[127] *Operations* 1991 states that members should remove restrictions on capital movements so that residents of member countries are as free to transact business with each other as are residents of a single country[128]. Annex A of the this code lists the sectors members undertake to liberalise and includes direct investment, real estate, operations in capital and money markets, and debt services. The Committee on Capital Movements and Invisible Operations monitors members' compliance with the codes through a regular process of notification, examination and consultation[129]. Jackson *et al* state that the scrutiny of the Committee has been an important factor in the code's success in bringing about

---

[124]OECD, *Guidelines for Multinational Enterprises* (Paris: OECD, 1997) at 7.

[125]See OECD home page at http://www.oecd.org.

[126]OECD, *Introduction to the OECD Codes of Liberalisation* (Paris: OECD, 1995) at 9.

[127]'Invisible operations' are transactions and exchanges in which no merchandise is involved - for example transactions in the insurance, banking and transport industries.

[128]Article 1.

[129]Articles 11 - 18.

liberalisation[130].

A related OECD code is the *Draft Convention on the Protection of Foreign Property 1976*. This provides that each state shall accord fair and equitable treatment to the property of foreign investors. States should not impair the management, maintenance, use, enjoyment or disposal of property by unreasonable or discriminatory means[131]. This code was drafted to respond to foreign investors' concern that developing countries were able to nationalise their property without paying them compensation. The Hull rule of international law requires that any expropriation be accompanied by prompt, adequate and effective compensation, but in the early 1970s some developing countries rejected it as a rule of international law and denied they had to pay compensation for expropriation[132]. This code deals specifically with this issue and does not require member countries to liberalise their investment regulations.

The OECD *Declaration on International Investment and Multinational Enterprises and Guidelines for Multinational Enterprises* was signed in 1976. The declaration states that OECD countries should adhere to the principles of national treatment with respect to the investments of multinational corporations - that is, they should treat the established investments of multinational foreign investors no less favourably than they treat domestic investors[133]. The declaration incorporates the OECD *Guidelines for Multinational Enterprises* ('the guidelines'). These guidelines are essentially recommendations from

---

[130] J.H. Jackson, W.H. Davey and A.O. Sykes, *Legal Problems of International Economic Relations* 3rd edition (USA: West Publishing, 1995) at 901.

[131] Article 1.

[132] J.H. Jackson, W.H. Davey and A.O. Sykes, *Legal Problems of International Economic Relations* 3rd edition (USA: West Publishing, 1995) at 273. Foreign investors were also concerned that general international law could not assist them as it does not apply to individuals *per se*, but to states. M. P. Avramovich, "The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?" (1998) 31 The John Marshall Law Review 1201 at 1224.

[133] The national treatment standard does not apply to establishment measures.

OECD members to multinational corporations on how multinationals should conduct their operations[134]. They do not bind multinationals to any code of conduct, to the disappointment of developing nations who had hoped the OECD would develop a strict binding global code of conduct for multinational corporations[135]. The guidelines are therefore not supported by developing nations.

The guidelines generally provide that multinational enterprises should take a country's policies, aims and objectives with regard to economic and social progress into account when operating in that country[136]. They were reviewed by the OECD Council of Ministers in 1991 and as a result of the review, a chapter on environment was added[137]. The guidelines are not binding upon corporations and there are no sanctions if they breach them.

There have been many other attempts by various countries to negotiate multilateral or regional investment agreements; UNCTAD lists 73 between 1948 and 1996[138]. Section A-E has been a discussion of the main ones. Perhaps the greatest impact on the liberalisation and codification of international investment has been the creation of bilateral treaties on investment.

---

[134]OECD, *Guidelines for Multinational Enterprises* (Paris: OECD, 1997) at 5.

[135]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 263.

[136]See section entitled 'General Policies'.

[137]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 75. The content of the environment chapter will be discussed in chapter 2.

[138]Standing Committee on Foreign Affairs and International Trade, *Canada and the MAI* (Canada: Canadian Government, 1997) at 47.

## F. Bilateral Investment Treaties

In the absence of an international treaty on investment, many countries have made bilateral investment treaties ("BITs") to ensure their foreign investors receive non discriminatory treatment and have protection from expropriation. These treaties are always made between a developed and a developing country[139]. The first BIT was signed in 1959 between Germany and Pakistan[140]. Several European countries followed suit, and then the USA and Japan began negotiating BITs to protect their investors. By the late 1970s, over 170 bilateral agreements between 65 states had been negotiated. In the 1980s, 199 treaties were signed[141]. In the 1990s the number of treaties dramatically increased. In 1995 alone, 172 were signed[142] and by the end of 1996, there were over 1,300 concluded[143]. Over 160 countries have at least one BIT.

BITs were created largely in response to international investors' demand for a treaty program to protect their investments from expropriation without compensation[144]. Investors often made contracts with states to deal with this and other matters, but were concerned that the contracts were unenforceable[145]. And even if these contracts were

---

[139] A.T. Guzman, "Why Less Developed Countries Sign Treaties that Hurt Them" (1998) 38 Va. J. Int'l L. 639 at 642.

[140] K.J. Vandevelde, "Investment Liberalisation and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal of Transnational Law 501 at 503.

[141] United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 3.

[142] A.T. Guzman, "Why Less Developed Countries Sign Treaties that Hurt Them" (1998) 38 Va. J. Int'l L. 639 at 640.

[143] K.J. Vandevelde, "Investment Liberalisation and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal of Transnational Law 501 at 503.

[144] See discussion of this in part E.

[145] M. P. Avramovich, "The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?" (1998) 31 The John Marshall Law Review 1201at 1234.

enforceable in the host's jurisdiction, investors worried that their claim would be heard before a tribunal biased in favour of the host country. BITs were developed to ensure foreign investors could enforce their agreements and to provide them with access to a neutral tribunal. A BIT is a treaty between two governments which contains a clause requiring a host country to comply with any contracts it has with an investor from the other country. Therefore a contract between a state and an investor becomes binding in international law[146]. If a state breaches a contractual obligation it makes to an investor, it will be breaching an international treaty obligation. Dispute settlement clauses are included to enable an investor to sue the host state directly in an independent tribunal.

BITs around the world are very similar[147]. Bilateral treaties usually provide for compensation in case of expropriation[148], protection for current and future investment, and a specific forum for dispute resolution. Most also provide for national treatment and most-favoured nation treatment of investors and of their investments. They may also provide specific standards for sensitive issues, such as foreign investment in cultural industries[149].

A common form of treaty is the Canadian standard BIT. It provides generally in Article II that foreign investors shall be accorded fair and equitable treatment and that their investments should have the full protection and security of the law once they are established. Articles III and IV require that investors be given most favoured nation treatment and national treatment after they have established an investment, except in areas

---

[146] A.T. Guzman, "Why Less Developed Countries Sign Treaties that Hurt Them" (1998) 38 Va. J. Int'l L. 639 at 654.

[147] *Ibid* at 653.

[148] Although outright expropriation is quite rare in the 1990s - A.T. Guzman, "Why Less Developed Countries Sign Treaties that Hurt Them" (1998) 38 Va. J. Int'l L. 639 at 644.

[149] United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 78.

such as telecommunications, aviation and financial services[150]. Cultural industries are also exempted from most favoured nation and national treatment in Article VI. Article V forbids performance requirements such as limits on freedom of hiring, domestic content restrictions, requirements to export a particular amount, domestic purchase restrictions and technology transfers. Dispute settlement between an investor and a state are to be carried out under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ISCID)[151] or the *Arbitration Rules of the United Nations Commission on International Trade Law* (UNCITRAL)[152].

Vandevelde states that BITs fail to provide investment liberalisation because they do not require the host state to grant access to the state's market. They only require equality of treatment after an investment has been established and therefore allow countries to continue to restrict market access and regulate the establishment of investment[153]. Further, BITs often exclude tax treatment from most favoured nation and national treatment principles. While a BIT can protect an investor from a state reneging on an agreement, a BIT does not require a host to pass laws to protect the investor from disputes with private parties[154] and does not provide an investor with a non domestic

---

[150]Article II (3) also requires the host state to permit the establishment of a new business enterprise or acquisition of an existing one on the same basis as it permits domestic and other foreign investors to do. It is unusual for a BIT to have an obligation in regard to establishment. Such obligations are only found in the BITs of the USA and Canada.

[151]Convention on the Settlement of Investment Disputes between States and National of other States (Washington, 1965) ILM 532

[152]The Arbitration Rules of the United Nations Commission on International Trade Law (15 December 1976) UN GAOR 31st session, Suppl. no. 17 at 46, section C.

[153]Other than those made by the USA or Canada. K.J. Vandevelde, "Investment Liberalisation and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal of Transnational Law 501 at 513.

[154]For example, BITS do not require a nation to pass comprehensive corporations or intellectual property legislation which could protect foreign investments.

alternative in case of a private dispute[155]. In general, Vandevelde states that "BITs are very weak instruments for promoting investment neutrality."[156]

## VII. The Impact of Globalisation

The process of globalisation is linked with two dramatic changes that have taken place in the field of international investment since the mid 1980s. First, globalisation has facilitated a remarkable growth in the level of foreign investment. Second, globalisation has pressured governments to liberalise their investment regulations.

### A. What is Globalisation?

Globalisation is the process in which economic markets, technologies and communications gradually exhibit more global characteristics and less national or local ones[157]. Governments are taking part in globalisation because they believe it will lead to economic growth in their countries[158]. The OCED states that "the globalisation of the economy.... gives all countries the possibility of participating in world development, and all consumers the assurances of benefitting from increasingly vigorous competition between producers."[159] Globalisation is driven by technological advance[160], by the creation of an

---

[155]K.J. Vandevelde. "Investment Liberalisation and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal of Transnational Law 501 at 514.

[156]*Ibid* at 513.

[157]OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 19.

[158]J. Mander and E. Goldsmith (eds.). *The Case Against the Global Economy* (San Francisco: Sierra Club Books. 1996) at 295.

[159]T. Jones. "Globalisation and the Environment: Main Issues" in OECD, *Globalisation and the Environment* (Paris: OECD. 1997) 7 at 11.

[160]*Ibid* at 8.

unrestricted free market and by the removal of government regulation[161]. Proponents of globalisation aim to facilitate a market in which capital moves frictionlessly with as little economic loss as possible due to the heterogeneity of places.

Advances in the technological and communication sectors have spurred globalisation and have led to a transformation of the global financial market. Investors can and do invest in another country at the stroke of a key. Electronic transfers of money account for five out of every six dollars that move in the world economy[162]. The ease with which investors can become foreign investors has led to a dramatic increase in the level of foreign investment.

Globalisation means that countries deregulate their economic systems so that their financial markets begin to exhibit similar global characteristics rather than varying national characteristics[163]. As markets become alike, investors have a larger and more level market place in which to operate and therefore increase their economic activity. Countries believe this will spur their own economic growth and are consequently liberalising and deregulating their investment regimes[164]. Another reason countries relax the restrictions they place on investment is so that they do not imperil the competitiveness of their own investors by taking unilateral action[165] and so that they can attract foreign investors.

---

[161] J. Mander, "Facing the Rising Tide" in J. Mander and E. Goldsmith (eds.), *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 3 at 4 - 5.

[162] R. Barnet and J. Cavanagh, "Electronic money and the casino economy" in J. Mander and E. Goldsmith (eds.), *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 360 at 361.

[163] T. Jones, "Globalisation and the Environment: Main Issues" in OECD, *Globalisation and the Environment* (Paris: OECD, 1997) 7 at 10.

[164] R. Barnet and J. Cavanagh, "Electronic money and the casino economy" in J. Mander and E. Goldsmith, (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 360 at 365.

[165] OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 21.

The effects of investment liberalisation and growth are mutually reinforcing. As countries liberalise their investment regimes, it becomes easier for investors to operate in foreign countries, and investment increases. And as investment increases, countries further liberalise their investment regime in an effort to compete for the increase in investment. Some commentators believe that globalisation "involves arguably the most fundamental redesign of the planet's political and economic arrangements since at least the industrial revolution."[166] This is certainly true in the investment sector.

## B. Growth in International Investment

Since the mid 1980s, world wide flows of foreign direct investment have been growing at unprecedented rates[167], faster than either trade or domestic investment. In the 1980s, FDI grew an average of 16 percent per year, compared to a 6 percent growth in trade and a 7 percent growth in domestic investment[168]. In the 1990s, the change has been even more dramatic. Between 1990 and 1996 it increased threefold[169]. Flows of foreign direct investment reached record levels in 1997, and the process of globalisation that is fueling it shows little sign of slowing down[170]. Foreign direct investment is expected to increase by 20 percent each year until 2001[171], and 7 to 10 percent per year after that[172].

---

[166] J. Mander. "Facing the Rising Tide" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books. 1996) 3 at 3.

[167] United Nations Transnational Corporations and Management Division. *World Investment Report - 1992* (New York: United Nations. 1992) at 1.

[168] J. Startup. "An Agenda for International Investment" in OECD. *The New World Trading System* (Paris: OECD. 1994) 189 at 190.

[169] H. F. French. "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co.. 1998) at 152.

[170] OECD. *International Direct Investment Statistics Yearbook 1998* (Paris: OECD, 1998) at 9.

[171] J. Burns and E. Chrysler. "Multinational Corporate Growth: The Need for Multinational Control" (1997) 141 Foreign Investment in Canada Report Bulletin 1 at 2. citing United Nations *World*

As noted in part IV, most countries in the world are trying to attract as great a share as possible of the increase in foreign investment because they believe it will facilitate their economic growth[173]. In their attempts to attract international investment, most developed countries and a majority of developing countries have liberalised their investment regulations[174].

## C. Liberalised National Regulations

Globalisation has led to what Barnet and Cavanagh describe as the "global race to deregulate"[175]. In the 1980s countries began to compete for foreign investment to stimulate their economic growth and become internationally competitive[176] and to replace declining levels of aid. To attract investment they began to relax the enforcement of their investment regulations. Therefore while the regulations appeared strict they often were not enforced[177]. In fact Lairson and Skidmore state that "impressively strict regulations

---

*Investment Report.*

[172]S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in D. Chertow and D.C. Esty, *Thinking Ecologically* (New Haven: Yale University Press, 1997) 118 at 121.

[173]Clarke and Barlow state that this belief has stemmed from the 'Washington Consensus', a model of development which has become globalised and is not presently being seriously challenged. The Washington Consensus is based on the belief that liberal market economics are the one and only economic hope for all countries, including poor countries. T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 14-15.

[174]ECOSOC, "Fostering an enabling environment for development: financial flows, including capital flows; investment; trade" at page 8, available at http://www.un.org.

[175]R. Barnet and J. Cavanagh, "Electronic money and the casino economy" in J. Mander and E. Goldsmith, (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 360 at 370.

[176]Chia Siow Yue, "Trade and Foreign Direct Investment in East Asia" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 49 at 73.

[177]T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 262.

designed to enhance local control often had surprisingly little effect on multinational corporation practice in general."[178] For example, when foreign investors were required to operate in a joint venture, the local partner in some cases borrowed from the foreign investor to contribute its share, so that the foreign investor actually had complete control. Even when a local partner legitimately provided capital, they may not have exercised real control if the foreign investor controlled the vital equipment, spare parts, financing, technology, managerial skills and marketing services. Laws requiring foreign investors to hire local labour were sometimes waived if the investor argued that the local labour could not meet its skill and expertise requirements.

As globalisation continued and countries became even more competitive for foreign investment in the late 1980s and 1990s, it appeared to most countries that openness to international investment and trade led to faster rates of growth than otherwise[179]. For example, India had extensive restrictions on foreign investment in the 1980s. During this time it received only one fortieth of investment that was going to Singapore and one thirteenth of that going to China, both of which had less restrictive laws[180]. Vandevelde states that all the evidence suggests that states which choose an illiberal path with regard to foreign investment will encounter enormous difficulties with economic development beyond a certain point[181]. An ECOSOC report states "it is well understood and generally accepted that the key characteristics of an enabling environment (for international investment) are stability, predictability, adaptability, growth orientation and transparent

---

[178]F. Weinstein, "Understanding Development and Efforts to Control Multinational Corporations" in Modelski (ed.), *Transnational Corporations and World Order: Readings in International Political Economy* (San Francisco: WH Freeman and Co., 1979) in T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993) at 262.

[179]J.F. Helliwell, "Asian Economic Growth" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 17 at 27.

[180]United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York: United Nations, 1992) at 83.

[181]K.J. Vandevelde, "Investment Liberalisation and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal of Transnational Law 501 at 526.

legal and regulatory frameworks."[182] And the United Nations generally "recognises the potential benefits for the world economy of greater freedom of capital movement"[183]. In light of this, many countries decided that they would not only sparingly enforce their investment laws, but that they would also repeal them.

Investment regulation in all developed countries has been liberalised to a very large extent[184]. The United States places little restriction on the number of investors or the magnitude of foreign investment, except in areas of key national concern such as nuclear power facilities[185]. Similarly the *Investment Canada Act*[186] places little restriction on foreign investors. The OECD observes that "liberalisation of capital movements (of members) has been nothing short of spectacular over the past 30 years.... Apart from outstanding sectoral restrictions on inward direct investment and non-resident acquisition of real estate, virtually all member countries had dismantled their controls on capital movements by the end of 1992"[187].

Many developing countries have liberalised their investment laws too. "More and more countries have opened up their economies to direct foreign investment..... of 82 policy changes made in relation to foreign direct investment by 35 countries in 1991, 80 were in

---

[182]ECOSOC. "Fostering an enabling environment for development: financial flows, including capital flows; investment; trade" at page 8, available at http://www.un.org.

[183] " Global financial flows and their impact on the developing countries" GA Res 52/180, GAOR (18 December 1997).

[184]OECD, *Foreign Direct Investment: Policies and Trends in the OECD Area* (Paris: OECD, 1992) at 14.

[185]There are reporting requirements for foreign investors over a certain size. See for example 15 CFR pt 806 (1993) and 31 CFR pt 129 (1993).

[186]RSC 1985 c.I-22

[187]OECD. *Introduction to the OECD Codes Of Liberalisation* (Paris: OECD. 1995) at 10.

the direction of liberalisation."[188] For example, in Argentina, the foreign investment regime introduced in 1989 made approval of foreign investments virtually automatic, and investment registration is now only required for statistical purposes[189]. India radically relaxed its investment laws in the early 1990s in an effort to attract a greater share of foreign investment[190]. In Laos in 1992 the government drastically altered its economic system from a centrally controlled system to a market based system in the hope of attracting foreign investment[191]. Several African countries have reduced or are removing legal and regulatory restrictions on the activities of foreign investors[192]. In South-East Asia there has been dramatic policy relaxation toward foreign investment in the past 10 years[193].

Some states have begun to offer incentives in an effort to attract investors as well as liberalising their laws. Incentives include the creation of industrial estates and industrial parks with provision of various industrial facilities and fiscal incentives such as tax holidays, depreciation allowances and exemption from import and export duties[194].

---

[188]United Nations Transnational Corporations and Management Division. *World Investment Report - 1992* (New York: United Nations. 1992) at 3.

[189]*Ibid* at 27.

[190]*Ibid* at 83.

[191]J.D. Nolan, "A Comparative Analysis of Laotian Law on Foreign Investment, the World Bank Guidelines on Foreign Direct Investment and the Normative Rules of International Law on Foreign Direct Investment" (1998) 15 Ariz. J. Int'l & Comp. L. 659 at 661.

[192]United Nations Transnational Corporations and Management Division. *World Investment Report - 1992* (New York: United Nations. 1992) at 30. However, it has not helped them increase their share of foreign investment, because the economic advantages of the region are not great enough.

[193]See discussion in Chia Siow Yue, "Trade and Foreign Direct Investment in East Asia" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 49.

[194]*Ibid* at 73. For example, the *Uganda Foreign Investments Decree* 1977 exempts foreign investors from paying import duties and sales tax on plant machinery and production material which is not available in Uganda (s1(1)), and foreign investors of a certain size are exempted from paying corporation tax (s1(2)).

### D. The Problem of Globalisation

Governments pursue the associated goals of globalisation, increased levels of foreign investment and investment liberalisation, to facilitate their economic growth. However, as noted in part IV, foreign investment may have some negative consequences which governments may seek to regulate. Similarly, globalisation also may have negative consequences. It is not within the scope of the paper to explore these, and it will suffice to list them to illustrate the areas national governments may wish to regulate in. Some of the negative effects of globalisation that commentators have articulated are[195]: the homogenisation of cultures, the homogenisation of education systems, increases in labour market uncertainty, increases in the gap between high and low income earners, instability in developing nations' economies dependent upon international monetary flows, technological displacement of labour, the spread of infectious diseases, environmental degradation (which will be discussed further in this paper) and multinational corporation control of economic systems and financial markets.

While the negative and positive effects of globalisation are widely debated, it is foreseeable that governments may want to retain the regulatory competence to legislate in the investment field if and when it becomes clear that globalisation or international investment has negative consequences. They may also wish to retain the ability to control powerful multinational investors. Therefore several commentators believe that countries should not liberalise their laws to such an extent that they lose the ability to limit the potential negative effects of liberalised investment[196].

---

[195]See for example, J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996), and N. Chomsky, *World Orders Old and New* (New York: Columbia University Press, 1994).

[196]Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 843, J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996), and T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997).

However, at the same time as some commentators note that national governments should preserve some ability to regulate investment, they note that globalisation reduces the effect of national government regulation[197]. It does so in two ways. First, in a globalised world the decisions of governments have a reduced effect upon investors. If an investor does not like the regime in one country it may move with relative ease to another. Second, governments are put under increasing pressure not to imperil the competitive position of their own investors by placing unilateral restrictions upon them that foreign investors do not face. Despite this, governments will still be able to regulate investor behaviour by negotiating an international agreement which sets common standards for international investor behaviour and responsibility. An international investment agreement could impose binding obligations upon international investors so that these investors are bound to conduct their activities in responsible ways wherever they invest.

Some countries may however wish to regulate investors more than an international agreement based upon consensus may allow them to. Therefore an investment agreement should also include some latitude for national governments to regulate investment unilaterally. If investors are bound to a certain level of behaviour by an international code which reduces the differences in countries' investment regimes, globalisation will not reduce individual national governments' ability to regulate to reduce the negative effects of investment to the extent it otherwise would. Any international investment agreement should include international standards to regulate investors' conduct and allow countries some latitude to regulate investment unilaterally.

## VIII. Conclusion

International investment has increased dramatically since the 1980s and today is one of the main facilitators of economic growth. Countries traditionally sought to regulate foreign

[197]OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 8.

investment strictly in order to maximise its advantages and to minimise the negative economic and non economic effects it has. However, globalisation has pressured many countries to liberalise their investment laws. The rapid increase in investment and its impact upon the global financial market, and the rapid changes in the regulatory regimes which govern it, have strengthened calls for an international agreement to set basic rules for international investment.

There are two main lines of argument in favour of the negotiation of an international investment agreement. The first is that national investment laws and BITs are too discriminatory, restrictive, uncertain and unpredictable, and do not provide investors with the freedom or stability they need to continue to increase their level of investment. The current international investment regime made of bilateral agreements, OECD codes and limited WTO agreements does not adequately protect existing forms of investment, let alone evolving forms such as portfolio investment and intellectual property[198]. The World Investment Report states "the overarching rationale for a comprehensive multilateral investment framework is that it would create a stable, predictable and transparent enabling framework, which would facilitate the growth of investment flows and their contribution to development."[199] The United Nations "expresses with conviction that a stable and transparent environment for commercial transactions in all countries is essential for the mobilisation of investment."[200]

Most commentators acknowledge that international investment, while enhancing economic growth, has the potential to impact negatively upon countries. It is because of this that all

---

[198]M. P. Avramovich, "The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?" (1998) 31 The John Marshall Law Review 1201 at 1277.

[199]United Nations Commission on Trade and Development, *World Investment Report 1996* (USA: United Nations, 1996) at 4.

[200]"Business and development" GA Res. 52/209 GAOR ( 18 December 1997).

countries have regulated international investment in the past. While most countries have now liberalised their investment laws due to globalisation, the potential of international investment to have negative impacts remains. At the same time, globalisation has reduced countries' ability to regulate investors. Therefore the second argument in favour of an international investment regime is that it could impose binding international obligations upon investors thereby allowing countries to continue to regulate investors' conduct through an international code without the fear of losing international investment or disadvantaging their own investors. Yet some countries may wish to regulate investors more than an international agreement based upon consensus may allow them to. An international investment agreement should permit states' the latitude to regulate investment if and when it becomes clear that it has had a negative effect upon that state. This paper focuses on the potential negative effects of international investment upon the environment.

The next chapter will examine whether international investment, and especially the increase in international investment that an international investment agreement which liberalises the field is expected to facilitate, will lead to environmental degradation or not.

# CHAPTER 2: SUSTAINABLE DEVELOPMENT AND INVESTMENT

## I. Introduction

This chapter deals with the question of whether international investment results in development that is damaging to the environment. The immediate and instinctive answer is simple - all modern human behaviour leads to some damage to environment[201]. The more refined question to ask then is whether investment induced development results in acceptable damage to the environment[202]. The most widely known concept for determining what level of damage is acceptable is sustainable development[203]. This chapter will explain the origin and meaning of sustainable development before moving to discuss whether international investment results in sustainable, or unsustainable, development.

Part II examines the concept of sustainable development. The concept incorporates the principle that development is unacceptable when it degrades the environment to such an extent that it impinges upon the ability of future generations to pursue their own development. The concept notes that most development in the past has been conducted without heed to the overall 'ecological footprint' of that development. This has led to such environmental degradation that the ability of future generations to develop is threatened. Sustainable development aims to ensure that development in the future has a reduced ecological footprint and therefore does not cause unacceptable damage to the

---

[201]The World Commission on Environment and Development *Our Common Future* (Oxford: Oxford University Press. 1987) at 40.

[202]I acknowledge that I have taken an anthropocentric approach and further acknowledge the validity of other approaches including ecological approaches. I chose to use the concept of sustainable development as an evaluative tool as it is the most common one used by the governments who will decide whether or not to sign the MAI.

[203]K.E. McSlarrow. "International Trade and the Environment: Building a Framework for Conflict Resolution" (1991) 21 Environmental Law Reporter 10589 at 10590.

environment.

Part III considers whether foreign investment that is facilitated by an international investment agreement such as the MAI will promote development which has an increased or decreased environmental footprint. In determining this issue, it considers the following issues:

- Investment spurs demand for higher environmental standards.
- Investment facilitates the transfer of clean technology.
- Liberalised markets allocate resources efficiently.

Investment has the potential to lead to a decrease in the ecological footprint of development because of these factors. However, it is by no means certain that it will, because there are many variables involved. In comparison, investment driven development will probably lead to an increase in the ecological footprint of development because:

- Freer markets increase the externalisation of environmental costs.
- Investment will lead to an increase in overall consumption.
- Investment induced financial crises lead countries to sell off their natural resources.
- Investment is headed to ecologically intense industries.

This part also deals with the question of whether some countries reduce or decline to enforce their environmental standards in order to attract investment and thereby facilitate the formation of pollution havens.

This chapter concludes in part IV that investment has the potential to lead to both increases and decreases in the ecological footprint of development. It also concludes that some countries will relax their environmental standards in order to attract valuable foreign investment. This part therefore argues that governments must have the latitude to regulate investment whenever it has a negative impact on the environment so that they can ensure that they can achieve sustainable development. Any international investment agreement that leads to sustainable development must include the scope for countries to regulate investment in order to protect their environment and some provision which prevents countries from lowering their environmental standards in order to attract investors.

## II. Sustainable Development

### A. The Origins of Sustainable Development

The environment is a bounded entity - it has a limited amount of non-renewable resources, a limited ability to restock renewable resources, and a limited capacity to absorb pollution[204]. Traditionally, development has not been restrained by these environmental limits, but has continually increased, usually requiring more resources and producing more pollution. For example, between 1950 and 1997, the global use of lumber tripled, the fish catch increased fivefold, grain consumption nearly tripled, fossil fuel burning nearly quadrupled and air and water pollutants multiplied several-fold[205]. If the earth's limited capacity to renew these resources and assimilate these forms of pollution is exceeded, the environment will begin to degrade.

A way of measuring whether development is exceeding the earth's limits and causing degradation is to consider the ecological footprint of that development. Ecological footprint is a measure of the total amount of resources used and pollution produced by development activities[206]. It is a measure of the total environmental space that development occupies[207]. For example, when mining is conducted in a forest, its ecological

---

[204] W. Ophulus. *Ecology and the Politics of Scarcity* (San Fransisco: W.H. Freeman and Co., 1977) at 29.

[205] L. R. Brown. "The Future of Growth" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 3 at 3-4.

[206] OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 64-65.

[207] J. Adams. "Globalisation. Trade. and Environment" in OECD. *Globalisation and Environment* (Paris: OECD. 1997) 179 at 183.

footprint includes the amount of forest that is cleared, the level of biodiversity lost, the degree the water system is disrupted, the energy consumed and the emissions produced, as well as the amount of minerals extracted.

Development in OECD nations leave a footprint upon an area of earth that is far larger than the area within their own jurisdictions. For example, the earth can absorb 13 to 14 billion tonnes of carbon dioxide annually. This is the volume that humanity can discharge into the atmosphere and remain within the natural limits of the earth. It means that each person can discharge 2.3 tonnes per year. However, a US citizen discharges 20 tonnes per year, and a German citizen 12 tonnes[208]. At present, total development in OECD countries leaves a footprint upon an environmental space that is 75% larger than the environment within their own jurisdictions[209]. In fact, OECD country development leaves a footprint that is so large that it covers the entire global environment. Therefore OECD country development combined with non OECD country development has a footprint that is larger than the entire earth. This means global development over-reaches the ecological limits of the earth, exceeding its capacity to restock its resources and recover from pollutive disturbances. Such development degrades the environment. Pursuing development without acknowledging the excessive ecological footprint of that development has led to the scale and nature of environmental degradation that we see in the world today[210].

To prevent further environmental degradation then, either development must be reduced or the environmental footprint of the development must be reduced[211]. In the 1970s, many

---

[208] W. Sachs, R. Loske and M. Linz, *Greening the North* (London: Zed, 1998) at 15.

[209] *Ibid* at 3.

[210] *Id.*

[211] D.W. Pearce and J.J Warford, *World without end: economics, environment and sustainable development* (USA: World Bank, 1993) at 3. See for example The Club of Rome's *The Limits to Growth* (New York: Universe, 1972) and W. Ophulus, *Ecology and the Politics of Scarcity* (San Fransisco: W.H.

environmentalists believed that reducing development was the correct response. They developed environmental policies which condemned development based on the belief that development and the preservation of the environment were incompatible goals[212]. Such policies were largely unpalatable to policy makers who were simultaneously trying to pursue goals such as economic growth and rising material levels of comfort, goals which were just as important to many people as environmental protection[213].

In the 1980s, a concept which focused on reducing the environmental footprint of development, rather than on reducing development, was conceived. This concept was 'sustainable development'. It rapidly became a popular idea with businesses, governments and some environmental policy makers because it was a welcome relief from previous environmental policies which had forsaken development. By the virtue of being sustainable *development*, policy makers saw the idea as one which would allow them to continue the pursuit of economic growth and rising living standards.

## B. A Definition of Sustainable Development

Sustainable development was adopted in and is most commonly associated with *Our Common Future*[214]. This book states that humanity should continue to pursue development while ensuring that the ecological footprint of development is reduced to a level where it is sustainable. A sustainable level is defined to exist when humans can ensure that they meet the needs of the present generation without compromising the ability

---

Freeman and Co.. 1977).

212 D.W. Pearce and J.J Warford. *World without end: economics, environment and sustainable development* (USA: World Bank. 1993) at 41.

213 M.R. Chertow and D.C. Esty ."Introduction" in M.R. Chertow and D.C. Esty (eds.) *Thinking Ecologically* (New Haven: Yale University Press. 1997) 1 at 5.

214 The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press. 1987)

of future generations to meet their own needs[215]. Environmental stocks should be preserved so that future generations have the same capacity to develop them as current generations. *Our Common Future* states that in order to preserve environmental stocks, current development should be contained within ecological boundaries. This means, at a minimum, not endangering the natural systems that support life on earth: the atmosphere, the waters, the soils and the living beings[216].

Sustainable development recognises the fact that economic growth and development can cause environmental degradation but maintains that if development is contained within ecological boundaries its ecological footprint will be not be so large that it causes unacceptable degradation which impacts on future generations. *Our Common Future* states that "economic growth always brings risk of environmental damage, as it puts increased pressure on environmental resources, but policy makers guided by the concept of sustainable development will necessarily work to assure that growing economies remain firmly attached to their ecological roots and that those roots are protected and nurtured so that they may support growth over the long term"[217].

Sustainable development is an overarching concept, and many policy makers have attempted to refine it so it may be used as a qualitative tool to formulate development policies which have a reduced ecological footprint[218]. This part will now consider what supporters of sustainable development say development is and why they say it is necessary, and then how the character of development must change so that it becomes sustainable.

---

[215] *Ibid* at 8.

[216] *Ibid* at 44-45.

[217] *Ibid* at 40.

[218] F.D. Muschett, "An Integrated Approach to Sustainable Development" in F.D. Muschett (ed.) *Principles of Sustainable Development* (Florida: St Lucie Press, 1997) 1 at 2.

### 1. What Is Development and Why Is It Necessary?

In 1980, the World Conservation Strategy defined development as "the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life."[219] *Our Common Future* emphasises that economic growth is a necessary part of development because economic growth contributes to the satisfaction of human needs and improves the quality of human life[220]. Since *Our Common Future* was written some commentators such as Daly have disputed whether development requires economic growth[221], but the dominant position of supporters of sustainable development is that development implies continuing along the present path of pursuing economic growth. Caldwell defines development simply as "development is as development does"[222].

Supporters of sustainable development argue that development based on economic growth is necessary if a stock of environmental resources is to be conserved for future generations. The belief is based on the observation that poverty is a major cause and effect of global environmental problems[223]. Poverty is the main cause of environmental degradation in developing countries[224]. *Our Common Future* states that

> "..poverty itself pollutes the environment, creating environmental stress... Those who are poor and hungry will often destroy their immediate environment in order

---

[219] International Union for Conservation of Nature and Natural Resources *et al.*, *World Conservation Strategy* (Switzerland: 1980) cited in S. Schmidheiny with the Business Council for Sustainable Development, *Changing Course* (USA: Massachusetts Institute of Technology, 1992) at 6.

[220] The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 51.

[221] H. E. Daly, *Beyond Growth - The Economics of Sustainable Development* (Boston: Beacon Press 1996).

[222] L.K. Caldwell, *International Environmental Policy* (Durham: Duke University Press, 1996) at 269.

[223] The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 3.

[224] N. Grimwade, *International Trade Policy* (London: Routledge, 1996) at 343.

> to survive: They will cut down forests; their livestock will over graze grasslands; they will overuse marginal land and growing numbers will crowd into the congested cities. The cumulative effect of these changes is so far reaching as to make poverty itself a major global scourge."[225]

When people live in poverty, they make short term decisions based on their need to survive. They are more concerned with day to day survival than the longer term ecological consequences of their actions. As poverty rises, people place increased pressure on environmental resources as they are forced to directly rely upon such resources and governments have to cut back efforts to protect the environment[226]. A cycle ensues - poverty means that people degrade the environment for basic necessities, and as the environment degrades and peoples' prospects for the future worsen, poverty is entrenched and people are forced to further degrade the environment. Pearce and Warford[227] state that an additional problem is that poverty removes people's ability to adapt and respond to environmental stress and shock. Therefore development based upon economic growth to break the poverty cycle is necessary to begin to protect the environment.

If growth is necessary to protect the environment in developing nations because of the poverty cycle is it also necessary in developed countries where there is no widespread poverty cycle? Supporters of sustainable development state that yes, world wide development and economic growth is necessary. *Our Common Future* states "sustainable development clearly requires economic growth in places where (essential) needs are not being met. Elsewhere, sustainable development can be consistent with economic growth provided the content of the growth reflects the broad principles of

---

[225]The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 28.

[226]*Ibid* at 6.

[227]D.W. Pearce and J.J Warford, *World without end: economics, environment and sustainable development* (USA: World Bank, 1993) at 272.

sustainability."[228] The World Commission on Environment and Development states that a growth rate of 3 - 4 percent in developed countries could be sustainable[229]. Supporters of sustainable development believe that the developed world must continue to pursue economic growth so that it can transfer funds to the developing world through aid and by purchasing the goods produced in the developing world[230]. They further believe that efficient technology and environment improving innovations[231] will only continue to be produced under conditions of economic growth[232].

## 2. The Meaning of Sustainable

As development can simply be defined as continuing upon the present path of economic growth, attempts to refine the concept of sustainable development have focused on defining 'sustainable'. Generally, a sustainable level of development is one where a sufficient stock of environmental resources is conserved to allow future generations to develop. However, the concept of sustainability does not specify particular goals, or indicate the particular ecological space specific developments can occupy and be sustainable. It is difficult to determine the effect of a single development upon the overall objective of conserving global environmental stocks. Therefore attempts to define 'sustainable' have largely failed and today many actions are termed sustainable despite

---

[228]The World Commission on Environment and Development. *Our Common Future* (Oxford: Oxford University Press. 1987) at 44.

[229]*Ibid* at 51.

[230]Both as direct investment. and to purchase the goods that the developing world produces. The World Commission on Environment and Development. *Our Common Future* (Oxford: Oxford University Press. 1987) at 68-9.

[231]F.D. Muschett. "An Integrated Approach to Sustainable Development" in F.D. Muschett (ed.) *Principles of Sustainable Development* (Florida: St Lucie Press. 1997) 1 at 5.

[232]The World Commission on Environment and Development. *Our Common Future* (Oxford: Oxford University Press. 1987) at 60 and 87.

their widely varying impacts upon the environment[233].

### 3. Development Decisions Should Be Based on an Awareness of Ecological Limits

While the concept of sustainability does not indicate specific development goals, it does indicate the way development planning should be approached so that it leads to sustainable activities[234]. If a sustainable level of development is one where a sufficient stock of environmental resources is conserved to allow future generations to develop, development will only be sustainable when it is contained within a set of boundaries established to ensure that biological resources are maintained[235]. The boundaries are formed by ecological limits of the earth, that is, the capacity of the environment to assimilate waste and regenerate resources. *Our Common Future* states that development within ecological boundaries means not endangering the natural systems that support life on earth such as the atmosphere, the waters, the soils and the living beings[236].

To ensure that development decisions are always made in light of these ecological boundaries means that development decision makers must place the environment in a central position in their decision making processes[237]. Essentially, economic and

---

[233]L.K. Caldwell. *International Environmental Policy* (Durham: Duke University Press. 1996) at 275. He states that sustainable development means different things to business people, governments, environmentalists, etc.

[234]*Ibid* at 275.

[235]D.W. Pearce and J.J Warford. *World without end: economics, environment and sustainable development* (USA: World Bank. 1993) at 8.

[236]The World Commission on Environment and Development. *Our Common Future* (Oxford: Oxford University Press. 1987) at 44- 45.

[237]D.W. Pearce and J.J Warford. *World without end: economics, environment and sustainable development* (USA: World Bank. 1993) at 8.

environmental concerns should have an equal influence on development decisions[238]. This means that the traditionally low profile of the environment in decisions affecting future development must be raised. In summary then, the ecological limits of the earth should set the boundaries for development decisions, and the environment should receive equal attention to development concerns from decision makers. In this way the ecological footprint of development may be reduced to a sustainable level.

## III. The Ecological Footprint of Investment Induced Development

Chapter 1 explained that an international investment agreement which aims to liberalise and codify the legal regime concerned with international investment is expected to promote economic growth and development. This development will only be sustainable if its environmental footprint is reduced to a level where sufficient environmental stocks are conserved to ensure future generations have the ability to develop. This paper will now consider whether development that is induced by liberalised investment has the potential to have either an increased or a decreased environmental footprint.

### A. The Complexity of the Problem

Determining the effect of large influxes of international capital upon the ecological footprint of development is a difficult problem. The impacts of growing private capital movements on the well being of people and the health of the natural world are at once enormous, complex, and somewhat contradictory[239]. Liberalised investment will have positive, negative, direct, indirect and cumulative environmental effects. The Commission for Environmental Co-operation (CEC) set up under NAFTA has recently commented on

---

[238] E. Dowdeswell and S. Charnovitz, "Globalisation, Trade and Interdependence" in M.R. Chertow and D.C. Esty (eds.) *Thinking Ecologically* (New Haven: Yale University Press, 1997) 85 at 94.

[239] H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 150.

this issue in a report which outlines one of the first attempts to comprehensively assess the impact of a specific liberalisation agreement (NAFTA) upon the environment[240]. The CEC states that "it is very difficult to determine the linkages between a liberalisation agreement's provisions and environmental effects"[241].

Difficulties arise because it is problematic to try and distinguish between the separate effects of domestic economic activity and foreign investor activity. In addition, the different time frames involved in investment and environmental degradation exacerbate the problems for researchers. Environmental problems emerge over a long period of time, often 20 years or more, while the state of global investments are in a continual state of flux. It is therefore difficult to establish a causative relationship between the two[242]. And often there is little baseline environmental data with which to compare new data and from which to extrapolate trends[243].

The question is more difficult to answer given that little research has been done on the subject. Virtually no research has been done to establish the interrelationships between capital markets and the environment[244] - as noted above, the CEC's 1999 report is one of the first research projects to simply outline how to conduct investment/environment research, let alone carry it out. The fact that little research has been done is due to several factors. Researchers have only recently considered that investment and the environment

---

[240]CEC. *Assessing the Effects of NAFTA (Phase II)* (1999) available at http://cec.org.

[241]At iv.

[242]R. Ramirez. *North American Investment under NAFTA - NAFTA Effects Working Paper Number 3* (Canada: CEC. 1996) at 1.

[243]CEC. *Assessing the Effects of NAFTA (Phase II)* (1999) available at http://cec.org at 8.

[244]OECD. *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 1.

are related[245] as prominent environmental issues such as pollution and logging meant attention was traditionally focused on industry, rather than upon investors. Further, attention has been focused on trade rather than investment liberalisation and the environment as a result of GATT/WTO cases such as the *Tuna Dolphin* decision[246]. Research is difficult because there is scant evidence of most companys' environmental performance. There is also insufficient data on where exactly investment is going[247].

To compensate for the lack of research in this area, this chapter will draw on the literature concerned with trade and the environment to the extent that it is applicable. For example, observations on the effect of growth and rising standards of living on the environment are equally relevant in the trade and investment spheres. This chapter will deal primarily with the literature that is available on traditional foreign direct investment and the environment, as there is little literature on the environmental effects of other international investments flows such as portfolio investment or debt. In any case, the FDI literature is the most helpful as the most direct and significant link between private international capital flows and the environment lies with foreign direct investment which goes into facilities such as mines and power plants that pose clear and immediate environmental issues[248].

This part will outline how international investment may lead to a decrease in the environmental footprint of development by focusing on the following issues:

---

[245]S. Schmidheiny with the Business Council for Sustainable Development, *Changing Course* (USA: Massachusetts Institute of Technology, 1992) at 58.

[246]GATT Panel Decision - *United States - Restrictions on Imports of Tuna* 30 ILM 1594 (1991)

[247]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 151.

[248]D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997) at 142. It is difficult to determine the effect of portfolio investment upon the environment. For example, portfolio investment may adversely affect the environment if pressure for short term profitability creates incentives for firms to cut environmental corners. Yet it may positively affect the environment if investors fear that poor environmental management will mean that a firm incurs unnecessary liabilities.

- Investment spurs demand for higher environmental standards.
- Investment facilitates the transfer of clean technology.
- Liberalised markets allocate resources efficiently.

It will then consider whether investment may lead to an increase in the environmental footprint of development by focusing on the following issues:

- Freer markets increase the externalisation of environmental costs.
- Investment will lead to an increase in overall consumption.
- Investment induced financial crises lead countries to sell off their natural resources.
- Investment is headed to ecologically intense industries.

Finally, this part will consider whether investment leads to the formation of pollution havens.

## B. A Potential Decrease in the Ecological Footprint of Development

### 1. Demand for Higher Environmental Standards

Foreign direct investment is welcomed by nations primarily because they believe that it will enhance their economic growth and development. As economic growth continues, living standards in a country rise. When living standards reach a certain level, the experience in developed countries has been that people begin to demand greater environmental protection and are able to pay for it[249]. A study of developed nations found that some indicators of environmental quality deteriorated with growth up to a certain point, but that when nations reached a certain level of income, people demanded better environmental standards[250]. The result of the demand was a turn around in environmental quality - the ecological footprint of development began to decrease. A specific example of this effect is given in another study. Grossman and Krueger

---

[249] K. Anderson and J. Drake-Brockman, "The World Trade Organisation and the Environment" in B. Boer, R. Fowler and N. Gunningham (eds.), *Environmental Outlook: Law and Policy No 2* (Australia: Federation Press, 1996) at 140.

[250] T. M. Seldon and D. Song, "Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution?" (1994) 27 Journal of Environmental Economic and Management 147 at 161.

determined that when peoples' incomes rose above $5,000 they began to demand greater protection from sulphur dioxide pollution and sulphur dioxide levels fell[251]. Field believes that the trend in developed countries will be emulated in developing countries, and that foreign direct investment which enhances development in developing nations will lead to greater environmental protection in those countries[252].

It should be noted that while some indicators of environmental health have been observed to fall with rising living standards, others such as carbon dioxide levels, have been observed to rise[253]. In any event, the experience in developed countries may not become the experience in developing nations. For example, the level of income that must be attained before a turn around in environmental quality occurs is quite high[254] and therefore a turn around may only be realised in specific countries which have strong and sustained economic growth. Further, greater environmental protection will only result when the national government concerned responds to the demand for environmental standards. Effective environmental policies will not be made unless there is active citizen interest and a receptive political system[255]. Moreover, a study by the US Office of Technology Assessment states that even if countries do upgrade their environmental laws, the effect upon the ecological footprint is likely to be slow to occur and will depend upon the institutions created and resources available to enforce standards[256].

---

[251] G.M. Grossman and A.B. Krueger, "Environmental Impacts of a North American Free Trade Agreement" in P.M. Garber, *The Mexico-US Free Trade Agreement* (Cambridge: MIT Press, 1993) at 13.

[252] B.C. Field, *Environmental Economics* 2nd edition (USA: McGraw Hill, 1997) at 411.

[253] C. Flavin and S. Dunn, "Responding to the Threat of Climate Change" in L. Brown *et al.*, *State of the World 1998* (New York: W.W. Norton and Co., 1998) 113 at 115.

[254] OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 4.

[255] United States Office of Technology Assessment, *Trade and Environment: Conflicts and Opportunities* (Washington: United States Department of Commerce, 1992) at 9.

[256] *Ibid* at 9. For example, Suriname has forest protection laws, but a budget of only $20,000 and just one motor vehicle to monitor 150,000 square kilometres of forest. J.N. Abramovitz, "Sustaining the

In summary, it is not inherently true that economic improvements arising from freer investment will translate into environmental improvements[257]. While liberalised markets may spur development which is a pre-condition for improving environmental quality, such markets are not by themselves a guarantee of improved environmental quality[258]. The experience of developed countries may not be the experience of developing nations due to the differences in the political regimes of countries and the resources that are available to enforce environmental regulations. An OECD report states that it is difficult to draw any meaningful conclusion about whether freer investment will result in a demand for increased environmental standards[259].

## 2. Clean Technology Transfer

International investment directly facilitates technological transfers to the developing world by enabling foreign multinational corporations to move freely and to act as vehicles of exchange. A World Bank study concluded that countries which are open to foreign investment acquire new technology far more rapidly than those which are closed to it[260]. International investment is directly responsible for approximately 18 percent of total technology transfer[261]. Technology transfers give developing nations access to cutting edge technologies which are usually cleaner and more efficient in their use of energy than

---

World's Forests" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 21 at 30.

[257] "WWF disputes conventional wisdom of free trade's positive environmental impact" (1998) 21 International Environment Reporter 563 at 563.

[258] "WTO says elimination of subsidies would end distortions, protect environment" (1998) 21 International Environment Reporter 306 at 306.

[259] OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 4.

[260] D. Wheeler and P. Martin, "Prices, Policies and International Diffusion of Clean Technology" in P. Low (ed.) *International Trade and the Environment* World Bank Discussion Papers (Washington: World Bank, 1992), cited in H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 157.

[261] N. Johnstone, "Globalisation, Technology and Environment" in OECD, *Globalisation and Environment* (Paris: OECD, 1997) 227 at 229.

existing technologies[262].

In addition to the direct transfer of technology, there are indirect effects of receiving technology transfers in developing nations. Local firms may try and copy the cleaner technology of multinationals, depending upon the stringency of the intellectual property rights in that country. Local workers may learn the expertise associated with the technology and apply it in the host country even if the foreign investor leaves[263]. Schmidheiny cites the example of Juarez in Mexico[264], where foreign investors such as Ford, General Motors and Johnson and Johnson are working with local and national officials to promote the construction of regional wastewater treatment plants. Even if these companies leave, the local officials involved will have accessed the knowledge and be able to implement it in other enterprises. Investment indirectly facilitates technology transfer because investment leads to growth and new sources of capital in a developing nation, which means local firms have more capital to invest in cleaner technology[265]. This is especially important in places where financial restraints are one of the most significant barriers to local companies investing in environmental technology.

The extent and type of clean technology transfer will be determined largely by what industries are attracted to what countries. For example, mining technology will only be transferred to a country where the labour, capital, materials and natural resources make it an ideal place to conduct mining. Further, as it is costly to transfer technology as well as train people to use it technology is most often transferred to countries which already

---

[262]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 157.

[263]OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 5.

[264]S. Schmidheiny with the Business Council for Sustainable Development, *Changing Course* (USA: Massachusetts Institute of Technology, 1992) at 123.

[265]OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 5.

possess the skills and endowments to successfully exploit it. Therefore apart from having access to some of the simpler technologies in the textiles industry, developing countries are not fully participating in the benefits of technology transfer[266]. Advanced technology is being predominantly transferred to what are known as "technology enclaves" - specific areas in developing nations where the cost of implementing the clean technology is not prohibitive[267]. The diffusion of clean technology is limited by the fact that multinationals tend to transfer technology to a subsidiary company subject to the same control and management as the technology provider, rather than to new domestic enterprises.

Other factors which influence whether technology transfer will occur in a particular country include political factors such as patent regimes[268]. Foreign investors will be reluctant to transfer technology when the rights to it will not be protected and local firms may copy it. However, the brake that this has had on technology transfer has probably been removed and replaced by another one in a recent international agreement. The parties to the WTO recently negotiated the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs)[269]. This agreement was made in response to the concerns of United States and European firms that their products were being afforded short and restricted periods of patent protection in developing countries. The US and Europe argued that this resulted in domestic imitations of foreign products and the loss of potential sales to the US or European manufacturer [270]. TRIPs requires countries to

[266]N. Johnstone. "Globalisation. Technology and Environment" in OECD, *Globalisation and Environment* (Paris: OECD. 1997) 227 at 234.

[267]OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 64.

[268]N. Johnstone. "Globalisation. Technology and Environment" in OECD. *Globalisation and Environment* (Paris: OECD. 1997) 227 at 227.

[269](Marrakesh. April 15 1994)

[270] M.J. Trebilcock and R. Howse. *The Regulation of International Trade* (London: Routledge. 1995) at 248.

protect the intellectual property rights of investors[271]. Therefore while foreign investors are less reluctant to transfer technology under the TRIPs regime, the ability of domestic firms to copy clean technology from developed nation investors is reduced.

Even when new technologies are transferred, they may not lead to the most environmentally sound development in developing countries[272]. Access to foreign technologies may displace existing local technologies which are better suited to local environmental conditions. Furthermore, technology is sometimes transferred to an industry that a national government has established by offering investment incentives, rather than to an industry that is naturally the most efficient or environmentally appropriate for the region. For example, the Chinese government currently has a program to develop coal fired power stations[273]. International investors are queuing up to participate in the construction of more than 500 medium sized coal generated power plants in China by 2010. These investors will probably transfer the best coal power technology available, which will make coal production more efficient. Yet coal is one of the most ecologically intense ways to produce energy. By continuing to use coal and promote the coal industry China, which is already the world's second largest producer of carbon dioxide will surpass the USA and top the list by 2010[274], will exacerbate its emission problems. Due to the government sponsorship of coal production and investors' efficient coal technology, coal will dominate the power industry and prevent the introduction of other clean technologies which could greatly decrease the ecological footprint of power generation.

---

[271] J.W. Wong. "Overview of TRIPs, Services and TRIMs" in OECD, *The New World Trading System* (Paris: OECD, 1994) 173 at 173.

[272] OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 64.

[273] H. F. French. "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 159.

[274] *Ibid* at 159.

Investment was liberalised to some extent under the 1994 NAFTA agreement between the USA, Canada, and Mexico. The agreement included several measures to liberalise establishment rules and reduce the scope of performance requirements[275]. As a consequence of this agreement, companies in Mexico were expected to utilise cleaner technology as it was transferred to them from the USA and Canada. However, a study showed that after several years under the NAFTA regime, Mexican companies had made very little change in their operations to treat pollution problems, though they claimed to be searching actively for ways to reduce their pollution. They were still found to produce more pollution than their counterparts in the USA and Canada, particularly in industrial processes that required intensive melting, dust production, or heavy fuel use[276].

In conclusion, liberalised investment will promote the transfer of clean technologies which may decrease the ecological footprint of development. However, if the technology is only transferred to technology enclaves, this effect will be limited to specific industries and places. The TRIPs will restrict local firms' ability to copy clean technology. The experience of Mexico under NAFTA shows that substantial clean technology transfer does not automatically flow from liberalised investment. In any case, as international investment is responsible for only 18 percent of total clean technology transfers it is far from clear that enough clean technology will be transferred as a result of international investment to significantly reduce the ecological space that development takes up.

### 3. The Market and Efficiency

Grimwade states that liberalisation of the investment market means that resources will be used in their most efficient way[277]. Owners of resources with the freedom to act in a

---

[275]See Chapter 11 generally, and specifically Articles 1102, 1103 and 1106.

[276]R. Ramirez, *North American Investment under NAFTA - NAFTA Effects Working Paper Number 3* (Canada: CEC, 1996) at 22.

[277]N. Grimwade, *International Trade Policy* (London: Routledge, 1996) at 343.

liberalised market will allocate resources to their most efficient use thereby conserving scarce resources and relieving unsustainable resource consumption. In an effort to attain maximum efficiency and ensure competitiveness, investors may conduct research into ways to reduce waste and improve productivity. The larger markets which result from globalisation and liberalisation mean that there are greater incentives for firms to innovate since they will realise greater profits from successful innovations than they would have before liberalisation[278].

An example of an investor who has sought to reduce its impact upon the environment in order to remain competitive is Dupont, who has set a target of zero emissions for its world wide operations in an effort to achieve maximum efficiency[279]. A study of chemical and engineering companies who used clean production techniques found that most of them reported financial benefits from commencing cleaner production, rather than increased costs[280]. Under the liberalised investment regime of NAFTA, investors are expected to favour cheap energy produced by clean and efficient technologies over energy produced by inefficient coal power stations[281].

Most transnational corporations have an environmental policy which they adopt world wide, it being more cost efficient to have one standard than to vary the policy for each operation depending upon the environmental laws where it is situated. Seventy percent of companies claim to follow their self imposed environmental standards[282]. Multinational companies have often taken a pro-active approach to making environmental strategies.

---

[278] OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 63.

[279] OECD. *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 12.

[280] *Ibid* at 12.

[281] CEC. *Assessing the Environmental effects of NAFTA ( Phase II)* available at http://cec.org.

[282] OECD. *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm.

They anticipate new regulatory requirements and seek environmentally friendly technology. They try to turn new environmental regulations into business opportunities. This has been particularly the case in Europe in industries most threatened by environmental controls, such as the energy, chemical and oil refinery industries[283]. There is also some evidence that foreign investors meet the environmental standards of countries more often than domestic companies do because they anticipate they will be subjected to a greater deal of scrutiny than domestic investors[284].

While the example set by Dupont is admirable, it is not being followed throughout the business community. A recent OECD study found that regulatory mechanisms, rather than efficiency initiatives, were the most important determinant in firms' decisions to reduce the environmental intensity of their activity[285]. And while 70 percent of multinationals claim to follow their environmental standards, many commentators and environmentalists are skeptical of this claim[286]. Some cite the example of the environmental degradation Shell Oil operations have caused in Nigeria while claiming to follow strict environmental standards[287].

In summary, freer investment markets may result in some efficiency initatives and therefore decrease the ecological footprint of development, but the extent to which this will occur is very uncertain and depends upon individual investors and the market in which they operate.

---

[283]OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 73.

[284]OECD. *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 11.

[285]OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 65.

[286]See "Industry Environmental Self Regulation Needs Improvement" (1996) 8 Transnationals 5.

[287]D.C. Esty and B.S. Gentry. "Foreign Investment. Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD. 1997) at 156.

## C. A Potential Increase in the Ecological Footprint of Development

International investment has the potential to lead to development which has a reduced ecological footprint because it could lead to rising living standards and a demand for greater environmental protection, to clean technology transfer, and to efficiency initiatives and resource allocation efficiency. However, none of these effects are certain and there are several ways in which investment could in fact lead to development with an increased ecological footprint.

### 1. Market Failure

Environmental degradation is a negative externality of production processes. The market determines the efficient level of output at the point where marginal revenue is equal to marginal private or internal costs. Damage to the environment is not a cost that the producer must take into account in calculating marginal private costs. Land, water and air are usually treated as inexhaustible and free for everyone to use. The cost of damaging them is not one that falls on a private producer, it falls on society[288]. Therefore polluting the air and water and contributing to biodiversity depletion are activities which form no part of the private producer's calculation. Producers produce more goods and damage the environment more than they would if they had considered the environmental costs. It is a failure of the market that it does not factor environmental costs into production decisions[289].

An OECD report on globalisation states that "given that significant market failures already occur within domestic economies, these failures will be even harder to deal with in a more

---

[288]R.H. Haveman and K.A. Knopf, "Market Failure" in E.L. Hughes, A.H. Lucas and W.A. Tilleman (eds.) *Environmental Law and Policy* 2nd ed. (Canada: Emond Montgomery Publications, 1998) 362 at 362.

[289]K. Haaland, *Can't see the forest for the trees: A critical assessment of the trade and environment debate and an analysis of proposed reforms* (Canada: Center for Trade Law and Policy, 1995) at 2.

globalised economic context, unless adequate governance structures are in place to deal with them."[290] An international investment agreement which liberalises the investment regime will direct governments to reduce their interference in the investment market, meaning market forces will become more and more determinative. Environmental degradation will be treated more and more as an externality. Private investors will not take the environmental impact of an investment decision into account unless there is a clear economic loss or gain associated with it[291]. Hart and Gera state that the most effective solution is for governments to implement measures that will allow markets to reflect the costs of environmental degradation more accurately and thus influence the behaviour of producers and consumers away from environmentally hostile decisions[292]. This requires interference in the market - the very thing that liberalisation seeks to reduce.

In summary, the 'spill over effect' and 'externality' that is environmental degradation is largely ignored by domestic markets and will be largely ignored by international markets that form as a result of a liberalised investment agreement and globalisation. The only way to ensure that the market considers environmental damage is to interfere in the market and force producers to take environmental costs into account - but interference in the market is precisely what liberalisation opposes. An international agreement on investment which liberalises investment laws will have the twin effects of exacerbating market failure and discouraging governments from interfering in the market to correct the failure.

## 2. Increased Overall Consumption

The demand for greater environmental standards and the transfer of clean technology may result in a decrease in the ecological intensity of individual units of development.

---

[290]OECD, *Economic Globalistaion and the Environment* (Paris: OECD, 1997) at 7.

[291]M.R. Chertow and D.C. Esty ,"Introduction" in M.R. Chertow and D.C. Esty (eds.) *Thinking Ecologically* (New Haven: Yale University Press, 1997) 1 at 7.

[292]M. Hart and S. Gera, "Trade and Environment: Dialogue of the Deaf or Scope for Cooperation?" (1993) 18 Canada - United States Law Journal 207 at 218.

However, the overall ecological footprint of development may increase at the same time because of the scale effects of development. As income levels rise, so does the demand for more consumer goods and the throw away lifestyle associated with western affluence[293]. Therefore even if the environmental intensity of economic activity can be decreased so that there is less resource use and less waste produced per unit[294], development means that an ever increasing number of units will continue to be used.

An OECD study illustrates this[295]. It studied the pollution, resource and material intensity of the global economic system between 1970 and 1992. It found that while the intensity of each of these indicators dropped, the aggregate rose. That is, it found that producing an individual good in 1992 produced less pollution and used less energy and materials than did producing the same good in 1970. However, it also found that the total amount of pollution produced and energy and materials used became greater in every year of the study period. The study states that "the results reveal a general decrease in the environment-intensity of production. However, it should be stressed that the aggregate figures for all indicators consistently rose throughout the same period, suggesting that the negative scale effects may be outweighing any positive technology effect."[296]

An example of a negative scale effect is in energy usage. As income levels rise, so does the demand for energy and thus the need for non renewable fuel sources[297]. Even though each unit of energy may be produced more efficiently, the increase in the overall demand

---

[293] K. Anderson and J. Drake-Brockman, "The World Trade Organisation and the Environment" in B. Boer, R. Fowler and N. Gunningham (eds.), *Environmental Outlook: Law and Policy No 2* (Australia: Federation Press, 1996) at 143.

[294] As D.W. Pearce and J.J Warford, *World without end: economics, environment and sustainable development* (USA: World Bank, 1993) argue is possible at 10.

[295] OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 65.

[296] *Ibid* at 64.

[297] C. Flavin and S. Dunn, "Responding to the Threat of Climate Change" in L. Brown *et al.*, *State of the World 1998* (New York: W.W. Norton and Co., 1998) 113 at 115.

for energy means that more fossil fuels are used. Associated with fossil fuel sources is the production of carbon dioxide which contributes to global warming. Field notes that global warming will probably become worse with increased economic growth[298]. Acknowledging negative scale effects, an OECD Secretariat representative recently stated that previous foreign investment experience proves that there is a link in some circumstances between increased investment and increased environmental degradation[299].

As market liberalisation increases, environmental degradation may outpace environmental gains from technology transfer and efficiency initiatives. While technology and efficiency decrease the environmental intensity of individual units of investment induced development, the ecological footprint of development increases because economic growth fueled by liberalised investment leads to negative scale effects of over consumption of natural resources and greater waste production[300].

### 3. Natural Resource Sell-Offs

The increased level of portfolio investment noted in chapter 1 means that countries have become susceptible to short term investors who can rapidly move capital in and out of a country and thereby severely destabilise that country's currency. Portfolio investors increased their holdings in developing countries tenfold between 1990 and 1993. However, by 1995 they had cut their new investments by 50% from the 1993 high[301]. This caused a financial crisis in several developing countries. French states that "investors may withdraw their funds quickly if they lose confidence in a country's economic

---

[298]B.C. Field. *Environmental Economics* 2nd edition (USA: McGraw Hill. 1997) at 411.

[299]"Negotiators working on investment policy for OECD to include environmental provisions" (1996) 19 International Environment Reporter 1099 at 1100.

[300]D.C. Esty. *Greening the GATT: Trade, Environment and the Future* (Washington DC: Institute for International Economics. 1994)

[301]S. Schmidheiny and B. Gentry. "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty., *Thinking Ecologically* (New Haven: Yale University Press. 1997) 118 at 121.

prospects, as happened in Mexico during the peso crisis of 1994 and in Southeast Asia in 1997"[302]. This type of crisis will become more prevalent if an international investment agreement leads to an increase in short term volatile investments and liberalises the international investment legal regime so that portfolio investors can move their investments with ease. The financial and currency crisis that ensues leaves some developing nations with little alternative other than to sell off their natural resources in order to gain foreign exchange and stabilise their currency[303].

Governments look in particular to their forests as a standing asset that can be liquidated to solve financial problems[304]. Abramovitz cites several examples[305]. In Russia, some cash strapped municipalities are paying creditors with forest land. The economically desperate South American nations of Suriname and Guyana considered bids that would give away half of their forests to Asian timber companies for pennies per hectare. Sachs observed that immediately after the currency crises in Mexico in 1994 and in Indonesia in 1997, both countries substantially opened up their forest industries in order to increase the value of their currency[306].

The problem is often exacerbated because countries do not receive the full market value of their resources and therefore have to sell greater amounts. In the forest industry, the size and power of timber companies allows them to dictate very favourable terms. In the

---

[302]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 153.

[303]W. Sachs, R. Loske and M. Linz, *Greening the North* (London: Zed, 1998) at 2. Part X of the MAI allows countries to suspend their MAI obligations for 6 months in times of foreign exchange problems, but countries are still left with the problem of regaining foreign exchange to alleviate the crisis.

[304]J.N. Abramovitz, "Sustaining the World's Forests" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 21 at 27.

[305]*Id.*

[306]Wolfgang Sachs in a presentation entitled "Globalisation and Sustainability" given at the University of Calgary, 19th March 1999.

Solomon Islands, land owners were paid $2.70 per cubic metre of timber that foreign investors sold for $350 per cubic metre[307]. Further, if several countries in crisis attempt to sell off their natural resources, a glut on the world market develops and prices fall further. Thus these countries are forced to sell more of their environmental resources to cope with a financial crisis precipitated by the free movement of short term capital. Selling natural resources means that these countries cannot develop them as the basis for long term sustainable industries or choose to conserve them for future generations.

### 4. Investment is Facilitating the Development of Ecologically Intense Industries

Schmidheiny states that it is the direction that foreign investment is headed that may be damaging to the environment, rather than the mere fact that investment occurs[308]. International investment is being used to facilitate some development activities which have a high ecological cost. Some of these activities and projects, especially those in developing countries, would not have been able to proceed without international investment. Therefore, the international investment which stimulates and facilitates these activities is leading to a greater current ecological footprint than would perhaps be observed if investment was not enabling them[309]. Even if it is conceivable that these activities would be conducted in the future without international investment it is the current ecological footprint that is of concern to this paper. In any case, technology that is available in the future may be available to make these activities less intense.

The flow of investment into natural resource industries in developing countries is having a deleterious effect upon the environment in those countries. For example, three to six

---

[307] J.N. Abramovitz, "Sustaining the World's Forests" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 21 at 26.

[308] S. Schmidheiny with the Business Council for Sustainable Development, *Changing Course* (USA: Massachusetts Institute of Technology, 1992) at 58.

[309] Note though that the economic development that such investment leads to may be used to break the poverty cycle and therefore decrease ecological damage.

multinational foreign investors control 80-90 percent of the world's trade in forest products, iron ore, copper and precious metals[310]. Many developing countries have re-written their mining codes to encourage investment in this sector but have not enacted new environmental laws[311]. In response to this, the multinational investors who control these industries increased their mining and exploration activities. In 1994 to 1997, mineral exploration in Latin America doubled, almost tripled in the Pacific Region and more than tripled in Africa. This increase in exploration would not have been observed without the injection of foreign capital. Foreign investment is also flowing to the forest industry[312]. Developing nations are providing concessions, subsidies and credit benefits for those foreign investors who 'improve' a forest by clearing it[313] in order that those nations may develop the forests that would otherwise stand 'idle'.

Foreign investment in developing countries is flowing in ever increasing amounts to high technology industries such as chemical manufacturing, industries that would probably not have substantially developed yet without foreign investment. Esty and Gentry note that in Mexico a large proportion of foreign investment goes into automobile factories and chemical production, and in China a large proportion goes to general industry[314]. High technology industries such as battery manufacturers, chemical industries and computer chip assembly factories are becoming concentrated in developing countries[315].

---

[310]T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 80.

[311] H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 154.

[312]*Ibid* at 154.

[313]J.N. Abramovitz, "Sustaining the World's Forests" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 21 at 25-26.

[314]D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997) at 151.

[315]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 157.

An associated problem is that investment in high technology industries is moving from developed countries to the developing or least developed nations which have the least resources to handle the environmental impacts of these industries. Therefore while this investment is not leading to new developments, it is probably leading to development with an increased ecological footprint. A study by Sorsa[316] reinforces this point: it observed that there were major structural changes in the manufacturing sector and that the developed world's share of these industries was falling in favour of the developing world. Meanwhile in the developed nations, Jones states that the decreased flows to the manufacturing industry have been more than matched by an increase in flows to the services industry[317]. While it is generally presumed that service activities are less environmentally intensive than manufacturing activities, no full life cycle analysis of services have been done, and such study may reveal unexpected environmental consequences[318].

Foreign direct investment is increasingly involved in privatization[319]. This can have good or bad implications for the environment. Private companies often insist on greater efficiencies than publicly owned institutions. However, privatization often means less accountability and less government control. The nature of private capital flows makes responsibilities towards the environment less obvious[320]. When the industry was publicly owned, the government was held responsible for the environmental impacts and could be

---

[316]P. Sorsa, "Competitiveness and Environmental Standards" cited in OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm.

[317]T. Jones, "Economic Globalisation and the Environment: An Overview of the Linkages" in OECD, *Globalisation and the Environment* (Paris: OECD, 1998) 17 at 21.

[318]*Id.*

[319]Between 1988 and 1994, 42 percent of privatisation involved sales to foreign investors. E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 12.

[320]S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty., *Thinking Ecologically* (New Haven: Yale University Press, 1997) 118 at 123.

held publicly accountable. With private ownership, the firm's shareholders can hold the firm responsible, but the public has little recourse.

An OECD report analyses the effect of privatisation in the energy industry[321]. Privatisation has encouraged a search for the cheapest fuel. In the UK in 1990 prior to privatisation gas accounted for 1 percent of electricity generation. Since privatisation, the discovery of gas to be a cheaper fuel source than coal has led to a dramatic increase in gas use. It was 11 percent in 1993, and is expected to be 46 percent by 2010. However, deregulation of the energy industry in the US and Japan is expected to increase the use of cheap coal and oil and decrease the use of cleaner gas. The environmental impact of privatisation and international investment in the energy industry will depend upon the nation concerned. One common effect though is that using cheaper sources and charging lower prices for energy will probably lead to an increase in electricity consumption. Unless the electricity is produced from emission free sources, this will have a negative environmental impact.

In summary, international investment is being used to fund some activities which have a high environmental cost and which would not be developed yet but for the investment. It is also leading to the development of industries in some countries who do not have the resources to protect their environment from the environmental impacts of them. International investment is often involved in privatisation, which has the potential to have both positive and negative environmental consequences. Overall then, considering the activities which international investment is being used to fund reveals that such investment has the potential to lead to an increased ecological footprint.

## 5. Conclusion

An international investment agreement which liberalises the legal regime surrounding

---

[321]OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 50.

investment will promote freer global markets. Environmental costs are externalised in free markets and environmental degradation may ensue. The free movement of portfolio investment which causes financial instability may force some developing countries to sell their natural resources in order to gain foreign exchange and stabilise their currencies. International investment is being used to facilitate some pollutive industries that would not otherwise have been developed yet in some countries who do not have the capacity to control the impact of those activities. For these reasons, international investment has the potential to increase the ecological footprint that development leaves. Any international investment agreement should be negotiated in cognisance of this fact and ensure that countries are able to regulate international investment when it becomes clear that it is impacting negatively upon the environment.

## D. Pollution Havens

### 1. The Theory of Pollution Havens

One of the liveliest debates over the environmental consequences of foreign investment concerns 'pollution havens'. Some environmentalists fear that foreign investors will be attracted to places with the lowest environmental standards and therefore the lowest costs of production, and pollution havens will form[322]. In 1982 Walter predicted that environmental factors would gradually take on greater importance in the decisions and planning of foreign investors[323]. In 1999, some commentators continue to predict this while others refute it. The answer is still unclear.

The idea that developing countries may be acting as pollution havens has two parts. The first is that stringent standards in developed nations are causing pollution intensive industries to flee. The second is that to enhance their economic growth some developing

---

[322]D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997) at 162.

[323]I. Walter, "Environmentally Induced Industrial Relocation to Developing Countries" in S.J. Rubin and T.R. Graham, *Environment and Trade* (USA: Allanheld, Osmun and Co. 1982) 65 at 99.

countries are trying to attract those industries with the promise of lower pollution control costs[324]. They perceive their lower environmental standards as a comparative advantage in attracting foreign investment. It is difficult to draw a general conclusion in this area, as most of the evidence concerning the formation of pollution havens is anecdotal or episodic and therefore not suitable to extract trends from[325]. Adding to the difficulty is that some countries have enacted sound environmental regulations but do not enforce them. The lack of enforcement attracts investors, but the covert nature of the enticement makes its effects difficult to determine without extensive study[326].

French cites the *maquiladoras* region in Mexico as an example of a pollution haven[327]. In Mexico near the United States border, more than 2000 foreign (mainly US) owned manufacturing plants were set up, and more than a quarter of those surveyed stated that Mexico's lax environmental regulation enforcement influenced their location decision. The lax enforcement was evidenced by the fact that the toxic pollutants in the area were 20 to 215 000 times the allowable standards. Similarly, the Chinese National Environmental Protection Agency has accused firms from Taiwan and Korea of setting up businesses in China to flee the enforcement of environmental regulations in their home countries[328]. This part will now consider whether investors flee because of high environmental costs and whether governments lower their environmental standards.

---

[324]B.C. Field, *Environmental Economics* 2nd edition (USA: McGraw Hill, 1997) at 409.

[325]OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm at 7.

[326]B.C. Field, *Environmental Economics* 2nd edition (USA: McGraw Hill, 1997) at 410.

[327]H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 157.

[328]*Id.*

### (a) Do Investors Flee Because of Environmental Costs?

#### (i) Industry Generally

In *Industrial Location*[329], Harrington and Warf list the following factors as being determinants of where industries locate: land (and its attributes), access to capital, access to materials, power and electricity, labour skills and cost, management pool, market size and type, price competition, transport, agglomeration and public policy. One study showed that of these factors, market access has been the primary influence on foreign investment in the 1990s[330]. Another study showed that industries respond to a variety of factors, not solely environmental regulations, in determining whether to move their investments abroad[331]. A World Bank study[332] concluded that the cost of meeting environmental standards, even in countries with strict rules, is low in relation to total costs. In the United States the costs of pollution abatement were found to average 0.54 percent of overall costs. As environmental costs are so relatively low, they are not likely to be determinative of a decision about where an investor locates its industry.

Even in industries where environmental costs are high, these costs may not reduce the industries' competitiveness[333]. The degree to which new costs affect sales depends upon whether the costs can be passed on to consumers, the price response of competitors and the price sensitivity of the demand for the product. If competitors increase their prices as well or the demand for the product is inelastic, the increased costs will not affect competitiveness. In addition, some firms who are faced with increased costs may decide to adopt measures such as improved environmental management to neutralise the effect of

---

[329] J.W. Harrington and B. Warf, *Industrial Location* (London: Routledge, 1995).

[330] J. Burns and E. Chrysler, "Multilateral Agreement on Investment: DOA" (1998) Foreign Investment in Canada - Feature Articles 399 at 401.

[331] B.C. Field, *Environmental Economics* 2nd edition (USA: McGraw Hill, 1997) at 411.

[332] World Bank, *The World Development Report 1992* (Washington: World Bank, 1992).

[333] OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 33.

the environmental costs.

In some industries, plants have life expectancies of around 40 years. Many investors believe that all environmental standards will become relatively high in that time, regardless of what country an investor is in. If this is the case, a plant built anywhere today without stringent environmental controls will have to be retro-fitted when the new laws come into force, which may be more expensive than building the plant with environmental controls initially[334]. Investors may therefore choose not to relocate to take advantage of the short term benefit of lower environmental costs.

Jaffe *et al*[335] considered the proposition that environmental regulations imposed significant costs on the manufacturing industry in general and therefore decreased its competitiveness and slowed its growth. They tested this against the opposing proposition that environmental regulations are a positive force in driving industry towards greater efficiency and therefore competitiveness. They found little or no evidence supporting either position. However, studies of particular industries have been more conclusive.

**(ii) Specific Industries**

While in general environmental costs are not determinative of industrial location, some studies have shown that high environmental costs in high pollution industries may cause investors to relocate. One study which focused on toxic industries found that the rate of growth in toxic industries was highest in the poorest countries with the lowest environmental standards[336]. Pearson states that the pollution haven hypothesis is likely to

---

[334] I. Walter, "Environmentally Induced Industrial Relocation to Developing Countries" in S.J. Rubin and T.R. Graham, *Environment and Trade* (USA: Allanheld, Osmun and Co. 1982) 65 at 97.

[335] A.B. Jaffe *et al.*, "Environmental Regulations and the Competitiveness of United States Manufacturing: What Does the Evidence tell Us?" (1995) 33 Journal of Economic Literature 132 at 132.

[336] B.C. Field, *Environmental Economics* 2nd edition (USA: McGraw Hill, 1997) at 411.

be realised in raw material processing and hazardous industry location[337], as both have high pollution costs and both are sought by developing countries seeking to reduce their dependence on primary industries. Environmental control costs are highest in raw materials processing industries such as iron, steel, pulp and paper, basic chemicals, petroleum manufacturing and cement. These are the industries which are most influenced by environmental regulation and may relocate to reduce costs[338].

### (b) Do Countries Lower Their Environmental Standards?

Countries may choose to lower their environmental laws to attract foreign investors who operate in high pollution industries and claim environmental costs imposed on them decrease their competitiveness. An OECD report states that "in some countries, local leaders have been known to offer potential foreign investors preferential treatment for locating in their jurisdictions. This can include a tacit (or express) commitment to relax the enforcement of environmental standards."[339]

Whether nations reduce or do not enforce their environmental laws varies from industry to industry. For example, in the resources and commodities industry where products are relatively similar and a small cost difference can translate into a large market gain or loss, foreign investors can exert considerable pressure upon countries to reduce their environmental laws[340]. The investors claim their competitiveness will be dramatically impacted by a small cost increase, such as an increase due to environmental compliance. The countries they are investing in are often eager for economic growth and impatient with the slow payback of investing in environmental protection. They therefore agree to

---

[337] C. Pearson, "Environment and International Economic Policy" in S.J. Rubin and T.R. Graham (eds.), *Environment and Trade* (USA: Allanheld, Osmun and Co. 1982) 46 at 57.

[338] *Ibid* at 51.

[339] OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 41.

[340] *Id.*

relax the environmental requirements. Esty and Gentry cite Shell's oil drilling in Nigeria and Freeport McMoRan's mining operations in Indonesia as high profile examples of where this has happened[341].

In other cases countries have been known to pressure investors to drop their environmental standards[342]. For example, foreign investors were competing to fund electricity generation projects in China. They were pressured to eliminate environmental components from their proposed bids in order to cut costs. They were told that if they would not eliminate their environmental proposals, local investors would be given the projects.

### (i) Countries May Maintain or Raise Their Environmental Standards

As discussed above, a country may be willing to decrease the environmental regulations in the toxic industry or power generation sector. In contrast, Schneider and Wellisch state that most countries are generally not willing to grant environmental leeway to foreign investors who are involved in exporting commodities. This is because when goods are exported by foreign investors, much of the benefit of the production flows out of the country while the pollution stays there[343]. Countries may also be reluctant to give individual investors preferential treatment if they want to become known as a country with consistent and predictable standards. Schmidheiny and Gentry[344] state that it may be in the best interests of a nation attempting to attract foreign investment to have open environmental legislation which is clearly and consistently enforced. This would ensure

[341] D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997) at 156.

[342] OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 41.

[343] K. Schneider and D. Wellisch, "EcoDumping, Capital Mobility and International Trade" (1997) 10 Environmental and Resource Economics 387 at 388.

[344] S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty, *Thinking Ecologically* (New Haven: Yale University Press, 1997) 118 at 124.

that that country meets private investors' demands for predictability in government requirements.

Just as being known as a country which maintains consistent environmental regulations may be beneficial to a country who seeks investment, being known as a nation with high environmental standards may also be beneficial. Consumers in the industrial world, particularly in northern Europe and to a lesser extent in the United States, are beginning to insist on respect for the environment in their purchasing decisions. For example, the OECD report explains that foreign investors in Costa Rica are insisting upon environmental care of banana crops, perceiving that their European customers want an environmentally sound product[345].

A study found that an issue that is of great concern to foreign investors is liability arising from past practices[346]. Many investors have turned away from investing in Eastern Europe because of the liability laws associated with toxic and contaminated sites there. This study concluded that poor environmental conditions deter investment. However, the fact that investors are moving away could also be interpreted as showing that the liability and environmental laws in these countries are deterring investment. If there were no liability placed on foreign investors to clean up the sites, perhaps they would still invest. If this is the case, then there will be pressure on those countries with liability laws to relax them if they wish to attract foreign investment.

Another study found there was a linkage between a state's spending on the environment

---

[345]OECD. *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm

[346]A. Zamparutti and J. Klavens. "Environment and Foreign Investment in Central and Eastern Europe" in OECD. *Environmental Policies and Economic Competitiveness* (Paris: OECD, 1993).

per employed manufacturing worker and the number of new companies started there[347]. It concluded from this that firms are attracted to places of high environmental quality rather than those of low quality because of the impact a poor environment has upon worker productivity and health. However, if the rate of environmental spending correlates with the rate of general expenditure, the companies may actually be attracted to the area because of higher overall general expenditure in that area. The high rate of expenditure on for example, industrial parks, rather than on the environment could be the dominant attraction to the region.

The research in this area does not show that countries either generally decrease or generally increase their environmental standards in order to attract foreign investment. It shows that what a country will do will depend upon the specific industry that an investor is involved in and the sensitivity of consumers to environmental concerns. In some cases at least, these factors will lead to a country decreasing its environmental standards.

## 2. The Chilling Effect on Environmental Regulation

As noted earlier in this section, environmental costs may not necessarily reduce a foreign investor's competitiveness. However, there is a perception in firms and governments that it will[348]. An OECD report found that firms who are resisting higher environmental standards often threaten industrial relocation to countries with low environmental standards in their campaign against higher standards[349]. The threat is sometimes real enough to convince policy makers not to impose environmental regulations. The threat of industrial migration based on the pollution haven theory may have a negative effect on

---

[347]OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm

[348]OECD, *Economic Globalisation and the Environment* (Paris: OECD, 1997) at 35.

[349]OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm

countries who wish to improve their environmental standards[350]. This has the greatest effect in developed nations who already have high environmental standards.

Esty and Gentry cite two instances of regulatory chill in developed nations[351]. The European Union efforts to implement a carbon tax have not progressed very far because of fears that it will disadvantage European firms in relation to their Japanese and US competitors. Similarly, the Clinton administration's efforts to advance a carbon tax in 1993 failed when industries complained they would be competitively disadvantaged by the tax in the global market place. In British Colombia for several years the forest industry opposed any regulations which introduced a widespread ban on clear cutting. In 1995, the government enacted the *Forest Practices Code* which banned all clear cutting in the province, but eased the code in July 1997 after industry complained that it was too burdensome and was hurting its profits and market share[352].

## 3. Conclusion

While the formation of pollution havens is one of the biggest fears environmentalists have concerning liberalised investment, most commentators state that factors such as market access and proximity to raw materials are more important determinants of industry location than environmental regulations. However, French states that even though foreign investors may move to developing countries for many reasons, they may take advantage of lower environmental standards when they are there[353]. There is some evidence that toxic and other environmentally intensive industries are moving to places where there are lower

[350] OECD. *Economic Globalisation and the Environment* (Paris: OECD. 1997) at 13.

[351] D.C. Esty and B.S. Gentry. "Foreign Investment. Globalisation and Environment" in OECD. *Globalisation and Environment Preliminary Perspectives* (Paris: OECD. 1997) at 163.

[352] J.N. Abramovitz. "Sustaining the World's Forests" in L.R. Brown *et al.*. *State of the World* (New York: WW Norton & Co.. 1998) 21 at 31.

[353] H. F. French. "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co.. 1998) at 157.

regulations, forming a specialised type of pollution haven. In any case, even if foreign investors generally do not re-locate to take advantage of lower environmental laws, they may use the threat of it to resist new laws.

If pollution havens form or firms use the threat of relocation to resist increases in environmental laws so they may continue polluting activities, there may be an increase in the ecological footprint of development. In contrast to the other factors discussed in this chapter which may increase the ecological footprint of development, the increase brought by pollution havens will be brought about not because investment has an incidentally negative impact upon the environment, but because countries have deliberately decreased their environmental laws. Therefore any provision in an international investment agreement which permits countries the latitude to regulate international investment when it becomes clear that it is impacting negatively upon the environment will have no effect upon the formation of pollution havens. To prevent pollution havens from forming, any international investment agreement should incorporate a provision which disuades countries from reducing their environmental standards in order to attract foreign investors.

## IV. Conclusion - The Need for Intervention to Lead to Sustainable Development

Development induced by investment may be sustainable if its environmental footprint is reduced to a level which means that a sufficient stock of environmental resources is conserved to allow future generations to develop. Determining whether this is probable or even possible is a complicated issue and little empirical research has been done to determine the actual effect of an investment liberalisation agreement such as the MAI upon the environment. The literature indicates that investment has the potential to both decrease and increase the ecological footprint of development.

International investment may lead to efficiency initiatives, transfers of clean technology and a development induced demand for higher environmental standards. However, the *may* should be stressed - it is far from certain that these effects will be observed and that there will be a decrease in the ecological footprint of development.

The market's failure to internalise environmental degradation will be exacerbated in a liberalised global market. Freer investment may stimulate consumption, increase the world's overall demand for natural resources and increase the world's overall pollutive output. On this point, note that an OECD report on investment and the environment states that "there is evidence that overall, global environmental problems worsen with growth."[354] Some developing nations sell off their natural resources to buffer themselves against foreign exchange fluctuations brought about by the movement of volatile capital. Investment is headed to highly polluting and environmentally intensive industries in developing countries that do not have the capacity to deal with them. Many of these industries would not have been developed yet had it not been for foreign investment. All of these factors mean that investment has the potential to lead to development which has an increased ecological intensity.

Determining the actual effects of international investment upon the environment will require the analysis of specific rather than general issues[355], including the nature of the industry and the foreign investors concerned. The actual effects will not be known until empirical studies have been carried out. What is clear, however, is that investment has the potential to have negative impacts upon the environment and reduce the sustainability of development. If an international investment agreement is to lead to sustainable development, it should permit countries to regulate international investment when it becomes clear that it is impacting negatively upon the environment.

---

[354]OECD, *Foreign Direct Investment and the Environment* (1998) available at http://www.oecd.org/daf/cmis/mai/fdienv.htm, at 4.

[355]United States Office of Technology Assessment, *Trade and Environment: Conflicts and Opportunities* (Washington: United States Department of Commerce, 1992) at 3.

As noted in chapter 1 due to the effect of globalisation countries must regulate investment to protect the environment by negotiating international standards for investors' behaviour with respect to the environment. Esty and Gentry state in relation to the MAI that:

> "the emerging OECD MAI might provide a useful vehicle for imposing some environmental discipline and international collective action... It might alternatively mandate adherence to an internationally determined set of environmental standards, such as minimum requirements established by the World Bank, "multi-tier' standards geared to the level of development of the recipient country, or the ISO 14000 series of standards."[356]

Dowdeswell and Charnovitz state that "there has been an increased recognition of the impact of development projects on the environment... the MAI could - and should - incorporate appropriate environmental standards."[357]

However, when international standards negotiated by consensus are not appropriate for a particular environment or for the standard of environmental protection demanded in a particular state, that state should have the latitude to require investors to consider the environment. Chertow and Esty believe this is so important they state that "environmental protection stands alongside national security as a core government function."[358] To allow this, an international investment agreement should permit countries the latitude to regulate international investment when it becomes clear that it is impacting negatively upon the environment. It should not interfere with the ability of nations to act decisively in the national or international interest of the environment[359].

---

[356] D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997)t at 168.

[357] E. Dowdeswell and S. Charnovitz, "Globalisation, Trade and Interdependence" in M.R. Chertow and D.C. Esty (eds.) *Thinking Ecologically* (New Haven: Yale University Press, 1997) 85 at 94.

[358] M.R. Chertow and D.C. Esty ."A vision for the future" in M.R. Chertow and D.C. Esty (eds.) *Thinking Ecologically* (New Haven: Yale University Press, 1997) 230 at 235.

[359] M. Swenarchuk, "The Environmental Community's Perspective" in J. Kirton and S. Richardson (eds.) *Trade Environment and Competitiveness* (Canada: National Round Table on the Environment and Economy, 1992) 67 at 71.

Regardless of whether an international agreement includes these provisions, some governments may not act to protect their environment if they are pressured in their competition for foreign investment to lower or not enforce their environmental laws. It appears that pollution havens are forming in specific toxic and pollutive industries, even if they are not forming generally. There is some evidence that the threat of industrial relocation has a substantial chilling effect and that firms put pressure on national governments not to increase environmental regulation in case this impinges on their competitiveness in an increasingly globalised market. Therefore, it is also important that any international investment agreement include a provision which prohibits countries from decreasing their environmental standards in order to attract investment.

In summary, if an international investment agreement is to lead to sustainable development, it should include both a code which mandates international investor behaviour with respect to the environment and sufficient latitude to permit countries to regulate investment when it becomes clear that it is having a negative environmental impact. It should also include a provision that prohibits countries from decreasing their environmental standards in order to attract investment. The next chapter will examine the provisions of the MAI to determine whether it incorporates these elements and whether it contains any other provisions which may affect the environment.

# CHAPTER 3: THE MULTILATERAL AGREEMENT ON INVESTMENT

## I. Introduction

Some commentators believe that the MAI could go a long way to establishing necessary foundation rules for foreign investment[360]. For example, Avramovich states that "the OECD is negotiating the MAI to serve as a comprehensive agreement for international investment to improve upon the crazy quilt of bilateral and regional multilateral treaties."[361] This chapter examines the MAI to determine whether it meets the criteria of a sustainable international investment agreement set out in chapter 1 and 2. It considers whether the MAI provides a certain and stable liberalised investment regime that does not discriminate against foreign investors, whether it includes provisions to govern multinational investor behaviour, particularly with respect to the environment, and whether it allows countries to regulate investment when it becomes clear that investment has had a negative impact the environment.

Part II of this chapter traces the history of the MAI OECD negotiations and outlines the current state of those negotiations. It explains that OECD developed nations began to negotiate an international investment agreement in 1995. The negotiations have been supported by the developed nation business community, but criticised by developing countries. These countries believe that they should be involved in the negotiations because of the huge impact the MAI will have upon the global economic system and because they believe they will be pressured into signing the agreement. The negotiations have also been criticised by NGOs, who issued such a powerful protest statement against the MAI in 1997 that it stalled negotiations. The negotiations were stalled again in

---

[360] J. Burns and E. Chrysler, "Multinational Corporate Growth: The Need for Multinational Control" (1997) 141 Foreign Investment in Canada Report Bulletin 1 at 3.

[361] M. P. Avramovich, "The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?" (1998) 31 The John Marshall Law Review 1201 at 1275.

October 1998 and have not started again. It is not clear whether the MAI will ever be signed. If it is, it will form a global investment treaty. If it is not, it will form a negotiating text for investment talks in the WTO. Either way it is important to look at the draft provisions in the MAI.

Part III considers the primary provisions of the MAI draft text, paying particular attention to those provisions which relate to the environment. Section A outlines the draft preamble which indicates the parties' intentions to create a binding multilateral investment agreement, to pursue sustainable development, and to incorporate a non binding code to govern corporate behaviour. Section B explains that the MAI will have a wide scope because of its asset based definition of investment and also because it incorporates all sectors of an economy except those which are specifically exempted.

Section C outlines that the MAI requires the liberalisation of national laws relating to both the establishment and the operation of investments by foreign investors. The primary obligations under the MAI are the national treatment and most favoured nation obligations. These oblige countries to treat foreign investors at least as favourably as they treat other foreign and domestic investors and may in fact permit a country to treat foreign investors more favourably than domestic investors. In section D, this paper notes that the MAI prohibits countries from imposing performance obligations upon investors. Section E explains that as an exception to the prohibition on performance obligations, a country may impose some types of performance obligations upon an investor when it believes this is necessary to protect human, animal or plant life or health. This is the only provision which may give states the regulatory latitude necessary to protect their environment. It is the only "environmental exception" provision in the MAI: countries may not derogate from any of their other MAI obligations to protect the environment. Section E also introduces a provision which aims to prevent countries from lowering their environmental standards in order to attract investment.

Section G notes that the MAI has extensive dispute resolution provisions which permit an investor to sue a state whenever an investor alleges that a state has breached an MAI obligation resulting in a loss to that investor's assets. The MAI prohibits all expropriations of foreign investors' assets except those which are carried out for a public purpose. In section H and I, this chapter notes that the MAI will be in force for at least 20 years and that countries will be permitted to specifically reserve certain areas of their economies from compliance with the MAI.

This chapter concludes in part IV that the MAI requires countries to liberalise their investment rules and provide extensive protection to foreign investors. However, the MAI does not impose any obligations upon investors nor contain any provisions to regulate multinational investor behaviour. It is particularly important for this paper to note that it does not impose any obligations upon investors to protect the environment. Some provisions of the MAI may restrict countries' ability to protect their environment.

## II. State of Negotiations

### A. Negotiations Commence

During the Uruguay Round of trade negotiations, it became clear to the OECD countries that they would not be able to successfully negotiate a comprehensive investment agreement within the WTO. However as OECD countries are responsible for over three quarters of all foreign direct investment, they kept the negotiation of an investment agreement firmly on the OECD agenda[362]. They determined that they had failed to get a comprehensive investment agreement primarily due to opposition from developing

[362] "Ministers Discuss Environmental Aspects of Controversial Multilateral Investment Pact" (1998) 21 International Environment Reporter 355 at 355.

countries[363] and decided to negotiate an investment agreement among themselves.

In 1993, the OECD commissioned a study of the feasibility of a multilateral investment agreement[364]. The results were positive, and so in May 1995 the OECD established a negotiating group to draft an agreement which would:

- Provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute resolution procedures; and
- Be a free standing international treaty open to all OECD Members and the European Community and to accession by non-OECD Member countries.[365]

The eventual aim of the negotiating group is to establish a regime for investment which is comparable to the WTO regime for trade[366]. The regime will facilitate the movement of capital across national borders by setting rules which restrict countries from using legislation, policies and programs to impede capital movement[367]. The MAI initiative will substantially extend the scope of the OECD codes[368] discussed in chapter 1 and unlike the codes be open to accession by non-OECD countries.

## 1. Support for Negotiations in the OECD

The negotiations are obviously supported by the member countries of the OECD. Those

---

[363] E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1017.

[364] See *MAI Chronology - Events and negotiations* available at http://www.dfait-maeci.gc.ca/english/trade/chrono-e.html.

[365] Standing Committee on Foreign Affairs and International Trade, *Canada and the MAI* (Canada: Canadian Government, 1997) at 12.

[366] *Ibid* at 11.

[367] T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 31.

[368] Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 838.

countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, France, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

The negotiations have also been supported by the developed country business community. In *A View from Business*, Worth says:

> "the international business community strongly supports negotiation of a wider investment instrument that includes right of establishment, national treatment and other investment protection (addressing expropriation, repatriation of profits and royalties, currency restrictions, fair and equitable treatment, and hiring freedom). To be meaningful, the exercise must also include a dispute resolution mechanism. In view of its expertise on investment, years of preparatory work, interest by its members and mechanisms to consult with the business community, the OECD is uniquely positioned to move this issue forward aggressively on the international agenda."[369]

### 3. Criticisms of Negotiations in the OECD

The support from the developed nations business community has been so strong that some commentators and developing nations believe that the MAI has in fact had too much support from business[370]. In support of this belief, they point to the example of the US Council for International Business. This Council is a major lobbyist for US business positions. It maintains a political presence within the OECD through its affiliation with the Business and Industry Advisory Council to the OECD. The position of the US Council means that US businesses have according to Caplan "been on the inside track right from the very beginning"[371] and in a position to unduly influence the negotiations.

---

[369]D.C. Worth, "A View from Business" in OECD, *The New World Trading System* (Paris: OECD, 1994) 213 at 214.

[370]W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 434.

[371]Caplan, *The MAI, Community, Visions, and Real Democracy* cited in W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 434.

The MAI negotiating group is made up of OECD party representatives who commenced their negotiations by conducting private meetings. Developing nations criticised the fact that they were being excluded from the MAI process given the huge potential impact the MAI could have upon them and demanded that they be allowed to participate.

The MAI will be open to accession by non OECD members. When the OECD Ministers launched the negotiations in 1995, they emphasised the open character of the MAI and stated that it should be open to non OECD members willing to meet its requirements[372]. Fitzgerald *et al* believe that the MAI will not just be open to developing nations - it will be almost mandatory for them to join, due to the considerable pressure on non members to sign if they want to attract foreign investment[373]. They comment that "by committing themselves to an international regulatory regime, developing countries would achieve a substantial reduction in investor uncertainty, which should lead to more and better investment by foreign, domestic and expatriate firms."[374] Countries who do not sign the agreement will not have the same credibility as those who do, and foreign investors may decide not to invest there[375]. Clarke and Barlow state that "put bluntly, if an MAI is concluded, it will be increasingly difficult for developing countries who want to attract foreign investment to remain outside."[376] Another commentator predicts that countries who receive financial assistance from the World Bank and the International Monetary

---

[372] W.H. Witherell. "Opening Address" in OECD. *Working Papers No 51* (Paris: OECD. 1997) at 14.

[373] E.V.K. Fitzgerald. R. Cubero-Brealy and A. Lehman. *The Development Implications of the MAI* (UK: University of Oxford. 1998) at 4.

[374] *Id.*

[375] *Ibid* at 6.

[376] T. Clarke and M. Barlow. *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books. 1997) at 27.

Fund may be obliged to sign the MAI[377]. Yet the MAI was being initially negotiated solely by developed nations. Developing countries fear that they could be pressured into signing an agreement which they played no part in negotiating - or forsaking foreign investment. They therefore argue that they should be included in the negotiations.

Developing countries further argue that they should be included in negotiations because of the huge potential impact of the MAI on the global investment environment and therefore upon all countries whether they sign the MAI or not. The MAI will set an international benchmark for states' behaviour towards foreign investors. Countries who do not sign the agreement will have their investment regime judged against the mark of the MAI, and their regime may be found wanting. Such countries may be forced to decrease their investment and other regulations in an effort to attract investors who would otherwise go to the more certain regime in MAI parties. This could lead to a downward regulatory spiral effect in countries who do not sign[378]. Developing nations argue that because of the dramatic impact the MAI will have upon them regardless of whether they sign it or not, they should be included in the negotiations.

## B. Negotiations Stall

The negotiations stalled in October 1997 after a group of 560 NGOs[379] in 67 countries issued a statement protesting against the MAI[380]. The NGOs stated that their primary concerns were that the MAI:

---

[377]W. Crane. "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 437.

[378]E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 4.

[379]Organisations included political parties, MAI opposition groups and environmental organisations such as Friends of the Earth.

[380]The statement is available at http://www.canadians.org/ngostatement.html.

- elevated the rights of investors far above those of governments and citizens without seeking to control their behaviour by imposing binding obligations upon them;
- failed to integrate economic, environmental and social policies to achieve sustainable development; and
- excluded developing countries and NGOs from negotiations.

The NGOs also expressed concern that the MAI would bind nations to one particular economic course for at least 20 years and therefore prevent future governments from revising investment policies to pursue any other economic course. The NGO coalition called upon the OECD and national governments to suspend negotiations and commence a comprehensive and independent analysis of the potential social, environmental and development impacts of the MAI.

The NGO protest and developing nations' criticisms had an impact upon the MAI negotiations. After the NGO protest, negotiators agreed to suspend talks until the OECD annual meeting in April 1998 so that countries could respond to NGO concerns. Many nations conducted inquiries into the effect of the MAI. For example in Canada, the House of Commons Standing Committee on Foreign Affairs and International Trade conducted an inquiry into the MAI, including public hearings in Ottawa. The OECD specifically urged each country to review its environmental legislation to ensure that the MAI would not interfere with it. The OECD commissioned a study into whether greater foreign investment would invariably lead to environmental degradation[381].

The negotiating group was expanded to include observers from countries and

---

[381] "OECD Multilateral Agreement on Investment to give more consideration to environment" (1997) 20 International Environmental Reporter 1041 at 1041.

organisations who were not part of the original MAI negotiating team[382]. However, as observers they have had no right to participate in the negotiations. Countries which have been attending the negotiations as observers include: South Africa, Argentina, China, Egypt, Hong Kong, India, Indonesia, Israel, Malaysia, Philippines, Singapore, Thailand, Belarus, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Croatia, Ecuador, Guatemala, Latvia, Lithuania, Peru, Dominican Republic, Romania, Slovak Republic, and Zambia[383]. Representatives from UNCTAD (United Nations Commission on Trade and Development), the IMF and the WTO have also attended.

At the annual OECD meeting in April 1998, negotiators agreed to further suspend official talks until October 1998 to continue their investigations.

## C. The Current State of the Negotiations

At a meeting of the parties in October 1998, talks were suspended once more, after France publicly withdrew from negotiations[384]. All other countries agreed to continue negotiating, but have substantial issues to resolve[385]. These include:

- Canada wants an exemption for its cultural industries, and Australia has supported it. The US and Japan are opposed to expansive cultural exemptions.
- The US wants strong labour and environment clauses, which are opposed by Mexico and South Korea.

---

[382] "NGO coalition including environmentalists vows campaign against MAI under way at OECD" (1997) 20 International Environment Reporter 1007 at 1007.

[383] OECD, *Working Papers No 51* (Paris: OECD, 1997) - List of participants.

[384] France withdrew because they were frustrated that the United States had suggested conditions which meant that the agreement would hardly apply to US investors. J. Burns and E. Chrysler "Multilateral Agreement on Investment: DOA" (1998) Foreign Investment in Canada - Feature Articles 399 at 399.

[385] J. Burns and E. Chrysler "Multilateral Agreement on Investment: DOA" (1998) Foreign Investment in Canada - Feature Articles 399 at 399.

- The United States wants to ensure that its Helms-Burton and D'Amato legislation, which are aimed at punishing those who invest in Cuba, Libya or Iraq, have an extra-territorial effect. The US claims the legislation is necessary for national security, and intends to apply it to foreign investors. The EU, Canada and Mexico have rejected the US position that this legislation should apply extra-territorially and want to include a clause that forbids countries from imposing their laws on other states.

One Canadian report states that " the idea of an (MAI) investment treaty appears to be in limbo until at least 2000."[386] It further states that "the OECD will continue to study the issue, but the talks are over."[387] However, the official position of the OECD negotiators is that the negotiations are paused while members deal with the strong public backlash against it[388]. The OECD Secretary General stated that the approval of the MAI was a matter of when, not if, and that as soon as parties corrected misinformation about the MAI given to the public, countries would sign the MAI[389]. As discussed above, there will be considerable pressure on non OECD countries to sign the agreement. If enough non members do sign, the MAI will take on the appearance of a global investment treaty[390].

If the talks stall further and the MAI is abandoned, the WTO will probably begin discussing a global investment treaty in earnest using the MAI as the basis of discussions

---

[386] J. Burns and R. Eberschlag "MAI: Down for the Count" (1998) 12 Foreign Investment in Canada News 5 at 5.

[387] *Id.*

[388] See OECD news release of 23rd October 1998, available at http://www.oecd.org/news_and_events.

[389] D. Mattern, "Democracy or Corporate Rule?" (1998) 58 Humanist 5 at 8.

[390] E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 7.

because it represents the desires of developed nations[391] and because it promises to be the most comprehensive and liberal multilateral investment framework in existence[392]. There are several indications that WTO talks are imminent. At the very least, discussions in the WTO regarding investment will take place by 2000 under the TRIMs agreement[393]. France stated when it pulled out of the MAI that it intended to continue to work towards a multilateral investment agreement by focusing its efforts on instigating talks in the WTO[394]. Canada too supports moving talks to the WTO[395]. In September 1996 the WTO signed the Singapore Declaration which established a working group specifically to look at international investment agreement issues. The Declaration states that any WTO negotiations on international investment will only be instituted after an "explicit consensus decision"[396]. However, Burt states that "realistically, the ability of developed country trade ministers to achieve their agenda through political manouvering and a linkage of concessions will likely enable the developed countries to set a course for negotiations on direct investment (in the WTO). The limiting language (the requirement for an explicit consensus decision before negotiations commence) in the Singapore Declaration will not have its current effect in a few years."[397]

Not everyone agrees that talks should be instituted in the WTO. European countries, the

---

[391] J. Startup, "An Agenda for International Investment" in OECD, *The New World Trading System* (Paris: OECD, 1994) 189 at 191.

[392] E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 1056.

[393] N. Grimwade, *International Trade Policy* (London: Routledge, 1996) at 328.

[394] See OECD news release of 23rd October 1998, available at http://www.oecd.org/news_and_events.

[395] See statement by Sergio Marchi, Canadian Minister for International Trade available at http://www.dfait-maeci.gc.ca/english/news/statements/98_state/98_031e.html.

[396] E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1050.

[397] *Ibid* at 1054.

USA and Japan all strongly oppose moving the MAI talks to the WTO, and most other MAI negotiating parties also oppose this[398]. Even if the talks are moved, there are no guarantees that establishing an investment agreement will be any easier for France and Canada at the WTO, given the consistent opposition of developing nations there[399]. One diplomat has been reported as saying "the MAI has become so political in some countries like Canada and France that ministers do not want to stand up for it. They think it's safer to put their cards in the WTO. This is ostrich behaviour."[400]

Regardless of the outcome of the actual MAI negotiations, it is vital to consider the draft MAI text. If the MAI is completed, it will probably become a global investment treaty and preclude talks in the WTO. If it is not completed, the draft text will form the basis of WTO discussions. Either way, it is important to analyse the impact that an investment regime based on the draft text will have upon the environment. This chapter will now outline and explain the primary provisions in the MAI.

## III. The MAI Draft Text

The provisions referred to in this paper are those in the April 28 1998 draft of the MAI, the most current draft at the time of writing.

### A. Preamble

Preambular statements indicate the intention of the parties when they made an agreement.

---

[398] D. Perry "Multilateral Investment: Considering the Options" (1998) Foreign Investment in Canada - Feature Articles 37 at 39.

[399] J. Startup, "An Agenda for International Investment" in OECD, *The New World Trading System* (Paris: OECD, 1994) 189 at 191.

[400] P. Hayden and J. Burns, *Foreign Investment in Canada - Digest* (Ontario: Carswell, 1998) at 374.

They do not form binding obligations upon parties[401]. The intention of parties is relevant when interpreting any obligations which are specified later in a treaty. For example, the *Vienna Convention on the Law of Treaties*[402] states that a treaty should be interpreted in good faith in light of its object and purpose as stated in the preamble[403].

The preamble of the MAI indicates the intention of the parties to create a liberalised investment regime, to recognise sustainable development, and to adopt the non-binding *OECD Guidelines for Multinationals*.

## 1. Investment Liberalisation

The preamble first recognises that international investment has assumed great importance in the world economy and has contributed considerably to the development of the contracting parties. It then states the main intention of the parties - to establish a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures. The other preambular statements indicate the parties' belief that investment liberalisation will lead to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards. The parties assume that these will be positive externalities arising from liberalised investment[404].

## 2. Environment and Sustainability

With respect to the environment and sustainability, several parties have suggested

---

[401]E. Patterson, "GATT and the Environment" (1992) 26 Journal of World Trade 99 at 99.

[402]8 ILM 691 (1969).

[403]Article 31.

[404]E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 17.

preambular statements which merely recognise that investment can play a key role in ensuring that economic growth is sustainable. Others have supported a clause which indicates that the parties actually intend to pursue sustainability. That clause is:

> "(the parties) resolve to implement this agreement in accordance with (international environmental law[405]) and in a manner consistent with sustainable development as reflected in the Rio Declaration on Environment and Development and Agenda 21 including the protection and preservation of the environment and principles of the polluter pays and the precautionary approach."

The *Rio Declaration* and *Agenda 21* were formulated at the United Nations Commission on Environment and Development (UNCED) Earth Summit in 1992. The Rio Declaration is a non binding statement of 27 broad principles to guide sustainable development. Agenda 21 is a non binding 800 page action plan to guide countries in pursuing sustainable development. The impact that a reference to sustainable development as specified in these documents may have upon the interpretation of the MAI will be discussed in Chapter 4. Stating that the MAI should be implemented "in accordance with international environmental law" raises the question of whether the MAI preamble is intended to set up a presumption that multilateral environment agreements have precedence over it. This will also be discussed in Chapter 4.

### 3. OECD Guidelines for Multinational Enterprises

The final preambular statement, which all parties agree upon, incorporates the *OECD Guidelines for Multinational Enterprises* ("the guidelines") while emphasising that the guidelines are non-binding and that multinationals need only observe them on a voluntary basis. The guidelines will also be annexed to the agreement[406]. The annexing provision states that such annexure does not alter the non binding character of the guidelines, nor are the guidelines to bear on the interpretation of the MAI.

---

[405]Several delegations are opposed to including these bracketed words - see note 8 of the draft text.

[406]Draft Agreement Part X.

The guidelines set behavioural standards for foreign investors with regard to the environment. They provide that enterprises should take account of the need to protect the environment within the framework of laws in the country in which they operate. In particular, they provide that firms should conduct environmental impact assessments and co-operate with environmental authorities. They should also take appropriate measures to minimise the risk of environmental damage such as adopting appropriate technologies, using environmental management systems, training workers and supporting public awareness programs. These relatively broad and non specific environmental guidelines are currently being reviewed by the MAI negotiating team[407].

While the guidelines are not binding, the Director for Financial Fiscal and Enterprise Affairs at the OECD states that they have strong political weight and have proven their value in the OECD region over the past twenty years[408]. Bridge is more circumspect and states that "the influence of the guidelines has been frankly, modest, though there probably have not been many flagrant breaches."[409] The guidelines have been included in the MAI, but negotiators have ensured that they remain unbinding. It is unlikely that any one could argue that a corporation is bound to follow the guidelines.

## B. Scope of Application

The definition of investment under the MAI has been discussed in chapter 1. Although negotiators have not agreed upon the final wording, the definition is certain to be an asset based one which encompasses evolving forms of investments such as intellectual property, portfolio investments, and debt financing. The MAI will relate to both the establishment

---

[407] "Ministers Discuss Environmental Aspects Controversial Multilateral Investment Pact" (1998) 21 International Environment Reporter 356 at 356.

[408] See http://www.oecd.org/daf/cmis/mai/wwpress.htm at 2.

[409] C. Bridge, "The OECD Guidelines and the MAI" in OECD, *Working Papers No 96* (Paris: OECD, 1997) 17 at 17.

phase and the operational phase of investments. Many investment agreements in the past have simply concentrated on the operational phase[410].

The OECD stated in October 1998 that "the recent global financial turbulence demonstrates the importance of promoting stable long term capital flows, and of encouraging patient capital as opposed to hot money."[411] However, the broad ambit of the definition means the MAI could afford protection to harmful speculative short term investment as well as to beneficial long term investment[412]. If a country is host to large amounts of speculative short term investments that country can quickly become financially unstable. Crane explains the danger of including private short term speculative investment under the protective umbrella of the MAI. "Asian markets provided an opportunity for foreign investors to profit from high returns for a while, but when investors decided to remove capital from the markets, the markets experienced an economic breakdown. A result of this chain of events is that many countries in the region have been left with serious financial difficulties."[413] Chapter 2 noted that some countries who experience financial difficulties caused by the movement of short term capital will sell off their natural resources to gain foreign exchange and thereby degrade the environment. If the MAI liberalises and protects short term capital flows, this effect may be exacerbated.

Chapter 1 noted that the MAI negotiators may modify the definition so that it only includes investments which create a significant stake in an economy. This modification will not exclude volatile portfolio investments. Although volatile investments may be short term, they may still be significant enough to give an investor a stake in a host

---

[410] R. Ley, "The Scope of the MAI" in OECD, *Working Papers No 51* (Paris: OECD, 1997) 16 at 16.

[411] OECD, News Release, 20 October 1998, available at http://www.oecd.org/news_and_events.

[412] Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 839.

[413] W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 455.

economy. They would therefore be included under the modified definition despite the recent OECD observation that this could lead to global financial turbulence. However, it is arguable that volatile investments are not an efficient use of capital [414], and therefore do not fall within the preamble, which states that the agreement is to contribute to the "efficient utilisation of economic resources". The *Vienna Convention* states that any treaty should be interpreted in light of its object as outlined in the preamble[415]. Therefore it is arguable that even though the definition unambiguously includes harmful speculative flows the parties did not intend the MAI to provide protection to such flows because they are an inefficient use of capital, and therefore that harmful short term flows should not be protected.

An investor under the MAI means a legal person resident in or constituted under the law of a party and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation[416]. The agreement will apply to the land, internal waters, territorial waters and overseas territories of any state. The general scope of the agreement is very broad as it covers all sectors in which investment occurs, except those which a country specifically includes in a reservation[417].

## C. Most Favoured Nation and National Treatment Obligations

### 1. Most Favoured Nation Obligation

Part III incorporates the major binding provisions of the MAI. It states:

> "Each contracting party shall accord to investors of another contracting party and to their investments, treatment no less favourable than the treatment it accords to investors of any other contracting party or of a non contracting party, and to the

---

[414]Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 839.

[415]See section III (A) of this chapter.

[416]Part II (1) (i ) and( ii).

[417]X. Musca, "Scope of the MAI" in OECD *Working Papers No 96* (Paris: OECD, 1997) 9 at 9.

> investments of investors of any contracting party or of a non contracting party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or disposition of investments."[418]

This provision ensures that any laws a country makes with regard to foreign investment are uniformly applied to foreign investors regardless of what country they are from. It is called the 'most favoured nation' ('mfn') clause after a similar clause that has been included in bilateral trade agreements since the 16th century[419]. The clause was first introduced to the investment sphere in the OECD *Declaration on International Investment and Multinational Enterprises* ('the Declaration') discussed in chapter 1. The MAI provision extends the obligation found in this Declaration[420] in two ways. In the Declaration, it is only necessary to give investors from member countries the same treatment you give to investors from other member parties. Under the MAI it will be necessary to provide investors from member countries with the same treatment as you give to an investor from any other nation, regardless of whether they are a member or not. In the Declaration countries are only obliged to provide the treatment to investors and their investments once they are established; under the MAI countries are oblige to extend the treatment to establishment measures as well.

## 2. National Treatment

The next section states:

> "Each contracting party shall accord to investors of another contracting party and to their investments, treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and

---

[418]Part III (2).

[419]World Trade Organisation. *Regionalism and the World Trading System* (Geneva: World Trade Organisation. 1995) at 5.

[420]The obligation is also found in subsequent OECD Codes such as the *Code on Liberalisation of Capital Movements and Current Invisible Operations* 1991.

sale or other disposition of investments."[421]

This is commonly known as a national treatment obligation[422]. National treatment means that governments must treat foreign investors and their investments no less favourably than they treat domestic investors and their investments. For example, if a government imposes a requirement on investors it should be no more stringent on foreign investors than it is on domestic investors. Similarly, if a government has an economic assistance program to benefit domestic investors, it must provide the same assistance to foreign investors.

National treatment was first applied to investments in the OECD *Declaration on International Investment and Multinational Enterprises* ('the Declaration'). This Declaration applied the national treatment obligation to the operational phase and not to the establishment phase of investments. Most BITs applied it similarly. The MAI therefore extends the scope of most BITs and the Declaration by applying the obligations to all stages of foreign investment. This means that the screening agencies that many nations have in place to review investment may be MAI-illegal[423]. Removing screening agencies and other establishment controls may prevent a country prohibiting a certain investor with a proven bad environmental record from investing in its country[424].

### 3. Application of Most Favoured Nation and National Treatment

These obligations do not prescribe a minimum or absolute level of treatment: they mandate a level of treatment relative to that already provided by the laws of a country.

---

[421] Part III (1).

[422] After its inclusion in article III of GATT, entitled "National Treatment of Internal Taxation and Regulation".

[423] Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 839.

[424] "OECD's talks on investment pact stall just as environment gets more play" (1998) 21 International Environment Reporter 194.

The treatment a country provides one investor under its law cannot be worse than the treatment it accords another investor under its law. This could have implications for developing countries who may not have legislated comprehensive environmental laws at the time they sign the MAI[425]. For example, in the course of utilising a new means of production in a developing country, a foreign investor may introduce new pollutants into that country. If the country attempts to regulate the pollution, the regulations will affect only the new investor. It is arguable that this would be a breach of the national treatment obligation and most favoured nation obligations because no domestic producers or other foreign producers would be subject to the regulation, while the new foreign investor is[426]. A foreign investor is being accorded relatively worse treatment than that accorded other investors.

Fitzgerald *et al.* state that the national treatment requirement is a comparative one[427]. It arguably incorporates the notion that foreign investors must be treated no less favourably than domestic investors only where the investors are in similar or comparable situations[428]. In developing countries, foreign firms are not easily comparable to domestic ones, so it is arguable that the host country is not required to give national treatment to the foreign firm. Biswajit *et al.* observe that "the obvious differences in sizes of the transnational corporations and an overwhelming majority of developing countries tend to render any attempt at comparing foreign and domestic enterprises in developing country territories

---

[425]E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 19.

[426]For example, it was argued in paragraph 36 of the Statement of Claim in *Ethyl Corporation v Government of Canada*, filed pursuant to Article 1116 and 1120 of NAFTA. There was no determination of the validity of the argument.

[427]E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 19.

[428]While one party suggested adding the words "to investors in like circumstances" to the clause so that this is clear, most delegations believe it already is clear based on their understanding of how Article III of GATT has been interpeted, and therefore believe that the addition is unnecessary and open to abuse. See the MAI Commentary at 11.

quite meaningless."[429] Therefore in regard to the example in the preceding paragraph, it could be argued that foreign investors are in a different position to domestic ones, and therefore the new environmental regulation would not breach the national treatment obligation. The regulation could still however be a breach of the most favoured nation clause if other foreign investors are comparable yet subjected to different treatment.

## 4. Non Discrimination and Investment Incentives

National treatment and most favoured nation obligations are commonly called the principles of non discrimination[430]. However, this can be misleading when considering national treatment. While national treatment prevents countries from discriminating against foreign investors, it does not prohibit countries giving foreign investors better treatment than it gives to domestic investors[431]. Better treatment is often provided to foreign investors in the form of investment incentives. As governments become increasingly competitive for foreign investment, they offer incentives in an attempt to attract it. As these incentives are available to foreign and not domestic investors, a foreign investor is in a better position than a domestic one.

Daly states that the proliferation of various investment subsidies may seriously distort the international allocation of investment without necessarily increasing its supply[432]. It may lead to situations where the cost of attracting the investment is more than the benefit of the investment. It could also lead to a large amount of investment flowing to an area that

---

[429] Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 840.

[430] A.P. Larson, "State of Play of MAI Negotiations" in OECD *Working Paper No 96* (Paris: OECD, 1997) 4 at 5.

[431] The Calvo doctrine adopted in the Andean Common market arrangement in South America would be an appropriate one if the MAI wished to ensure equality of treatment, rather than just protect foreign investors. This doctrine states "while aliens should be given equal treatment with nationals, they are not entitled to extra rights and privileges". Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 839.

[432] M. Daly, "Investment Incentives and the Multilateral Agreement on Investment" (1998) 32 Journal of World Trade 5 at 6.

a country does not necessarily have a comparative advantage in, and therefore result in resource allocation inefficiencies. The MAI negotiators have an opportunity to regulate investment incentives and remedy these problems. However, investment incentives will probably not be addressed specifically in the MAI. Daly states this is because it is difficult to comprehensively define what constitutes an incentive, and because negotiators do not want to stifle their own country's ability to attract investment while non parties continue to offer incentives[433]. If investment incentives are not included, countries will be able to continue to provide more favourable treatment to foreign investors.

Investment incentives are often conditional - that is, they are tied to performance obligations[434]. By imposing performance obligations, a country can ensure that they actually receive the benefits they expect from foreign investment. For example, a country may agree to give a foreign investor a tax break on the condition that the investor hire a certain percentage of local labour and transfer some technology. However, the MAI specifically prohibits performance obligations. Countries who sign the MAI and continue to offer incentives will no longer be able to tie them to many of the obligations they traditionally have done. The next section deals with performance obligations.

## D. Performance Requirements

### 1. Performance Requirements Generally

The MAI prohibits some specific performance requirements that national governments commonly impose on investors to ensure they reap the benefits they expect from foreign investment. Part III of the MAI states that parties shall not enforce or maintain any of the performance requirements listed in relation to either the establishment or the operation of an investment. The list is exhaustive and includes measures which require an investor:

---

[433] *Ibid* at 22.

[434] *Ibid* at 10.

"(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content[435];
(c) to purchase, use or accord a preference to goods produced or services provided in its territory;....
(f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory...;...
(i) to achieve a given level or value of research and development in its territory;
(j) to hire a given level of nationals;.."

This list is a substantial extension of those included under the *Agreement on Trade Related Investment Measures* (TRIMs), and includes all of the performance obligations that states commonly impose. Given this and the fact that imposing performance requirements upon either the establishment or operation of an investment is prohibited, it is unlikely that any performance obligations escape the list's ambit. However, as the list is exhaustive, countries may still require a type of performance obligation that is not indicated, as long as they do not breach national treatment or most favoured nation standards in doing so[436]. By prohibiting countries from "maintaining" any obligation, the provision has a retroactive effect. If a nation has already placed a condition upon an investment incentive, it will be committing an MAI-illegal act if it continues to hold an investor to the performance obligation. Parties are prohibited from requiring obligations from any investor - not just from investors who are based in an MAI signatory.

Crane states that the "ban on performance requirements is particular disconcerting because it creates a slippery slope of environmental deregulation for foreign investors"[437], and he provides an example of how such deregulation may occur. Some states in the US require a minimum percentage of recycled content in plastic containers. They encourage this by

---

[435]Laws requiring a given level of domestic content include laws requiring an investor to use a certain level of local labour, resources or services.

[436]E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 20.

[437]W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 444.

obliging investors to preferentially purchase materials with recycled content which come from local manufacturers. Such laws would not be enforceable against foreign investors due to the prohibition on measures which require an investor to purchase local goods[438].

A country is allowed to subject foreign investment to the performance requirements characterised in the list from (f) to (l) if it links the requirement to an advantage such as an investment incentive or subsidy. However, if the performance requirement is characterised as one in the list from (a) to (e), it will not be allowed under any circumstances.

## 2. The Special Case of Technology Transfer

Provision (f) prevents the use of any measure to ensure the transfer of technology or of a production process, except where this is required by a court or administrative tribunal or is consistent with the *Agreement on Trade-related Aspects of Intellectual Property* (TRIPs)[439]. This provision may be at variance with several multilateral environmental agreements[440]. Some global environmental treaties[441] contain elaborate provisions to facilitate the transfer of environmentally sound technology to developing nations so that they can perform their obligations under the agreements. For example, under the *Framework Convention on Climate Change* countries commit to take all practicable steps to promote, facilitate and finance technology transfer. *Agenda 21* states that governments should design fiscal and other incentives to encourage the private sector to transfer technology and that governments should purchase patents and licences [442].

---

[438] *Id.*

[439] Or where the obligation is tied to an investment incentive.

[440] Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 840.

[441] Such as the Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) and Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) 26 ILM 1987, the United Nations Framework Convention on Climate Change (Rio de Janeiro, 4 June 1992) 31 ILM 1992 and Agenda 21 (Rio de Janeiro, 4 June 1992).

[442] Agenda 21, section 34.18.

One of the techniques developing countries may use to ensure technology transfer occurs is to impose a performance requirement on a foreign investor to transfer the technology they use. This method has become particularly important as other methods begin to fail. Developed countries have become increasingly reluctant to encourage their investors to transfer technology for fear of reducing the profits of those investors[443]. Further, developing countries face increased costs if they want to purchase technology, as a result of the TRIPs agreement[444]. Performance obligations requiring transfer are one of the most effective options developing countries have to ensure they receive clean technology. Under the MAI, this option will be barred unless countries link the obligation to an investment incentive. This will severely inhibit developing countries' ability to access technology and may mean that they cannot perform their environmental treaty obligations.

The prohibition of performance obligations was a high priority for negotiators. Many countries impose many different performance obligations which contribute to the uncertainty and inconsistency that foreign investors complain of. However, removing a country's ability to impose such obligations takes away one of the only ways many developing countries could ensure they actually benefit from foreign investment.

## E. Provisions Relating to the Environment

### 1. Environmental Exceptions to the Prohibition on Performance Obligations

The MAI may include a provision which enables parties to apply the performance obligations set out in (b) and (c) on environmental grounds. That is, parties may require an investor to achieve a given level or percentage of domestic content or to accord a preference to goods produced or services provided domestically if this will further an

[443] J. Cameron and Z. Makuch, "Implementation of the United Nations FCCC" in J. Cameron, P. Demaret and D. Geradin (eds.) *Trade and the Environment* (London: Cameron and May, 1994) at 136.

[444] Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, April 15 1994).

environmental policy. The provision which allows this states:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and (c) shall be construed to prevent any contracting party from adopting or maintaining measures, including environmental measures:...
> (b) necessary to protect human, animal or plant life or health;
> (c) necessary for the conservation of living or non living exhaustible natural resources[445].

This formulation is very similar to that in Article XX of GATT[446]. It appealed to the negotiating team because it was a known quantity, applicable to WTO GATS and TRIMs agreements and also used in the *Energy Charter Treaty*[447]. While a majority of delegates see no reason for this provision, or consider that it is too broad[448], it will probably be necessary for the MAI to include some environmental exception, given the effective opposition of environmental NGOs to the treaty when it did not consider the environment. In the event that the MAI negotiations stall again and the text becomes the basis for discussions in the WTO, these provisions will probably be included in a WTO investment treaty as they are already known to WTO parties and because the WTO will be faced with similar opposition from environmentalists. These limited environmental exceptions to the prohibition on performance obligations will be analysed in chapter 4. Parties may not breach any of their other obligations in order to protect the environment, and the only other substantive provision which refers to the environment is a 'not lowering standards' provision.

---

[445]One delegation would like the words "within its jurisdiction" added to this paragraph to make it clear that it has no extra-territorial ramifications. See MAI draft text at note 31.

[446]Article XX (b) and (g).

[447]MAI Commentary at 27. However, some delegates argue a different formulation should be used as they believe the existing GATT jurisprudence on the provisions is problematic.

[448]See draft text, note 30.

## 2. 'Not Lowering Standards' Provision

The MAI may include a provision aimed at preventing countries from lowering their environmental standards in order to attract investment. This is aimed at preventing the pollution havens described in chapter 2 which form when countries lower their environmental standards or retreat from their support of internationally recognised environmental standards in order to attract investment[449]. The US suggested the inclusion of such a provision and is urging members to adopt similar language to the NAFTA Article 1114[450]. However, some countries dispute the need for the provision, and the Director for Financial Fiscal and Enterprise Affairs at the OECD has stated that the provision should not prevent governments from having the ability to adjust and lower their overall environmental policies over time as appropriate[451]. There are four alternative draft provisions which provide that parties should not lower their environmental standards in order to attract investment. Alternatives 3 and 4 are supported by just one party and will not be discussed in this paper. The other 2 alternatives have equal support and will be discussed in Chapter 4.

There are still 3 delegations who oppose any reference to the environment in the MAI, and business groups are also generally opposed to any environmental provisions. The Business and Advisory Committee stated on behalf of its members that the MAI should serve to increase investor confidence and should not be used to require specific levels of environmental protection. It does not believe that the MAI is an appropriate forum for environmental concerns, and opposes any binding environmental terms being included in

[449] See http://www.oecd.org/daf/cmis/mai/wwpress.htm at 2.

[450] "OECD's talks on investment pact stall just as environment gets more play" (1998) 21 International Environment Reporter 194 at 195. NAFTA Article 1114 states: "The parties recognise it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor."

[451] See http://www.oecd.org/daf/cmis/mai/wwpress.htm at 2.

the agreement[452].

## F. Investment Protection

A number of specific issues that foreign investors have complained of are dealt with in Part IV of the draft text entitled *Investment Protection*.

### 1. General Treatment

Whereas the most favoured nation and national treatment obligations are relative, the provision on general treatment is absolute. It provides that each party accord fair and equitable treatment and constant protection and security to the investments of foreign investors, and that foreign investors should not be treated any less favourably than they would be under international law. Specifically, it provides that parties shall not impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of the investments of investors from other parties.

This provision is similar to the national treatment obligation in that it prevents discriminatory treatment being provided to foreign investors, but allows foreign investors to be accorded preferential treatment. It does not require that fair and equitable treatment be accorded to all investors - just to foreign investors. The obligations in this provision only relate to investors who have already established investments, they do not oblige countries to provide an absolute standard of treatment to investors who are trying to establish an investment.

### 2. Expropriation

Although the incidence of expropriation has declined rapidly since the mid 1980s[453],

---

[452] "Environment still major issue in talks on OECD's Multilateral Investment Accord" (1998) 21 International Environmental Reporter 46 at 46.

[453] Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 844.

expropriation still concerns foreign investors. Generally under the MAI countries are not permitted to expropriate the investment of a foreign investor either directly, indirectly, or by taking any measures which have an equivalent effect[454]. There is one exception - expropriation or nationalisation is allowed in the public interest, in which case it must be done in a non discriminatory manner with due process and accompanied by prompt, adequate and effective compensation. The compensation must be the equivalent of fair market value just before the expropriation, and not reflect any change in the market value due to the fact that the expropriation became public knowledge. Neither expropriation nor public interest are defined in the MAI.

The expropriation clauses may leave a foreign investor in a better position than a domestic investor is in[455]. If a law is applied to domestic and foreign investors and has the effect of expropriation, foreign investors have the choice of using the dispute settlement in the MAI or the domestic court system. Domestic investors only have the domestic system available through which to seek compensation. Clarke and Barlow suggest that this, combined with the favourable treatment foreign investors may be accorded under the national treatment obligation and the investment incentives they may receive, means it will be advantageous for corporations to organise themselves so that they are considered foreign investors in every country in which they operate[456].

The rules of international law will apply to the determination of whether or not there has been an expropriation, and how much the compensation should be paid. Shrybman states that this is problematic, as the international law on the subject of expropriation has been greatly influenced by the US position which reflects the fact that private property rights

---

[454]This is nearly identical to the provision on expropriation in the NAFTA investment chapter - Article 1110.

[455]T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) cit at 46.

[456]*Ibid* at 87.

have constitutional protection in that country[457]. This will be discussed further in Chapter 4.

### 3. Privatisation

Foreign investors are involved in at least two thirds of all privatisations carried out around the world[458]. In the event of privatisation, the national treatment and most favoured nation provisions will apply. The procedures governing and essential features of each prospective privatisation must be made publicly available. The MAI specifically states that there is no obligation upon parties to conduct privatisations.

## G. Dispute Resolution

The negotiating group had a mandate to ensure the MAI contained comprehensive and effective dispute settlement procedures[459]. There are two types of dispute settlement provisions contained in Part V - those for state-state disputes, and those for investor-state disputes.

### 1. State-State Disputes

In state-state disputes, the dispute settlement mechanism is similar to that provided in the WTO[460]. Parties are expected to enter into mutual negotiations. If these fail after 60 days, either party can request that the Group of Parties consider the matter. If this also fails to resolve the issue, the parties can move to mediation or arbitration. Arbitration is

---

[457]S. Shrybman, "The MAI and Dispute Settlement" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives. 1998) 48 at 56.

[458]H. F. French. "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) at 158.

[459]A.P. Larson. "State of Play of MAI Negotiations" in OECD *Working Paper No 96* (Paris: OECD. 1997) 4 at 6.

[460]WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

performed by a three member panel chosen from a rotating group of highly qualified, independent, and impartial individuals who are each nominated for five years. The panel must publish its findings of law and fact, and can award a declaration, a recommendation, pecuniary compensation or any other form of relief. There is no appeal from this tribunal, though a party may apply to the Group of Parties to have the award nullified. There is provision for the tribunal to accept scientific or technical evidence on any factual matter concerning the environment, health or safety.

## 2. Investor-State Disputes

### (a) The Scope of the Dispute Resolution Provisions

Customarily under international law only nations have rights arising under treaties[461]. However, the OECD parties have always agreed that investor-state dispute settlement procedures should be provided under the MAI[462] so that governments do not always have to be a party to investment disputes. The investor-state regime outlined in the MAI is very similar to that provided under the NAFTA[463]. It provides that investors can commence proceedings against a state "concerning any alleged breach of an obligation under this Agreement which causes loss or damage to that investor or its investment."[464] There is no corresponding right enabling a state to commence proceedings under the MAI against an investor[465], but the state may choose to make the MAI binding in its own court system and thereby commence an action against an investor in its national court.

---

[461] S. Shrybman. "The MAI and Dispute Settlement" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives. 1998) 48 at 52.

[462] M. Baldi. "Dispute Settlement" in OECD *Working papers No 96* (Paris: OECD. 1997) 28 at 29.

[463] Chapter 11. Section B.

[464] Section 1.

[465] There is probably no need for states to have such a right. as the MAI imposes no binding obligations upon foreign investors that could be enforced by states.

Commentators have questioned whether an investor must incur loss or damage before it brings a claim, and whether the loss may include a lost opportunity to make profits from a proposed investment[466]. The Commentary states that:

> "an alleged breach of the MAI must be causally linked to loss or damage to the investor or investment before the investor has standing, but the damage, while imminent, would not need to be incurred before the dispute is ripe for arbitration. Further, a lost opportunity to profit from a planned investment would be a type of loss sufficient to give an investor standing to bring an establishment dispute under this article, without prejudice to the question of whether a specific amount of lost profits might later prove too remote or speculative to be recoverable as damages. The claim would be initiated on the basis of allegations of loss or damage, but their existence and actual amount would remain to be demonstrated, along with the remainder of the investor's case, during the proceedings on the merits of the dispute."[467]

A wide range of actions affecting either the establishment or operation of foreign investments will enable an investor to invoke the dispute resolution process. Under these provisions, an investor may in some circumstances be able to institute a claim that it has lost an opportunity to make a profit before it has even entered a country.

**(b) Procedures Under the Dispute Resolution Provisions**

The MAI states that an investor-state dispute should, if possible, be settled by negotiation or consultation, but does not require disputants to participate in any negotiations. The investor can choose to submit the dispute for resolution to:

> "a. any competent court or administrative tribunal of the contracting party to the dispute[468];
>
> b. in accordance with any dispute settlement procedure agreed upon prior to the dispute arising;

---

[466]Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 842.

[467]MAI Commentary at 38.

[468]Whether this is available will depend upon whether a party chooses to make the MAI directly enforceable in its courts.

c. by arbitration in accordance with this Article under:

i. The Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) if available[469];

ii. The Additional Facility Rules of the Center for Settlement of Investment Disputes[470];

iii. The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

iv. The Rules of Arbitration of the International Chamber of Commerce."

The rules of international law are applicable to the settlement of the dispute, rather than the law of the host party. Disputants are to bear their own costs. The tribunal can award a declaration, pecuniary compensation (including interest), restitution or any other form of relief. The tribunal will not be able to order changes to a country's laws, as some critics have suggested[471]. However, the fact that damages are available may inhibit a country making a law in the first place if they are wary of paying large pecuniary compensation. Similarly to the state-state regime, the tribunal can request scientific or technical information on the environment from appropriate experts.

The parties give unconditional consent to submit to arbitration. Fitzgerald *et al.* state that this may mean that the provision is used as a form of harassment[472], as there is no limit to the number of times that an investor can allege a breach and commence new proceedings. The MAI has partly addressed this concern by allowing parties to notify the Depositary

---

[469] This will be available when both the host country and the investor's home country are parties to the ICSID.

[470] This will be available when only one of the countries involved is a party to the ISCID.

[471] E.M. Burt. "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1046.

[472] E.V.K. Fitzgerald. R. Cubero-Brealy and A. Lehman. *The Development Implications of the MAI* (UK: University of Oxford. 1998) at 24.

that they only consent to arbitration on the condition that the investor waive in writing the right to initiate any other dispute settlement procedure with respect to the same dispute and withdraw from those proceedings before it is concluded.

While the MAI does not provide a right of appeal under either the state-state or investor-state regime, parties to the *New York Convention Act*[473] may seek judicial review of an arbitral decision made under the MAI or refuse to enforce that decision if the recognition or enforcement of the decision would be contrary to the public policy of that country [474].

The investor-state dispute settlement provisions will be a powerful tool for foreign investors. The mere threat of litigation may generate considerable political clout, as the costs of arbitration are usually very high and barely affordable for poorer developing countries, particularly when they may extend over an indefinite period[475]. In relation to the similar investor-state dispute settlement regime under the NAFTA, Clarke and Barlow state that "it has been shown that various US corporations have successfully used the NAFTA takings rule behind the scenes to subvert the Ontario government's plans for public automobile insurance, the federal government's proposals for the plain packaging of cigarettes, and the repudiation of contracts to privatise airports."[476] Chapter 4 will discuss how investors may use the investor-state regime to resist environmental regulation.

## H. Reservations

Parties may depart from their obligations under the MAI to protect their essential security

---

[473]United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards Convention Act (New York, 10 June 1958) 330 UNTS 3.

[474]S. Shrybman, "The MAI and Dispute Settlement" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 48 at 61.

[475]E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 24.

[476]T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 43.

interests and public order, or to implement monetary and exchange rate policies. They may also adopt laws which are MAI inconsistent as temporary safeguards for up to six months when they experience a severe balance of payments difficulty. If a country who would normally be forced to sell off their natural resources in order to regain foreign exchange utilises these clauses this may assist it to protect the environment.

Each party will be able to lodge exceptions to the basic rules of the MAI to cover situations where that party is not prepared to grant national treatment to foreign investors or where it wishes to retain full freedom of action. Annex A to the MAI will list measures that are presently in force in a country that do not conform to the MAI national treatment and most favoured nation sections (and possibly other sections[477]). The measures listed will be able to be maintained and amended, but their non-conforming characteristic must not be increased. Some environmental laws could be listed in this annex. There is no agreement yet as to whether parties will be able to add to this schedule after the agreement has come into force[478].

Annex B will list specific sectors and sub-sectors in which countries do not want the national treatment and most favoured nation provisions to apply. Countries will be able to list new non-conforming measures within a specified sector listed under Annex B. Each country must justify why it wants to exempt a particular area or law. Annex B has been controversial. Some countries believe that it undermines the MAI, while others believe that it makes it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries who lodge reservations[479]. In any case, the inclusion of reservations such as these will be necessary in many countries to win political support for

---

[477]Which other sections may be included is still being negotiated.

[478]Corporate Watch *NGOs campaign against investment agreement* available at http://www.igc.org/trac/feature/planet/mai_bissio.html

[479]MAI Commentary at 61.

the MAI[480]. Most countries have exempted their financial, banking and air transport sectors. Several have also exempted mining and telecommunications. Canada intends to reserve its right to regulate freely with respect to education, health and social services, culture, programs for Aboriginal people and programs for minority groups[481]. Its intention to reserve its cultural sector has been particularly controversial and was partly responsible for negotiations stalling.

Countries who accede to the treaty after it comes into force will be allowed to lodge in Annex B a similar list of sectors and sub-sectors where they have or may in the future have non-conforming measures. However, they may not be at such liberty to do so as the developed nations who sign the agreement up front. If a developing country attempts to sign on but exempt important sectors, the developed parties may conclude that the country is not sufficiently stable to sign on, and block their accession[482].

## I. Other Provisions

Transparency and public dissemination of national measures which affect foreign investment were considered essential to the operation of the MAI to reduce the regulatory uncertainty many foreign investors are faced with[483]. The MAI requires each contracting party to publish or make publicly available all its laws, regulations, procedures, rulings and decisions (administrative and judicial) which are pertinent to foreign investment. This does not represent a problem to most developed countries who are already required to

---

[480] T. Clarke and M. Barlow. *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books. 1997) at 45.

[481] Department of Foreign Affairs and International Trade *MAI* available at http://www.dfait-maeci.gc.ca/english/trade/backgro-e.htm at 4.

[482] As the specific terms of accession will be negotiated between the applying country and the existing OECD and MAI members.

[483] MAI Commentary at 13.

publish their laws under the OECD investment codes. However, it represents a huge administrative burden on developing countries, particularly small or poor ones[484]

Countries will not be able to leave the agreement until the MAI has been in force for at least 5 years. If they do withdraw after this time, they must give 6 months notice and they will be required to leave the rules in effect for another 15 years after this notice. This is to provide stability and security to investors[485]. It effectively means that the MAI will be in place for at least 20 years. This is a long time frame - under the WTO and NAFTA, countries may withdraw after giving just 6 months notice of their intention to do so[486].

## IV. Conclusion

The provisions of the MAI have been designed to respond to the concerns of foreign investors from developed nations who do not believe the current regime of investment codes and BITs provides them with the freedom, certainty and stability they require to continue investing. The MAI prohibits countries from discriminating against foreign investors relative to both domestic investors and other foreign investors. It prevents countries from imposing discriminatory restrictions upon foreign investors both when they seek to establish an investment in a country and when they operate inside it. It provides investors with a very strong dispute resolution scheme in case a host country breaches an obligation. However, it goes beyond providing equal treatment, certainty and stability, and may actually put foreign investors in a better position than domestic investors. It therefore fulfills and surpasses the first criterion that this paper determined a sustainable international investment agreement should meet - it provides a certain, liberalised and non-

---

[484] E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 19.

[485] T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 51.

[486] WTO Article XV, GATT Article XXXI, NAFTA Article 2205.

discriminatory regime for international investment.

The second criterion that this paper established was that the agreement should govern multinational investor behaviour. While the MAI gives extensive protection to investors, it does not impose any obligations upon them. It does not include any binding provisions which regulate powerful multinational[487] investor behaviour. Some commentators have questioned the wisdom of introducing an instrument which provides solely for investment protection at a time when the host-foreign investor relationship has changed in favour of the latter[488]. Most developing countries have now entered into BITs which protect foreign investors. Most countries are also endeavouring to attract a larger share of foreign investment and have therefore adopted policies which provide preferential treatment to foreign investors. It is unlikely that this situation will change, given countries' increasing reliance on international investment. Biswajit *et al* state that any investment agreement "should allow for the a balancing of the rights of investors in the host countries and their obligations "[489]. The MAI will not ensure that investors have obligations which balance their rights. For this paper, it is particularly important to note that the MAI will not oblige investors to protect the environment they operate in.

The third criterion was that the MAI allow countries the latitude to act to protect their environment when it became clear that investment was leading to development that was not sustainable. The stringent obligations the MAI places upon states may restrict their regulatory competence to protect their environment. In protecting foreign investors against discriminatory treatment, the MAI may prevent developing countries from

---

[487]The strength of multinationals is indicated by the fact that of the 100 biggest economies in the world, 51 are corporations. In 1994, Mitsubishi sold US$175.8 billion worth of products, while the GDP in Indonesia was $174.6 billion, in Iran was $63.7 billion, and in Bangladesh was $26.8 billion. United Nations, *World Investment Report 1996* (New York: United Nations, 1996).

[488]Biswajit *et al*., "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837 at 837.

[489]*Ibid* at 843.

instituting environmental measures where a foreign investor introduces a new pollutant and will be the only one affected by the measure. The MAI also outlaws performance obligations either absolutely or unless they are tied to an investment incentive. Imposing performance obligations is one of the only ways in which developing nations can ensure that they receive the clean technology they hope foreign investment will bring. The threat of an investor taking action under the dispute resolution scheme to receive compensation after an environmental regulation has led to expropriation of their investments may discourage countries making the environmental regulation at all.

At the same time as the MAI restricts what some countries can do in relation to the environment, it contains some provisions which will permit and ensure that countries can protect their environment. For example, a country can exempt a current environmental law that is inconsistent with the MAI under Annex A as long as it does not increase the laws' MAI inconsistency in the future. A country can depart from its MAI obligations in order to stabilise its foreign exchange and thereby may avoid having to sell off natural resources in a financial crisis. However, the major provisions which relate to the protection of the environment are the environmental exceptions to the performance obligations provisions and the provision on not lowering standards. Chapter 4 will discuss these.

# CHAPTER 4: ENVIRONMENTAL PROVISIONS IN THE MAI

## I. Introduction

If the MAI is to result in investment which contributes to sustainable development it must ensure that countries have the ability to introduce and maintain environmental laws which are appropriate for their environment and stage of development. It must not interfere with the ability of nations to act decisively to protect their environment. It must contain provisions which prevent countries from lowering their environmental standards in order to attract investment. The MAI addresses these issues in 3 places - in a not lowering standards provision, in the preamble, and in a provision which provides an exception to performance obligations requiring domestic content. None of these provisions will effectively promote sustainable development. In fact, the MAI as currently drafted has the potential to severely erode the ability of parties to protect their environment and may conflict with international environmental programs and agreements[490].

Part II of this chapter will discuss the 'not lowering standards' provision in the MAI. It argues that this provision is unlikely to substantially influence many parties' behaviour and prevent them from lowering their environmental standards to protect the environment as it is not a binding obligation and does not allow states to utilise the dispute resolution provisions in case another state lowers their standards.

Part III of this chapter discusses the MAI preamble, which includes a reference to sustainable development as reflected in the *Rio Declaration* and *Agenda 21*. Neither of these documents reflect a clear picture of what making international investment sustainable will involve. In any case, the recent *United States - Import Prohibition of Certain Shrimp*

[490] W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 429.

*and Shrimp Products*[491] decision (the 'Shrimp Turtle' case) of the WTO Panel and Appellate Body shows that the inclusion of sustainable development in the preamble of an economic agreement may not actually have a significant effect upon the interpretation of that agreement. The preamble also states that the MAI should be implemented in accordance with international environmental law. This may permit governments to protect their environment in accordance with environmental treaties regardless of the impact of this upon investment or investors.

Part IV describes how the MAI permits countries to implement otherwise MAI illegal performance obligations in order to protect their environment. The performance obligations which will be permitted are those which require an investor:

> (b) to achieve a given level or percentage of domestic content; or
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from its territory.

The provision which allows states to implement these performance obligations states:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and (c) shall be construed to prevent any contracting party from adopting or maintaining measures, including environmental measures:
>
> > (b) necessary to protect human, animal or plant life or health;
> > (c) necessary for the conservation of living or non living exhaustible natural resources.

This provision is similar to Article XX of GATT[492]. The GATT jurisprudence shows that it will be very difficult for a country to successfully invoke the provision. This paper will discuss several components of the provision with reference to GATT and WTO jurisprudence.

---

[491] Report of the Panel - WT/DS58/R. 15 May 1998 and report of the Appellate Body WT/DS58/AB/R. 12 October 1998.

[492] Article XX (b) and (g).

In part V this chapter will explain how the investor-state dispute resolution provisions enable investors to sue national governments if an environmental law causes loss or damage to their investment, or has the effect of expropriating their investment. The dispute procedures will permit investors to bring a wide range of disputes. Most commentators believe that investors will have strong cases if they plead that their investments have been expropriated in addition to pleading general loss and damage. Several recent cases filed under *North American Free Trade Agreement* (NAFTA)[493] show how investors can use an investor-state dispute settlement regime to challenge states' environmental legislation.

## II. 'Not Lowering Standards' Provision

The MAI negotiating group began to consider incorporating a 'not lowering standards' provision in the MAI after the 1997 protest of the NGO coalition. The coalition argued that so many countries were under increasing pressure to lower their environmental standards in order to achieve greater shares of foreign investment that a 'race to the bottom' could be observed and would lead to the formation of pollution havens. As noted in chapter 2 there is evidence that some governments are lowering their standards in particularly toxic and ecologically intense industries, although there is substantial debate over whether governments *generally* lower their environmental standards and facilitate pollution havens. The MAI draft contains 2 alternative provisions which aim to discourage countries from lowering their environmental standards in order to attract investment.

### A. Alternative 1

Alternative 1 is a 'soft' option and similar to the provision in NAFTA on not lowering

---

[493] (1994). United States, Canada and Mexico.

environmental standards[494]. It states that:

> "The parties recognise that it is inappropriate to encourage investment by lowering environmental standards (or measures)[495]. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such standards as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a party considers that another party has offered such an encouragement, it may request consultations with the other party."[496]

This provision is deliberately framed as an understanding among the parties, rather than an obligation upon them[497]. While parties recognise that it is inappropriate to lower their standards, it is not mandatory that they refrain from doing so.

If a country did lower its standards, parties could not allege there had been a breach of the MAI and utilise the dispute resolution clauses. Instead, the provision specifically provides a forum apart from the MAI dispute resolution if a party suspects another of a breach - the forum of consultation. The right to have consultations is a much weaker one than a right to complain to a tribunal[498]. In relation to the NAFTA provision on which this clause is based, Jeffery states that "this provision completely fails to provide access to any appropriate formal dispute resolution mechanism. While it emphasises cooperation, it utterly ignores the realities of the problem..... It is merely an expression of good intentions

---

[494] Article 1114 (2).

[495] The negotiating group has not decided whether to use the word 'standards' or the word 'measures'.

[496] Part III - Additional Clause on Labour and Environment.

[497] See comments in relation to NAFTA by R.B. Ludwiszewski and P.E. Seley, "Reconciling Free Trade and Environmental Protection" in S.R. Rubin and D.C. Alexander (eds), *NAFTA and the Environment* (Netherlands: Kluwer Law International, 1996) 1 at 12.

[498] M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" (1993) 51 University of Toronto Faculty of Law Review 204 at 233.

and nothing else."[499]

### B. Alternative 2

Alternative 2 is a harder option. It states that:

> "a party shall not waive or offer to waive or otherwise derogate from, or offer to waive or otherwise derogate from environmental measures (or standards) as an encouragement for the establishment, acquisition, expansion or retention of an investment by an investor."

This alternative provision specifies a mandatory obligation - parties are bound not to waive or offer to waive environmental standards in order to encourage investment. If they do, they are liable before the dispute resolution forums provided in the MAI. Due to this, some parties have argued that the word 'shall' should be replaced with 'should', so that the section forms a statement of intention rather than an obligation. They argue that using 'shall' will limit the discretion of environmental authorities to waive a regulation and use non regulatory techniques such as consultation and persuasion to ensure environmental protection[500]. If the 'shall' formulation is used, parties will probably add the sentence in Alternative 1 which provides for consultation rather than dispute settlement procedures upon a breach[501].

### C. Critique

Most pollution havens that have formed, such as the maquiladoras region, have not formed because countries overtly lowered their standards, but rather because they did not

---

[499] M.I. Jeffery, "The Legal Framework for Environmental Regulation under NAFTA" in S.R. Rubin and D.C. Alexander (eds), *NAFTA and the Environment* (Netherlands: Kulwer Law International, 1996) 207 at 211.

[500] MAI draft, note 126.

[501] MAI draft, note 126.

*enforce* their environmental standards. Most countries have environmental laws which appear comprehensive, but many do not have the resources, or in some cases the will, to enforce the standards. This paper noted in chapter 2 that local leaders have been known to offer a tacit commitment to foreign investors to relax the enforcement of environmental standards. It is not clear whether either of the MAI 'not lowering standards' provisions address this issue. It is arguable that while the terms 'lower' or 'waive' probably do not include a covert omission to enforce a regulation, the phrase 'otherwise derogate from' can be interpreted to encompass a lack of enforcement. However, to be clear, the final provision should specify that countries must not offer to lower, to not enforce, or to otherwise derogate from them their environmental standards [502].

The negotiating team has not decided whether to use the term 'standards' or 'measures' in either provision. 'Standards' probably only includes prescriptive directions to investors on how to behave in relation to the environment and does not encompass the enforcement of such directions. Support for this interpretation comes from the WTO *Agreement on Technical Barriers to Trade*[503] which defines standards as rules or guidelines[504]. However, 'measures' could be interpreted to include those directions which relate to enforcement as well as those which prescribe behaviour. 'Measures' are defined in NAFTA to include any law, regulation, procedure, requirement or practice[505]. To ensure that the 'not lowering standards' provision has the maximum effect and prevents countries from offering to not enforce their legal environmental requirements, the word 'measures' should be preferred

[502]This paper will not deal with how to solve the problem of pollution havens which form because investors know that a country does not have the resources available to enforce their environmental standards. The problem of countries who lack the resources to enforce their standards and the possibility of developed countries transferring funds to developing countries to assist them is potentially huge given the number of parties in the MAI, and could be the subject of another paper.

[503](Marrakesh, April 15 1994).

[504]Annex 1 section 2 - a standard is a document which provides, for common or repeated use, rules, guidelines or characteristics.

[505]Article 201 - General Definitions.

to 'standards'.

Another problem with both 'not lowering standards' provisions involves the ambiguity of what constitutes a lowered standard or measure. For example, does movement from a command and control regulation to a market based regulation constitute a lowered standard? The market based regulation may appear less prescriptive and therefore be classified as a lowered standard, though in fact be more effective at achieving environmental protection. Therefore a not lowering standard provision may limit the options governments have to ensure that the ecological intensity of development is decreased.

The effect of a not lowering standards provision on parties' activities will vary among states. In countries which currently have high environmental standards the provision may lead those countries to maintain high and effective standards for environmental protection. However in countries with low current standards Dunleavy reasons that "it would probably be possible to maintain a consistently low regulatory or enforcement standard to attract investment without violating the provision."[506]

About half of the drafting delegates support a binding provision on not lowering environmental standards while the other half will only support a non binding version, or oppose any version at all[507]. If the binding version is adopted, it will probably include a provision which provides for consultation, rather than dispute resolution, upon a party's breach. Both of the clauses are problematic because it is ambiguous whether they address the most common way states derogate from their standards, that is, by not enforcing them. The clauses may in fact restrict states' non regulatory options with regard to ensuring environmental protection. In summary, while the effect of a 'not lowering standards'

[506] M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA " (1993) 51 University of Toronto Faculty of Law Review 204 at 233.

[507] MAI Commentary at 25.

provisions will vary between countries the provision may not cause enough states to change their behaviour to such an extent that investment under the MAI becomes sustainable.

## III. Preamble

As discussed in Chapter 3, there is still debate among negotiators about the precise formulation of a preambular statement concerning the environment. The final draft will probably include a reference to sustainable development. The reference will not be to sustainable development generally, it will be to the specific formulation in the Rio Declaration and Agenda 21. The preamble will probably state that the parties:

> "Resolve to implement this agreement (in accordance with international law)[508] and in a manner consistent with sustainable development, as reflected in the Rio Declaration on Environment and Development and Agenda 21, including the protection and preservation of the environment and principles of the polluter pays and the precautionary approach."

Chapter 2 noted that the concept of sustainable development incorporates the ideas that: 1) national governments must be permitted to maintain appropriate environmental measures and 2) environmental policies should be integrated into development decisions. Do the statements in the Rio Declaration and Agenda 21 elucidate how these ideas should be applied in the field of international investment?

### A. Sustainable Development in the Rio Declaration and Agenda 21

The Rio Declaration and Agenda 21 are both official non-binding agreements which were developed at the UNCED Earth Summit in Rio de Janeiro in June 1992[509]. The primary aim of this conference was to reconcile environmental and development objectives through

---

[508]Some parties are opposed to including this bracketed text.

[509]D.F. Murphy and J. Bendell, *In the Company of Partners* (UK: The Policy Press, 1997) at 24.

the concept of sustainable development[510].

## 1. The Rio Declaration

The Rio Declaration on Environment and Development is a non binding statement of 27 broad principles to guide sustainable development[511]. It states that "states have... the sovereign right to pursue their own environmental and development policies"[512] and that "states shall enact effective environmental legislation."[513] These statements affirm a national government's right to make whatever environmental policies are appropriate for its state. Further, while the Rio Declaration stresses that countries should cooperate to preserve the global ecosystem[514], it primarily recognises that "in view of the different contributions to global environmental degradation, states have common but differentiated responsibilities."[515] States have different responsibilities to the environment because of their differing effect on it, different development priorities, and different environmental limits to work within. States therefore need to maintain their sovereign rights to act with regard to the environment. The Rio Declaration incorporates the first idea that this paper identified as essential to sustainable development - that governments be permitted to make appropriate environmental laws for their country.

In regard to the second criterion of sustainable development, that environmental policies are integrated in development decisions, the Rio Declaration intially mandates that

---

[510]L.K. Caldwell, *International Environmental Policy* (Durham: Duke University Press, 1996) at 110.

[511]D.F. Murphy and J. Bendell, *In the Company of Partners* (UK: The Policy Press, 1997) at 24.

[512]Principle 2.

[513]Principle 11.

[514]Principle 11 - "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem".

[515]Principle 7.

"environmental protection shall form an integral part of development policies and cannot be considered separate from it."[516] However, in principle 12 the Declaration expresses concern that countries may claim to integrate environment and development, but really aim to impose protectionist trade measures under the cloak of environmental protection. It states that "states should promote a supportive and open economic system..... measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[517] The Declaration does not, however, express caution that trade measures will be implemented in such a way that they have a disguised or unjustifiably negative impact on the environment. Principle 12 is primarily concerned with any effect that environmental measures may have on the open international economic system - and no other principle expresses the obverse concern. This means that arbitrators analysing the preamble to aid their interpretation of the MAI could acknowledge not only that the preamble states environmental and development policies should be made in concert, but also that the preamble requires them to scrutinise the environmental policy to ensure that it does not result in undue restriction on the freedom of the economic system. It is unlikely that there can be a true integration of environmental and development policies when one is subject to far greater scrutiny than the other. Therefore the Rio Declaration does not incorporate the second idea essential to sustainable development - it does not fully integrate environmental policies into economic decisions.

## 2. Agenda 21

Agenda 21 is a non legally binding blueprint to guide all levels of government in making environment related policies and promoting sustainable development. It is a 40 chapter and 800 page long action plan which extensively details goals and principles, but leaves the implementation of these goals and principles to the decision making institutions within

[516]Principle 4.

[517]Principle 12.

nation states. Governments may choose very different strategies to implement the common goals and objectives of Agenda 21. The document is indirect in places but it is as specific as it could be considering that it had to detail an action plan applicable to over 150 countries with different environments and development capabilities[518].

It deals with investment in 2 chapters. The first is Chapter 2 - 'International Co-operation to Accelerate Sustainable Development in Developing Countries'. This chapter recommends that states create an open, equitable, secure, non discriminatory and predictable multilateral economic system[519] and that all countries should be integrated into the world economy[520]. The MAI will help to achieve this. It further states that "investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and meet their needs in a sustainable manner, all without deteriorating or depleting resource bases. Sustainable development requires an increase in foreign and domestic investment."[521] Chapter 33 - 'Financial Resources and Mechanisms' - states that to help make economic growth and environmental protection mutually supportive countries should create economic conditions which enhance free trade[522].

Agenda 21 fails to meet both criteria necessary to achieve sustainable development. First, it does not encourage states to maintain the full gamut of measures it may use to protect the environment. It encourages countries to become part of the open global economic system. To do so they may need to abdicate some ability to regulate investment and use

---

[518] L.K. Caldwell, *International Environmental Policy* (Durham: Duke University Press, 1996) at 116.

[519] At 2.5.

[520] At 2.10.

[521] At 2.23.

[522] At 33.6.

economic measures if it becomes clear that being part of the global economic system is having some negative environmental impacts. Second, Agenda 21 pays no attention to how environmental considerations should be integrated in investment decisions. While some chapters state generally that countries should integrate their economic and environmental policies, the chapters which deal with investment assume that foreign investment will have a positive impact upon the environment and therefore do not require that investments be regulated with any consideration for the environment.

The Rio Declaration and Agenda 21 do not contain strong indications of how the character of international investment should be changed if it is to lead to sustainable development. They do not ensure that investment and ecological decisions are integrated. Even if the MAI more strongly elucidated the principles necessary to achieve sustainable development, what impact would this have on the actual interpretation of obligations under the MAI?

### 3. Interpreting Sustainable Development - The Case of the Shrimps and Turtles

Recent decisions of the WTO dispute Panel and Appellate Body in the *Shrimp Turtle* case provide an example of how a preamble in a liberalisation agreement which incorporates sustainability was used to interpret binding treaty provisions.

The facts of the case are that[523] in 1987 the United States passed regulations under the *Endangered Species Act*[524] aimed at preventing the incidental killing of sea turtles. The regulations required US shrimp trawlers to use turtle excluder devices (TEDs). In 1989, they passed section 609 which provided that shrimp harvested in other nations with technology that may adversely affect sea turtles could not be imported into the US unless those nations had a regulatory program and an incidental catch rate comparable to that of

---

[523]Panel decision 2.4 - 2.15.

[524](1973) Public Law 93-205, 16 U.S.C. 1531 *et. seq.*

the US. Guidelines which were subsequently implemented required that shrimp caught in other nations be caught using TEDs, that the regulatory scheme in that nation require the use of TEDs, and that the regulatory scheme be in place within 3 years. A US Court of International Trade decision meant that the time for implementation in some countries was shortened to just 4 months.

Over 1996 and 1997 India, Malaysia, Pakistan and Thailand instituted WTO proceedings against the US objecting to the US embargo on their shrimp. A panel was established to consider the matter, and scientific evidence was heard for 2 days. The US admitted that it had prohibited imports contrary to Article XI of the GATT 1994, but tried to show that this breach was allowable under Article XX. This article states:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination... or a disguised restriction on international trade, nothing in this Agreement shall be considered to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

**(a) The Panel Decision**

The Panel stated that the US had the right in Article XX to derogate from their GATT obligations but that in doing so, they must not frustrate or defeat the purposes or objects of the GATT agreement[525]. They noted that the objects and purposes of the GATT are found in the WTO preamble[526], which states that trade should be conducted with a view to raising living standards "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent

---

[525] At 7.40.

[526] At 7.42.

with their respective needs and concerns at different levels of economic development."[527]

This statement represents an amendment to the preamble of the original GATT 1947, which stated that parties should conduct trade with a view to developing the full use of resources of the world. The Panel considered the new statement along with other preambular statements which referred to the parties' aims to substantially reduce tariffs and to eliminate discriminatory treatment. It concluded that "while the WTO preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade."[528]

Upon deciding that the object of the agreement was economic development through the provision of a multilateral trading system[529], the Panel held that the US measure was contrary to this object. The measure was a serious threat to the trading system and could not be justified on any ground[530]. In concluding, the Panel noted that "even though the situations of the turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system."[531]

### (b) Appellate Body Decision

The Appellate Body disagreed with the Panel's analysis. They held that the Panel had looked into the object and purpose of the whole of the GATT [532] when they more

---

[527] *Id.*

[528] *Id.*

[529] At 7.43.

[530] At 7.44.

[531] At 7.61.

[532] At 116.

correctly should have considered the object and purpose of the specific provision in question [5.33]. The Panel should have considered the purpose of Article XX by looking both at the words in subsection (g)[5.34] and the words of the chapeau. Subsection (g) provides that a measure should be one which relates to the conservation of natural resources. The chapeau provides that parties can only take measures which are not arbitrary or unjustifiably discriminatory or do not represent a disguised restriction on international trade. The Appellate Body noted that the purpose of both the subsection and the chapeau is indicated by the preamble, which adds colour, texture and shading to all interpretations under GATT[5.35].

The Appellate Body noted that the negotiators at the Uruguay Round fashioned the new preamble while noting the Rio Declaration and Agenda 21 and in light of the knowledge they had of the environmental problems caused by unsustainable development[5.36]. The Appellate Body stated "those negotiators evidently believed... that the objective of "full use of the resources of the world" set forth in the preamble to GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947."[5.37]

The Appellate Body first discussed whether the US measure was one which was concerned with the conservation of exhaustible natural resources. The US measure was aimed at conserving sea turtles. India, Pakistan and Thailand argued that the phrase "exhaustible natural resource" meant the measure had to be concerned with conserving a finite resource such as a mineral, rather than a biological or renewable resource. The

---

[5.33] At 114.

[5.34] The US did not make an argument with respect to Article XX (b) before the Appellate Body.

[5.35] At 153.

[5.36] At 154.

[5.37] At 152.

Appellate Body stated that "recalling the explicit recognition by WTO members of the objective of sustainable development in the preamble to the WTO agreement, we believe... Article XX(g) of the GATT 1994 may be read as referring... to measures to conserve exhaustible natural resources, whether living or non living."[538]

The preambular reference to sustainable development was important in the Appellate Body's reasoning. However to support its decision it also referred to two past panel decisions which had decided that living organisms came within this definition of exhaustible natural resources, and four other international treaties which considered that 'natural resources' included living things[539]. It is arguable that even without considering the WTO preamble the Appellate Body could have decided that the seven species of sea turtles were an exhaustible natural resource.

The Appellate Body went on to discuss the meaning of the chapeau. It held that the chapeau should be interpreted as encompassing the right of a party to invoke an exception to the GATT rules to protect the environment[540] as well as the duty of that same party to respect the rights of other parties. While the Appellate Body prefaces this decision by reiterating that the new preamble which includes sustainable development must give colour, texture and shading to their interpretation of the agreement[541], the discussion of sustainable development and the determination of the meaning of the chapeau do not appear to be actually connected. The Appellate Body draws authority for its interpretation of the chapeau from the drafting history of the GATT[542] and past GATT/WTO decisions, not from the inclusion of sustainable development in the preamble

---

[538] At 131.

[539] At 130.

[540] At 156 - 157.

[541] At 153.

[542] At 157.

to the whole agreement. It is arguable then that the fact that sustainable development was included in the preamble did not significantly influence the Appellate Body's determination. Article XX correctly interpreted already had the meaning the Appellate Body determined. The Article is entitled "*General Exceptions*" and was obviously designed to be an exception to the GATT rules. If parties were still required to act in accordance with the agreement, they would not actually be 'excepted' from anything, and the exceptions provision would have no effect. The Appellate Body clarifies this in the *Shrimp Turtle* decision but did not need to refer to sustainable development to do so. The point was already obvious. The inclusion of sustainable development in the WTO preamble added little to the interpretation of the chapeau of Article XX.

The preambular reference to sustainable development had little influence upon the Panel's interpretation of the agreement. The preamble appeared to slightly sway the reasoning of the Appellate Body when it determined that 'exhaustible natural resources' included living organisms - but this had already been recognised in several panel decisions[543]. It had a negligible effect on the Appellate Body's determination of the meaning of the chapeau. Further, in spite of stating that the Panel did not need to interpret the object of the whole of the WTO, the Appellate Body did not disagree with the Panel's interpretation of that object. Both observed that "maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement."[544]

### (c) Implications for the MAI

Sustainable development may very well be an object of the WTO, but it is no way a primary object and it has a nebulous effect upon the interpretation of the rest of the

---

[543]For example, in *United States - Standards for Reformulated and Conventional Gasoline* (1996) 35 ILM 274 and *United States - Restrictions on Imports of Tuna* (1994) 33 ILM 839 (the "Tuna II" case).

[544]Panel report at 7.42. Appellate Body report at 116.

agreement. What are the implications of this for the MAI?

The reference to the concept of sustainable development in the MAI is not as strong as that in the WTO. The WTO preamble refers to sustainable development without condition whereas the reference in the MAI is to sustainable development is tempered by its association with the Rio Declaration and Agenda 21. However, even if MAI parties did make as unequivocal a commitment to sustainable development as they did in the WTO, it seems unlikely on the basis of the *Shrimp Turtle* decision that this would significantly influence a dispute resolution body's findings. A dispute resolution body may need to make reference to another form of authority, such as another case or another international agreement which has dealt with the same issue, or a favourable statement in the MAI drafting history, before it will offer an interpretation based on sustainable development. The inclusion of sustainable development in the preamble is unlikely to influence the interpretation of obligations in what is primarily an agreement designed to facilitate the flow of international capital.

## B. The Polluter Pays Principle and the Precautionary Principle

The draft preamble incorporates the principles of polluter pays and the precautionary approach as reflected in the Rio Declaration and Agenda 21.

The polluter pays principle is essentially a principle of economic policy used to allocate the costs of pollution[545]. It is a strategy for controlling environmentally harmful activities by emphasizing that investors must accept responsibility for the true economic costs of their activities so that environmental costs are not externalised. It is incorporated in the Rio Declaration in Principle 16 which states "national authorities should... take into account the approach that the polluter should, in principle, bear the cost of pollution."

[545] P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford, Clarendon Press, 1993) at 109.

The precautionary approach most often means that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation[546]. The approach allows parties to exercise caution in approving a development when they are not certain of the environmental impact it will have. There are strong and weak versions of the principle. A strong version of the precautionary principle states is that it is impermissible to carry out an activity unless it can be shown that it will not cause unacceptable harm to the environment[547]. This means that if a developer cannot prove that their development will not cause unacceptable harm they cannot proceed. There is a burden on the developer to prove that they will not cause unacceptable harm. By contrast the version in the Rio Declaration is a weak one and states "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[548] Unlike in the strong version, a developer does not have to show that it will not cause harm to the environment. Instead, the Rio Declaration version focuses on removing the burden on a decision maker to prove that a development will cause harm before they regulate it. There is no burden on any party to either show that a development will cause harm or that it won't. However, even if someone shows that a development will cause harm a developer could argue that there is no cost effective measure which can be implemented to protect the environment and proceed regardless of the harm caused.

Neither the formulation of the polluter pays or precautionary principles is strong. They are mere suggestions for policy directions rather than positive obligations. The polluter pays principle is especially weak - "authorities *should take into account* the approach that the polluter *should, in principle*...". Being weak they are liable to be forsaken by the

---

[546] *Ibid* at 97.

[547] *Ibid* at 98.

[548] Principle 15.

operation of other principles in the *Rio Declaration*, which state that nations have the sovereign right to act as they think is most appropriate for their particular environment and stage of development. It would be relatively easy for a country to state that they recognise the principles, but that they are not appropriate for the particular objective the country is trying to achieve. In any case, as these environmental principles merely form part of sustainable development which is part of the preamble of the MAI, they may be unlikely to substantially influence decisions made under that treaty.

## C. In Accordance With International Environmental Law

### 1. Conflict with Multilateral Environmental Agreements

Some commentators and NGOs have expressed concern that international environmental agreements may conflict with the MAI. There are no direct legal conflicts between the MAI and any existing multilateral environmental agreements (MEAs)[549], primarily because no MEA imposes any investment related sanctions, nor requires any action which would clearly conflict with an MAI obligation. However, several MEAs, such as the ozone treaties[550], and *CITES*[551] have the potential to conflict with the MAI[552]. If

---

[549]OECD "Relationships between the MAI and selected MEAs", available at http://oecd.org/daf/cmis/mai/meanv.htm at 1.

[550]Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) 26 ILM 1987 and Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) 26 ILM 1987.

[551]Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, March 3 1973) 12 ILM 1973. Also see the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989) 28 ILM 1989 and the United Nations Framework Convention on Climate Change (Rio de Janerio, 4 June 1992) 31 ILM 1992. J. Cameron and Z. Makuch, "Implementation of the United Nations FCCC" in J. Cameron, P. Demaret and D. Geradin (eds.) *Trade and the Environment* (London: Cameron and May, 1994) at 116.

[552]An OECD report states that this potential arises because these treaties contain provision for trade related environmental measures (including TRIMs) which could affect investors - OECD "Relationships between the MAI and selected MEAs", available at http://oecd.org/daf/cmis/mai/meanv.htm at 4. It should be noted that although these treaties contain the potential for conflict, as yet no conflict has occurred between them and the GATT. "WTO cannot be

government actions under these treaties affect a foreign investor, the government may be in breach of its MAI obligations.

An example of a potential conflict is demonstrable by looking at the *Framework Convention on Climate Change* ('FCCC'). The 1997 *Kyoto Protocol* of the *FCCC*[553] provides in Article 6 (1) (a) that a party[554] or a legal entity acting under the responsibility of a party can transfer or acquire emission reduction units. However Article 6 (1) (c) states that a party (or legal entity) will only be permitted to trade in emission reduction units when they have complied with other Articles of the Kyoto Protocol[555]. Therefore a legal entity from a country who has not complied with the relevant provisions of the Kyoto Protocol and who is also an MAI investor will not be permitted to trade emissions with a country who has complied with the provisions. A country which refuses to trade emission reduction units with an investor on this basis would be in breach of its national treatment and possibly its most favoured nation obligations in the MAI. Another example of potential conflict comes from the *Montreal Protocol*. The Multilateral Fund set up under the *Montreal Protocol* distinguishes between local and foreign companies. If action which discriminates against a foreign investor is taken by a party in accordance with the Fund rules it could be a breach of national treatment[556]. Action under MEAs which leads to an expropriation of an investor's assets would also be a breach of a party's MAI obligations. Which agreement prevails in case of these conflicts?

---

'Judge, Jury, Police' of global environment issues, Ruggerio says" (1998) 21 International Environment Reporter 308 at 308.

[553] Available at http://www.unfcc.de/

[554] Although this Article is specific to Annex I parties, most of who are OECD parties. Article 17 states that Annex B developing parties can also trade in emission reduction units.

[555] Parties must comply with Article 5 which requires countries to estimate their emissions and Article 7 which requires parties to provide information.

[556] OECD "Relationships between the MAI and selected MEAs", available at http://oecd.org/daf/cmis/mai/meanv.htm at 5.

## 2. Position Under International Law

Generally under the *Vienna Convention*, a later treaty will prevail over an earlier treaty[557]. Therefore if any environmental agreements which are signed after the MAI contain provisions which conflict with a provision in the MAI the provision in the later environmental agreement will prevail.

In regard to environmental agreements which already exist the MAI states that it should be implemented "in accordance with international environmental law". The *Vienna Convention* states that "when a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[558] This provision is not applicable however, as the MAI does not specifically refer to other treaties - simply to international environmental law. International law is traditionally created by treaty or custom. The problem parties may face in being required to act in accordance with international environmental law as evidenced by law and custom is that environmental treaty obligations are usually non specific and customary law simply may not exist.

### (a) Custom

Customary law is evidenced by the general practice of states[559] Birnie and Boyle state that conservationists have attempted to argue that 'sustainable development' and 'inter-generational equity' have become customary international law[560], as many states portend

---

[557]Article 30.

[558]Article 30 (2).

[559]See Article 38 (1) of the *Statute of the International Court of Justice*.

[560]P.W. Birnie and A.E. Boyle *International Law and the Environment* (Oxford, Clarendon Press, 1993) at 15.

to be seeking these goals[561]. However, developing nations usually refute that these policies are generally *practiced* and have therefore become customary law. Their refuting the point has probably had the effect of preventing the crystallisation of the policies into customary law[562].

Another factor which has probably prevented the customisation of environmental practices is that international treaties on the environment often contain different obligations for developed, developing and least developed states. Which could be said to be the norm? Customary law has to be evidenced by general practice - if there is no general practice, there is probably no custom. Birnie and Boyle state that "it is becoming increasingly difficult in a world of over 170 states of diverse cultures, policies, interests and legal systems to identify any universal practice. Their approaches and aims are difficult to reconcile even on questions of general principle, let alone specific details of policy."[563] Although customary environmental law may evolve at some point in the future, at present it appears that term 'international environmental law' only includes treaties.

### (b) Treaties

Treaties are the most common law making tool used in regard to the environment. Countries have made protocols, conventions, covenants and treaties concerning the environment. These are binding on the countries which sign them and not binding on countries which do not sign them[564].

---

[561] S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty, *Thinking Ecologically* (New Haven: Yale University Press, 1997) 118 at 118.

[562] P.W. Birnie and A.E. Boyle *International Law and the Environment* (Oxford, Clarendon Press, 1993) at 15.

[563] *Ibid* at 16.

[564] See Article 34 of the *Vienna Convention* - "A treaty does not create either obligations or rights for a third State without its consent."

Treaties too are problematic to enforce as 'international environmental law'. They do not necessarily lay down clear detailed and specific obligations[565]. Many treaties are frameworks which lay down general requirements and oblige parties to take all practicable measures to implement the treaty. Therefore when one party alleges that another party has breached its obligations under such a treaty, the second party could deny the allegation by stating that the treaty is a mere framework and does not set specific obligations which they can be said to have breached.

If the 'in accordance with international environmental law' clause remains in the preamble, it will be arguable that countries must carry out their obligations to liberalise investment only so long as this is consistent with international environmental treaties. This could restrict the scope of the MAI. The *Kyoto Protocol* and *Montreal Protocol* measures outlined above would take precedence. So would any treaties which contain provisions to facilitate technology transfer. The MAI by prohibiting performance obligations restricts countries from facilitating the transfer of clean technology by making this a condition of investment[566]. If the MAI states that countries are to implement it in accordance with international environmental law, and a country can show that the only feasible way it can facilitate the transfer of clean technology is to impose a performance obligation which requires a technology transfer from investors, the performance obligation will be permitted.

However, it may be that when an arbitral body determines the meaning of the preamble in order to analyse a specific MAI provision, that arbitral body will attempt to discover the overall intent of the MAI parties rather than concentrate on a single statement of the parties' intent. The WTO Panel and the Appellate Body in the *Shrimp Turtle* decision

---

[565]P.W. Birnie and A.E. Boyle *International Law and the Environment* (Oxford, Clarendon Press, 1993) at 13.

[566]Unless it links the obligation to an investment incentive - see discussion of this point in chapter 3.

discussed the reference to sustainable development in the preamble but nevertheless stated that "maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement."[567] By analogy it is arguable that while the MAI includes the phrase 'in accordance with international law' in its preamble, the overall intent of the agreement is to establish a multilateral framework for liberalisation of investment, and this overall intent should hold more weight than the statement on international environmental law. To ensure that this argument is not tenable the MAI should express that the parties intend to implement the agreement in accordance with international law as an objective of the parties, rather than incorporate it in the preamble.

## IV. Environmental Exceptions to Performance Obligations

Article III section 4 contains a provision which will allow MAI parties to require or continue to require some performance obligations from a foreign investor (contrary to the MAI prohibition on performance obligations) in order to protect the environment. It allows that a party can impose conditions on an investor requiring them to:

> "1. (b) to achieve a given level or percentage of domestic content; or
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from its territory."

The exceptions provision states that:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:....
> (b) necessary to protect human, animal or plant life or health;
> (c) necessary for the conservation of living or non-living exhaustible natural resources."

Examples of the type of performance obligation that may be exempted under the provision

---

[567] Panel report at 7.42. Appellate Body report at 116.

include: a requirement on foreign investors to use a certain level of recycled paper obtained from local suppliers, in order to conserve local and global forests; a requirement that investors use domestic supplies of energy produced from a renewable source, to ensure that investors do not import cheap oil and exacerbate air pollution and greenhouse gas emissions; and a requirement that investors involved in food production include a certain level of local organic produce, so that citizens are not exposed to harmful levels of chemicals and pesticides.

The negotiating group chose the formulation of the exception provision because it was familiar to all OECD parties[568]. It is almost identical to two of the general exceptions in Article XX of GATT 1994, which provide that:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination... or a disguised restriction on international trade, nothing in this Agreement shall be considered to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

However, there is one important difference between the MAI and the GATT provisions. The GATT exceptions can exempt a GATT party from complying with any of its GATT obligations. The MAI exceptions are far more limited. They only exempt a party from the MAI prohibition on countries imposing performance obligations on investors requiring them to use a specific level of domestic content or use domestic goods and services - they do not provide a general exception to all MAI obligations. In their competition for foreign investment, countries are imposing fewer and fewer performance obligations upon investors. This means that the MAI environmental exceptions will be of limited and declining use. If countries are to be provided real freedom to pursue environmental aims,

[568] MAI Commentary at 27.

the exceptions should be applicable to all of the MAI obligations, including the national treatment and most favoured nation obligations. However, given that these are the only environmental exceptions provided by the MAI, this paper will now analyse their potential use and scope.

The GATT/WTO Panel and Appellate Body have interpreted the environmental exception provisions. The interpretation these bodies have given to the GATT provisions provides a useful guide to how the MAI provisions may be interpreted for two reasons. First, the parties currently negotiating the MAI drafted the provisions knowing that the specific words they used had been interpreted in the GATT in a certain way. For example, Article XX (g) of GATT permits measures which are "*related to* conservation", whereas the MAI only permits those which are "*necessary* for conservation". This indicates the parties considered the way in which 'related to' had been interpreted, and preferred the term 'necessary' and its interpretative background. Under the GATT, the term 'necessary' sets a much harder test for parties trying to prove the validity of environmental measures than the term 'related to'. This indicates the intention of the parties to create a high threshold test for environmental exceptions, a fact which can be taken into account when an arbitral panel interprets the MAI[569]. Second, the *Vienna Convention* Article 31 (1) states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Given the similar object and purpose of the MAI and the GATT it is likely that they will be interpreted in the same way. The preambles of both refer to the importance of reducing barriers to trade/investment and reducing discriminatory treatment to raise living standards and create employment.

The phrases "necessary to", "protect human, animal and plant life or health", "exhaustible

[569] Article 32 of the *Vienna Convention* states that recourse may be had to supplementary means of interpretation including the preparatory work of a treaty to confirm the meaning of a treaty where there is an ambiguity or obscurity or another interpretation leads to an unreasonable result.

natural resource", and "arbitrary and unjustifiable discrimination" have all been the subject of GATT jurisprudence, as have jurisdictional issues. The language of GATT could have been interpreted to accommodate environmental protection, but the jurisprudence has generally restricted environmental protection[570]. By adopting the same language the MAI will probably permit the same restrictive interpretations. This paper will now discuss the GATT jurisprudence and its relevance to the MAI.

## A. Protect Human, Animal and Plant Life or Health

Measures under the GATT Article XX (b) are permitted if they are necessary to 'protect human, animal or plant life or health'. Measures taken to reduce the incidental kill rate of dolphins in tuna fishing have been found to be a policy aimed at protecting animal life[571]. Measures which relate to the protection of health include those aimed at dissuading people from smoking. For example, in *Thailand - Restrictions on Importation and Internal Taxes on Cigarettes*[572], Thailand prohibited the importation of US cigarettes in order to control smoking levels generally and to protect Thai people from the impact of advertising associated with US cigarettes. The Thai government presented substantial evidence of the adverse effects of smoking, and the World Heath Organisation also made an extensive submission on the matter. Though the ban was not able to be justified under Article XX (b)[573], the panel accepted that smoking constituted a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the range of policies covered by Article XX (b).

---

[570]M. Swenarchuk, "The MAI and the Environment" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 120 at 130.

[571]The *Tuna II* Panel decision, 5.30.

[572]7 November 1990, BISD 37S / 200.

[573]Because of the restrictive interpretation given to the term "necessary" in Article XX (b).

The WTO Panel in *United States - Standards for Reformulated and Conventional Gasoline* decision noted that a policy to reduce air pollution and protect clean air was a policy within the range of policies to protect human, animal and plant life or health[574]. It stated that "air pollution, in particular ground level ozone and toxic substances, presents health risks to humans, animals and plants..... one half of such pollution is caused by vehicle emissions....a policy to reduce air pollution resulting from the consumption of gasoline is a policy within the range of Article XX(b)."

Applying these cases in the context of the MAI, a performance obligation upon foreign investors involved in food manufacture to use locally grown organic produce so citizens are not exposed to harmful chemicals and pesticides by eating non-organic food could be described as a measure to protect human health. So could a performance obligation requiring investors to use local renewable energy sources rather than importing oil which contributes to air pollution.

A wide range of measures could be described as aimed at protecting human, plant or animal life or health under the GATT and the MAI. Note though that in the cases cited above, the GATT complainants generally agreed that the activities which were being regulated were dangerous. Parties will not always agree on such matters. For example, in a recent case launched under NAFTA, Canada and an American company, Ethyl Corporation, disputed whether the petroleum additive methylcyclopentadienyl manganese tricarbonyl (MMT) was dangerous to human health. Canada relied on evidence that MMT had indirect potential effects on human health and concluded that it should ban MMT in the interest of public health[575]. Ethyl however argued that MMT was not a direct risk to health, and that no Canadian studies showed it was[576].

---

[574]At 6.21.

[575]Canadian Government Statement of Defence 67-70.

[576]Ethyl Corporation Statement of Claim at 14 - 18.

In relation to a performance obligation to use organic produce in food manufacturing, a foreign investor may argue that the pesticides and chemicals used on imported food have not been proven to be harmful. Proving that chemicals are acutely toxic to humans can generally be done by simple tests (such as the Ames test) but proving their chronic toxicity, or that they are harmful either in the long term, in association with other chemicals that many people are exposed to, or indirectly, is far more difficult and can involve years of expensive testing[577]. Data on the toxicity of chemicals are often incomplete, inconclusive, or the subject of industry confidentiality. Some countries are unlikely to have access to sufficient information to show that non organically grown food is harmful to health. The MAI preamble incorporates the precautionary principle which states that lack of full scientific certainty should not be used as a reason for postponing cost effective measures to protect the environment. If an arbitral panel considers this principle they may not require a state to prove with irrefutable scientific evidence that a particular pesticide is hazardous to human health. However, as the version of the precautionary principle incorporated in the MAI is a relatively weak one and is merely one part of the entire preamble it is conceivable that an arbitral panel may accord little weight to it and require a party to produce extensive evidence of harm that it does not have.

In summary, the GATT/WTO jurisprudence indicates that the MAI could permit a wide range of performance obligations if they are implemented as part of a policy aimed at protecting life or health. If a relatively liberal interpretation is given to the MAI provision, many policies will come within its ambit. However, investors with large amounts of damages at stake[578] will be unlikely to concede that an activity they are doing is dangerous. If an arbitral body gives little weight to the precautionary principle in the MAI preamble parties may be required to provide substantial scientific evidence that an

[577] J. I. Kroschwitz (ed.) *Encyclopedia of Chemical Technology* 4th ed. (New York: Wiley, 1991-1998).

[578] For example, Ethyl Corporation was claiming $251 million in damages from the Canadian government.

action is directly harmful to life or health. This may mean that some states may choose not to implement a performance obligation in cases where they do not have sufficient proof that an activity is damaging to organism life or health.

## B. Living or Non Living Exhaustible Natural Resource

The GATT Article XX (g) provides that parties may act to conserve 'exhaustible natural resources'. GATT parties have attempted to argue that the term exhaustible natural resources only includes finite resources such as minerals and is not meant to include biological or renewable resources[579]. This argument could not be made under the MAI which explicitly incorporates living as well as non living exhaustible natural resources. A performance obligation which requires foreign investors to use a certain level of recycled paper from local suppliers in order to conserve local and global forests would be a measure to conserve a living natural resource. However, it is unclear whether the forests would be considered 'exhaustible'. This paper will now consider the arguments of GATT complainants that some resources are not 'exhaustible'.

### 1. Exhaustible

In the *Shrimp Turtle* case, India, Pakistan and Thailand argued that if all natural resources were considered to be 'exhaustible', the term 'inexhaustible' would be stripped of meaning[580]. Malaysia argued that if the term "exhaustible natural resources" in XX (g) were meant to cover plants and animals, then the protection given plants and animals in XX (b) would be superfluous[581]. The drafters could not have intended this to be so - they could not have meant either to deprive one exception of meaning or to provide 2 exceptions to justify one measure. The Appellate Body ignored these interpretative

---

[579]India, Pakistan and Thailand argued this in the *Shrimp Turtle* decision - see Appellate Body report at 128.

[580]Panel report at 3.237.

[581]Panel report at 3.240.

arguments when it determined whether sea turtles were exhaustible[582], stating that they were obviously exhaustible as all of the seven recognised species of sea turtle were listed in *CITES* as threatened with extinction[583].

The *Shrimp Turtle* case is one where the exhaustibility of a species was relatively apparent. It was not so apparent in *United States - Restrictions on Imports of Tuna* (the "Tuna I" case)[584]. Here, the United States amended its 1972 *Marine Mammal Protection Act*[585] to ban imports of tuna caught in the Pacific Ocean using technology such as purse seine nets which resulted in the incidental killing of dolphins. Mexico challenged the ban. The United States attempted to show its measure was one which was aimed at conserving an exhaustible natural resource. They stated that dolphin populations were likely to be exhausted if they sustained too high a mortality rate. They noted that the need to conserve dolphins was recognised in a number of international treaties[586]. Mexico replied that a resource could only be considered exhaustible if it could be shown by means of internationally recognised scientific data to be in danger of extinction[587].

The Panel did not consider the issue. By the time of the *Tuna II* decision in 1994, all the dolphins concerned were listed on *CITES*[588]. The Panel held that "dolphin stocks could

---

[582]At 128 the Appellate Body stated that it was not convinced that these arguments limited the scope of the term 'natural resource', but did not refer to the arguments in its determination of 'exhaustible' at 132.

[583]Appellate Body report at 132.

[584] (1991) 30 ILM 1594.

[585]s 101(a) (2).

[586]Panel report at 3.40. For example, the Inter-American Tropical Tuna Commission and the United Nations Convention on the Law of the Sea (Montego Bay, 1983) 21 ILM 1261 recognise the need to conserve dolphin populations.

[587]Panel report at 3.44.

[588]Panel report at 3.14.

potentially be exhausted, and the basis of a policy to conserve them did not depend on whether at present their stocks were depleted... (we) accept that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource."[589]

In *Canada- Measures Affecting Exports of Unprocessed Salmon and Herring* ('the Salmon Herring case')[590], Canada implemented measures to conserve salmon and herring stocks. It stated that the fish were vulnerable to depletion, and that in spite of continuing management and conservation efforts, the fish stocks remained at far below optimum production levels[591]. This meant that the fish stocks could be classified as exhaustible. The United States agreed, as it had implemented its own conservation measures to preserve such fish stocks. The Panel did not refute the exhaustibility of salmon and herring stocks[592].

The *Tuna II* and *Salmon Herring* cases are usually interpreted to indicate that 'exhaustibility' will be relatively easy to prove. In *Tuna II*, the Panel held that animals did not have to be near extinction to be considered exhaustible. In *Salmon Herring*, it was the fact that an economic resource (the fish stocks) was exhaustibile, rather than the fact that an actual species of fish was near extinction, that was relevant. However, these cases could be interpreted in another way. In each of them the exhaustibility of a living resource was established either by the fact that the animal concerned was listed on *CITES*, or because exhaustibility was admitted. The interpretative arguments of GATT complainants outlined at the beginning of this section have not been addressed in the jurisprudence. For example - what is the purpose of including the word 'exhaustible' if all animals are to be considered under it in any case? Should countries have to show the exhaustibility of a

---

[589] At 5.13.

[590] Panel report (L/6268) adopted 22 March 1988.

[591] Panel report at 3.6, 3.7.

[592] Panel report at 4.4.

resource by reference to internationally recognised scientific data?

If these interpretative arguments are made before a MAI tribunal and hold any weight, it is foreseeable that a party under the MAI who attempts to impose a performance obligation in order to conserve a plant or animal may fail to justify their position if they cannot show, with reference to internationally recognised scientific data, that the plant or animal is in imminent danger or is at least vulnerable and showing signs of exhaustibility. A performance obligation with the general aim of conserving global forest resources will probably not be able to be shown to fit within the exception - a party will need to show that global forest resources are being so over-cut that they are showing signs of exhaustibility, or that its measure is aimed at conserving a particular species of vulnerable tree.

## 2. Environmental Measures

Are all the kinds of performance obligations which impose environmental measures upon investors which states may choose to protect the environment able to be classified as aimed at protecting human, animal or plant life or health, or conserving living and non living exhaustible natural resources? In the *United States - Standards for Reformulated and Conventional Gasoline* case, the Panel found that clean air was an exhaustible resource, and that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)[593]. The Appellate Body did not refute this. If policies to protect air, exhaustible natural resources, and human, animal and plant life and health are all legitimate under the MAI - do any measures fall through the gaps?

Patterson states with regard to similar provisions under the GATT: "Certainly, Article XX does not cover the full range of policies aimed at environmental protection. Because the

---

[593] Panel report at 6.37.

original drafters in 1947 did not intend the Article to cover environmental protection which was not then an issue, strained arguments are made to include particular policy measures under the exceptions."[594] Another commentator states that there "may be a few issues which are not covered"[595]. In relation to similar language in the *EEC Treaty*[596], Kramer states that "it is obvious that numerous measures which aim at the protection of the environment cannot be considered as protecting the health and life of humans, animals and plants; such measures include environmental taxes, environmental labeling, waste prevention measures, measures to assess the environmental impact and measures on environmental liability."[597]

The MAI provision states that a party may take *environmental measures* which breach the performance obligations section in order to protect life or health or conserve exhaustible natural resources. This is a departure from the GATT which simply states that a party may take *measures* which breach the GATT. However, as the environmental measure under the MAI must always be shown to be one which protects life or health or conserves exhaustible natural resources, the inclusion of the word 'environmental' does not increase the range of measures available under the MAI from the range available under the GATT. Some performance obligations under the MAI may not come within the scope of the MAI exceptions. For example, if a state requires a foreign investor to label their products 'organic' in conjunction with placing a performance requirement upon that investor to include a certain level of locally grown organic food, that state will not be able to justify the labeling requirement as aimed at protecting life or health or conserving natural resources. If a country imposes a performance obligation upon a foreign investor to

[594] E. Patterson, "GATT and the Environment" (1992) 26 Journal of World Trade 99 at 107.

[595] S. Charnovitz "Exploring the environmental exceptions in GATT Article XX" (1991) 25 (n5) Journal of World Trade 37 at 55.

[596] European Economic Community Treaty (Rome, 1 January 1958).

[597] L. Kramer, "Environmental Protection and Article 30 EEC Treaty" (1993) 30 Common Market Law Review 111 at 117-8.

conduct an extensive impact assessment of its facilities, it could not justify this under the MAI. This limits states' capacity to regulate foreign investors in order to protect their environment.

## C. Necessary

The MAI negotiating group has chosen to incorporate the word 'necessary' in both of its environmental exceptions, rather than using the term 'related to' which is found in GATT Article XX (g). The GATT cases show that it is very difficult for a party to argue that a measure it has taken is 'necessary'. Most commentators state that the 'necessary' test is very rigorous and results in most challenged environmental measures being found to violate the GATT[598]. If the rigorous GATT interpretation of necessary is adopted in the MAI, it will be difficult for a party to show that their performance obligations come within the environmental exception.

### 1. Rigorous test

In the *Tuna II* case, the United States imposed an import ban on Mexican tuna caught in violation of US fishing standards legislation. The panel concluded that the US import ban was not a necessary measure because the US had not exhausted all GATT consistent options reasonably available to it in pursuing its policy. The test to decide whether a measure is necessary is:

> "a contracting party cannot justify a measure as 'necessary' under GATT if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[599]

---

[598] M.J. Trebilcock and R. Howse. *The Regulation of International Trade* (London: Routledge. 1995) at 338.

[599] Panel report at 5.35.

The Panel noted that the US could have negotiated an international agreement to protect dolphins which would probably have been more GATT consistent[600]. The Panel was not concerned with and did not discuss whether this would be as effective at protecting dolphins as the import ban.

In *United States - Standards for Reformulated and Conventional Gasoline* Venezuela and Brazil contested the validity of a US Act which aimed to reduce air pollution by setting standards for gasoline quality. The Act provided that foreign producers could only import gasoline which met a statutory baseline standard, whereas domestic gasoline producers were not bound by the statutory baseline and could use an individual baseline. The US stated that it was necessary to have a different method to determine the foreign producers' standards because it could not rely on the data from other countries to develop individual baselines for importers. The Panel held that "although foreign data may be formally less subject to complete control by US authorities, this did not establish that foreign data could not in any circumstances be sufficiently reliable to serve US purposes."[601] The US could have negotiated with other nations to collect data. Therefore the measure they had imposed was not necessary.

In the *Thai cigarettes* case, Thailand banned the importation of US cigarettes. The Panel held that this was not necessary, as there were alternative measures available to Thailand to achieve its objective. It could ban cigarette advertising (though the panel noted that this would also breach GATT)[602]. It could conduct an educational anti-smoking campaign

[600]See the Tuna I Panel report at 5.28 and the Tuna II Panel report at 5.38.

[601]Panel report at 6.28.

[602]Panel report at 78. The panel noted that a complete ban on advertising would create unequal conditions of competition between established local producers and new foreign producers.

(although this had been unsuccessful in the past)[603]. It could place warnings on cigarette packets and ban smoking in certain public places (which it was already doing)[604]. The Panel ignored the possibility that the alternative measures they suggested might involve high regulatory and compliance costs, or might be impracticable and ineffective[605].

The *Thai cigarettes* case shows that the current interpretation of 'necessary' is concerned with finding an alternative that is not GATT inconsistent, regardless of whether the alternative is effective or not. Kramer states that an effective system of environmental protection, such as requiring an 80 percent use of returnable bottles, may be acceptable, but that a very effective system, such as one requiring a 100 percent use would not be 'necessary' and therefore unacceptable[606]. Countries are not able to choose the level of environmental protection they wish. A country can always do something that is less effective - should they be required to choose the least effective measure?[607] NAFTA states that when a NAFTA obligation conflicts with an obligation in a listed environmental agreement, the parties should choose the alternative that is least consistent with NAFTA obligations *as long as the alternative is equally effective and reasonably available* (italics added)[608]. The MAI negotiators have chosen not to use this language and have used the potentially restrictive GATT language instead.

## 2. International Standards

Considering whether a party's environmental measure is necessary involves the WTO

---

[603]Panel report at 23.

[604]Panel report at 78.

[605]M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 337.

[606]L. Kramer "Environmental Protection and Article 30 EEC Treaty" (1993) 30 Common Market Law Review 111 at 127.

[607]*Ibid* at 129.

[608]Article 104.

Panel comparing the measure with alternative measures which it considers are available to the party. The GATT jurisprudence indicates that the panel will consider international negotiation as an alternative measure. An international agreement would result in the country adopting international standards. This is problematic for sustainable development. National governments need to be able to enact the level of environmental protection that is appropriate for the desire of their population and the nature of their environment. In some cases, this level may be higher than an international standard. Often international standards will have been negotiated and compromised, and represent a lower standard than an individual country desires. If an MAI arbitration panel determines whether a performance obligation is valid by looking at whether it is necessary to meet an international standard, rather than necessary to meet an individual country's higher standard, the nation's measure is bound to be struck down. This paper now gives two examples of where a country wanted to achieve a level of environmental protection which was higher than an international standard.

In 1989 the US EPA instituted a ban on asbestos[609] which was aimed at phasing out the manufacture, import and distribution of asbestos. Canada was one of the largest asbestos exporters in the world at that time, and challenged the ban[610]. Canada argued that since none of the other industrial countries, nor the World Health Organisation, nor the International Labour Organisation, banned asbestos, the US should not do so either. Canada argued that the US should instead have a controlled use policy similar to other countries[611] and that the EPA's ban was not necessary in light of the international consensus that asbestos products could be safely regulated[612].

[609] 54 Fed Reg 29460 (1989).

[610] *Corrosion Proof Fittings v EPA* No 89-4596.

[611] K.E. McSlarrow, "International Trade and the Environment: Building a Framework for Conflict Resolution" (1991) 21 Environmental Law Reporter 10589 at 10592.

[612] *Ibid* at 10594.

In 1989 the EU prohibited imports of meat and meat products derived from cattle to which certain hormones had been added for growth purposes in response to public concern about the effect of the hormones on human and particularly small children's health[613]. Canada and the United States both used the hormones, and challenged the ban. The challenge formed the basis of a long running dispute before the GATT/WTO[614]. Canada and the US challenged the ban on the grounds that international food standards set in Codex Alimentarius did not prohibit the hormone, and therefore neither should the EU. This dispute was decided under the Agreement of Sanitary and Phytosanitary Measures, rather than under the GATT 1994. However, a similar argument based upon an international standard to show that a country's environmental measure is not necessary could be presented before an MAI arbitration panel.

In arguing that another party's environmental measure is not necessary, a party could point to an alternative measure which is based upon an international standard and which is less MAI inconsistent. Based on the GATT/WTO jurisprudence, the existence of this alternative measure may be enough for the panel to decide that the original measure is not necessary, and is therefore MAI illegal. However, if sustainable development is to be achieved, the question for the panel should be whether the measure is necessary to achieve the standard of protection that the national government decides is appropriate for its country.

### 3. Conclusion

If the GATT interpretation of 'necessary' is followed under the MAI, it is unlikely that many of the performance obligations countries may wish to impose will be validated under

[613] M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" (1993) 51 University of Toronto Faculty of Law Review 204 at 221.

[614] *EC Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998.

the environmental exceptions provision. Requirements that an investor purchase a certain level of recycled paper from local sources, or that they use domestic renewable supplies of energy or locally grown organic food are all liable to be challenged on the basis that a less MAI inconsistent measure would have been to legislate across the board, rather than to impose requirements upon investors only. A MAI arbitral panel following the GATT interpretation would not consider a party's arguments that it is more effective to target foreign investors through performance obligations. It may indeed be more effective for countries to use performance obligations, as if these are imposed pursuant to a contract they enable a country to sue an investor for breach of contract as well as apply a statutory penalty when an investor breaches the obligation. Requiring investors to use local organic products may also be the most effective measure a country can use as it more easily allows a country to monitor whether the products are actually being produced in a way that is better for the environment. An MAI arbitration panel may not consider these arguments. Foreign investors could also challenge the necessity of performance obligations by arguing that the country should have commenced international negotiations to achieve their environmental aims. Finally, an investor could argue an environmental performance obligation was unnecessary on the basis that it aimed to achieve an level of environmental protection which was higher than the accepted international standard. Each of these arguments may make it very difficult for a country to show that imposing a performance obligation upon a foreign investor to achieve environmental protection is 'necessary'.

### D. Jurisdiction

One delegation would like to alter exception (c), which permits performance obligations which are aimed at conserving living or non living exhaustible natural resources, so that a country may only seek to protect living and non living exhaustible natural resources *in its jurisdiction* (alteration in italics). This delegation wants to make it clear that the provision has no extra-territorial ramifications[615]. This is a common concern among countries who believe that if a state makes legislation which has an extra-jurisdictional application it impinges upon another state's fiscal and political sovereignty[616]. Ironically, the same countries have not expressed concern that the MAI will bind states for at least 20 years to a single economic system and vision and impinge upon their sovereign right to make laws with respect to foreign investors and economic policy generally.

It is important that the MAI allow countries to impose performance obligations which aim to protect the environment outside of their jurisdiction, as the environment knows no jurisdictional boundaries[617]. Many actions have transboundary environmental spillover effects and even global effects[618]. A country may seek to protect a part of the environment that is partly, but not solely, in their own country - a shared resource. Many countries are party to international environmental treaties which protect shared resources such as air, the ozone layer, and threatened species. A country who imposes a performance obligation upon an investor to purchase locally produced energy from renewable sources may be doing so in order to protect the shared resources of air and climate. A country who imposes a performance obligation on an investor to use a specific level of recycled paper from local suppliers may not have any significant timber itself and therefore may be acting solely to protect forests in other jurisdictions.

It is therefore important that exception (c) does not include the jurisdictional limit that one delegate has suggested. However, even if does not, it is still not clear whether the MAI as currently drafted will permit countries to protect the environment outside their

---

[615]MAI draft text at note 31.

[616]H.L. Thaggert. "A closer look at the Tuna-Dolphin case" in J. Cameron, P. Demaret and D. Geradin (eds.). *Trade and the Environment* (London: Cameron May, 1994) 69 at 81.

[617]E. Patterson. "GATT and the Environment" (1992) 26 Journal of World Trade 99 at 107.

[618]N. Grimwade. *International Trade Policy* (London: Routledge, 1996) at 346.

jurisdiction. The preamble to the MAI does not provide any assistance in this matter. It provides by reference to the Rio Declaration that states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies. This indicates that states should not impose performance obligations with extra-territorial effects. However, the Rio Declaration also provides that states should co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem, which indicates that extra-territorial measures are important. If just one of these principles were included it could be useful for interpretation, but both effectively cancel the effect of the other out in the context of considering jurisdictional issues.

The GATT jurisprudence on this matter is indeterminate. In *Tuna I*, the Panel rejected the notion that a country's environmental measure which affected trade could have an extra-jurisdictional application and remain GATT legal[619]. However in *Tuna II* the Panel held that "Article XX (b) does not spell out any limitation on the location of the living things to be protected.... The nature and precise scope of the policy area named in the Article.... is not specified in the text to the Article, in particular with respect to the location of the living thing to be protected."[620].

In *Shrimp Turtle* India, Pakistan and Malaysia argued that according to customary international law, nations should recognise the sovereignty of others and the principle of non interference in the internal affairs of another state. They stated that in the absence of language to the contrary, the GATT should be interpreted so that it does not extend to measures taken by one state to protect the health of organisms or conserve natural resources in another state[621]. The US replied that nothing in the provisions suggested a

[619]Panel report at 5.32.

[620]Panel report at 5.31.

[621]Panel report at 3.157.

jurisdictional limit, therefore one should not be implied[622]. The *Shrimp Turtle* Appellate Body did not decide the matter. It noted that in the specific circumstances of the case before them, there was sufficient nexus between the United States and the migratory and endangered turtle populations[623].

While the GATT jurisprudence does not decide the question of whether extra jurisdictional legislation to protect the environment is valid or not, some guidance on the issue may be obtained from the recent *Shrimp Turtle* case. In this case, the Appellate Body suggests that the validity of a particular law with extra jurisdictional effect will depend upon how that law was made. A country can seek to protect the environment which is outside its jurisdiction by negotiating with the other states concerned and taking multilateral action, or by taking unilateral action. If the country takes multilateral action, a law with extra jurisdictional effect will probably be GATT legal. If it takes unilateral action, the measure will probably be GATT illegal.

### 1. Multilateral Action

Many environmental treaties have already been concluded, and many more will probably be concluded, through which countries aim to protect resources, plants and animals which are either partly or completely outside of their territory[624]. In *Shrimp Turtle* the US noted that:

> "there has been a long standing practice, continuing through today, of contracting parties maintaining measures to protect and conserve animal and plant life and health outside their jurisdiction. There has never been a historical distinction between the protection of domestic plants and animals and non-domestic plants and animals."[625]

---

[622]Panel report at 3.159.

[623]Appellate Body report at 133.

[624]Such as *CITES*, the *Basel Convention*, the *Montreal Protocol*, and the *FCCC*.

[625]Panel report at 3.194.

The fact that states make international environmental agreements indicates that the international practice is to allow states to take action which affects parts of the environment not within their jurisdiction. Such international practice can be used to interpret a treaty document[626] and would indicate that extra - territorial legislation may be permitted as long as it is made pursuant to an international agreement. In support of this contention the Rio Declaration which is incorporated in the MAI contemplates that states will make international environmental agreements and in fact provides that states should co-operate in a spirit of partnership to protect the environment.

In *Shrimp Turtle*, the Appellate Body stated that the US should have engaged in serious, across the board negotiations with the objective of concluding a bilateral or multilateral agreement for the protection and conservation of sea turtles before it took unilateral action[627]. It noted that consensual and multilateral procedures were available and feasible for the establishment of programs for the conservation of sea turtles, and that the US should have availed itself of these[628]. While the Appellate Body did not need to decide whether the US measure would have been valid if the US had conducted multilateral negotiations, it did indicate that the measure would have been looked at more favourably if this had been the case.

However, in some cases the negotiation of an international agreement will not be the best way to protect the environment. Housman and Zaelke state that international agreements take a long time to negotiate, and countries may wish to act quickly when they perceive a developing environmental threat[629]. As noted in section C (2) of this part, the standard of

---

[626] Article 31 (3) (b) of the *Vienna Convention* states that the subsequent practice of parties can be considered when interpreting a treaty.

[627] Appellate Body report at 166.

[628] Appellate Body report at 170.

[629] R. Housman and D. Zaelke "Trade, Environment and Sustainable Development: A Primer" (1992) 15 Hastings Int'l and Comp. L. Rev. 535 at 548.

protection that an international agreement sets may represent the lowest common denominator and not provide the level of protection a country believes is necessary. Countries may therefore wish to take unilateral action, either to protect the environment themselves, or to force other countries to come to the table and begin to negotiate an international agreement[630]. Are unilateral measures which have an extra-territorial effect GATT legal?

**2. Unilateral Action**

In *Tuna I*, the US banned imports of tuna from Mexico because the Mexican government's policy on tuna fishing did not meet the standards the US thought were necessary to protect dolphins. The Panel held that the US could not make unilateral laws which affected Mexico in this way, as that would lead to a situation where "each contracting party could unilaterally determine the conservation policies from which other parties could not deviate"[631], which was unacceptable. It held the US measure was GATT illegal. In *Shrimp Turtle*, the Appellate Body stated that the unilateralism of the US measure to protect sea turtles was one of the factors which led to its conclusion that the measure was not GATT legal[632].

In summary, the validity of a country's law which imposes performance obligations on foreign investors with the aim of conserving the environment outside of that country's jurisdiction is unclear. The MAI preamble offers no assistance, and the GATT jurisprudence is inconclusive. However, statements of the Appellate Body in the *Shrimp Turtle* case indicate that measures which have an extra-territorial effect which are taken pursuant to a multilateral treaty will probably be held to be valid. Those which are taken unilaterally will probably be held to be invalid. This means that under the MAI a country

---

[630] *Id.*

[631] Panel Report at 5.32.

[632] Appellate Body report at 172.

will probably have to impose its performance obligations pursuant to an international environmental treaty, or at least show that it made extensive efforts to facilitate an international agreement before it unilaterally imposed the obligations. This may not be the best way to protect the environment.

## E. Arbitrary and Unjustifiable Discrimination

Under the GATT, if a measure can be shown to fit within one of Article XX (b) or (g) it must then be shown to come within the ambit of the chapeau[633]. A country must show that the measure it has implemented has been applied in a manner which is not arbitrary or unjustifiably discriminatory and is not a disguised restriction on international trade. Similarly under the MAI a performance obligation which aims to protect the environment must not be applied in an arbitrary or unjustifiable manner or constitute a disguised restriction on investment.

The *Shrimp Turtle* decision is the seminal case on what constitutes arbitrary and unjustifiable discrimination. The Appellate Body held that the standard should be applied on a case by case basis, as the content and contour of the standard varies according to the case[634]. However, the standard is generally one which assesses the good faith of the party invoking the exception[635] and is designed to prevent an abuse of the environmental exceptions[636]. The Appellate Body found that the United States had not met the standard of good faith required by the chapeau for several reasons.

First, section 609 banned shrimp imports into the US from countries whose policies did

---

[633] *Shrimp Turtle* Appellate Body report at 118-119.

[634] Appellate Body report at 120.

[635] Appellate Body report at 158.

[636] Appellate Body report at 151.

not require the use of TEDs and which were not identical to the regime of the US. The Appellate Body found that the application of a rigid unbending standard to other countries without considering their environmental or developmental position was unjustifiably discriminatory. So was the practice of the US not to certify countries who had similar, but not identical, turtle protection regimes. It was arbitrary of the US to require certification based on the same policy standard in other countries without giving them a chance to be heard or review the decision. Finally, as noted above, it held the US should have engaged in serious, across the board negotiations with the objective of concluding a multilateral agreement before they acted unilaterally[637]. The US failed to meet the chapeau's requirement that parties use the environmental exceptions in good faith and do not abuse or misuse them[638].

The duty to act in good faith already exists under international law[639]. The *Vienna Convention* Article 26 states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Good faith is also a general principle of international law[640]. It requires that parties to a treaty deal honestly and fairly with each other, represent their motives truthfully, and refrain from taking an unfair advantage. Specifically, it means that a state should not exercise its rights to fictitiously mask an illegal act or evade an obligation[641]. The Appellate Body in *Shrimp Turtle* stated that the customary international law principle of good faith "prohibits the abusive exercise of a state's rights.... a treaty obligation must be exercised bona fide, that is to say,

---

[637] Appellate Body report at 166.

[638] Appellate Body report at 156.

[639] *France - Nuclear Tests* ICJ Rep 1974.

[640] I. Brownlie, *Principles of Public International Law* 4th ed. (Oxford: Clarendon Press, 1990) at 19, and American Casebook Series *International Law Cases and Materials* (USA: West Publishing Company, 1980) at 78.

[641] North Holland *Encyclopedia of Public International Law Volume II* (Amsterdam: Elsevier Publishers, 1995) at 599-601.

reasonably"[642]. As a general rule of international law, the principle of good faith does not need to be explicitly mentioned in a treaty because it is implicit in all treaties[643]. If this is so, why has the chapeau, which the Appellate Body indicates is aimed at preventing an abuse of the exceptions provisions and requires parties to act in good faith, been included as part of the environmental exceptions provision in the GATT and the MAI?

One reason for the chapeau's inclusion in the GATT could be that some developing nations are concerned about environmental measures being use as disguised restrictions on trade which form protectionist barriers. They argue that environmental quality is a luxury good and fear that their growth and development will be truncated by policies targeted at environmental conservation objectives. They talk of 'green' or 'eco' imperialism[644]. They also fear that the environmental exceptions provision could allow certain states to impose their environmental standards upon others in an arbitrary and unjustifiable way by imposing unilateral trade restrictions. They make a strong argument that standards should not be unilaterally imposed based on the fact that the vulnerability of the environment is not the same everywhere, awareness of environmental problems is not the same everywhere and resource availability varies from country to country[645]. India in particular has opposed the inclusion of environmental provisions in economic treaties[646]. The inclusion of the chapeau therefore alleviates some developing country concerns about the GATT.

---

[642] Appellate Body report at 158.

[643] North Holland *Encyclopedia of Public International Law Volume II* (Amsterdam: Elsevier Publishers, 1995) at 599-601.

[644] J. Whalley, *Trade and Environment Beyond Singapore* (USA. National Bureau of Economic Research, 1996) at 39.

[645] W. Lang, "Trade and Environment: progress in the WTO?" (1997) 27 Environmental Policy and Law 275 at 276.

[646] R. Housman and D. Zaelke "Trade, Environment and Sustainable Development: A Primer" (1992) 15 Hastings Int'l and Comp. L. Rev. 535 at 588.

This response may explain why the WTO, which includes developing countries and is sensitive to their concerns, has included a chapeau which mandates good faith. However, it does not explain why the developed countries of the OECD are seeking to include it in the MAI. Developing countries are not represented in the MAI. Why then does the MAI environmental exception provision include a chapeau which has been interpreted as preventing parties from abusing the exception and as providing for good faith?

One answer is that the provision in the MAI that a performance obligation not be arbitrary or unjustifiably discriminatory is *not* a test of good faith. The provision is aimed at ensuring that parties consider the principle of investment liberalisation with paramountcy to the principle of environmental protection. The MAI is a treaty that is directly aimed at liberalising investment. In so liberalising, it specifically prohibits parties from requiring investors to achieve a certain level of domestic content or to purchase a certain level of domestic goods or services. When parties decide to impose these performance obligations to protect the environment, they do so in full awareness that they are deviating from the overall goal of investment liberalisation in order to achieve the alternative goal of environmental protection. Parties consider the principle of investment liberalisation and then decide that in order to protect the environment they must depart from that principle. They are required by international law to do so in good faith, and investors or other countries who doubt that a party acted in good faith can challenge that party's action under the MAI dispute resolution provisions. To require that a party prove that the measure is not arbitrary and is justifiable is actually to make them consider the principle of liberalisation again, giving it a paramount position. This will not lead to sustainable development. Sustainable development requires that environmental and economic considerations be integrated in development decisions, not that economic considerations should be considered with paramountcy.

## F. Conclusion

In the *Shrimp Turtle* case, the complainants argued that in becoming a member of the WTO, the US had agreed to accept imports of shrimp whose harvest and sale in the US market might mean the extinction from the world of sea turtles for all time[647]. The previous interpretation of the GATT environmental exceptions provisions gave the complainants the scope to make such an environmentally insensitive argument. The same argument may be able made under the MAI, and it probably will be because the MAI language is so similar to and even more restrictive than the GATT.

The only measures which deliberately or incidentally affect investment that the MAI parties can implement in order to protect the environment are foreign investor performance obligations which relate to domestic content or purchasing. Parties cannot be excused from implementing environmental measures which breach national treatment or most favoured nation obligations[648].

Many domestic content requirements will be able to be justified if they are applied to protect human, animal or plant life or health, or to conserve an exhaustible natural resource. However, obligations which relate to labeling and environmental impact assessment may not able to be classified under these heads. Due to the incorporation of the precautionary principle in the MAI preamble it is arguable that countries may not need substantial proof that life or health is being endangered, or that a resource is exhaustible, before they implement the performance requirement. However, this is not clear and will depend upon an arbitral body's interpretation of the preamble.

The biggest hurdle countries will face in utilising the environmental exceptions provision

---

[647] Panel report at 3.146.

[648] Except to the extent that these relate to performance obligations.

will be to show that a performance obligation upon foreign investors is necessary to achieve the overall policy aim of environmental protection. Investors could successfully argue that the country should have enacted across the board legislation or negotiated an international agreement in preference to imposing a performance obligation upon them.

Nations may not be permitted to impose performance obligations which have an extraterritorial effect. This could seriously inhibit a country's ability to protect the environment. Finally, the requirement that the performance obligations be shown to be justifiably discriminatory and not arbitrary could be argued to have been included by the negotiators to ensure that parties give greater weight to considerations of investment liberalisation than to environmental protection. If this is so, it is contrary to the approach that sustainable development requires.

If the environmental exceptions allowed under the MAI are interpreted as similar provisions under the GATT have been, they will not ensure that countries can achieve sustainable development. They will not allow governments to make many laws which derogate from the principle of free investment to protect the environment.

## V. Investor-State Dispute Settlement Provisions

Sustainability requires that a national government have the ability to pass the most appropriate environmental laws for its country. Whether a state does in fact pass such legislation depends upon that state's evaluation of the consequences of the law. In Chapter 2 it was noted that some countries may not increase their environmental regulation for fear of increasing costs to investors and driving them away. Some nations may be prepared to accept this risk because the need for environmental protection laws is so great. But under the MAI nations face more than simply the risk of investment fleeing because they have passed an environmental law. They face the risk of being taken by an investor before a dispute resolution panel set up under the MAI where they will have to justify their environmental law based on extensive scientific evidence and prove that it is not discriminatory[649]. And they face the further risk of having to pay compensation to the investor for having caused loss or damage to that investor or for having expropriated the property of that investor. This section will deal with the investor-state dispute resolution provisions in the MAI.

## A. Scope of the Provisions

One of the first things to note is that providing for investor-state dispute resolution means that many more disputes will be brought before a panel than under state-state dispute settlement. Under state-state regimes many investment disputes do not reach the economic threshold necessary for the investor's home state to become involved in the dispute. Governments look to the general interest to decide whether to bring a claim, rather than the interest of a single investor[650]. There may be many political, financial and other reasons that a state may be reticent to institute proceedings against another state[651]. Providing investors with the right to challenge host governments directly removes this brake upon the number of disputes pursued.

The MAI provides that foreign investors can invoke the dispute settlement procedures by alleging that the host country has breached an MAI obligation which causes loss or damage to the investor or its investment. This paper will now analyse the elements of this provision.

---

[649]Except if it is a performance obligation which fits within the exceptions provision.

[650]"Is the WTO Dispute Settlement Mechanism Responsive to the Needs of Traders?" (1997) Journal of World Trade 147 at 148.

[651]M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" (1993) 51 University of Toronto Faculty of Law Review 204 at 237.

### 1. Loss or Damage

As noted in chapter 3, the investor does not have to prove that it has suffered actual loss or damage - just that damage is imminent. Neither does the investor have to show that damage is imminent in relation to an existing investment - imminent damage to a planned investment will suffice. Whether damages are recoverable or not due to remoteness would be established in the proceedings, but remoteness does not condition the institution of proceedings.

### 2. To the Investor or Their Investment

The definition of investment in the MAI is very broad - it covers property, shares, rights under contracts, licences, leases, mortgages, and every kind of asset owned directly or indirectly by a foreign investor. If any of an investor's assets is damaged, the dispute provisions can apply. Further, if damage pertains to an actual investor rather than its investment, the provision applies. For example, if a host state expropriates some land owned by an investor without compensating that investor, the investor may claim it has lost its investment. If the state in the course of expropriating the land states that it is doing so because the investor is not fit to own it, the investor can also claim that the state has damaged its reputation and goodwill.

### 3. Breached an Obligation

A breach of any obligation under the MAI will trigger the provisions. For example, if a host state has already approved a foreign investment subject to a performance obligation such as an export requirement, the state will breach its MAI obligations if it continues to hold the investor to the obligation. If the host state treats two foreign investors differently, it will be in breach of its most favoured nation obligation. The obligation that most commentators believe will lead to the greatest number of claims is the obligation not to expropriate[652]. Countries are generally not permitted to expropriate the investment of a

---

[652] W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 447. T. Clarke and M. Barlow, *MAI: the*

foreign investor, directly or indirectly, or take any measures which have an equivalent effect. They are permitted to expropriate when the public interest is at stake as long as they provide prompt, adequate and effective compensation at fair market price. This paper will focus primarily on states' potential breaches of the expropriation obligation.

## 4. Procedure Under Investor-State Dispute Provisions

Investors have a choice of forums before which to bring their complaints. If a host state makes the MAI enforceable in one of its own courts, the investor may choose the relevant court. Otherwise, the dispute can be heard by arbitration panels set up under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID)[653], the *Additional Facility Rules of the ICSID Convention*[654], the *Arbitration Rules of the United Nations Commission on International Trade Law* (UNCITRAL) rules or the *Rules of Arbitration of the International Chamber of Commerce* (ICC Rules). Each of these forums has different procedures, and a limited jurisdiction to deal with certain types of disputes. The investor may choose any forum which has the jurisdiction to deal with the issues in dispute.

ICSID panels are independent arbitration panels established under the auspices of the World Bank to hear legal disputes between governments and private investors which arise directly out of an investment[655]. Panel members are selected from a rotating board of people with "high moral character, (and) recognised competence in the fields of law,

---

*Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books. 1997) at 46. and S. Shrybman. "The MAI and Dispute Settlement" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives. 1998) 48 at 48.

[653] Both the host country and the investor's home country must be members.

[654] These rules can be used if only one of the states involved is a member.

[655] G. Schwarzenberger. *Foreign Investments and International Law* (New York: Frederick A. Praeger. 1969) at 142.

commerce, industry or finance"[656]. Since the ICSID was established in 1966, 26 disputes have gone before it, eight of which have ended with an award on the merits[657]. The UNCITRAL panel is set up under the United Nations and governs disputes arising out of contracts or other disputes. The International Chamber of Commerce (ICC) panel is constituted under the International Chamber of Commerce. This forum provides independent experts who act as neutral arbitrators[658]. Its mandate is to deal with 'international business' disputes, which includes a wide range of transactions. Panels of the ICC under the MAI will consist of three people, with a chair who is not affiliated with either the state or the investor involved.

Under the MAI when an environmental regulation which affects investment is challenged the parties go to a tribunal which specialises in the settlement of business disputes. They do not go to a specialist environmental tribunal. The panel members are experts in commercial and investment disputes - not in environmental measures. The panel can request scientific evidence on an environmental issue from a scientific or technical review board. This board will be selected from among highly qualified independent experts after consultation with the parties to the dispute and the panel must take the scientific evidence into account when preparing its decisions[659]. However, the dispute will be discussed within the overarching context of the investment regime[660]. The investment agreement is the constitution of the arbitration panel, and the panel's primary goal is to see that the agreement functions smoothly and the parties are faithful to it. This does not mean that

---

[656] Article 14

[657] E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998) at 34.

[658] Z.A. Kronfol, *Protection of Foreign Investment* (Netherlands: A.W. Sijthoff International Publishing Company, 1972) at 139.

[659] Investor -State Dispute Settlement s14 (d).

[660] M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA " (1993) 51 University of Toronto Faculty of Law Review 204 at 236.

environmental issues cannot be dealt with at all, but it does mean that the issues are heard in a forum which gives priority to other issues[661]. Due to this, Dunleavy states that dispute resolution systems such as the one the MAI provides are probably not effective or sensitive mechanisms to deal with investment and environment matters[662].

This paper will now analyse the expropriation clause, which commentators believe will give investors the greatest cause to invoke the dispute settlement procedures.

## B. Expropriation

### 1. What Constitutes Expropriation?

The MAI prohibits direct or indirect expropriation or any regulation having the effect of expropriation, as some investors fear that government regulations may result in the indirect expropriation of their assets. Nwogugu states that:

> "...the deprivation of title from an owner may be achieved under the camouflage of governmental acts which by their nature do not ordinarily constitute a taking of property. This is indirect expropriation. Often, the use of the... regulatory power.... is carried out so subtly that there is a gradual deprivation of the constitutive rights of property. A state may achieve its purpose of 'nibbling the foreign property owner to death' by 'sidestepping an outright and explicit taking'. This process is sometimes referred to as 'creeping expropriation.'"[663]

Would environmental regulations amount to an indirect or creeping expropriation under the MAI?

Expropriation is not defined in the MAI. The commentary states that the provision is

---

[661] *Ibid* at 236.

[662] *Ibid* at 249.

[663] E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (UK: Manchester University Press, 1965) at 23.

intended to cover creeping expropriation[664], but what precisely constitutes an expropriation must be determined with reference to international law[665]. This is problematic because international law on the issue is not settled[666]. Expropriation is generally thought of as the compulsory taking of private property by the state[667], or the deprivation of a right of property held by a foreign investor by a state[668]. However, some states' actions which have the effect of depriving a right of property or which considerably affect foreign interests may *not* be expropriation[669]. Due to political differences between nations there is little agreement on the exact actions that may be termed 'expropriation'[670].

### (a) United Nations Resolutions

United Nations resolutions on this issue may indicate the position of international law. While resolutions "are not unanimous sources of law"[671], they "are evidence of the recent dominant trend in international opinion"[672]. The *UN Resolution on Permanent Sovereignty Over Natural Resources 1962*[673] and the *Charter of Economic Rights and*

---

[664] At 30. The commentary also states that an expropriation will not be construed as having occurred if a nation cancels a permit because an investor no longer meets the conditions for it. It offers no other assistance in interpreting 'expropriation'.

[665] Section 14 states that any issues in dispute will be decided "in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law".

[666] I. Brownlie, *Principles of Public International Law* 4th ed (Oxford: Clarendon, 1990) at 531.

[667] D.J. Harris, *Cases and Material on International Law* 3rd ed. (London: Sweet and Maxwell, 1983) at 422.

[668] I. Brownlie, *Principles of Public International Law* 4th ed (Oxford: Clarendon, 1990) at 532.

[669] *Id.*

[670] *Ibid* at 432.

[671] *Libyan American Oil Company v Government of Libyan Arab Republic* 20 ILM (1981) 1 ("the Liamco case") at 103.

[672] *Id.*

[673] GA Res. 1803 (XVII) G.A.O.R 17th Session, Supp 17 p.15, adopted 87 votes to 2, 12 abstentions.

*Duties of States 1974*[674] both confirm the rights of nations to conduct expropriation. In doing so they indicate that the national law of the host state, as well as international law, should govern the terms of the expropriation. Based upon this if an act constitutes an expropriation under the law of the host state it also does under the MAI. Therefore whether there is an expropriation or not will always depend in part upon the law of the host state. This means that investors are subject to numerous different expropriation regimes, which is contrary to the aim of the MAI to provide investors with more certainty and predictability. Therefore investors will probably argue that the drafters of the MAI could not have intended that the question of what constitutes expropriation be decided on the basis of national laws and that the UN resolutions should be ignored. They could support their argument by stating that the International Court of Justice has noted that the resolutions are essentially political documents and should not be relied upon to indicate international law[675]. In any case, several developed countries, such as the United States, France and the United Kingdom voted against the resolutions and have consistently affirmed their objections to them, so the documents could not be applied to disputes involving those countries[676].

**(b) International Jurisprudence**

There are few international arbitration cases which deal with the issue - most cases on expropriation deal with the amount of compensation to be paid, rather than whether there has actually been an expropriation. This is because in most cases a direct legislative act of or declaration by a state will make it obvious that an expropriation has taken place. For example, in the *Liamco* case the Libyan government legislated to expropriate the property of a foreign national. In *Assets of Hungarian Germany*[677] a German national's property

---

[674]GA Res. 3281 (XXIX) 14 ILM 251 (1975), adopted 120 votes to 6, 10 abstentions.

[675]*Texaco v Libya* (1977) 53 ILR 389; 17 ILM 1 (1978), at paragraph 73.

[676]I. Brownlie, *Principles of Public International Law* 4th ed (Oxford: Clarendon, 1990) at 533.

[677](1967) ILR 32, 565

was vested by decree in the State of Netherlands. In other cases, while a country may deny that it has expropriated assets, the evidence will clearly show that government action has resulted in the direct compulsory acquisition by the state of private property, which all countries agree is expropriation[678].

At least one international case has decided that expropriation includes indirect acts. In *Starrett Housing Corporation v Iran*[679], a US company was involved in a housing project in Iran. The company was forced to leave in the midst of a revolution after the government froze some of their assets and the majority of their work force had to leave because they were being harassed. The government took over the project but did not pass any law or decree under which the project was expressly expropriated[680]. The arbitrator stated that "measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property remains formally with the owner"[681].

Kolvenbach states that any one of a combination of government acts, at one or other time, can constitute an indirect expropriation[682]. Therefore a series of government acts to regulate an industry over time and climaxing in an environmental regulation may so severely restrict an investor's use of an asset that the final act leads the investor to be able

[678] *Benvenuti and Bonfant SRL v The Government of the Popular Republic of the Congo*, (1980) 67 ILR 345. An Italian company in a joint venture with the Congo government was forced to leave the Congo because of threats to the director's lives and because the government dissolved the entity they were in a joint venture with.

[679] 4 Iran-US CTR 122, 23 ILM (1984).

[680] At 1115.

[681] At 1116.

[682] W. Kolvenbach, *Protection of Foreign Investments* (Deventer: Kulwer, 1989) at 247.

to claim that the actions should be described as an expropriation[683]. There have been no cases dealing with whether an environmental regulation alone will be an indirect expropriation. It appears from the cases such a regulation can be considered an indirect expropriation in international law if it is very invasive and renders the investor's asset useless. This is an extension of the expropriation law in most countries which requires that there be an actual "taking" before an expropriation is found. Shrybman states that the international law position has been greatly influenced by the US (the complainant country in most cases) position which reflects the fact that private property rights are enshrined in the constitution in that country[684]. The right to own property is not a constitutional one in most other countries.

If an environmental regulation which interferes with an investor to such an extent that its "private property rights are rendered useless"[685] and therefore expropriated, the state may be able to justify its breach of the MAI on the basis that the regulation was made for a public purpose.

## 2. Public Purpose

Expropriation is permitted under the MAI if it is for a public purpose. If an environmental regulation can be construed as being for a 'public purpose', it will not result in a breach of a party's MAI obligation not to expropriate. Brownlie states that "a loss caused indirectly

[683] However, not all acts which affect a foreign investor will be expropriation. An incidental regulation such as one which causes a currency devaluation which affects a foreign investor will not amount to expropriation. *Tabar Claim*, (1953) 20 ILR 211.

[684] S. Shrybman, "The MAI and Dispute Settlement" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada. Canadian Center for Policy Alternatives, 1998) 48 at 56. For example, in *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982), the US Supreme Court held that a New York law requiring the installation of cables on a property was an interference with property rights which amounted to an expropriation and required compensation.

[685] *Starrett Housing Corporation v Iran*, 4 Iran-US CIR 122, 23 ILM (1984).

by health or planning legislation and the concomitant restrictions on the use of property"[686] will be an allowable public purpose expropriation under international law. Unfortunately, public purpose is not defined in the MAI. The position under international law is not helpful - not only is public purpose vague, but whether a public purpose will in fact excuse an expropriation is unclear. For example, in the *Liamco* case, the arbitrator stated that "the public utility principle is not a necessary requisite for the legality of nationalisation. It is often mentioned... but there is no international authority to support its application to expropriation. Motives are indifferent to international law."[687] However, in the *British Petroleum*[688] case, the arbitrator stated that an expropriation would be illegal if it were made for a purely political reason and was arbitrary and discriminatory, and therefore that motivation and public purpose should be considered.

It is not clear in international law and therefore under the MAI whether an environmental regulation will be considered as amounting to an expropriation, and if so, whether it may be MAI legal because it is for a public purpose. The MAI should include a definition of expropriation to clarify the position for both states and investors and to ensure that environmental regulations which have the effect of expropriation are nevertheless permissible. If the MAI does not include such a definition, several cases which have recently been filed under NAFTA could form a precedent for investor-state disputes under the MAI[689]. In each of these cases the complainant alleges that an environmental regulation has amounted to an expropriation.

---

[686] I. Brownlie, *Principles of Public International Law* 4th ed. (Oxford: Clarendon Press, 1990) at 535.

[687] *Libyan American Oil Company v Government of Libyan Arab Republic* 20 ILM (1981) 1 ("the Liamco case") at 103.

[688] (1970) 53 ILR 297.

[689] "Environment Still Major Issue in Talks on OECD's Multilateral Investment Accord" (1998) 21 International Environment Reporter 46 at 47.

## C. Claims by Investors under the North American Free Trade Agreement

### 1. NAFTA Provisions

Chapter 11 section B of NAFTA 1994 establishes a mechanism for the settlement of investment disputes between a NAFTA country and an investor in another NAFTA country. This section represents the first time that two OECD countries have included such a provision in an agreement between themselves[690]. The section provides that an investor in another country can, on its own behalf or on behalf of an enterprise that the investor owns or controls directly or indirectly, claim that the host country has breached a provision in chapter 11 section A[691] which has resulted in loss or damage to that investor[692]. A breach of Article 1110, which prohibits expropriation in the same way that the MAI does, will trigger the dispute settlement. So will a breach of Article 1106 which prohibits performance obligations similarly to the MAI, and article 1102 which contains a similar national treatment obligation to the MAI.

### 2. Ethyl Corporation

Ethyl Corporation is a Virginia based company, and the sole owner of Ethyl Canada. Ethyl Canada owns and runs an MMT processing facility in Ontario. MMT is a fuel additive in unleaded gasoline. On 25th April 1997, the Canadian government passed the Manganese-based Fuel Additives Act[693] ('Act') which prohibits anyone without a licence from importing or interprovincial trade in MMT.

The Canadian government passed the legislation after it became concerned that MMT was

---

[690] J. Kirton and J. Soloway, *Assessing NAFTA's environmental effects: Dimensions of a framework and the NAFTA regime - NAFTA Working Paper 1* (Canada: CEC, 1996) at 28. This type of clause exists in many BITS between OECD countries and a developing country.

[691] Or article 1503(2) or 1502(3)(a).

[692] Article 1116, 1117.

[693] SC 1997, c.11

not permitted in several states in the United States including the states with the highest levels of air pollution[694]. It banned MMT on the basis of evidence which showed MMT was highly toxic at high levels and that its indirect effects could be hazardous to human health. Indirect effects included that MMT plugs catalytic converters so that they operate less efficiently and release other toxic air pollutants[695]. While the government did not have evidence which proved beyond doubt that MMT had hazardous direct effects at low levels, it "decided that it's prudent, based on the precautionary principle, to ban the import and interprovincial transport of MMT."[696]

The government could not rely on an environmental basis to ban MMT as it did not have evidence of its direct harmful effects, only evidence of its indirect effects[697]. Therefore Canada designed the Act in view of constitutional issues and banned trade in MMT, rather than prohibiting Canadian manufacturers from producing it and selling it within the same province. "The restriction of import and interprovincial trade in a product is a method employed by the Canadian federal government, within its sphere of constitutional competence, to regulate trade, health and environment.... Its use here and in other regulatory schemes is in no way an attempt to target foreign investors or to favour Canadian investors."[698] The penalty for importing or trading in MMT was $1,000,000 or 3 years imprisonment[699]

Ethyl Canada was the sole importer of MMT to Canada, and obtained its supply from

---

[694]Statement of Defence para 33.

[695]Statement of Defence para 62.

[696]"Trade Action Against MMT Best Answer to Environmental Problem, Official Says" (1997) 20 International Environment Reporter 153 at 153.

[697]*Id.*

[698]Statement of Claim para 79.

[699]Section 14.

Ethyl. Once the MMT was partly refined in the US, it was imported to Ontario and then distributed across Canada[700]. Therefore the Act prohibited Ethyl Canada from conducting business as it had been. Ethyl sought relief of $251,000,000 and interest on the basis that its assets had been expropriated and that Canada had breached its NAFTA national treatment obligation and had imposed an illegal performance requirement.

### (a) Expropriation

Ethyl claimed that the Act terminated Ethyl Canada's long term ability to participate in the octane enhancement market in Canada because it did not manufacture MMT in Canada. It claimed that due to this Ethyl Canada might be forced to close down[701]. It claimed that this amounted to an expropriation of Ethyl's assets because it was an unreasonable interference with them[702] It further claimed that the Act had adversely affected the company's reputation and goodwill to such an extent that they too were expropriated. Canada replied that while the Act had placed a restriction on importing MMT, it did not 'take' Ethyl's property, and therefore could not be said to have expropriated anything[703]. In any case, Canada argued, the Act was an exercise of a public purpose that was recognised in international law to excuse an illegal expropriation.

### (b) National Treatment

Ethyl claimed that because the Act banned the import of MMT while permitting it to be sold domestically within each province the Canadian government had breached its obligations to provide treatment no less favourable to foreign investors than it did to its own investors. The result of the Act was that if Ethyl, the sole importer of MMT, "wanted to maintain its presence in the Canadian octane enhancement market, it would be

[700] Statement of Claim para 8-9.

[701] Statement of Claim para 23.

[702] Statement of Claim para 27.

[703] Statement of Defence at 93-95.

required to build a MMT manufacturing, blending and storage facility in each Canadian province"[704]. Canada replied that the fact that Ethyl was the sole importer of MMT was merely a reflection of the current industry structure and could not give rise to a breach of national treatment. If it did, "general measures affecting foreigners who are currently or temporarily sole suppliers in a given market would always have national treatment consequences. The substance of the measure, not solely the relevant industry structure at a given point in time, must be assessed to determine its effect on national treatment obligations."[705]

### (c) Performance Obligations

Ethyl claimed that the Act would breach the NAFTA prohibition on performance obligations in three ways[706]. It would require Ethyl to use MMT that was produced in Canada, it would require Ethyl to build an MMT plant in each province, and it would require Ethyl to use Canadian labour to continue its operations because it was not commercial to operate in any other way. Canada replied that Article 1106 was a prohibition on governments imposing direct and specific performance obligations upon an investor. It was not a prohibition on any regulatory scheme which required investors to do something[707]. The Act was a way of removing MMT from petroleum, not of ensuring preferences to local industry and labour, and therefore did not breach Article 1106.

Article 1114 of NAFTA states that the provisions in chapter 11 shall not be interpreted to "prevent a party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns". Canada

---

[704] Statement of Claim para 13.

[705] Statement of Defence para 80.

[706] Statement of Claim para 43.

[707] Statement of Defence at 86.

therefore argued that the Act was part of Canada's framework to address air pollution and was permissible under Article 1114. The Canadian government also defended the Act on the basis that the NAFTA preamble stated that it had a right to establish its own level of domestic environmental protection[708].

## (d) Outcome

The Canadian government settled the case. It agreed to immediately end the MMT trade and import ban and to pay Ethyl $13 million compensation if Ethyl agreed not to pursue its claim[709]. The government also issued a statement that MMT was not a health risk.

The Canadian government argument on performance obligations was probably its strongest. The Act did not require Ethyl to do anything - it simply meant that if Ethyl wanted to continue to produce MMT, it would have to do so in each province. The argument on national treatment was not as strong. Even though the Act may not have seemed discriminatory upon its face, it had the effect of discriminating against a foreign investor. The act only affected Ethyl - a foreign investor - it did not affect any domestic investors. Even though the Act had this effect quite simply because Ethyl was the only importer of MMT, given the purpose of NAFTA to liberalise investment and the constitutive bias of the tribunal the case would go before, it is foreseeable that a breach of national treatment could have been found. Canada's argument on the expropriation was not strong. Ethyl was effectively prohibited from continuing to conduct business in Canada because of the Act. Given the state of international law on expropriation, a panel could have found that Ethyl's assets had been so interfered with that they were rendered useless.

The government stated that "we didn't settle with Ethyl because of the NAFTA challenge,

---

[708] Statement of Defence at 71.

[709] "Canada Gasoline Additive Lawsuit Called Poor Test of NAFTA Environmental Impact" (1998) 21 International Environment Reporter 946 at 946.

we settled because of the Agreement on Internal Trade (AIT) challenge"[710], and one commentator does not believe that this case was a good test of how the dispute resolution provisions will affect environmental regulation as the scientific facts on the environmental and health impacts of MMT were in doubt[711]. However, most commentators believe that Canada was forced to settle because of the strength of Ethyl's' expropriation claim. Herman states:

> "The legal concept of expropriation and the protection afforded under NAFTA provisions go beyond traditional legal concepts. The MMT case... illustrates governments are at peril if they adopt measures having the effect of expropriating foreign-owned assets, directly or indirectly. It shows using trade instruments to achieve public policy goals must be meticulously thought out and supported with impeccable scientific backstopping."[712]

Another commentator states

> "The investment provisions in Chapter 11 of NAFTA pose a threat to the NAFTA countries' environmental standards by permitting challenges of democratically passed laws before a dispute panel of trade officials.... Chapter 11 puts the onus on governments to justify measures on purely objective terms without being able to use the precautionary principle"[713].

## 2. Metalclad

Metalclad, a US waste treatment corporation, has filed a claim against Mexico under the NAFTA investment provisions. The basis of the claim is the Mexican government's

---

[710] "US firm hits Ottawa with NAFTA lawsuit" Globe and Mail (21 August 1998) B2. The AIT challenge was filed in April 1997 by Alberta, Quebec, Saskatchewan and Nova Scotia who claimed that the Act imposed unnecessary measures to trade contrary to the AIT.

[711] "Canada Gasoline Additive Lawsuit Called Poor Test of NAFTA Environmental Impact" (1998) 21 International Environment Reporter 946 at 946.

[712] Herman, "Expropriation takes on new meaning: MMT case sets far reaching precedent" The Financial Post (28 July 1998) 13.

[713] "Canada Gasoline Additive Lawsuit Called Poor Test of NAFTA Environmental Impact" (1998) 21 International Environment Reporter 946 at 946.

refusal to allow them to operate a notoriously polluting Mexican waste disposal facility[714]. The site was previously operated by a Mexican company who illegally confined 20,000 tons of hazardous wastes on the site. The site was shut down and the area was declared part of an ecological zone. Metalclad had already bought the site and after it was declared an ecological zone they requested permission to clean up the site and begin using it again. The local government refused to give Metalclad a building permit based on its zoning and community opposition to the site being reopened[715].

Metalclad seeks compensation of $90 million, based on arguments that its asset has been expropriated and that the Mexican government has breached national treatment obligations by not allowing it, a foreign investor, to operate the site[716]. Crane states that Metalclad's argument on expropriation is its strongest one[717]. The company claims that it has invested more than $22 million on cleaning up the landfill[718] and that this money will effectively have been expropriated if they are not allowed to operate the site.

### 3. SD Myers

SD Myers is a company based in Ohio which transports and processes wastes contaminated with PCBs. It collects wastes in Canada and transports them to Ohio for

---

[714] T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) at 86.

[715] "US Firm to Submit Claim for Arbitration to Panel over Mexico's Action on Waste Site" (1997) 20 International Environment Reporter 956 at 956.

[716] M. Swenarchuk, "The MAI and the Environment" in in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 120 at 127.

[717] W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 452.

[718] Metalclad stated that it did so without a permit because no domestic operators obtained one, and it thought this was the practice. "US Firm to Submit Claim for Arbitration to Panel Over Mexico's Action on Waste Site" (1997) 20 International Environment Reporter 956 at 956.

processing[719]. In 1995, the Canadian government prohibited people from exporting PCB wastes[720]. This meant that SD Myers could no longer continue to conduct business in Canada by transporting wastes to the US.

The ban was in place for 15 months and then rescinded. SD Myers claims that during the ban they lost more than $10 million. They base their claim partly on national treatment, stating that the ban discriminated against US investors who wanted to treat the waste in America while allowing Canadian investors to treat waste in Canada[721]. They also claim that the effect of the ban was to totally frustrate their Canadian operations and constituted an expropriation[722]. The case is currently in arbitration.

### 4. Sun Belt Water

Sun Belt Water Inc is a Santa Barbara company. It formed a joint venture with a Canadian company to export water from British Colombia to California in super-tankers. The BC government imposed a moratorium on bulk water exports, and the venture could no longer operate. The Canadian company and Sun Belt sued the BC government, and the Canadian company settled. Sun Belt has filed a claim under NAFTA claiming that their share of the venture has been effectively expropriated and that the BC government has breached national treatment obligations by settling with the Canadian company and not them. The claim is for $220 million in damages and lost profits[723].

---

[719]Statement of Claim para 1-3.

[720]Order in Council #1992-261, February 26 1996. This order prohibited wastes being exported from Canada to the US - a previous order in 1990 had banned PCB waste from being exported from Canada to anywhere other than the US.

[721]Statement of Claim para 11.

[722]Statement of Claim para 14.

[723]Scoffield, "BC water export ban brings US lawsuit" Globe and Mail (9 December 1998) B1 and B9.

This case is especially important as the Canadian federal government is proposing to prohibit the export of bulk water resources[724]. Such a measure could lead to numerous claims of expropriation by foreign investors. Two other cases have recently been filed under NAFTA[725].

## D. Conclusion

The MAI does not define the terms expropriation or public purpose. This could create a situation where a foreign investor interprets these terms very differently to a signatory nation. This situation could be prevented by the inclusion of universally understood terms in the text[726]. It also means that the wide US view of expropriation based on the sanctity of property rights is arguable and will probably be argued by investors seeking maximum compensation. Such has been the recent experience in cases filed under NAFTA. The recent NAFTA cases may be an important indication of how the MAI provisions will be used, with one important difference. According to Crane, Article 1114 in NAFTA could absolve a nation from liability for expropriation where the country undertakes the expropriation to ensure that investments are sensitive to environmental concerns[727]. The MAI does not contain such a provision.

While the Canadian government had the resources to defend their actions in the Ethyl dispute, many small nations may not have such resources. Crane notes that out of the 100

---

[724]Reguly, "Water tap will be hard to shut off" Globe and Mail (16 February 1999) at http://theglobeand mail.com

[725]One where a Canadian company is suing the US, and another where a US company is suing Canada. Scoffiled "Another US firm sues Ottawa under NAFTA" The Globe and Mail (16 February 1999) at http://theglobeandmail.com

[726]W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429 at 448.

[727]*Ibid* at 447.

biggest economies in the world, 51 are corporations and 49 are countries[728]. Developing countries have far fewer resources than many multinationals and may be reluctant to pass environmental regulations which may have the effect of triggering the dispute resolution procedures. Dunleavy states that this raises the possibility of interested industries lobbying through the dispute process to have environmental laws altered[729].

Many developing countries have not yet established a comprehensive environmental law framework to deal with developed nation industries[730]. As industries spread and developing nations begin to legislate to deal with the pollution they may produce, these nations face the difficulty of having their legislation challenged on the basis that it breaches the MAI national treatment obligations. If an environmental regulation affects a foreign investor in a way which appears discriminatory the dispute resolution procedures will be triggered. Foreign investors who have a monopoly in a particular area will be in the strongest position to argue this, as they can show that the environmental regulation can never affect a domestic investor[731]. Even if the country can successfully argue that the effect is simply the result of market structure and not discrimination, they will have to go through extensive litigation to do so.

## VI. Conclusion

If the MAI is to lead to sustainable development and decrease the ecological footprint of development spurred by investment, it must permit national governments to adopt

---

[728] *Ibid* at 453.

[729] M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" (1993) 51 University of Toronto Faculty of Law Review 204 at 237.

[730] M. Swenarchuk, "The MAI and the Environment" in in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 120 at 126-7.

[731] It seems ironic that monopolies, which are usually powerful investors, may receive the greatest protection under the MAI.

whatever environmental regulations are appropriate for their country. It must also contain provisions which prevent countries from lowering their environmental standards in order to attract investment. It does not do either of these and therefore may not lead to sustainable development.

Neither of the not lowering standards provisions in the MAI are likely to have a substantial effect upon many countries' behaviour in regard to lowering or not enforcing their environment laws. One draft provision does not prohibit countries from lowering their environmental standards and neither provision provides for effective dispute settlement if countries do.

The preamble does not include a strong iteration of the concept of sustainable development, or of the precautionary principle, or of the polluter pays principle. Therefore it will probably have a negligible effect upon the interpretation of the MAI. It does however include a statement that the agreement should be implemented in accordance with international environmental law which may allow countries to protect the environment under international treaties notwithstanding that this may result in a breach of the MAI.

If the environmental exception to the performance obligations provision is interpreted similarly to the GATT environmental exceptions it may provide only rare justification for a state's domestic content performance obligations in order to protect the environment. Under the provision it is arguable that countries may be required to show that their legislation was the least investment restrictive option and was made in accordance with international standards. Countries will almost certainly be required to conduct extensive international negotiations before they legislate to protect any part of the environment out of their jurisdiction, regardless of the likely effectiveness of such negotiations or the imminent danger to the environment.

With little scope in the MAI for countries to justify their environmental measures, countries will be exposed to being challenged by foreign investors when they pass an environmental law which affects foreign investors. This may have a substantial chilling effect upon the passage of environmental legislation.

The MAI will probably not lead to sustainable development and by restricting states' latitude to regulate investment when it affects the environment may in fact lead to an increase in the environmental footprint of development.

# CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

## I. Conclusion

### A. The Need for an International Investment Agreement

Prior to the mid 1980s, most international investment was in the form of foreign direct investment and flowed primarily between the United States, Japan and the countries in European Community. Most countries in the world who received foreign investment sought to restrict and regulate it in order to obtain the maximum advantage they could from it. Therefore, international investors were faced with a myriad of different establishment regulations and performance obligations wherever they sought to invest. Several attempts were made at an international level to liberalise and codify these laws but none was completely successful.

The process of globalisation has proved to be more successful than the international initiatives and has led to substantial liberalisation of national regulations on international investment, though even today no country allows international investment into its jurisdiction without at least monitoring it. Globalisation has also facilitated a massive growth in foreign direct investment and in new forms of international investment such as portfolio investment and debt financing. Both developed and developing countries have started to compete for foreign investment, believing that it will spur their economic growth. Most foreign investors have responded to this and begun to invest in ever increasing amounts in the emerging markets in some developing nations. The face of international investment has changed dramatically in a very small time period.

This has led to international investors calling upon their home countries to negotiate an international agreement on investment both to provide them with certainty, predictability, and non discriminatory treatment and to provide a greater impetus for liberalisation.

Without such an agreement investors argue that they will not be able to continue increasing investment at the rates the world has become accustomed to. At the same time, critics of uncontrolled international investment and many developing nations argue that investors, who are often powerful multinational corporations, should be bound to a corporate code of conduct. Globalisation reduces the ability of national governments to regulate international investors, and therefore negotiating an international binding code is one of the most effective ways that nation states can continue to regulate investors to ensure they are not disadvantaged by it.

The OECD, an institution primarily formed of developed nations, responded to these calls for an international investment agreement and in 1995 began to negotiate the MAI.

## B. The Criteria for Assessing Whether the MAI Will Lead to Sustainable Development

International investment which is facilitated by the MAI has the potential to decrease the ecological footprint of development. It could lead to the transfer of clean technology. It could increase peoples' living standards to such a level that they begin to demand better environmental protection and are willing to pay for it. It could lead to a more efficient allocation of resources. However, it also has the potential to increase the ecological footprint of development. It could exacerbate the market's failure to include environmental degradation as a cost of production. It could lead to an increase in overall consumption and negative scale effects. It could precipitate natural resource sell-offs in countries whose currency is destabilised by the rapid movement of portfolio investment. It could lead to the formation of pollution havens in toxic industries when countries are willing to lower their environmental standards in order to attract investment.

Due to its potential negative environmental impacts the MAI must allow countries to regulate foreign investment when it becomes clear that investment is having a negative impact upon their environment. The most effective way for countries to do this in the face of globalisation is to negotiate an international code which makes investors responsible for the environment they operate in. However, as an international agreement represents a consensus, countries should also be permitted to implement different environmental measures when their population or specific environment requires it. The MAI should also include a provision which prohibits countries from reducing their environmental standards in order to attract investment.

The above discussion generates three criteria which the MAI should meet if it is to lead to sustainable development. The first criterion is that it should provide a certain, liberalised and non discriminatory legal regime for international investment. The second is that it should govern multinational investor behaviour. The third is that it should allow countries to regulate international investment when it becomes clear that investment is having a deleterious effect upon the environment.

## C. Evaluating the Multilateral Agreement on Investment

In relation to the first criterion, the MAI mandates extensive liberalisation of national investment regulations and will provide considerable stability and certainty to international investors. It contains a wide definition of investment which means that the MAI provides protection to all of the existing and emerging ways foreign investors are conducting their activities. It obliges countries to provide most favoured nation and national treatment to investors. It provides investors with access to a neutral dispute resolution procedure when an investor suffers any loss due to a state party breaching its MAI obligations or expropriating an investor's assets.

In relation to the second criterion, the MAI does not govern multinational corporate behaviour. It includes the non binding *OECD Guidelines for Multinationals* and specifies that they will retain their non binding status.

In respect of the third criterion, the MAI will not provide states with sufficient latitude to regulate investment when it becomes clear that the MAI is having a negative impact upon the environment. It contains some provisions which directly conflict with a state's ability to protect the environment, such as the national treatment obligation which arguably prevents states from imposing environmental laws which affect a single foreign investor. The environmental exception provision provided in the MAI is so limited in scope and sets such high standards that it unlikely to be effectively utilised. For example, countries may be required under the provision to prove that the performance obligation they have instituted is based on irrefutable evidence of environmental harm and that they conducted international negotiations before imposing the obligation. The 'not lowering standards' provision included in the MAI is not likely to influence states' behaviour to any significant extent. Due to these deficiencies the MAI will probably not lead to sustainable development.

## II. Recommendations

Some provisions in the MAI could be altered so that it is more likely to lead to sustainable development. Altering the draft provisions will require extensive negotiation among parties, and given the resistance of many business organisations to the inclusion in the MAI of provisions which relate to the environment, the negotiations are bound to be protracted and difficult. Altering the draft provisions will also require a comprehensive analysis of the effects and consequences of the suggested changes to determine whether they will in fact lead to sustainable development and whether they will unacceptably compromise the ability of the agreement to liberalise investment and to provide certainty to investors.

In light of these problems, this chapter now highlights some provisions of the MAI which should be altered if it is to forestall unacceptable environmental damage and suggests how the provisions could be altered to ensure that the MAI achieves sustainable development.

## A. A Code for Investor Responsibility

Gro Bruntland, the Chairman of The World Commission on Environment and Development which wrote *Our Common Future*[732] stated that "with greater freedom for the market comes greater responsibility"[733]. However, this will not be the experience of investors under the MAI. The investment market will be greatly liberalised under the MAI yet the investors in that market will not be accorded any greater responsibility. Specifically, they will not be accorded any responsibility for the environment. The OECD guidelines that are incorporated in the MAI preamble and annex do not bind investors and the annexing provision specifies that, at least in connection with the MAI, the guidelines will always be non binding.

The MAI could ensure that whatever standard of conduct or code of responsibility it prescribes for investors is binding and enforceable. Even though international investors will not be parties to the MAI and therefore can not be bound by *it*, individual countries could require investors to follow a code which prescribes standards for behaviour. Countries could do so by requiring an investor to sign a contract agreeing to be bound by an MAI code of international environmental standards before that investor is permitted to establish an investment. If the investor fails to act in accordance with the standards, it will breach the contract. If the MAI requires parties to seek this agreement from investors, any county who allows a foreign investor to establish an investment without first signing the agreement will be in breach of its MAI obligations. In this way foreign investors could become subject to a binding and enforceable code of environmental responsibility.

The OECD *Guidelines for Multinational Enterprises* ('the guidelines') set behavioural

---

[732]The World Commission on Environment and Development *Our Common Future* (Oxford: Oxford University Press, 1987).

[733]Cited in S. Schmidheiny with the Business Council for Sustainable Development, *Changing Course* (USA: Massachusetts Institute of Technology, 1992) at 1.

standards for foreign investors which are relatively broad and non specific. They are currently being reviewed by the MAI negotiating team which aims to make them more detailed and specific. However, even as currently drafted the guidelines provide the basis for a set of internationally regarded behavioural standards for multinational investors. They state, among other things, that corporations should conduct environmental impact assessments, implement environmental management plans and use appropriate technologies. They further state that corporations should take account of the need to protect the environment and avoid creating environmental problems.

The effect of national governments' laws is lessening due to globalisation. However, once a code has established a basic standard of conduct for investors with respect to the environment and therefore ensured that investors are not completely exempted from responsibility, it is important that countries have the ability to pass specific national laws to regulate investors to protect the environment. It is unlikely that after investors are bound to a basic level of conduct (and given the relatively small cost to investors of meeting environmental standards) they will move their investments to escape national environmental regulations. National laws will still be of great importance in protecting the environment and countries' ability to make them should be greater than it is under the environmental exceptions provision in the current draft of the MAI. The next part examines this point.

**B. Broad Environmental Exceptions**

The environmental exception to the prohibition on performance obligations does not provide countries with sufficient latitude to regulate international investment when it becomes clear that such investment is having a negative effect upon the environment. The environmental exception provision should be broadened in scope and altered in form. Instead of using the restrictive GATT formulation, a new one which gives countries sufficient latitude to protect the environment should be designed. The current draft of the

MAI states:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and (c) (which paragraphs prohibit domestic content and purchase requirements) shall be construed to prevent any contracting party from adopting or maintaining measures, including environmental measures:...
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) necessary for the conservation of living or non living exhaustible natural resources."

A new draft could state.

> "A contracting party may adopt any measure which is inconsistent with their obligations under this agreement which will facilitate them in protecting their national or the global environment."

The following explains the elements of the new draft of the provision.

### 1. "Inconsistent With Their Obligations"

Countries are becoming more reluctant to require performance obligations of specific investors for fear of deterring them and are therefore unlikely to utilise the exception provided in the MAI in relation to performance obligations. Countries could be permitted to deviate from any of their obligations under the MAI in order to protect the environment, not just from the prohibition on performance obligations requiring investors to purchase or use domestic goods and services. Specifically, they could be permitted to deviate from their obligations to provide national treatment and most favoured nation treatment to investors. They could be permitted to expropriate an investors' assets (the issue of compensation will be discussed below) in the course of protecting their environment. If countries are to have sufficient latitude to regulate international investment when it becomes clear that such investment is having a negative effect upon the environment, they should be permitted to deviate from any of their obligations under the MAI in order to protect the environment.

### 2. "Protecting the Environment"

The new provision could state that countries are able to detract from their MAI obligations in order to protect 'the environment'. The phrases 'to protect human, animal and plant life or health' and 'to conserve living or non living exhaustible human resources' which are used in the MAI do not encompass all of the purposes for which countries may wish to implement environmental measures. On a related point, the MAI could specify that countries are not required to conclusively prove that their measure will protect the environment. If countries are so required a regulatory chill effect may ensue. The MAI incorporates a soft version of the precautionary principle in the preamble. To ensure that the precautionary principle in fact governs the standard of proof that countries are required to show, a harder version of the principle could be incorporated into the agreement as a specific objective of the parties.

### 3. "Which Will Facilitate"

The MAI provision should not require that a country prove a measure is 'necessary' to protect the environment. This requirement is probably too rigorous to provide countries with sufficient latitude to regulate for the environment. Further, it may be interpreted to incorporate the notion that a measure will only be deemed necessary when it meets an international standard of protection, rather than the level a specific country desires. The provision could instead state that parties can take measures which 'will facilitate' environmental protection. This is a far less rigorous test, but by using the word 'will' the test still incorporates the notion that a measure should be squarely aimed at environmental protection. Using 'facilitate' also incorporates the notion that one measure alone may not achieve environmental protection.

### 4. "Their National or the Global Environment"

As the environment is not constrained by jurisdictional boundaries it is important that countries be able to act to protect the environment within their own jurisdiction and the environment that they share with other countries. The question of whether the GATT environmental exception clause contains a jurisdictional limit has not been resolved by the WTO/GATT jurisprudence. Unless the issue is made clear in the MAI, some countries may argue that another has no right to act to protect the global environment without first conducting extensive and potentially fruitless negotiations for an international environmental agreement. Therefore a new exception provision could state explicitly that countries may implement measures to protect either the environment within their jurisdictional boundaries or the environment that they share with other countries.

### 5. The "arbitrary and unjustifiable" Clause

The test that a measure should be shown to be justifiably discriminatory and not arbitrary has not been included in the new formulation of an environmental exception. This clause has arguably been incorporated in the MAI to ensure that the principle of investment liberalisation retains paramountcy over the principle of environmental protection. If the clause is interpreted to ensure this, it is contrary to sustainable development. If the clause is interpreted as it was in the *Shrimp Turtle* Appellate Body decision, it will require that parties act in good faith and do not abuse the exception provisions. Parties are already required to so act under international law. Therefore, as the clause may either prevent sustainable development or merely be superfluous it should not be included in any formulation of an environmental exceptions provision.

## C. Strong Preambular Language

The preamble to the MAI incorporates sustainable development. However, as it includes a weak version of the concept of sustainable development, as well as a weak version of the precautionary principle and the polluter pays principle, the preamble is not likely to have a substantial influence upon the interpretation of binding obligations. And while it includes a statement that the MAI should be incorporated in accordance with international environmental law, it is not clear what that law is.

The preamble could include a strong version of sustainable development. Rather than referring to the *Rio Declaration* and *Agenda 21* it could include a specific articulation of the principle which recognises the importance of integrating environmental and economic decision making. The following, taken from principles 3 and 4 of the *Rio Declaration*, may be appropriate:

> "The parties wish to exercise their rights to development so as to equitably meet the development and environmental needs of present and future generation. The parties recognise that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

This is a far stronger version of the principle currently in the MAI. Further, by stating that the parties wish to exercise their rights to development in a certain way, this preambular clause is on par with the parties' other aim to establish a fair and transparent liberalised investment regime. It is therefore unlikely to be overlooked as easily as a preambular clause which merely recognises that sustainable development may be consistent with international investment, as the current preamble does.

The preamble could include a separate clause which states that the parties wish to implement the agreement in accordance with any international environmental treaties that they are parties to at any time. The NAFTA Article 104 lists several environmental and conservation agreements and allows parties to add other agreements in an annex for this purpose. While this may be suitable for the NAFTA which only has three parties, it may be more difficult for the number of parties in the MAI to reach agreement on which environmental agreements should be included initially or added to the annex. Therefore individual parties should only be bound to implement the MAI in accordance with the international environmental agreements they are parties to.

While there are no instances at present of a specific obligation in a multilateral environmental agreement (MEA) which conflicts with an obligation in the MAI, it is foreseeable that MEAs in the future may contain some MAI inconsistent requirements.

To deal with such a situation, a similar clause to the NAFTA Article 104 would be useful to include. Such a clause could state:

> "In the event of any consistency between this Agreement (the MAI) and a requirement in an international environmental agreement that a party (of this Agreement) is a party to, the requirement in the international environmental agreement shall prevail to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with the requirement, the party chooses the alternative that is least inconsistent with the other provisions of this Agreement."

This clause ensures the primacy of the international environmental agreement while ensuring that a party does not derogate from its obligations under the MAI unless it has no other effective or reasonable option.

## D. Not Lowering Standards Provision

The two versions of a not lowering standards provision proposed by the negotiating group are problematic. Only one will be a binding obligation upon states and neither will give parties access to the dispute resolution provisions in case of breach. It is not clear whether either clause will address the issue of parties who do not enforce their standards rather than lower or waive them. And a formulation which uses the term "lower" in relation to environmental measures may restrict the regulatory options that countries have.

A new clause could state that

> 1) "A party shall not waive, or offer to waive, or not enforce, or otherwise derogate from environmental measures in order to attract or facilitate international investment."
>
> 2) "A party shall not decide to not enact a new environmental measure or not amend an existing one in order to attract or facilitate foreign investment."

Part 1 of this clause creates a binding obligation upon states not to waive their environmental measures, and therefore provides states and investors with access to the dispute resolution provisions in case a country breaches the obligations. It explicitly covers countries who choose not to enforce their standards in order to attract investment[728], and by omitting the word 'lower' does not restrict countries' regulatory options. Part 2 deals with the issue of the regulatory chill in some developed countries who decide not to implement better environmental standards because it would make their own investors less competitive

## E. Investor-State Dispute Resolution

Some commentators[729] believe that the investor-state dispute resolution provisions should be removed from the MAI altogether. This paper will not address this issue. Rather it will suggest some ways in which the provisions could be altered so that they are not able to used by investors to avoid environmental regulation

The MAI provides that a dispute resolution panel can request scientific evidence from a board of independent scientific experts. However, these experts may only provide advice and the final decision is made by panel members who are experts in financial and investment disputes. Some commentators believe that the constitution of the panel means this method of dispute resolution cannot effectively deal with investment/environmental disputes. This problem could be alleviated if an independent scientific expert could be appointed to the panel when there is an investment/environment dispute. Panels consist of 3 members. Parties are usually able to choose one member of the panel. The final panel member could be a person with scientific expertise as well as knowledge of the investment field.

---

[728] As noted in Chapter 4, this paper does not address the issue of countries who do not have sufficient access to resources to enforce their environmental measures.

[729] T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997) and A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998).

The provision which prohibits expropriation could define expropriation so that investors cannot argue for a broad interpretation of the word based on the United States position which is inconsistent with the position in several other countries. This would mean that an investor could not claim that an environmental regulation has had the effect of expropriating its asset simply because it cannot use that asset in the same way it did prior to the regulation. In cases where an environmental regulation interferes so much with an investor's use of its assets that it does amount to an expropriation, that expropriation should be allowed on the basis that it is for a public purpose. Expropriations for a public purpose are permitted under the MAI, and public purpose could be defined to include laws made for the purpose of protecting the environment

Investors whose assets are expropriated should be able to receive damages. However, the MAI should ensure that the damages claims are not so great that they chill a country's will to pass a new environmental law This paper makes the following preliminary suggestion which could be the subject of further study as to how to address this issue. States could be required to place some percentage of the revenue they receive from taxing international investors into a special fund available only for payment to foreign investors whose assets are expropriated by an environmental law. This will ensure that countries have access to funds in case they expect to enact far reaching environmental laws and are therefore not deterred from this goal.

In the recent Ethyl Corporation claim under NAFTA Canada argued that NAFTA Article 1114 should have been considered to legitimate their ban on MMT. This Article states that:

> "Nothing in this investment chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

Including a similar Article in the MAI could ensure that there is an underlying assumption that parties who regulate investors to protect the environment are acting legitimately, and that nothing in the MAI may be interpreted to indicate otherwise.

## F. Modified Definition of Investment

The negotiating team drafted a broad definition of 'investment', which encompasses all the current and emerging areas in which foreign investors invest, in an effort to ensure that the MAI has a comprehensive application. The definition is so broad that it includes volatile short term investments, the rapid movement of which can precipitate financial crises. This is problematic for two reasons. First, it is arguable that volatile flows are not an efficient use of capital. Therefore by incorporating volatile flows the definition is inconsistent with the preamble to the MAI which states the aim of the parties is to facilitate the efficient use of capital. The second problem is that some developing countries have been observed selling off their natural resources to alleviate financial crises caused by the movement of volatile investment. This causes unnecessary damage to the environment in those countries and is not a sustainable activity.

The definition of investment should be refined so that it excludes volatile short term investments. This paper makes the following preliminary suggestion which could be the subject of further study as to how the definition could be so modified. The modification could take the form of a criterion that investment be of a long term nature. It could prescribe a fee or penalty be levied on investors who claim their investments are long term and therefore avail themselves of protection under the MAI but move the investment before it has proven to be long term.

## G. Other Recommendations

### 1. Investment Incentives

Another problem with the MAI is that it does not regulate investment incentives. The incentives that some countries offer to attract foreign investment can be so great that they distort the investment market and lead to resource allocation inefficiencies. Countries could be required to publish details of their investment incentive schemes. This may mean that countries are more circumspect in offering incentives, and therefore may lead to fewer resource allocation problems.

### 2. National Treatment

While it is arguable that the MAI national treatment obligation incorporates the notion that countries are only required to accord national treatment to foreign investors when those investors are in similar or comparable situations, the MAI could be amended so that it explicitly incorporates the notion. This would prevent multinationals arguing that they should be accorded the same treatment as small local firms who are involved in far different activities. Therefore, if a multinational investor was the only investor in a country affected by an environmental measure, it could not argue that the country had breached national treatment because no domestic firms were subject to the same measure. Multinationals who are in a monopoly position in any country, such as Ethyl Corporation, would not be able to argue that a country had breached national treatment by enacting a regulation which affected only them.

## H. Conclusion

The question posed in the introduction to this paper was whether the MAI incorporated sound environmental principles which make it compatible with sustainable development, as supporters believe it does, or whether it could lead to the environmental degradation that critics assert it will. Perhaps not surprisingly, the answer this paper provides lies between these two propositions. Indeed, the MAI has the potential to lead to positive impacts upon the environment and to sustainable development. However, as currently drafted it negates some of the positive impacts it may have and largely prevents countries from regulating investment which has a negative environmental impact.

Sustainable development requires that development decisions, such as whether a country should sign the MAI or not, be made in full light of their ecological consequences. Countries should be aware that signing the MAI as currently drafted has the potential to have negative consequences for the environment which they will not be permitted to address. The challenge is to redraft the MAI so that the countries who sign it may be sure they can continue to pursue sustainable development.

# BIBLIOGRAPHY

## I. Primary Sources


GATT/WTO Judicial Opinions

*Canada - Administration of the Foreign Review Investment Act*, GATT Panel Decision (1984) GATT 30th Supplement BISD 140

*Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Panel Decision (1988) L/6268

*Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Panel Decision (1990) BISD 37th Sup 200

*United States - Restrictions on Imports of Tuna*, GATT Panel Decision (1991) 30 ILM 1594

*United States - Restrictions on Imports of Tuna*, GATT Panel Decision (1994) 33 ILM 839

*United States - Standards for Reformulated and Conventional Gasoline*, WTO Panel Decision (1996) 35 ILM 274

*United States - Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Decision (1996) WTO Doc. WT/DS2/AB/R

*EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Appellate Body Decision (1998) WT/DS/AB/R and WT/DS48/AB/R

*United States - Import Prohibition of Certain Shrimps and Shrimp Products*, WTO Panel Decision (1998) WT/DS58/R

*United States - Import Prohibition of Certain Shrimps and Shrimp Products*, WTO Appellate Body Decision (1998) WT/DS58/AB/R

Other Judicial Opinions

*Tabar* Claim (1953) 20 ILR

*Assets of Hungarian Germany* (1967) ILR 32, 565

*France - Nuclear Tests* ICJ Rep. (1974)

*Texaco v Libya* (1977) 53 ILR 389; 17 ILM 1 (1978)

*Benvenuti and Bonfant SRL v The Government of the Popular Republic of the Congo*, (1980) 67 ILR 345

*Libyan American Oil Company v Government of Libyan Arab Republic* 20 ILM (1981)

*Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982)

*Starrett Housing Corporation v Iran* 4 Iran -US CIR 12, 23 ILM (1984)

*Corrosion Proof Fittings v EPA* No 89-4596 (1989)

<u>Treaties</u>

General Agreement on Tariffs and Trade (1947) GATT BISD Vol IV (March 1969)

European Economic Community Treaty (Rome, 1 January 1958)

United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards Convention Act (New York, 10 June 1958) 330 UNTS 3

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 1965) ILM 532 (1965)

Vienna Convention on the Law of Treaties (1969) 8 ILM 691

Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973) 993 UNTS 243

Arbitration Rules of the United Nations Commission on International Trade Law, approved by the UN General Assembly 15 December 1976, UN GAOR, 31st Session, Suppl no 17 at 46, section C

United Nations Convention on the Law of the Sea (Montego Bay, 1983) 21 ILM 1261 (1982)

The Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) 26 ILM 1529

Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) 26 ILM 1550

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 1989) 28 ILM 657

Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) 31 ILM 874

United Nations Framework Convention on Climate Change (Rio de Janeiro, 4 June 1992) 31 ILM 848

Agenda 21 (Rio de Janeiro, 4 June 1992).

North American Free Trade Agreement (1994) Canada, Mexico, United States

Agreement Establishing the World Trade Organisation (Marrakesh, April 15 1994)

Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, April 15 1994)

General Agreement on Tariffs and Trade 1947, as amended (Marrakesh, April 15 1994)

Agreement on Trade- Related Investment Measures (Marrakesh, April 15 1994)

Agreement on Technical Barriers to Trade (Marrakesh, April 15 1994)

General Agreement on Trade in Services (Marrakesh, April 15 1994)

Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh, April 15 1994)

Rules of Arbitration of the International Chamber of Commerce

Canada - Legislation

Foreign Investment Review Act SC, 1973-74, c.46 (no longer in force)

Investment Canada Act RSC, 1985, c.I-22

Manganese- Based Fuel Additives Act S.C. 1997 c. 11

Other Primary Sources

"Global financial flows and their impact on the developing countries" GA. Res. 52/180, UN GAOR (18 December 1997) A/52/626/Add.1

"Global partnership for development high level international intergovernmental consideration of financing for development" GA Res 52/179, UN GAOR, (18 December 1997) A/52/626/Add.1

"Business and development" GA Res. 52/209 UN GAOR ( 18 December 1997).

Charter of Economic Rights and Duties of States GA Res. 3281 (XXIX) 14 ILM 251 (1975), adopted 120 votes to 6, 10 abstentions.

UN Resolution on Permanent Sovereignty Over Natural Resources GA Res. 1803 (XVII) GAOR 17th Session, Supp 17 p 15, adopted 87 votes to 2, 12 abstentions.

*Ethyl Corporation v Government of Canada:*

Notice of intent to submit a claim to arbitration
Notice of arbitration
Statement of Claim
Statement of Defence

*S.D. Myers Inc. v Government of Canada:*

Notice of intent to submit claim to arbitration

## II. Secondary Sources

J.N. Abramovitz, "Sustaining the World's Forests" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 21

J. Adams, "Globalisation, Trade, and Environment" in OECD, *Globalisation and Environment* (Paris: OECD, 1997) 179

American Casebook Series, *International Law Cases and Materials* (USA: West Publishing Company, 1980)

K. Anderson and J. Drake-Brockman, "The World Trade Organisation and the Environment" in B. Boer, R. Fowler and N. Gunningham (eds.), *Environmental Outlook: Law and Policy No 2* (Australia: Federation Press, 1996)

M. P. Avramovich, "The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?" (1998) 31 The John Marshall Law Review 1201

M. Baldi, "Dispute Settlement" in OECD *Working Papers No 96* (Paris: OECD, 1997) 28

R. Barnet and J. Cavanagh "Electronic Money and the Casino Economy" in J. Mander and E. Goldsmith (eds.), *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 360

G. Bingham, *Resolving Environmental Disputes: A Decade of Experience* (Washington: The Conservation Foundation, 1986)

P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford, Clarendon Press, 1993)

Biswajit *et al.*, "MAI - An Analysis" (1998) 33 Economic and Political Weekly 837

C. Bridge, "The OECD Guidelines and the MAI" in OECD, *Working Papers No 96* (Paris: OECD, 1997) 17

L. R. Brown, "The Future of Growth" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 3

I. Brownlie, *Principles of Public International Law* 4th ed. (Oxford. Clarendon Press, 1990)

P.J. Buckley, "Introduction" in P.J. Buckley (ed.), *International Investment* (London: Edward Elgar Publishing Company, 1990)

J. Burns and E. Chrysler, "Multinational Corporate Growth: The Need for Multinational Control" (1997) 141 Foreign Investment in Canada - Report Bulletin 1

J. Burns and E. Chrysler, "Multilateral Agreement on Investment: DOA" (1998) Foreign Investment in Canada - Feature Articles 399

J. Burns and R. Eberschlag, "MAI: Down for the Count" (1998) 12 Foreign Investment in Canada News 5

E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015

L.K. Caldwell, *International Environmental Policy* (Durham: Duke University Press, 1996)

J. Cameron and Z. Makuch, "Implementation of the United Nations FCCC" in J.

Cameron, P. Demaret and D. Geradin (eds.), *Trade and the Environment* (London: Cameron and May, 1994)

"Canada Gasoline Additive Lawsuit Called Poor Test of NAFTA Environmental Impact" (1998) 21 International Environment Reporter 946

S. Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX" (1991) 25 (no. 5) Journal of World Trade 37

M.R. Chertow and D.C. Esty ,"Introduction" in M.R. Chertow and D.C. Esty (eds.), *Thinking Ecologically* (New Haven: Yale University Press, 1997) 1

M.R. Chertow and D.C. Esty ,"A vision for the future" in M.R. Chertow and D.C. Esty (eds.) *Thinking Ecologically* (New Haven: Yale University Press, 1997) 230

Chia Siow Yue, "Trade and Foreign Direct Investment in East Asia" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 49

N. Chomsky, *World Orders Old and New* (New York Columbia University Press, 1994)

T.Clarke, "Mechanisms of Corporate Rule" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) at 297

T. Clarke and M. Barlow, *MAI: the Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Canada: Stoddart Books, 1997)

Commision for Environmental Co-operation, *Assessing the Effects of NAFTA (Phase II)* (1999) available at http://cec.org

J.T. Connor, *Legal Aspects of Doing Business with the USSR and Eastern Europe* (New York: Practising Law Institute, 1977)

W. Crane, "Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment" (1998) 9 Col. J. Int'l Env. Law and Pol'y 429

C. Crouch and D. Marquand, *Ethics and Markets* (Oxford. Blackwell Publishers, 1993)

J. Culbertson, *The Trade Threat* (Madison: Century Press, 1989)

H. E. Daly, *Beyond Growth - The Economics of Sustainable Development* (Boston: Beacon Press 1996)

M. Daly, "Investment Incentives and the Multilateral Agreement on Investment" (1998) 32 Journal of World Trade 5

A. Dobson, *Green Political Thought* (UK: Routledge, 1990)

E. Dowdeswell and S. Charnovitz, "Globalisation, Trade and Interdependence" in M.R. Chertow and D.C. Esty (eds.), *Thinking Ecologically* (New Haven: Yale University Press, 1997) 85

R. Deigan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Canada: Thomson Professional Publishing Canada, 1991)

W. Dobson, "Canada and Pacific Dynamism: An Introduction to the Issues" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 1

M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA " (1993) 51 University of Toronto Faculty of Law Review 204

J. Ebbesson, *Compatibility of International and National Environmental Law* (London: Kluwer Law International, 1996)

R. Eckersley, *Markets, the State and the Environment* (Australia: Macmillan, 1995)

ECOSOC, *Fostering An Enabling Environment For Development* (1999) available at http://www.un.org

F. Engering, "Keynote Address" in OECD, *Working Papers No 51* (Paris: OECD, 1997)

"Environment still major issue in talks on OECD's Multilateral Investment Accord" (1998) 21 International Environmental Reporter 46

D.C. Esty, *Greening the GATT: Trade, Environment and the Future* (Washington DC: Institute for International Economics, 1994)

D.C. Esty and B.S. Gentry, "Foreign Investment, Globalisation and Environment" in OECD, *Globalisation and Environment Preliminary Perspectives* (Paris: OECD, 1997)

I. Feltham (ed.) *International Trade Dispute Settlement: Implications for Canadian Administrative Law* (Canada: The Centre for Trade Law and Policy, 1994)

B.C. Field, *Environmental Economics* 2nd ed. (USA: McGraw Hill, 1997)

E.V.K. Fitzgerald, R. Cubero-Brealy and A. Lehman, *The Development Implications of the MAI* (UK: University of Oxford, 1998)

C. Flavin and S. Dunn, "Responding to the Threat of Climate Change" in L. Brown *et al.*, *State of the World 1998* (New York. W.W. Norton and Co., 1998) 113

H. F. French, "Assessing Private Capital Flows to Developing Countries" in L.R. Brown *et al.*, *State of the World* (New York: WW Norton & Co., 1998) 149

D.H. Freyer, B.H. Garfinkel and H.G. Gharavi "Bilateral Investment Treaties and Arbitration" (1998) 53 Dispute Resolution Journal 74

R. Garcia and D. W. Graber, *NAFTA'S Environmental Effects: General Connecting Processes - NAFTA Effects Working Paper No 6* (Canada. CEC, 1996)

J. Greenwald, *Trade and Environment in a North American Free Trade Agreement* (Ottawa: Centre for Trade Policy and Law, 1991)

B. Griffiths, "The OECD Guidelines for Multinational Enterprises, and Environment and Labour Issues" in OECD, *Working Papers No 51* (Paris OECD, 1997) 42

N. Grimwade, *International Trade Policy* (London. Routledge, 1996)

G.M. Grossman and A.B. Krueger, "Environmental Impacts of a North American Free Trade Agreement" in P.M. Garber, *The Mexico-US Free Trade Agreement* (Cambridge: MIT Press, 1993)

A.T. Guzman, "Why Less Developed Countries Sign Treaties that Hurt Them" (1998) 38 Va. J. Int'l L. 639

K. Haaland, *Can't see the forest for the trees: A critical assessment of the trade and environment debate and an analysis of proposed reforms* (Canada: Centre for Trade Law and Policy, 1995)

D.J. Harris, *Cases and Material on International Law* 3rd ed. (London: Sweet and Maxwell, 1983)

J.W. Harrington and B. Warf, *Industrial Location* (London: Routledge, 1995)

M. Hart and S. Gera, "Trade and Environment: Dialogue of the Deaf or Scope for Cooperation?" (1993) 18 Canada - United States Law Journal 207

R.H. Haveman and K.A. Knopf, "Market Failure" in E.L. Hughes, A.H. Lucas and W.A.

Tilleman (eds.), *Environmental Law and Policy* 2nd ed. (Canada: Emond Montgomery Publications, 1998) 362

P. Hayden and J. Burns, *Foreign Investment in Canada Digest* (Ontario: Carswell, 1998)

J.F. Helliwell, "Asian Economic Growth" in W. Dobson and F. Flatters (eds.), *Pacific Trade and Investment: Options for the 90s* (Kingston: Queens University, 1994) 17

Herman, "Expropriation takes on new meaning: MMT case sets far reaching precedent" The Financial Post (28 July 1998) 13

R. Housman and D. Zaelke, "Trade, Environment and Sustainable Development: A Primer" (1992) 15 Hastings Int'l and Comp. L. Rev. 535

International Union for Conservation of Nature and Natural Resources *et al.*, *World Conservation Strategy* (Switzerland: 1980)

"Is the WTO Dispute Settlement Mechanism Responsive to the Needs of Traders?" (1997) Journal of World Trade 147

"Industry Environmental Self Regulation Needs Improvement" (1996) 8 Transnationals 5

J.H. Jackson, W.H. Davey and A.O. Sykes, *Legal Problems of International Economic Relations* 3rd ed. (USA: West Publishing, 1995)

A.B. Jaffe *et al.*, "Environmental Regulations and the Competitiveness of United States Manufacturing: What Does the Evidence tell Us?" (1995) 33 Journal of Economic Literature 132

M.I. Jeffery, "The Legal Framework for Environmental Regulation under NAFTA" in S.R. Rubin and D.C. Alexander (eds), *NAFTA and the Environment* (Netherlands: Kluwer Law International, 1996) 207

N. Johnstone, "Globalisation, Technology and Environment" in OECD, *Globalisation and Environment* (Paris: OECD, 1997) 227

T. Jones, "Globalisation and the Environment: Main Issues" in OECD, *Globalisation and the Environment* (Paris: OECD, 1997) 7

T. Jones, "Economic Globalisation and the Environment: An Overview of the Linkages" in OECD, *Globalisation and the Environment* (Paris: OECD, 1998) 17

J. Kirton and J. Soloway, *Assessing NAFTA's Environmental Effects: Dimensions of a*

*Framework and the NAFTA Regime - NAFTA Working Paper 1* (Canada: CEC, 1996)

W. Kolvenbach, *Protection of Foreign Investments* (Deventer: Kluwer, 1989)

L. Kramer "Environmental Protection and Article 30 EEC Treaty" (1993) 30 Common Market Law Review 111

Z.A. Kronfol, *Protection of Foreign Investment* (Netherlands: A.W. Sijthoff International Publishing Company, 1972)

J. I. Kroschwitz (ed.), *Encyclopedia of Chemical Technology* 4th ed. (New York: Wiley, 1991-1998).

M.J. Kust, *Foreign Enterprise in India* (USA: University of North Carolina Press, 1964)

T.D. Lairson and D. Skidmore, *International Political Economy* (Fort Worth: Harcourt Brace College Publishers, 1993)

W. Lang, "Trade and Environment: Progress in the WTO?" (1997) 27 Environmental Policy and Law 275

A.P. Larson, "State of Play of MAI Negotiations" in OECD, *Working Paper No 96* (Paris: OECD, 1997) 4

The Law Reform Commission and Ministry of Justice of Uganda, *Foreign Investment in Uganda* (Uganda: Government Publisher, 1977)

R. Ley, "The Scope of the MAI" in OECD, *Working Papers No 51* (Paris: OECD, 1997) 16

R.B. Ludwiszewski and P.E. Seley, "Reconciling Free Trade and Environmental Protection" in S.R. Rubin and D.C. Alexander (eds), *NAFTA and the Environment* (Netherlands: Kluwer Law International, 1996) 1

Lush "The Decline of the Nation State in International Trade and Investment" (1996) 18 Cardozo Law Review 1011

J. Mander, "Facing the Rising Tide" in J. Mander and E. Goldsmith (eds.) *The Case Against the Global Economy* (San Francisco: Sierra Club Books, 1996) 3

O. Masera and V. Maclaren, *NAFTA's environmental effects: Dimensions and Indicators of Environmental Quality- NAFTA Effects Working Paper Number 5* (Canada: CEC, 1996)

D. Mattern, "Democracy or Corporate Rule?" (1998) 58 Humanist 5

S. McCarthy, "Threat of NAFTA case kills Canada's MMT ban" The Globe and Mail (July 20 1998) A1

I. McConnell, *Environmental Standards Under NAFTA* (Canada: The University of Calgary, 1993)

J. MacNeill, "Trade and Environment Links: The Global Dimension" in J. Kirton and S. Richardson (eds.), *Trade Environment and Competitiveness* (Canada: National Round Table on the Environment and the Economy, 1992) 7

K.E. McSlarrow, "International Trade and the Environment: Building a Framework for Conflict Resolution" (1991) 21 Environmental Law Reporter 10589

"Ministers Discuss Environmental Aspects Controversial Multilateral Investment Pact" (1998) 21 International Environment Reporter 356

D.F. Murphy and J. Bendell, *In the Company of Partners* (UK: The Policy Press, 1997)

X. Musca, "Scope of the MAI" in OECD, *Working Papers No 96* (Paris: OECD, 1997)

F.D. Muschett, "An Integrated Approach to Sustainable Development" in F.D. Muschett (ed.), *Principles of Sustainable Development* (Florida: St Lucie Press, 1997) 1

"Negotiators working on investment policy for OECD to include environmental provisions" (1996) 19 International Environment Reporter 1099

"NGO coalition including environmentalists vows campaign against MAI under way at OECD" (1997) 20 International Environment Reporter 1007

J.D. Nolan, "A Comparative Analysis of Laotian Law on Foreign Investment, the World Bank Guidelines on Foreign Direct Investment and the Normative Rules of International Law on Foreign Direct Investment" (1998) 15 Ariz. J. Int'l & Comp. L. 659

North Holland *Encyclopedia of Public International Law Volume II* (Amsterdam: Elsevier Publishers, 1995)

E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (UK: Manchester University Press, 1965)

"OECD Multilateral Agreement on Investment to give more consideration to environment" (1997) 20 International Environmental Reporter 1041

R. Ramirez, *Literature Review of Econometric Models Developed to Assess Environmental Effects of NAFTA - NAFTA Effects Working Paper Number 4* (Canada: CEC, 1996)

T. Regan, *The Nature and Possibility of an Environmental Ethic* (1981) 3 Environmental Ethics 19

Reguly "Water tap will be hard to shut off" Globe and Mail (16 February 1999) at http://theglobeand mail com

W. Sachs, R. Loske and M. Linz, *Greening the North* (London: Zed, 1998)

W. Sachs, presentation entitled "Globalisation and Sustainability" given at the University of Calgary, 19th March 1999

S. Schmidheiny with the Business Council for Sustainable Development, *Changing Course* (USA: Massachusetts Institute of Technology, 1992)

S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty, *Thinking Ecologically* (New Haven. Yale University Press, 1997) 118

K. Schneider and D. Wellisch, "EcoDumping, Capital Mobility and International Trade" (1997) 10 Environmental and Resource Economics 387

G. Schwarzenberger, *Foreign Investments and International Law* (New York: Frederick A. Praeger, 1969)

H. Scoffield, "US firm hits Ottawa with NAFTA lawsuit" The Globe and Mail (August 21 1998) B1

H. Scoffield, "BC water export ban brings US lawsuit" The Globe and Mail (9 December 1998) B1

H. Scoffield "Another US firm sues Ottawa under NAFTA" The Globe and Mail (16 February 1999) at http://theglobeand mail.com

Scott, "Environmental Watchdogs Take Bite Out of Chilean Investment" (1998) 11 The Transnational Lawyer 245

T. M. Seldon and D. Song, "Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution?" (1994) 27 Journal of Environmental Economic and Management 147

S. Shrybman, "The MAI and Dispute Settlement" in A. Jackson and M. Sanger (eds.), *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 48

D.M. Smith, *Industrial Location* (USA: John Wiley and Sons, 1981)

Standing Committee on Foreign Affairs and International Trade, *Canada and the MAI* (Canada: Canadian Government, 1997)

J. Startup, "An Agenda for International Investment" in OECD, *The New World Trading System* (Paris: OECD, 1994) 189

R. Steinerg, "Great Power Management of the World Trading System. A Transatlantic Strategy for Liberal Multilateralism" (1998) 29 Law and Policy in International Business 205

S.C. Straight, "GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States" (1995) 45 Duke Law Journal 216

M. Swenarchuk, "The Environmental Community's Perspective" in J. Kirton and S. Richardson (eds.), *Trade Environment and Competitiveness* (Canada: National Round Table on the Environment and Economy, 1992) 67

M. Swenarchuk, "The MAI and the Environment" in A. Jackson and M. Sanger (eds.), *Dismantling Democracy* (Canada. Canadian Center for Policy Alternatives, 1998) 120

H.L. Thaggert, "A Closer look at the Tuna-Dolphin case" in J. Cameron, P. Demaret and D. Geradin (eds.), *Trade and the Environment* (London: Cameron May, 1994) 69

"Trade Action Against MMT Best Answer to Environmental Problem, Official Says" (1997) 20 International Environment Reporter 153

M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge, 1995)

United Nations Commission on Trade and Development, *World Investment Report 1996* (New York: United Nations, 1996)

United Nations Transnational Corporations and Management Division, *World Investment Report - 1992* (New York. United Nations, 1992)

United Nations, *Earth Summit: Agenda 21 and Rio Declaration* (New York: United Nations, 1992)

United States Office of Technology Assessment, *Trade and Environment: Conflicts and Opportunities* (Washington: United States Department of Commerce, 1992)

"US firm hits Ottawa with NAFTA lawsuit" Globe and Mail (21 August 1998) B2.

"US Firm to Submit Claim for Arbitration to Panel over Mexico's Action on Waste Site" (1997) 20 International Environment Reporter 956

K.J. Vandevelde, "Investment Liberalisation and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36 Columbia Journal of Transnational Law 501

I. Walter, "Environmentally Induced Industrial Relocation to Developing Countries" in S.J. Rubin and T.R. Graham, *Environment and Trade* (USA: Allanheld, Osmun and Co, 1982) 65

J. Whalley, *Trade and Environment Beyond Singapore* (USA: National Bureau of Economic Research, 1996)

D. Wheeler and P. Martin, "Prices, Policies and International Diffusion of Clean Technology" in P. Low (ed.), *International Trade and the Environment* World Bank Discussion Papers (Washington: World Bank, 1992)

W.H. Witherell, "Opening Address" in OECD, *Working Papers No 51* (Paris: OECD, 1997)

J.W. Wong, "Overview of TRIPs, Services and TRIMs" in OECD, *The New World Trading System* (Paris: OECD, 1994) 173

World Bank, *The World Development Report 1992* (Washington: World Bank, 1992)

The World Commission on Environment and Development *Our Common Future* (Oxford: Oxford University Press, 1987)

World Trade Organisation, *Regionalism and the World Trading System* (Geneva: World Trade Organisation, 1995)

World Trade Organisation, *Trade and Foreign Direct Investment* (Geneva: WTO, 1996)

"WTO cannot be 'Judge, Jury, Police' of global environment issues, Ruggerio says" (1998) 21 International Environment Reporter 308

"WTO says elimination of subsidies would end distortions, protect environment" (1998) 21 International Environment Reporter 306

D.C. Worth, "A View from Business" in OECD, *The New World Trading System* (Paris: OECD, 1994) 213

"WWF disputes conventional wisdom of free trade's positive environmental impact" (1998) 21 International Environment Reporter 563

Young, *International Law of Environmental Protection* (USA: Cahner Publishing Company, 1995)

A. Zamparutti and J. Klavens, "Environment and Foreign Investment in Central and Eastern Europe" in OECD, *Environmental Policies and Economic Competitiveness* (Paris: OECD, 1993)

### III. Internet Sources

http://www.appletonlaw.com/MAI

http://asil.org/ilibindx.htm

http://www.avid.net.au/stopmai

http://www.canadians.org

http://www.cec.org

http://www.dfait-maeci.gc.ca/english/

http://www.igc.org/trac/feature/planet/mai_bissio.html

http://www.oecd.org

http://www.un.org